Neutral Citation Number: [2021] EWHC 2132 (QB)

Case No: QB-2019-001696

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand, London
WC2A 2LL

Date: Tuesday, 13th July 2021

Before:

MR JUSTICE NICKLIN

- -

Between:

LONDON BOROUGH OF EALING

Claimant

- and -

PERSONS UNKNOWN

Defendant

- -
- -

MR STEVEN WOOLF for the **Claimant**
MR ISAAC RICCA-RICHARDSON for the **Intervenors**

- -

APPROVED JUDGMENT

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MR JUSTICE NICKLIN:

1. This action is one of the cohort claims referred to in the judgment handed down on 12 May 2021: [2021] EWHC 1201 (QB). In that judgment it is action number 4 identified in the Appendix to the judgment.

2. In summary, the position in this claim is as follows. The Claimant Local Authority made an urgent application for an interim injunction on 10 May 2019. A Part 8 Claim Form was issued the same day. The Claim Form identified the basis of the claim as (a) trespass; (b) nuisance; (c) breach of planning control under s.187B Town and Country Planning Act 1990; (d) s.130 Highways Act 1980. The ultimate remedy sought was an injunction "*to protect the greenspaces, leisure facilities and car parks in the London Borough of Ealing*". The Defendants were identified as (1) Persons Unknown Occupying Land and (2) Persons Unknown depositing Waste or Fly tipping on Land. The application was for what I will refer to as a Traveller Injunction in respect of the First Defendants (as defined in [4] of the *London Borough of Barking* decision). The Claimant sought an injunction to prohibit the Persons Unknown in both categories from occupying a total of 182 Green Spaces, 124 Housing Estates and 33 Leisure Facilities and Car Parks. The relief sought was borough wide.

3. The Application Notice for the interim injunction was dated 9 May 2019. No sealed copy of that has been provided, but the Application Notice identified the order sought by the Claimant as follows:

> "The defendant as persons unknown occupying land and/or depositing waste or fly tipping on land are forbidden from:-
>
> (1) setting up an encampment on any land identified on the sites numbered 1 to 182 on Map 1, 1 to 124 on Map 2, and P1-P17, L1-L8 and C9-C16 on Map 3 listed on the attached schedules marked 1, 2 and 3 without written permission from the local planning authorities or planning permission granted by a planning inspector;
>
> (2) occupying any part of the land identifies on the sites numbered 1-182 on Map 1, 1-124 on Map 2, P1-17, L1-L8 and C9-C16 on Map 3 listed on the attached schedules marked 1, 2 and 3 for residential purposes (temporary or otherwise), including with caravans, mobile homes, vehicles and residential paraphernalia;
>
> (3) bringing onto the land identified on the sites numbered 1 to 182 on Map 1, 1 to 124 on Map 2, and P1-P17, L1-L8 and C9-C16 on Map 3 listed on the attached schedules marked 1, 2 and 3 any vehicle whether for the purpose of disposal of waste and materials or otherwise, other than when driving through the Borough of Ealing or in compliance with the parking orders regulating the use of car parks, or with the express permission from the owners of the land.
>
> (4) depositing any personal, domestic or commercial waste and/or fly tipping on any of the sites numbered 1 to 182 on Map 1, 1 to 124 on Map 2, and P1-P17, L1-L8 and C9-C16 on Map 3 listed on the attached schedules marked 1, 2 and 3."

4. The Application Notice sought no order in respect of service of the Claim Form on the Persons Unknown Defendants.

5. A draft order was provided with the Application Notice. The key features of the draft order were as follows:

    a. The draft order sought to attach a power of arrest to any interim injunction the court granted under s.27 Police and Justice Act 2006

    b. The order contained an interim injunction in the terms of the application notice "*pending the final Part 8 claim for an injunction order*"

    c. Paragraph 1 of the draft order sought an order in the following terms:

> "Service of this order and Part 8 Claim shall be effected at each of the sites referred to in the schedules and shown on the attached Maps by affixing copies of this order (as opposed to an original sealed Order) contained in a transparent waterproof envelope or laminated copies in a prominent position at each of the entrances to the Land, together with a Notice that a copy of the Part 8 Claim Form and Notice of Hearing and supporting evidence can be obtained from the London Borough of Ealing, Percival House, 14-16 Uxbridge Road, Ealing W5 2HL during normal council opening hours and on the council's website"

    d. A hearing of the Part 8 claim was sought to be fixed for the first available date after 15 July 2019.

6. The interim injunction application was supported by a witness statement of Paul Murphy dated 9 May 2021. For present purposes I need only note that Mr Murphy failed to address, or provide evidence in support of, either the issue of service of the Claim Form, or attaching a power of arrest to any injunction order. An order under CPR 6.15 for alternative service of a Claim Form must be supported by evidence (CPR 6.15(3)). So too an application to attach power of arrest under s.27(2) Police and Justice Act 2006 must also be supported by written evidence (CPR 65.9(2)). The threshold requirements before the Court has jurisdiction to attach a power of arrest to an injunction are contained in s.27(3) Police and Justice Act 2006.

7. Mr Woolf provided a skeleton argument for the interim injunction application dated 9 May 2019. The 16-page skeleton argument covered several issues, but left unaddressed the following matters:

    a. the description of the Persons Unknown – an important issue (see the ***London Borough of Barking*** [49]-[51]); and

    b. the jurisdiction of the Court and the statutory requirements to add a power of arrest to an injunction order. The only reference in the skeleton to the power of arrest that the Claimant sought was in the Introduction section:

> "If anyone chooses to breach the injunction the Penal Notice will make it clear that any breach could lead to imprisonment, fining, or seizing of assets. The power of arrest that is attached by virtue of s.27 Police and

> Justice Act 2006 adds weight to the proposed Order and acts as a significant deterrent".

To anyone unfamiliar with the requirements of s.27 that might have suggested that attaching a power of arrest to an injunction was a matter of routine. It was anything but that, particularly where the Defendants were Persons Unknown – see ***London Borough of Barking*** decision [51].

8. As regards service of the Claim Form, the Skeleton midway through a long section headed "*Application of the law to the facts*" contained the following at paragraphs 56 and 57:

> "56. The claimant is mindful that the application is made against persons unknown occupying land and persons unknown depositing waste on land and that it is made without notice. Notice could only have been made at every location specified on the maps. That was a wholly impracticable, disproportionate and unnecessary exercise. It is however necessary to serve on each site the order. It is proposed that this will be done as soon as practicable by sealing in a transparent envelope attached to a signpost or fence the order at every entrance at each location. That way, notice of the order will be fully achieved. In addition, notice will be given of the date of the final hearing. this is important so that notification is given to any interested party. This ensures an interested party would have the opportunity of appearing before the court in opposition to the continuation of the injunction.
>
> 57. In addition, all paperwork, namely the Part 8 claim form, the application notice and the order, together with all the evidence served in support, will be posted on the claimant's website so as to ensure that all persons interested in the injunction application can have full and unrestricted access to the relevant paperwork. Notification of the order and where information surrounding the order can be obtained will be advertised in the local press. Notification to the travellers and gypsy group in the interim order and the date of final hearing can also be given."

It might be thought that relegating service of a Claim Form to matters of "*paperwork*" somewhat downplays the importance of this important phase of civil litigation.

9. The application for the interim injunction came before Lang J, sitting in the Urgent Applications Court, in the Queen's Bench Division ("Court 37") on 10 May 2019. Mr Woolf, who has represented the Claimant again today, appeared at the hearing for the Claimant. The application was made without notice to any defendant and a transcript of the hearing has been obtained.

10. At the outset of the hearing, the Judge complained that she had had little time to consider the papers. She told Mr Woolf:

> "I think it would assist the Court if papers were sent down in advance, because there is an awful lot to read... We sit in this Court on a rota basis so you could get a judge who has never had one of these before and … come at ten and expect to get on straightaway."

11. Mr Woolf made his submissions and the Judge indicated that she was satisfied that an injunction order should be granted. The Judge then went through the draft order with Mr Woolf. The Application Notice did not contain any application for an order for alternative service of the Claim Form and Mr Woolf accepts that he did not make any application at the hearing. The requirements for an order for alternative service were therefore not addressed. There was also no evidence before the Court supporting any such application and Mr Woolf did not specifically take the Judge to paragraph 1 of the draft order which purported to deal with service of the Claim Form. The issue of attaching a power of arrest to the injunction order was also unaddressed by Mr Woolf at the hearing.

12. The interim order was granted substantially in the terms sought by the Claimant. In particular, paragraph 1 of the Order was granted in the terms of the draft order that I have set out in [5(c)] above.

13. Probably as a result of the application for alternative service not being addressed at the hearing, the terms of the order did not comply with CPR 6.15(4). The rules mandate that an order for alternative service must specify the date on which the Claim Form is deemed served and the period for filing an acknowledgement of service by the Defendant. The Order of 10 May 2019 did neither.

14. On 15 July 2019, the final hearing of the Part 8 Claim brought by the Claimant was adjourned to await the outcome of the Court of Appeal decision in ***Bromley LBC -v- Persons Unknown*** that was eventually handed down on 21 January 2020 **[2020] PTSR 1043**. A hearing was then later fixed for 11 May 2020, but was then further adjourned by an order dated 14 April 2020. Thereafter, in October 2020 the Claim was gathered as one of the Cohort Claims to be managed by me. Initial directions were made in all the Cohort Claims on 16 October 2020. Then, on 2 November 2020, noting that paragraph 1 of the order of 10 May 2019 did not comply with CPR 6.15(4), I made an order requiring the Claimant to file a witness statement which exhibited copies of any Application Notice seeking an order for alternative service, together with the evidence that was relied upon in support. I also required the Claimant, in the witness statement, to explain what steps the Claimant had taken in compliance with paragraph 1 of the order of 10 May to serve the order and the Claim Form.

15. In compliance with that Order, the Claimant filed a witness statement from Keith Robinson, dated 20 November 2020. Mr Robinson confirmed that no application notice seeking an order for alternative service of the claim form had been issued and there was, as a result, no supporting evidence that had been filed. In relation to service of the 10 May 2019 order, and the Claim Form, pursuant to paragraph 1 of the injunction order, Mr Robinson stated:

> "In accordance with paragraph 1 of the order, I am aware that Paul Murphy, the Save the Community Operations Manager (involved in managing the Borough's Community Safety and Antisocial Behaviour Service, Police Partnership Terms and Project Officer and Noise and Nuisance Team) made arrangements for the Burlington Group Enforcement Agents and Process Servers to attend at all locations and at every entrance to affix in a prominent position the order, together with the notice. He exhibited copies of these documents to his statement. The small bundle also includes an email from a Mr Ed Fairhead confirming service at all the locations."

16. The Notice referred to by Mr Robinson was a single A4 sheet that summarised the Claim that had been brought by the Claimant and the injunction made by the Court on 10 May 2019. It provided details of the hearing on 15 July and stated that copies of the Claim Form, together with the injunction application and supporting evidence, could be obtained from the Claimant's offices and were also available at a website address that was given in the notice.

17. Meanwhile, on 13 November 2020, the Claimant had issued an application notice seeking orders in the following terms:

> "1. Pursuant to CPR 3.10 an order providing that (a) the failure of the order dated 10 May 2019 to comply with CPR 6.15(4) does not invalidate the order for alternative service; and (b) that the service in fact effected in reliance on that order is valid alternative service of the claim form.
>
> 2. In the alternative, that in the event that the court is of the view that the failure to comply with CPR 6.15(4) does invalidate the order for alternative service or the service in fact effected in reliance on that order, the claimant seeks an order remedying the error, namely by amending the order for alternative service within the order dated 10 May 2019 so that it provides as follows:
>
> (a) for the claim form to have been deemed served on the first and second defendants on [blank – date to be completed] and;
>
> (b) that the time for filing acknowledgement of service required by CPR 8.3 was to be calculated by the deemed date of service; and
>
> (c) should any person wish to identify themselves as a defendant and/or wish otherwise to be joined as a defendant to this claim, they be permitted to do so at any time between the date herein and 17th December 2020.
>
> 3. In the further alternative, an order pursuant to CPR 6.15(2) for an order that the steps already taken to bring the claim form to the attention of the defendant by the alternative method or at an alternative place is good service.
>
> 4. Service of this order shall be deemed served pursuant to CPR 6.27 by affixing a copy of this order (as opposed to an original) contained in a transparent waterproof envelope or laminated copy in a prominent position at each of the entrances to the land identified in exhibit PM1 attached to the witness statement of Mr Paul Murphy dated 9 May 2019. The deemed date of service will be the next business day."

I shall refer to that application as the "Service Application".

18. The Service Application was supported by a witness statement of Keith Robinson. At that stage, a transcript of the hearing before Lang J on 10 May had not yet been obtained, but Mr Robinson attached a copy of his attendance note and stated that he did not recall any "*specific discussion*" taking place as regards the order for alternative service, but said that he recalled Mr Woolf taking the Judge through the draft order. In support of the application under CPR 3.10, Mr Robinson did not explain why no

application had been made under CPR 6.15. In support of the application retrospectively to deem, as good service, the steps taken by the Claimant to serve the Claim Form, he did not explain how the method of service actually used by the Claimant could "*reasonably be expected to bring the proceedings to the attention of the defendant*" – see ***London Borough of Barking*** [34]. The width of the definition of the "Persons Unknown" Defendants adopted by the Claimant in its claim meant that there could be no real prospect that posting copies of the injunction order and the notice on the land would be an effective way of bringing the proceedings to the attention of all of those caught in the definition of the Defendants – see the discussion in ***London Borough of Barking*** [45].

19. The hearing of the Service Application was postponed until the Court had determined the issues of principle in the Cohort Claims, as directed in the order dated 17 December 2020, and finally resolved in the judgment handed down in the Cohort Claims on 12 May 2021. On 24 May 2021, I made a direction that the Service Application would be heard today and provided that the Claimant should serve any further evidence in support of the Service Application by 5 July 2021.

20. Further to that Order, the Claimant has filed a further witness statement dated 5 July 2021 from Justin Morley, who is the Head of Legal Services (Litigation) at the Claimant. Mr Morley stated that he could not provide any further evidence in support of the Service Application beyond that which had been provided by Mr Robinson, who had since retired. However, he did provide copies of draft statements that had been provided by Paul Murphy, the Manager of the Claimant's Safer Community Team, and Jackie Adams, the Head of the Legal Services (Commercial) at the Claimant. As Mr Morley explained in his statement, Mr Murphy's draft statement identifies people who it is alleged have behaved in a way that would justify them being joined to the proceedings as named Defendants. Mr Morley stated that:

> "For some years the proposed named defendants have been known to the claimant as they have engaged in activity within Ealing that could be considered a nuisance to the public" over a "concerted period of time".

Mr Murphy's statement identified alleged fly-tipping by this group in February 2021. Ms Adams' draft witness statement deals with what Mr Morley describes as issues of proportionality of the actions that the Claimant intends to take. Her draft witness statement suggests that the Claimant intends to seek protection for 42 properties in several categories: parks and open spaces, properties owned by the Council, housing land, and library and other community and leisure facilities.

21. In his skeleton argument for the hearing today Mr Woolf has helpfully narrowed the issues that require determination. If the Claimant is not successful with its application under CPR 3.10, it does not wish to pursue the alternative application under CPR 6.15(2), seeking retrospective validation of the efforts to serve the Claim Form on the Defendants. The Claimant does not intend to seek any relief against the 2 "Persons Unknown" Defendants in the existing proceedings. The intention behind the application under CPR 3.10 is to enable a subsequent application to be made to join named Defendants to the proceedings.

22. CPR 3.10 provides as follows:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

23. Mr Woolf accepts the following:

    a. the Application Notice seeking the interim injunction did not include any request for the service of proceedings by an alternative method or at an alternative place;

    b. the draft order that was presented to Lang J included the provision as to alternative service in paragraph 1, but did not include any reference to the requirements under CPR 6.15(4)(b) and (c); and

    c. no application was made to Lang J for an order for alternative service of the Claim Form and there was no discussion of the issue, although Mr Woolf submits it is clear that the Judge did consider the wording of the draft injunction order quite carefully during the hearing.

24. Nevertheless, Mr Woolf submits, on behalf of the Claimant, that the Court should invoke CPR 3.10 and declare that, despite the failure to comply with CPR 6.15(4)(b) and (c), the proceedings should continue as the failure did not invalidate the method of alternative service that was made in compliance with the injunction order. The failure of the order to include the requirements of CPR 6.15(4)(b) and (c) in the injunction Order was an error, but it is not so significant an error that should lead the Court to conclude that the service of the proceedings was not valid. The absence of the deemed date of service, he argues, is likely to benefit the Defendant as it prevents the Defendant ever being subject to time requirements, particularly the date for filing an acknowledgement of service or defence.

25. Relying upon notes in the White Book, Mr Woolf submits that ***Walsham Chalet Park -v- Tallington Lakes Limited*** **[2015] 1 Costs LO 157** is authority for the proposition that the Court is entitled to have regard to the principles in ***Denton v TH White*** **[2014] 1 WLR 3926** when considering whether to make a declaration that a procedural error does not invalidate any step in the proceedings.

26. Mr Woolf has also referred me to the decisions in ***Steele -v- Mooney*** **[2005] 1 WLR 2819** and ***Vinos v Marks & Spencer*** **[2001] 3 All ER 784**. As noted in the White Book, he submits there is a significant distinction between (a) making an application which contains an error (as in ***Steele***) and erroneously not making an application at all (as in ***Vinos***). Mr Woolf submits that the current case is more akin to ***Steele*** than ***Vinos***.

Decision

27. I refuse the Claimant's application.

28. The contention that the Claimant is trying to correct an error in an application that it claims to have made would require a rewriting of history. The Claimant made no application for an order under CPR 6.15 for alternative service of the Claim Form. It did

not make one in an application notice and it did not make one orally at the hearing before Lang J. Mr Woolf submitted that the Judge went carefully through the order. I can only assess that submission by reference to the transcript of the hearing, and it is clear from that that Mr Woolf did not take the Judge to paragraph 1 of the draft order. It appears to have been included in the final order, not as a result of any conscious decision-making after argument, but by default.

29. Insofar as the skeleton argument for the hearing could be said to address the issue of service of the Claim Form at all, it was in a passing reference to service of the "*paperwork*" so that "*persons interested in the application can have full and unrestricted access to the paperwork*". On a most charitable construction that cannot even arguably amount to an application for an order under 6.15(2). Indeed, apart from paragraph 1 of the draft/order the Claimant seems not to have thought about what an application for an order for alternative would require by way of evidence in support, or the requirements of CPR 6.15(4). That is before any attention is paid to whether the proposed method of alternative service would satisfy the requirement that it could reasonably be expected to bring the proceedings to the attention of the defendants.

30. In my judgment, the correct analysis is that the Claimant has not made an error in an application it made. It made an error by not making an application at all. That is not something that can be corrected by an application under CPR 3.10: see ***Vinos***. There has been no (mistaken) failure to comply with the Civil Procedure Rules. The Civil Procedure did not *require* the Claimant to make an application under CPR 6.15, any more than it required the Claimant, for example, to apply for an order dispensing with service of the Claim Form altogether under CPR 6.16. What the CPR required the Claimant to do was to serve the Claim Form within the period provided by CPR 7.5. It has not done so.

31. Even were I wrong about that, and that CPR 3.10 would permit the Court to correct the defects in the purported alternative service order, it seems to me that the real question is whether there was a proper basis to make the order at all. It is quite clear that the Judge, because she was not asked to, did not make any decision on whether it was right to make an order for alternative service. In my judgment it was not.

32. Requirements for an order for alternative service in a "Persons Unknown" case are set out in ***London Borough of Barking*** [31]-[34], [43]-[48] and [164]-[166]. There is an important interrelation between any application for an order for alternative service of a Claim Form under CPR 6.15 and the definition of the Persons Unknown Defendants:

> "The greater and more ambitious the width of the definition of "persons unknown" in the claim form, correspondingly the more difficult it is likely to be to satisfy the requirements for an order for alternative service".

On the evidence, the Claimant could not demonstrate before Lang J, and cannot demonstrate now, that the order for alternative service that was made (even if it were an order for alternative service) could be expected to bring the proceedings to the attention of the very large number of people who fell within the very wide category of persons unknown in this case. Had an application actually been made for an order under CPR 6.15 for alternative service of the Claim Form on the Defendants Persons Unknown, it would have been refused.

33. In argument, Mr Woolf appeared to submit that in the event that the Court refused the CPR 3.10 application then the Claimant might press on, on another occasion, with an application to amend to add named defendants to the proceedings. In my judgment, that option is not available.

34. The Claim Form was issued on 10 May 2019. The Claimant had four months to serve it on the Defendants. The Claimant does not suggest that it has been actually served on anybody. The consequence of my judgment is that the Claimant has also not obtained an order for alternative service of the Claim Form. The Claim Form is no longer valid. There is no civil claim left to which amendments could be made or parties added. If the Claimant wants to seek an interim injunction or any other remedy against named defendants (as outlined in the evidence before me) then it will have to do so by way of fresh proceedings. This claim is at an end.

35. Formally I will discharge the injunction order of 10 May 2019 and direct that the Claimant must remove all copies of the injunction order from the sites at which it has been displayed.

This judgment has been approved by Nicklin J.