CPR 40.9: a means for Interested Persons to challenge protest injunctions

1. Applying to vary an injunction

1.1. A standard provision in protest injunctions is that any person interested in the order may apply to vary or discharge it at any time providing that they apply to be joined as a named defendant to the proceedings at the same time.

1.2. This provision allows anyone who is interested in the order to challenge it, as long as they apply to be named defendants. It is important because protest injunctions are usually granted ex parte, so effectively in secret. They are frequently against persons unknown, often with no named defendants at all. This means that the world at large is affected by the order and anyone whose right to protest is restricted ought to have the opportunity to question that restriction.

1.3. However there are significant disadvantages in being joined as a named defendant and many reasons why a person may wish to challenge an injunction without wishing to be so joined. As a defendant the order is likely to be served on them, at which point they are bound by its terms and could be liable for contempt of court for breaching it. Penalties for contempt of court include an unlimited fine and up to two years in prison. A defendant to the claim also likely to become a defendant to the underlying claim in nuisance, trespass or similar. This means that they could also become liable for damages and costs at the trial of the claim, particularly if they choose not to actively defend it.

1.4. For anyone who only wants to challenge an injunction the most immediate risk in becoming a defendant is the risk of being ordered to pay the claimant's costs in responding to the challenge.

1.5. There is already severe imbalance of resources between the large corporates or the State-backed and State-funded bodies with the financial power to obtain these injunctions, and the individual protestors who are affected by them. Legal aid is not available for such challenges so anyone wishing to bring a challenge has to pay privately. To then take on the risk of adverse costs makes bringing a challenge beyond the resources of any ordinary person. As a result many protest injunctions go completely unchallenged.

2. The National Highways injunction

2.1. In May last year Owen and I were instructed in a challenge to an injunction granted to National Highways Limited (NHL) restricting protests on a series of roads. We were instructed by Jessica Branch, an environmental activist who was not a named defendant and had not attended any of the Insulate Britain protests that had led NHL to apply for the injunction. She gave evidence that the terms of the order were so wide as to prevent lawful protests and, more specifically, they might catch people such as her who might protest near some of the sites specified in the injunction and find herself inadvertently caught up in contempt proceedings.

2.2. At the hearing before Bennathan J, NHL argued that our client should apply to be a named defendant in order for the court to consider her representations, consistent with the directions order made by Chamberlain J at the previous hearing.

2.3. Owen argued that in fact CPR 40.9 provided the most appropriate mechanism for non-parties such as our client to make submissions and it did not require a person applying to vary an order to become a party to it.

2.4. CPR 40.9 provides: **"***A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied*."

2.5. Bennathan J found that Chamberlain's order was at odds with CPR 40.9, which specifically allows for the possibility of participation by non-parties, in other words those who are not defendants. He therefore varied that order to permit Owen to advance submissions on behalf of our client.

2.6. In his helpful judgment on the point (*National Highways Limited v Persons Unknown and 133 named defendants* [2022] EWHC 1105 (QB)) he noted that the words of the rule were "*strikingly wide*" and provided *"no guidance*". He granted permission for our client to make submissions challenging the order as an Interested Person (IP) under CPR 40.9 and without being named as a defendant on the grounds that:

> *"(1) The scenario she suggested (that she might find herself caught up in contempt proceedings), was not fanciful and would amount to a sensible basis to regard her as "directly affected".*
>
> *(2) Even absent that most direct connection, in a case where an order is sought for unnamed and unknown defendants, and where [as here] Convention rights are engaged, it is proper for the Court to adopt a flexible approach and a general concern by a person concerned with the political cause involved could, perhaps only just, fit within the term. To take an example far removed from the facts of this case, a member of a proselytising religious group who only attended their local place of worship might nonetheless be seen as directly affected by an order banning his co-religionists from travelling to seek converts.*
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> *(3) In a case where the Court is being asked to make wide ranging orders and, but for a successful rule 40.9 application, would not hear any submissions in opposition it seemed to me desirable to take a generous view of such applications."*

2.7. While there are cases before the NHL judgment in which the courts have considered whether a non-party may apply to set aside or order under CPR 40.9 (see, for example, *Hepworht Group Ltd v Stockley* [2006] EWHC 3626 (Ch); *Latif v Imaan Inc* [2007] EWHC 3179 (Ch); *IPcom GmbH v HTC Europe* [2013] EWHC 2880 (Ch)*, Abdelmamour v The Egyption Association in Great Britain Ltd* [2015] EWHC 1013 (Ch); *Mohamed v Abdelmamoud* [2018] EWCA Civ 879; *Ageas Insurance Ltd v Stoodley* [2019] Lloyd's Rep. I.R. 1), there are none that relate to protest injunctions. Those earlier judgments all focussed on whether the non-party was directly affected by the order and whether there was a real prospect of success in changing the order.

2.8. The use of CPR 40.9 in this manner is a novel development in the law. It permits those affected by an injunction which has the potential to impact on their rights under Articles 10 and 11 ECHR to make representations on the order sought without becoming a party to the litigation and without the application of the standard costs regime against parties to a claim. However as there are no previous cases there is no guidance on whether and in what circumstances costs can be ordered against an Interested Person (IP) under CPR 40.9.

3. The Esso pipeline injunction

3.1. In September last year Owen and I represented two more activists, who this time were concerned about a pipeline that is being built to carry aviation fuel from Southampton to Heathrow.

3.2. The first was a semi-retired lady who is deeply committed to environmental causes. She gave evidence about two protests against the pipeline that she was involved in. The first involved standing on a footpath close to the construction works, which caused the contractors to stop work for around 45 minutes. The second was a mock funeral for future children affected by the environmental catastrophe that global warming and the use of fossil fuels will cause. A coffin was lowered into the pipe trench, causing works to stop for around 40 minutes.

3.3. The second activist was a pensions consultant and a single parent from Farnborough. She took part in the same protests as the first activist, plus one additional protest when she and others stood on a public road, blocking the entry of vehicles to the construction site and obstructing the progress of the works to a limited degree.

3.4. Both ladies were proud of their actions, asserted that they were lawful and peaceful and implied that they intended to interfere with Esso's business in building the pipeline to a limited degree as a method of getting their message across to the general public and the politicians.

3.5. The first return hearing was before Ritchie J and was concerned solely with whether our clients could make submissions at all, and as IPs, rather than named defendants, under CPR 40.9.

3.6. Ritchie J gave judgment in our favour that contained more detailed guidance than Bennathan's: *Esso Petroleum Company Limited v Scott Breen and persons unknown* [2022] EWHC 2600 (KB).

3.7. He set out that when deciding whether to grant an application for permission under CPR rule 40.9, the court should first consider whether an Interested Person passed the gateway test, which required two factors to be satisfied: (1) directly affected, and (2) good point.

3.8. In relation to the "directly affected" criterion, the questions to consider were:

> *"Is the person applying directly affected by the injunction? A person can be directly affected in many ways. The order may affect the person financially. It may affect the person's property rights or possession of property. It may affect the person's investments or pension. The order may affect a person's ability to travel or to use a public highway. The order may affect the person's ability to work or enjoy private life or social life or to obtain work and in so many other ways. It may affect rights enshrined in the Human Rights Act 1988."*

3.9. As to the "good point" requirement, the test was simply: "*Does the IP have a good point to raise? If the point raised is weak or irrelevant there is no need for the CPR rule 40.9 permission.*"

3.10. On getting through the gateway the next issue is whether the person should be required to be a party to take part or permitted to remain an IP. Overall Ritchie found that *"the closer the connection between the IP and the claim or the defence the more likely the*

Court will require the IP to join the action to take part". He set out seven factors for the court to consider when determining the nature and degree of a non-party's connection with proceedings:

(1) Whether the IP will profit from the litigation financially or otherwise.

(2) Whether the IP is controlling the whole or a substantial part of the litigation.

(3) Whether the final decision in the litigation will adversely affect the interested person, whether by way of civil rights, financial interests, property rights or otherwise.

(4) Whether the IP is funding the litigation or the defence thereof.

(5) Whether there is a substantial public interest point or a civil liberties point being raised by the interested person.

(6) The court should take into account the wide or draconian nature of injunctions against unknown persons which may be geographically large or temporarily large or both. There should be a low threshold for IPs to be able to take part in such broad and or wide orders.

(7) The costs risks and difficulties faced by IPs who are affected by orders which they did not instigate.

(8) Any prejudice which would be suffered by the Claimant in granting the IPs their request and refusing to require them to become parties.

3.11. Ritchie commented that:

"48. At the heart of the distinction between being a party and being an Interested Person making submissions under CPR 40.9 is the difference in the costs and costs risks. A party is subject to the normal cost rules set out in CPR rule 44 and the other rules. The general rule is that the winner has his or her costs paid by the loser. In contrast an Interested Person making submissions on the CPR rule 40.9 basis has far less prospect of suffering adverse costs orders. ..

50. In summary costs orders against non parties are exceptional or, written another way, outside of the ordinary run of cases which parties pursue or defend for their own benefit and at their own expense. The ultimate question in any such case is whether in all the circumstances it is just to make the order. This is fact specific to a large extent.

51. Guidance is given as to the jurisdiction to make costs orders against litigation funders who have no personal interest in the litigation and do not stand to benefit from it. Likewise for those who do not seek to control litigation.

52. The Courts also note the public interest in parties getting access to justice through third party funding.

53. However the main principle is that a non party who funds litigation and controls and benefits from litigation will ordinarily be required to pay the costs on losing.

54. In Deutsche Bank v Sebastian [2016] EWCA civ 23 the Court of Appeal considered that the main factor to consider was the nature and degree of the non party's connection with the proceedings. It can be seen from this case that the "connection" issue affects both the decision on whether a person can remain an IP or should be a party and whether the person is more or less likely to be liable to an adverse costs order on losing an issue or argument."

3.12. Ritchie found that our client were directly affected by the injunction on the grounds that (1) they were long term conscientious objectors against fossil fuel use, (2) they sought to protest lawfully but actively, (3) the injunction would have bound them, and (4) the protests that they took part in could have caused them to breach it.

3.13. Ritchie also found that that they raised some potentially good points in relation to the scope of the injunction, as set out in Owen's skeleton argument.

3.14. Having passed the gateway, Ritchie applied his seven factors in order to determine whether they may proceed as IPs, without being made defendants:

(1) Neither lady would profit directly from the litigation.

(2) They did not seek to control the litigation, although they did seek "*to restrict the breadth of the injunction granted or indeed to prevent it being granted so that they can protest lawfully and exercise their rights under the European Convention on Human Rights especially Arts 10 and 11*".

(3) The final decision in the claim would not adversely affect them financially, nor would it adversely affect their civil rights so long as the injunction was properly drafted.

(4) Neither lady was involved in funding the litigation.

(5) The points they raised were matters of public interest and related to fundamental civil liberties which were important points of wide public interest.

(6) The draconian nature and the breadth of large injunctions against persons unknown meant that there is relatively low threshold to allow IPs to make representations on a return date.

(7) There is no legal aid provided for IPs, who therefore have to fund their representations themselves. Ritchie considered that it was therefore: "*not unreasonable for them to do so with a reduced (but not extinguished) cost risk, on the contrary it is just and fair*".

(8) No evidence of prejudice was put forwards by the Claimant. Indeed Esso expressly stated that it did not wish to prevent the IPs making submissions, merely that it sought the benefit of having them as parties. *"The only prejudice I can infer is that it will more difficult for the Claimant to achieve a costs order against the IPs if they remain IP instead of parties. I do not characterise that as prejudice. Costs orders*

are a result of the Courts exercising discretion under the CPR on the facts. In addition if the Claimant wishes to name these two Interested Persons as Defendants they can join them as Defendants. If, as Jon Anstey De Mas asserted in his first witness statement, the 3 past protests by these Interested Persons amounted to tortious actions causing loss to the Claimant, then the Claimant could have and still can chose to claim damages. In the event the Claimant has chosen so far not to do so."

3.15. In conclusion, Ritchie J considered that both ladies passed the CPR 40.9 gateway and exercised his discretion to permit them to make representations at the return hearing as IPs.

4. Does this mean that individuals can now challenge injunctions without any risk of adverse costs?

4.1. It should be stressed that while IP status reduces the adverse costs risk, costs can still be awarded against non-parties under CPR 46.2, which states:

"46.2— Costs orders in favour of or against non-parties

(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must—

(a) be added as a party to the proceedings for the purposes of costs only; and

(b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

4.2. Guidance on this provision concerns cases in which costs orders are sought against non-parties who are effectively controlling litigation on behalf of named parties (such as a costs order being made personally against a director of a company which is the named party to proceedings). Those principles ought not to apply in a protest injunction case, but this is untested.

4.3. It is also clear that a costs order should not be made against a non-party for costs which would in any event have been incurred (see *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 W.L.R. 2807 at [20]). This is often the case where a challenge is brought at the return hearing, which the claimant is required to attend in any event, and the very purpose of which is to allow persons affected by the order to question it.

4.4. Ritchie and Bennathan's judgments on CPR 40.9 help to redress the astonishing imbalance between the well-resourced bodies who seek these injunctions and those who seek to challenge them, in a small but significant way. I hope that further cases will build on this development, and provide more reliable costs protection for these brave individuals.

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