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INJUNCTIONS ENJOINING NON-PARTIES: DISTINCTION WITHOUT DIFFERENCE?

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ORDINARILY, claimants seeking injunctive relief will be able to identify by name the individuals likely to interfere with their rights. However, claimants increasingly anticipate that they will be harassed, their property damaged[1] or confidential information revealed by persons difficult or impossible to identify. In *M Michaels (Furriers) Ltd* v. *Askew*[2] the claimant's commercial premises were under sustained attack from animal rights activists. The claimant "had difficulty in identifying all those responsible for these damaging actions" and addressed this difficulty by bringing a representative action against, among others, the national organiser and local contact of Animal Aid as the representatives of all members of that organisation. The Court of Appeal upheld the interim injunction granted against these representative defendants restraining them, and therefore all members of Animal Aid, from, *inter alia*, damaging, injuring or trespassing on the claimant's premises. In *Hampshire Waste Services Ltd* v. *Persons Intending to Trespass and/or Trespassing Upon Incinerator Sites*[3] the four owners of a number of incinerator sites faced a similar problem. Incinerators had been targeted for protest, sometimes on a predetermined and advertised day described as a "Global Day of Action Against Incinerators". Evidence suggested that such a protest was planned but the claimants were "unable to name any of the protesters who might be involved" and their claim was brought against "Persons intending to trespass and/or trespassing upon incinerator sites" at six locations.[4] Morritt V.C. made an order binding "persons entering or remaining without the consent of the claimants … on any of the incinerator sites … in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003".

Despite the apparent similarity between these two situations, the two claims are viewed as distinct – the former an example of the

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[1] For recent examples, see *Heathrow Airport Ltd* v. *Garman* [2007] All E.R. (D) 28 (Aug); *Smithkline Beecham plc* v. *Avery* [2007] EWHC (QB) 948 and *RWE Npower plc* v. *Carrol* [2007] EWHC (QB) 947. The claim by the Huntingdon Life Sciences Group plc continues to make its way through the courts, *Huntingdon Life Sciences Group plc* v. *Stop Huntingdon Animal Cruelty (an unincorporated association by its representative Dr Gastone) ("SHAC")* [2007] EWHC (QB) 522.

[2] (1983) 127 S.J. 597.

[3] [2003] EWHC (Ch) 1738, [2003] 42 E.G.C.S. 126, at [10].

[4] [2003] EWHC (Ch) 1738, [2003] 42 E.G.C.S. 126, at [6].

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court's power to grant an injunction against a representative defendant under Civil Procedure Rule 19.6,[5] the latter an example of the court's power to grant an injunction against a party by description. This article, though, argues that the two situations, and the solutions adopted, are equivalent – those represented under CPR 19.6 are not parties and there is no good reason to distinguish claims for injunctive relief[6] against them from such claims against other non-parties. So long as the similarity between these two approaches remains unacknowledged, it also remains unclear whether there are circumstances in which one ought to be favoured over the other.

However, despite arguments to the contrary, the effect of an injunction enjoining non-parties (whichever approach is adopted) is not synonymous with the effect which may be achieved by enforcing an injunction against persons not bound by it.

Injunctions Enjoining Non-Parties

Ordinarily, "you cannot have an injunction except against a party to the suit".[7] The rationale for this principle is self-evident but reference may be made to *Re Wykeham Terrace, Brighton, Sussex, ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East*,[8] where Stamp J. commented that

> it is axiomatic that a person claiming an order of this court against another, except where a statute provides otherwise … cannot obtain that relief except in proceedings to which that other person is a party and after that other person … has had the opportunity of appearing before this court and putting forward his answer to the claim. The accusatorial process by which the person against whom relief is sought is summoned to appear to answer the plaintiff's claim is the process by which justice has been done in England and Wales between man and man over the centuries.

It is not uncommon for injunctions to refer to non-parties.[9] So, for example, in *League Against Cruel Sports Ltd* v. *Scott*,[10] the injunction granted restrained the three defendants, the joint masters of the Devon

[5] CPR 19.6 or "the representative parties rule". CPR 19.6 (S.I. 2000/221, in force 2 May 2000) replaced, with some amendment, RSC Order 15 r.12 (introduced by the Rules of the Supreme Court (Revision) 1962) ("the 1962 rule"). The 1962 rule replaced and substantially amended Rules of the Supreme Court 1883 Order 16 r.9.

[6] Claims for other relief, such as damages, raise different issues and are outside the scope of this article.

[7] *Iveson* v. *Harris* 7 Ves. Jun. 251, 257; 32 E.R. 102, 104.

[8] [1971] Ch. 204, 208.

[9] The comment in R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora 2000), para. 6–17 that injunctions "are often made enjoining not only defendants but also officers, members and servants" may refer to this practice but it is difficult to be sure as it is not, unfortunately, supported by any authority.

[10] [1986] Q.B. 240, 256.

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and Somerset Staghounds "by themselves, their servants or agents, or mounted followers, from causing or permitting hounds to enter or cross [a particular] property". However, such an injunction, while *referring* to non-parties, *enjoins* the named defendants only, whether acting by themselves, their servants or their agents.[11] In *Marengo* v. *Daily Sketch and Sunday Graphic, Ltd*[12] Lord Uthwatt[13] noted that the

> substance of the matter is that the defendant is to be enjoined whatever method he may use in committing the prohibited acts. It is not, indeed, necessary to refer to servants, workmen or agents at all, but it may be desirable to mark the amplitude of the order by including in it some reference to them.[14]

However, injunctive relief is not uncommon in claims made against representative defendants under CPR 19.6. These orders are an exception to the principle that ordinarily injunctive relief is only granted against parties.[15] Those represented under CPR 19.6 are not "parties" to the proceedings.[16] It is moreover clear that there is no requirement that they be individually identified or that notice of the claim be served on them. They will not, ordinarily, be named on the record or permitted to attend the proceedings.[17] Nevertheless, they are bound by any order made.[18]

Moreover, there is increasing resort to the court's jurisdiction to order injunctive relief against "parties by description".[19] These injunctions are also an exception to the principle that ordinarily injunctive relief is only granted against parties - those bound by description *become* parties when they do an act which brings them within the scope of the order[20] – they are not parties when the

[11] I.C.F. Spry, *The Principles of Equitable Remedies*, 6th ed. (Sydney 2001) ("Spry, 6th ed."), pp. 375–376. Contrast however J.E. Martin, *Hanbury & Martin Modern Equity*, 17th ed., (London 2005) ("*Hanbury & Martin*"), 771 in relation to agents.

[12] [1948] 1 All E.R. 406.

[13] With whom Viscount Simon and Lords Porter, Simonds and du Parcq agreed.

[14] [1948] 1 All E.R. 406, 407. His Lordship went on to note that in the case before him the defendants were limited companies and could only act through others. See also *Malcolm* v. *The Chancellor, Masters and Scholars of the University of Oxford* [2002] EWHC (Ch) 10, [2002] E.L.R. 277, at [24]; *Attorney-General* v. *Newspaper Publishing plc* [1988] Ch. 333 (CA) 366–367; *Kirkpatrick* v. *Kotis* [2004] NSWSC 1265.

[15] Although they are not recognised as such in most academic texts.

[16] Uncertainty as to the status of those represented (see, for example, *Moon* v. *Atherton* [1972] 2 Q.B. 435, 441 per Lord Denning M.R. and *Harrison* v. *Abergavenny* (1887) 3 T.L.R. 324) is dispelled by reference to the wording of the rule itself: see *Ventouris* v. *Mountain* [1990] 1 W.L.R. 1370, 1371–1372, discussing the 1962 rule. Similarly, see now CPR 19.6(4)(b) and *RWE Npower plc* v. *Carrol* [2007] EWHC (QB) 947, at [40] and *Smithkline Beecham plc* v. *Avery* [2007] EWHC (QB) 948 at [31] and [33] (where Teare J. expressed the view that those represented under CPR 19.6 become parties when permission to enforce is sought against them).

[17] In *Conybeare* v. *Lewis* (1883) 48 L.T. 527, 528 it was held that it was not usual to allow a member of a represented class to attend.

[18] CPR 19.6(4)(a).

[19] Whether described as "persons unknown" or in some other way.

[20] *South Cambridgeshire District Council* v. *Gammell* [2005] EWCA (Civ) 1429, [2006] 1 W.L.R. 658, at [32]; *Attorney-General* v. *Newspaper Publishing plc* [1988] Ch. 333, 369.

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injunction is granted.[21] Their substantive position when the order is made is that of a non-party - they have not been identified and they will not ordinarily[22] be in a position to respond to the allegations made by the claimant[23] or to resist the grant of injunctive relief.[24]

In the light of these decisions, characterising the jurisdiction to grant injunctive relief against non-parties as "extraordinary"[25] or "radical"[26] is no longer entirely accurate. Nor is it meaningful to continue to distinguish between claims against representative defendants under CPR 19.6 and against parties by description.[27]

Distinguishing Those Represented under CPR 19.6 from Other Non-Parties

Injunctive relief against representative defendants under CPR 19.6 is often sought in the same circumstances and in response to the same difficulty which generates other claims against non-parties – the claimant simply cannot identify by name all those likely to interfere with her rights, or it is very difficult to do so.[28]

Where the claimant can identify an individual, CPR 19.6 may enable him to overcome the difficulty of identifying others by claiming against that individual as a representative of all others likely to interfere with his rights. Indeed, before the introduction of the Civil Procedure Rules 1998, a claim under the representative parties rule was the only means available to a claimant to respond to potential infringement of his rights by unidentifiable persons. Unless the claimant could identify a named individual to represent all those

[21] *Attorney-General* v. *Greater Manchester Newspapers Ltd* (2001) 145 S.J. L.B. 279, at [5].

[22] Although, clearly, in some factual situations those likely to be bound will be aware of the proceedings in which the injunction is sought.

[23] Or to choose to make no response.

[24] Although they may, at a later point, apply to vary or discharge the injunction, discussed at notes 67–70 below.

[25] Spry, 6th ed., p. 322 n.2.

[26] His Hon Judge W. Rose (ed.), *Blackstone's Civil Practice 2006* (Oxford 2006) ("*Blackstone's Civil Practice 2006*"), p. 419.

[27] Academic texts (where they do refer to both possibilities) treat them as distinct, see Spry 6th ed., pp. 322 note 2 and 393 note 8; D. Bean and I. Parry, *Injunctions* (London 2003) ("Bean, 8th ed"), p. 8. Hanbury & Martin, 17th ed., refers to the possibility that injunctions may be granted "against all the members of a class or organisation to restrain the unlawful acts of unidentified members" but does not refer to the representative nature of the decisions cited in support: p. 770. Other texts do not refer to the possibility that injunctive relief may be ordered against representative defendants at all.

[28] Of course, there are claims where those represented could have been identified by name but it was simply more convenient not to (see, for example, the claims against representatives of the members of the Cotswold Motor Boat Club in *Kennaway* v. *Thompson* [1981] Q.B. 88, the Lintz Cricket Club in *Miller* v. *Jackson* [1977] Q.B. 966, 970 (injunction awarded at trial); the cricketing bodies represented in *Greig* v. *Insole* [1978] 1 W.L.R. 302; *Amos Removals & Storage Pty Ltd* v. *Small* [1981] 2 N.S.W.L.R. 525 and *Australian Performing Right Association Ltd* v. *Miles* (1961) 3 F.L.R. 146). While not the focus of this article, those represented in these cases are similarly not before the court, and the same issues arise as in claims against persons difficult to identify.

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likely to interfere with his rights, no claim could be brought at all - the prescribed form of writ required a named defendant.[29]

Clearly it offends against common sense if relief depends entirely on the coincidence of whether the claimant is able to find a named individual to represent the other unidentified persons likely to infringe his interest. Otherwise, as Morritt V.C. notes in *Bloomsbury Publishing Group plc* v. *News Group Newspapers Ltd*[30] a claimant "could obtain an injunction against all infringers by description so long as he could identify one of them by name, but, by contrast, if he could not name one of them then he could not get an injunction against any of them".[31] That anomaly has been addressed in the CPR. Practice Direction 7 now anticipates the possibility that a defendant will not be identified, providing that "the claim form and every other statement of case, must be headed with the title of the proceedings. The title *should* state … (3) the full name of each party".[32] Factually similar claims are now brought before the courts either against representative defendants under CPR 19.6 or against parties identified by description. The two procedural routes are viewed as distinct but, apart from the claimant's ability to identify an individual to act as a representative of the other persons likely to infringe her rights, it is not clear that there is any significant distinction in law between the position of those represented under CPR 19.6 and other non-parties.

A. "Same Interest"

Claims under CPR 19.6 may only be brought where those represented have the "same interest" as their named representative. It might therefore be argued that the determination that the named defendant and those represented have the "same interest" justifies the grant of injunctive relief against those represented and distinguishes it from injunctive relief granted against non-parties in any other circumstances. This assumes that the test of "same interest" is a meaningful one, capable of distinguishing the non-parties represented under CPR

[29] *Friern Barnet Urban District Council* v. *Adams* [1927] 2 Ch. 25, 30, 31, 32. This difficulty is addressed in particular situations by specific statutory provisions. See, for example, the Planning (Listed Buildings and Conservation Areas) Act 1990, s. 44A(3), the Town and Country Planning Act 1990, s. 187B(3); the Planning (Hazardous Substances) Act 1990 s. 26AA(3) and CPR 19.8A (claims relating to deceased estates, property subject to a trust or to the sale of property).

[30] [2003] 1 W.L.R. 1633, 1640. Very few judicial decisions draw any link between claims for injunctive relief against representative defendants and those against parties by description. For another example, see *EDO MBM Technology Ltd* v. *Campaign to Smash EDO* [2005] EWHC (QB) 837, discussed at notes 77–79 below.

[31] Contrast *Maritime Union of Australia* v. *Patrick Stevedores Operations Pty Ltd* [1998] 4 V.R. 143, 157, 160 where the Court of Appeal of the Supreme Court of Victoria rejects the claim for an order against persons unknown preventing picketing but accepts that such an order could have been made against a representative defendant.

[32] At 4.1 (emphasis added). See discussion in *Bloomsbury Publishing Group plc* v. *News Group Newspapers Ltd* [2003] 1 W.L.R. 1633, 1640.

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19.6 from other non-parties. However, examination of the relevant case law demonstrates that "same interest" does not provide a coherent basis for distinguishing between those claims against representative defendants where injunctive relief has been granted and those where it has not.[33] Nor does it provide a rational basis for distinguishing claims for injunctive relief against representative defendants from claims for injunctive relief against parties by description. For example, in *EMI Records Ltd* v. *Kudhail*[34] the Master of the Rolls found that those represented who were dealing in pirated cassettes had a "common interest in preventing anybody finding out where the cassettes come from". Had the claim been brought against "persons unknown", the persons enjoined would clearly have also had this interest. Similarly in *Oxford University* v. *Webb*[35] Irwin J. finds that "same interest" "must depend to some degree upon context" and in the case before him is justified by reference to the shared aims of the members of the associations represented – aims which they would still share if the claim was brought against them by description.[36]

Comparison of the claims for injunctive relief brought against representative defendants with those brought against parties by description reinforces the conclusion that they cannot be distinguished by reference to the requirement of "same interest".

Most of the claims for injunctive relief against parties by description and against representative defendants under CPR 19.6 seek to prevent torts against property such as trespass and nuisance and breach of the Protection of Harassment Act 1997, or are concerned with breach of copyright or confidentiality in circumstances where the claimant can demonstrate that future serious infringement of her rights is likely but she is unable to identify the individuals likely to infringe those rights. Bringing a claim against a representative defendant is simply another way of describing the non-parties against whom relief is sought. In both cases the issue before the court will be whether those described are likely seriously to interfere with the claimant's rights,[37] with the additional requirement in a representative

[33] J. Seymour, "Representative Proceedings and the Future of Multi-Party Actions" (1999) 62 M.L.R. 565, pp. 567–569, 572–574. For recent reference to the difficulty caused by the ambiguity inherent in the requirement, see *Huntingdon* v. *SHAC No 2* [2004] EWHC (QB) 1231, at [55].

[34] [1985] F.S.R. 36.

[35] [2006] EWHC (QB) 2480, at [48]–[50], [55].

[36] Since the introduction of the CPR, such a claim could be brought under CPR 19.6 or brought against a defendant described as, for example, "the members of Animal Aid" without there being any need to identify a particular individual to represent those members.

[37] So, in *Mills* v. *News Group Newspapers Ltd* [2001] EWHC Ch 412 Lawrence Collins J. refuses to grant an injunction against the world in circumstances where the evidence of risk to the claimant's rights "is very slight", at [37] and [34]. Similarly, the refusal to grant the injunction sought against unidentified persons in *Re Independent Insurance Co Ltd* 2005 NSWSC 587 emphasises the unusual nature of the relief sought (at [48]–[52]), but it is noteworthy that there was "no suggestion that any person is threatening" the plaintiff's rights, at [47].

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claim that the individual defendant be likely to interfere with the claimant's rights.

Those represented under CPR 19.6 are often described by their membership of an association,[38] in many cases one whose explicit or demonstrable purpose is to resort to torts in order to protest against activities to which its members object and where action against the claimant is ongoing. So, for example, a claim for an injunction brought against the representative of "the members of the Animal Liberation Front" essentially asks whether members of that organisation are likely to be involved in sufficiently serious infringement of the claimant's rights.[39] In a number of claims, this question has been answered affirmatively, and sufficient "same interest" found.[40]

Clearly, there will be a number of situations in which describing those likely to infringe the claimant's rights by reference to their membership of an association will not be appropriate. Most obviously, there may not be any relevant association.[41] Even if some association does exist, it must be of such a nature that description by reference to membership is sufficiently clear identification of those to be bound.[42] Moreover, an injunction directed against all members of an association may not necessarily be sufficient to protect a claimant's rights.[43] Those likely to infringe the claimant's right may plead allegiance to some other association or deny membership of any association at all.[44] These

[38] Where those likely to infringe the claimant's rights have formed an association it may be easier to identify an individual to act as representative (although there still may be difficulties, see *Hall* v. *Save Newchurch Guinea Pigs (Campaign)* [2005] All E.R. (D) 301 (Mar), at [8]).

[39] This approach to claims for injunctive relief against representative defendants is consistent with the argument that the only workable test for the "same interest" required under CPR 19.6 is whether there are common questions of law or fact (the common question here being whether those represented – however described - are likely to infringe the claimant's rights), see J. Seymour "Justice and the Representative Parties Rule – an Overriding Interest?" (2005) 25 Legal Studies 668, pp. 684–686.

[40] *Smithkline Beecham plc* v. *Avery* [2007] EWHC (QB) 948, at [12]–[16]; *RWE Npower plc* v. *Carrol* [2007] EWHC (QB) 947, at [31]; *Oxford University* v. *Webb* [2006] EWHC (QB) 2490, at [55]; *Monsanto plc* v. *Tilly* [2000] Environmental Law Reports 313, 331–332; *M Michaels (Furriers) Ltd* v. *Askew* (1983) 127 S.J. 597. It is of course also possible that the question whether all members of an association are likely to engage in tortious conduct will be answered negatively, as it was in *United Kingdom Nirex Ltd* v. *Barton* (unreported judgment, 13 November 1986, transcript, pp. 4–5) and sufficient "same interest" denied. See also the reformulation of those represented in *RWE Npower plc* v. *Carrol* [2007] EWHC (QB) 947, at [32]–[33] and *Electricity Commission of New South Wales* v. *Arrow* (unreported judgment, NSW Supreme Court, 7 December 1990, transcript, p. 4).

[41] In claims concerning breach of copyright or confidentiality it is unlikely that those who threaten to infringe the claimant's rights will have formed an association.

[42] See discussion of this point in *Monsanto plc* v. *Tilly* [2000] Environmental Law Reports 313, 333; *Oxford University* v. *Webb* [2006] EWHC (QB) 2490, at [63]–[64] and *RWE Npower plc* v. *Carrol* [2007] EWHC (QB) 947, at [31].

[43] Subject to possibility that the injunction may be enforced against any person who knowingly aids and abets breach of the injunction – see discussion at notes 100–120 below.

[44] A possibility explicitly acknowledged in *Huntingdon Life Sciences Group plc* v. *SHAC* [2007] EWHC (QB) 522, at [13]–[16], [43]. Nevertheless, the fact that enjoining the members of an association may not be sufficient to protect the claimant's rights does not defeat an argument that the members of an association with particular declared or demonstrable aims are likely in the future to interfere with the claimant's rights and are therefore properly subjected to an injunctive order.

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difficulties have been met in both claims against representative defendants and against parties by description by describing the non-parties against whom the claim is brought more broadly – by reference to the alleged infringement of the claimant's rights,[45] as "protestors",[46] as "persons unknown"[47] or, indeed, as "all the world".[48]

It is not however the description of those against whom the claim is made which is significant, but the scope of the order made.[49] With the exception of orders made against members of associations, all such orders, whether made against a representative defendant or against a party by description, are effectively made against all the world.[50] So, for example, in *Hampshire Waste Services Ltd* v. *Persons Intending to Trespass and/or Trespassing Upon Incinerator Sites*[51] potentially anyone might have entered or remained "without the consent of the claimants … on any of the incinerator sites … in connection with the 'Global Day of Action Against Incinerators' (or similarly described

[45] *Harrington* v. *North London Polytechnic* [1984] 1 W.L.R. 1293, 1294 (claim against second defendant as the representative of "all other students or members of the First Defendant who have participated in the Socialist Worker Student Society's organised picket against the Plaintiff"); *EMI Records Ltd* v. *Kudhail* [1985] F.S.R. 36 (search order granted against the defendants as the representatives of all other persons selling cassette tapes bearing the trade name "Oak Records" - the evidence showed that such tapes were pirated, and that the name had been adopted to avoid detection); *Hampshire Waste Services Ltd* v. *Persons Intending to Trespass and/or Trespassing Upon Incinerator Sites* [2003] EWHC (Ch) 1738, [2003] 42 E.G.C.S. 126; *Jagger* v. *Darling* [2005] EWHC (Ch) 683, at [1] (other defendants described as "person or persons who acquired or made a copy of the CCTV recording of the [private] incident and supplied it or images taken from it to the News of the World newspaper"). See also *Doyle* v. *Commonwealth of Australia* (1985) 156 C.L.R.510, 513 where the High Court of Australia refers to the injunction granted by the Supreme Court of Victoria against the defendants as the representatives of persons occupying the plaintiff's premises.

[46] *Huntingdon Life Sciences Group plc* v. *SHAC* [2007] EWHC (QB) 522, at [16]; *Hall* v. *Save Newchurch Guinea Pigs (Campaign)* [2005] All E.R. (D) 301 (Mar), at [12]; *Huntingdon Life Sciences plc* v. *Cass* [2005] EWHC 2233 (QB), [2005] 4 All E.R. 899, at [3]; *EDO MBM Technology Ltd* v. *Campaign to Smash EDO* [2005] EWHC (QB) 837, at [12] and [78]; *Silverton* v. *Gravett* (unreported, 19 October 2001).

[47] *X* v. *Persons Unknown* [2006] EWHC (QB) 2783; *Gate Gourmet London Ltd* v. *Transport and General Workers' Union* [2005] EWHC (QB) 1889, [2005] I.R.L.R. 881, at [4]; *Bloomsbury Publishing Group plc* v. *News Group Newspapers Ltd* [2003] 1 W.L.R. 1633. See also *Tony Blain Pty Ltd* v. *Splain* [1993] 3 N.Z.L.R. 185.

[48] *Carr* v. *Newsgroup Newspapers Ltd* [2005] EWHC (QB) 971; *X (a woman formerly known as Mary Bell)* v. *O'Brien* [2003] EWHC (QB) 1101, [2003] 2 F.C.R. 686; *Venables* v. *News Group Newspapers Ltd* [2001] 2 W.L.R. 1038. Orders *contra mundum* granted in the special protective jurisdiction in respect of minors or in aid of criminal, statutory or administrative proceedings in public law are excluded from the scope of this article, for references see P. Devonshire "Freezing Orders, Disappearing Assets and the Problem of Enjoining Non-parties" (2002) 118 L.Q.R. 124, 125 note 8.

[49] The comment in *Monsanto plc* v. *Tilly* [2000] Environmental Law Reports 313, 332 that "the injunction only applies to conduct which falls within its terms" is apt to describe many of the injunctions under consideration here.

[50] In contrast, claims against members of an association or some institution (as in *Harrington* v. *North London Polytechnic* [1984] 1 W.L.R. 1293) will require proof of membership as well as breach of the terms of the injunction. Orders are sometimes limited to persons "with notice" (see cases cited at note 46 above) – arguably notice of the order has to proved in any event in any application to enforce, see at notes 81–92 below.

[51] [2003] EWHC (Ch) 1738, [2003] 42 E.G.C.S. 126, at [10]. In *Re Independent Insurance Co Ltd* 2005 NSWSC 587 at [31] counsel acknowledged that the order sought would be binding on the whole world "although he preferred to characterise it as directed to all persons with claims against [the plaintiff]".

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event) on or around 14 July 2003''. In *X* v. *Persons Unknown*[52] any person might have acquired information concerning the claimants' personal relationship and any marital difficulties or the fact that they had obtained an injunction and would therefore be prohibited from publishing that information. In *Huntingdon Life Sciences Group plc* v. *SHAC*[53] the order made enjoined not only members of SHAC but also ''protestors''. Holland J. accepted that if other persons, not members of SHAC, ''are minded to demonstrate within an Exclusion Zone, then, good intentions notwithstanding, arguably they too become 'Protestors' so as to be bound by the Order''.[54] While clearly the number of persons who are likely, or able, to engage in the prohibited behaviour may vary, such orders enjoin any person in the world who does so, whether represented by a named individual or not.[55]

B. Interests of those Represented Protected by Named Defendant

It might be argued that representative claims can be distinguished from those against other non-parties on the ground that there will be a named defendant before the court who can protect the interests of those represented, either by challenging the representative nature of the claim generally or by raising arguments on their behalf.

While courts have rarely remarked on the nature or the extent of the representative's role, there is no authority to contradict the conclusion that the representative is in control of the defence of the action.[56] In *M Michaels (Furriers) Ltd* v. *Askew*,[57] for example, Purchas L.J. commented that the named representatives could have applied ''to have the writ amended by deleting all references to their capacity as representatives of Animal Aid. They have not done this but have chosen to defend on the merits, asserting that Animal Aid had not to date been concerned with campaigns against the fur trade''. Clearly, a representative defendant may be active in protecting the interests of those represented but no particular obligations are imposed on the representative by the rule or by authority to date.[58]

[52] [2006] EWHC (QB) 2783, at [3].
[53] [2007] EWHC (QB) 522, at [15].
[54] However, the definition of ''protestor'' adopted arguably only includes persons against whom the injunction could be enforced in any event, [2007] EWHC (QB) 522, at [16]. See discussion at notes 100–120 below.
[55] Given the potential breadth of such orders, it may be noteworthy that the Protection from Harassment Act 1997 contains a ''striking innovation'' in that ''breach of an injunction restraining harassment can be a crime as well as contempt of court'', L.A. Sheridan, *Injunctions and Similar Orders* (Chichester 1999), p. 353.
[56] This is consistent with authority in relation to representative claimants, *Handford* v. *Storie* (1825) 2 S. & S. 196, 198, 57 E.R. 320, 321.
[57] (1983) 127 S.J. 597.
[58] For example, there is no suggestion that a representative defendant is required to notify those represented of the claim, or to consult with them or canvass their views.

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C. Opportunities for those Represented to Protect their own Interests

In the absence of any particular obligations on the named defendant, the opportunities available for those represented to protect their interests do not differ significantly from those available to any other non-party. The ability of those represented to protect their own interests will depend, in the first instance, on whether they are aware of the proceedings at all. As they do not need to be identified or notified of the proceedings brought against their representative this may constitute a significant limitation. Other non-parties will be similarly constrained from protecting their interests.[59] Assuming that those represented are aware of the claim, there is no requirement that they authorise the representative defendant to act on their behalf in any way. CPR 19.6 does make specific provision for challenging the representative, however it is clear that only a *party* may apply to the court for an order that a person may not act as a representative.[60]

While those represented cannot supervise the representative's conduct of the defence, they may apply to be added as a defendant or to take the conduct of the action out of the representative's hands.[61] Similarly, any non-party - assuming that he is aware of proceedings which might affect his interests - may apply to become a defendant in those proceedings.[62]

An alternative available for those represented under CPR 19.6 may be to apply to be excluded from the proceedings. In *The Irish Rowan* Purchas L.J. expressed the view that the 1962 rule was capable of supporting applications to the court "from both sides of the proceedings to adjust those either appearing as parties or as members of the class represented, whether they be plaintiffs or defendants." He went on to say that, on his reading of the rule, "it is open to … a party to apply to be discharged from membership of the class".[63] The

[59] It is, of course, factually possible in both situations that those represented or described will be aware of the proceedings brought against them, and, in the former case, that they will have some influence over the named representative.

[60] CPR 19.6(2) and (3). Similarly, under earlier formulations of the rule, it was never suggested that those represented could challenge the form of the proceedings unless he or she was made a party to the proceedings, discussed at notes 61–62 below.

[61] *Oxford University* v. *Webb* [2006] EWHC (QB) 2480 at [49]; *Watson* v. *Cave (No 1)* (1881) 17 Ch.D. 19 , 21–22. The former option was also noted in *Haarhaus & Co GmbH* v. *Law Debenture Trust Corp Plc* [1988] B.C.L.C. 640, 647 and in *The Irish Rowan* [1991] 2 Q.B. 206, 240–241, 245. Neither is explicit in any formulation of the rule. The first option embraces the possibility of making, in turn, the dissident a representative defendant for all who disagree with the existing representative's conduct of the defence, so long as there is more than one dissentient with sufficient same interest, *Wilson* v. *Church* (1878) 9 Ch.D. 552, 559. See also *Fraser* v. *Cooper, Hall, & Co* (1882) 21 Ch.D. 718, 719; *Hancock* v. *Scattergood* [1955] S.A.S.R. 1, 20.

[62] An application for permission to add a party under CPR 19.4(1) can be made by "a person who wishes to become a party", CPR 19.4(2)(b). The court may order that a person be added as a new party if it is desirable so that the court can resolve all the matters in dispute or if there is an issue involving the new party and an existing party which is connected to the matters in dispute and it is desirable to add the new party so that the court can resolve the issue, CPR 19.2(2).

[63] [1991] 2 Q.B. 206, 240–241, 245. The reference to a "party" having this right is symptomatic of the confusion as to the position of those represented before *Ventouris* v. *Mountain* [1990] 1 W.L.R. 1370 which was decided some ten months later.

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interpretation is a plausible one given that the 1962 rule provided that "the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or all except one or more of them".[64] The current rule involves a change in wording, but the reference to the court's ability to order that the claim be continued "by or against one or more of the persons who have the same interest as representatives of *any* other persons who have that interest"[65] may also be capable of supporting an application for an order that one who is *prima facie* a member of the defendant class is, nevertheless, not represented in the proceedings. Whether it was anticipated that the right to opt out would be absolute, or dependent on the court's discretion is not made clear. It seems likely that if permission to opt out is granted, then any order made would not enjoin that individual.[66] Whether parties by description could apply to be excluded from the ambit of any order made is, not surprisingly, not the subject of authority. The very reason the claim is brought against them by description, as is often the case with claims under CPR 19.6, is that they cannot be identified. It is therefore unlikely that any such application would be made, either because they are not aware that the claim is proceeding or because they are reluctant to identify themselves to the claimant and to the court.

Where an injunction has already been granted, presumably those represented under CPR 19.6 are in the same position as any other interested person and will have liberty to apply for the order to be discharged or varied without the need to issue a formal application.[67] Comparison might usefully be made to orders made against "persons unknown" under statutory authority. The appeal in *South Cambridgeshire District Council* v. *Gammell*[68] arose out of an injunction granted under the Town and Country Planning Act 1990 s. 187B(3) against persons unknown. The appellant was not identified or in occupation of the land to which the order related when the injunction was granted and appealed against an order finding that she

[64] Former RSC 1965 Ord. 15 r.12(1). Purchas L.J. relied in particular on the phrase "unless the Court otherwise orders". Arguably, the reference to representation of "all except one or more them" also supports the possibility that some may opt out. However, in *Carnie* v. *Esanda* (1995) 182 C.L.R. 398, 405, Mason C.J., Deane and Dawson JJ. do not seem to think it clear that those represented have the right to opt out of the proceedings, including it in their list of factors requiring resolution.

[65] CPR 19.6(1) (emphasis added). The qualification in CPR 19.6(4) that judgments or orders are binding "[u]nless the court otherwise directs" may also provide a basis on which individuals could be excluded from a class.

[66] Although the injunction may nevertheless be enforced against the individual concerned, discussed at notes 100–120 *below.

[67] *X* v. *Persons Unknown* [2006] EWHC (QB) 2783, at [73]. See also *Blackstone's Civil Practice 2006*, p. 437. The right to make such an application does not need to be expressed in the order itself, *South Cambridgeshire District Council* v. *Gammell* [2005] EWCA (Civ) 1429, [2006] 1 W.L.R. 658, at [23].

[68] [2005] EWCA (Civ) 1429, [2006] 1 W.L.R. 658.

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was in breach of the injunction and in contempt of court. The court rejected the argument that the appellant could effectively ask the court to reopen the question whether the injunction should have been granted at all. The Master of the Rolls[69] stated that the proper approach for a person who learns that he is enjoined is to apply for an order to vary or discharge the injunction. Where action which breaches the injunction has already been taken, an application to vary the injunction for the future can still be made, but the person concerned will remain liable for the earlier breach.[70]

D. Judicial Protection of Interests of those Represented

While the opportunities for those represented to supervise their representative are limited, it might be argued that they can rely on the court to ensure that he presents an adequate defence of their interests. However, the rule does not require court authorisation to bring an action against a representative defendant – a claim may simply "be begun" against a person as the representative of others who have the same interest.[71] There is arguably an opportunity for judicial scrutiny where a claim is not begun as a representative one – "[w]here more than one person has the same interest in a claim … (b) the court may order that the claim be continued" against a person as the representative of others with the same interest.[72] That possibility aside, claims against representative defendants before the introduction of the CPR did not demonstrate any particular judicial interest in the capacity of the defendant adequately to safeguard the interests of those represented. Considerable concessions have been made on behalf of those represented and accepted by the court, such as the acceptance by the representative defendant in *Kennaway* v. *Thompson*[73] that there

[69] With whom Rix and Moore-Bick L.JJ. agreed, [2005] EWCA (Civ) 1429, [2006] 1 W.L.R. 658, at [38] and [39].

[70] [2005] EWCA (Civ) 1429, [2006] 1 W.L.R. 658, at [33] (cited in *Wychavon District Council* v. *Rafferty* [2006] EWHC 910, at [19]).

[71] CPR 19.6(1)(a). Contrast the situation under the original rule where an order authorising the representative to defend was necessary, *Campbell* v. *Thompson* [1953] 1 Q.B. 445, 450; *London Association for Protection of Trade* v. *Greenlands Ltd* [1916] 2 A.C. 15, 38; *Walker* v. *Sur* [1914] 2 K.B. 930 934; *May* v. *Newton* (1887) 34 Ch.D. 347, 349; *Andrews* v. *Salmon* [1888] W.N. 102, 103; *Guardians of Tendring Union* v. *Dowton* (1890) 45 Ch.D. 583; and *Wood* v. *McCarthy* [1893] 1 Q.B. 775. See also A.A.S. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 2nd ed. (London 2006), p. 511.

[72] CPR 19.6(1).

[73] [1981] Q.B. 88, 90. Similarly significant concessions by representative defendants were also accepted in *Guardians of Tendring Union* v. *Dowton* (1890) 45 Ch.D. 583, 584; *Bolton* v. *Stone* [1951] A.C. 850, 858; *Tetley* v. *Chitty* [1986] 1 All E.R. 663 (the representative of the members of the Medway Kart Club admitted liability and undertook not to continue any further nuisance); and *Australian Performing Right Association Ltd* v. *Miles* (1961) 3 F.L.R. 146 (an action alleging breach of copyright where the defendants were authorised to act as representatives of the members of a club after they had made admissions in the pleadings which presumably then bound all members).

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were no grounds for challenging the trial judge's finding that some of the club's activities caused a nuisance.

Claims against those represented under CPR 19.6 bear out the assessment that the introduction of increased case management powers in the CPR has not "fundamentally altered"[74] the principle of party autonomy in litigation. There does not appear to be any significant increase in independent judicial examination of "same interest"[75] or of the extent to which the defendant's submissions protect the interests of those he or she represents.[76]

In any event, claims against those represented under CPR 19.6 cannot be distinguished from other claims to enjoin non-parties on this basis. The same possibility of judicial scrutiny of the claim applies equally to claims to enjoin parties by description. Indeed, it is possible that the scrutiny to which a claim is likely to be subjected when an order is openly sought against persons not before the court may well be greater than that which is brought to bear on a claim against a defendant who fails to challenge his representative status.

In a rare example of direct comparison of claiming against a representative defendant and against a party by description, the two possibilities were viewed as interchangeable. In *EDO MBM Technology Ltd* v. *Campaign to Smash EDO*[77] Gross J. struck out the proceedings against Smash EDO, an unincorporated association.[78] He continued that the strike out was

> without prejudice to the Claimants having liberty to commence fresh proceedings against Smash EDO should they be in a position to identify individuals who, on an appropriate evidential basis, could be treated as its representatives. In that situation, the Court would readily incline towards using its powers under CPR 19.6 to do justice in the case.

[74] Zuckerman, *op cit.*, p. 397.

[75] Although in *Oxford University* v. *Webb* [2006] EWHC (QB) 2490 (QB) Irwin J., in response to argument by counsel, undertakes a more detailed than usual examination of whether the nominated representative has the same interest as those represented, at [33]–[40], [67].

[76] See, for example, *Huntingdon Life Sciences Group plc* v. *SHAC* [2007] EWHC (QB) 522, at [5] (where Holland J. notes that the named defendant "effectively offered his services as representative of SHAC for the purposes of CPR 19.6" without considering whether he has the "same interest" as those represented) and at [9] (where there is reference to the defendants' "tacit concession" that injunctive relief would need to continue).

[77] [2005] EWHC (QB) 837.

[78] [2005] EWHC (QB) 837, at [6], [42]–[44]. A number of claims attempted to overcome the difficulty of identifying a representative individual by making a protest association party to the proceedings in its own name (*Hall* v. *Save Newchurch Guinea Pigs (Campaign)* [2005] All E.R. (D) 301 (Mar), at [8] and [35]; *Daiichi Pharmaceuticals UK Ltd* v. *SHAC* [2003] EWHC (QB) 2337, [2004] 1 W.L.R. 1503; *Chiron Corpn Ltd* v. *Avery* [2004] EWHC 493 (QB), [2004] All E.R. (D) 157 (Mar), at [2]; *Huntingdon Life Sciences Ltd* v. *SHAC* [2003] EWHC (QB) 1967; *Silverton* v. *Gravett* (unreported, 19 October 2001), transcript pp. 6–7). However, unincorporated associations are not legal persons and Gross J's rejection of this approach has since been followed in *Oxford University* v. *Webb* [2006] EWHC (QB) 2490, at [60]–[62], [68]–[69] and *Huntingdon Life Sciences Ltd* v. *SHAC* [2007] EWHC (QB) 522, at [3]–[5]).

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He then continued that the "problem of identification in the present case can in any event be addressed through the definition of "protestor" in the draft of the order sought" concluding that "one way or another, the law would not countenance an inability to afford effective relief, if once relief is justified".[79]

The only ground on which the two approaches might differ is in relation to enforcement.

Enforcement against Enjoined Non-Parties

Authority in relation to the enforcement of injunctions against those represented under CPR 19.6 or against parties by description is limited. However, it is not surprising, given the potential scope of such orders, that there are some limits on enforcement. In *Oxford University* v. *Webb*[80] Irwin J. refers to two safeguards – notice of the order and the need for permission to enforce under CPR 19.6(4)(b). While both safeguards apply to orders made against representative defendants, clearly the latter does not apply to orders enjoining other non-parties.

A. Notice of the Order

In *Oxford University* v. *Webb*[81] Irwin J. noted that "careful provision should be taken so far as possible to alert all those in the class, of the existence of the order and of the fact that it binds them". In *Monsanto plc* v. *Tilly*[82] Stuart-Smith L.J. commented that "with the representative order in place, those perpetrating a similar attack will be guilty of contempt of court *provided they know of the injunction*". Similarly, in *Attorney-General* v. *Greater Manchester Newspapers Ltd*[83] Dame Elizabeth Butler-Sloss P. considered whether the defendant[84] was liable for breach of the injunction against all the world she had ordered in *Venables* v. *News Group Newspapers Ltd*,[85] and concluded that this depended not only on whether its actions breached the terms

[79] [2005] EWHC (QB) 837, at [44]. Similarly, in *Electricity Commission of New South Wales* v. *Arrow* (unreported judgment, NSW Supreme Court, 7 December 1990, transcript, p. 4) Hodgson J. denies the representative order sought on the ground that not all members of the protest association concerned are likely to infringe the plaintiff's rights but then achieves essentially the same effect by extending the injunction against the named defendants to "persons unknown" who commit the acts prohibited. See also *Bloomsbury Publishing Group plc* v. *News Group Newspapers Ltd* [2003] 1 W.L.R. 1633, 1637–1638, referred to at notes 30–31 *above.

[80] [2006] EWHC (QB) 2490, at [49]–[50].

[81] [2006] EWHC (QB) 2490, at [49].

[82] [2000] Environmental Law Reports 313, 332–333 (emphasis added).

[83] (2001) 145 S.J. L.B. 279.

[84] Who was not party to the injunction proceedings nor served with a copy of the order, (2001) 145 S.J. L.B. 279, at [5].

[85] [2001] Fam. 430.

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of the injunction but also on whether it had notice of the injunction.[86] This is consistent with authority in relation to claims against persons unknown under statutory authority that enforcement against a non-party will turn on "the terms of the injunction, the actions of the [person concerned] and the state of knowledge of the [person concerned]".[87] The apprehension in *Winder* v. *Ward*[88] that if the representative claim seeking an injunction preventing the members of a Hunt from trespassing on the plaintiff's land were successful, then "any member of the Hunt could be committed to prison for contempt of court if he went across the plaintiff's land, whether he had heard of the action or not" does not therefore appear to be justified.

Many of the orders made both under CPR 19.6 and against parties by description anticipate the need for knowledge of the order. In some claims the description of those bound includes reference to their having notice of the order.[89] Alternatively or additionally provision is made for the order to be posted at specific locations which are, for example, targeted by protestors.[90] Where it is not a location but information which is to be protected by the order, Eady J. opined in *X* v. *Persons Unknown*[91] that it was appropriate to direct that "best endeavours" be used to trace those to whom the injunction is likely to apply and to draw it to their attention. He concluded that "the most appropriate 'best endeavours' will inevitably have to be tailored to the circumstances by those best qualified to judge" who were in the case before him, in his view, the claimants themselves.[92]

B. Permission to Enforce the Order

It might be argued that those represented under CPR 19.6 are in a different position from other non-parties because orders made in a representative claim can only be enforced against those represented "with the permission of the court" (CPR 19.6(4)(b)).[93] The existence of this restriction on enforcement has been a significant source of

[86] In that case, the order was "widely publicised" and the defendant did not rely on lack on notice, (2001) 145 S.J. L.B. 279, at [5], [19].

[87] *South Cambridgeshire District Council* v. *Gammell* [2005] EWCA (Civ) 1429, [2006] 1 W.L.R. 658, at [33]. See also N. Lowe and B. Sufrin, *Borrie and Lowe The Law of Contempt*, 3rd ed. (London 1996), p. 558.

[88] The Times, 27 February 1957.

[89] See cases cited in note 46 above.

[90] *Gate Gourmet London Ltd* v. *Transport and General Workers' Union* [2005] EWHC (QB) 1889, [2005] I.R.L.R. 881, at [33]; *Hampshire Waste Services Ltd* v. *Persons Intending to Trespass and/or Trespassing Upon Incinerator Sites* [2003] EWHC (Ch) 1738, at [10]. For comment on the importance of such notice, see *Oxford University* v. *Webb* [2006] EWHC (QB) 2480, at [49].

[91] [2006] EWHC (QB) 2783, at [73]–[80].

[92] [2006] EWHC (QB) 2783, at [80].

[93] Given that those represented are explicitly bound by any order it seems likely that the reference to "enforcement" is intended to include only actions to enforce, such as proceedings for contempt.

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comfort in a number of decisions permitting a claim to proceed against a representative defendant.[94]

However, there is limited authority on the effect of CPR 19.6(4)(b) and so the extent to which it offers those enjoined under CPR 19.6 greater protection than that afforded to other non-parties is not clear.[95] The permission of the court is required in any event to enforce an injunction by a writ of sequestration.[96] Whether a separate application for "permission to enforce" an injunction against a person represented under CPR 19.6 would have to precede an application for an order for committal for contempt[97] is an open question. Nor is it clear whether an application for permission to enforce must to be served on the person against whom enforcement of the injunction is to be sought.[98] Insofar as this provision does offer some additional protection for those represented under CPR 19.6, it might be asked why this "important additional safeguard"[99] is not available to other non-parties.

Enforcement against Third Parties not Bound by the Injunction

The similarity of claims for injunctive relief against representative defendants and against parties by description is further emphasised by the fact that in both situations it has been argued that an order enjoining the non-parties is not necessary because the possibility of enforcement against third parties[100] not bound by the injunction is sufficient to protect the claimant's interests.[101]

[94] See *M Michaels (Furriers) Ltd* v. *Askew* (1983) 127 S.J. 597; *Oxford University* v. *Webb* [2006] EWHC (QB) 2480 at [50]; *Huntingdon Life Sciences Group plc* v. *SHAC* [2007] EWHC (QB) 522 at [43].

[95] Attempts to obtain permission to enforce under CPR 19.6(4)(b) in advance have been rejected: see *Huntingdon Life Sciences Group plc* v. *SHAC* [2007] EWHC (QB) 522, at [38]–[44], *Smithkline Beecham plc* v. *Avery* [2007] EWHC (QB) 948, at [27]–[37] and *RWE Npower plc* v. *Carrol* [2007] EWHC (QB) 947, at [34]–[47]. The orders were sought in the context of claims under the Protection of Harassment Act 1997 and, in particular, in relation to the power to arrest for breach of an injunction under s. 3(6) of that Act.

[96] See CPR Part 23 and CPR Sch. 1, R.S.C. Ord. 45 r.5(1)(b) and Ord. 46 r.5.

[97] See Practice Direction, Committal Applications and CPR Sch. 1, R.S.C. Ord. 52 rr.2–4 and 9 (retention of the power to fine). For discussion see P.H. Pettit, *Equity and the Law of Trusts*, 10th ed. (Oxford 2006) ("Pettit, 10th ed"), pp. 589–590 and *Blackstone's Civil Practice 2006*, p. 1018.

[98] While the 1962 rule explicitly required applications for leave to enforce an order made against those represented to be made by summons served personally on the person against whom it was intended to enforce the order (former R.S.C. 1965 Ord 15 r.12(4)), CPR 19.6 does not.

[99] *Oxford University* v. *Webb* [2006] EWHC (QB) 2480, at [50].

[100] "Third parties" are clearly also "non-parties" – the different term is used in order to highlight the distinction being drawn between orders which enjoin, and which may therefore be enforced against, non-parties and enforcement against persons ("third parties") who are not bound by the injunction.

[101] *Monsanto plc* v. *Tilly* [2000] Environmental Law Reports 313, 332 and *Venables* v. *News Group Newspapers Ltd* [2001] Fam. 430, 468.

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Although it is unusual for injunctions to enjoin non-parties, they may, in some circumstances, be *enforced* against third parties.[102] In *Marengo* v. *Daily Sketch and Sunday Graphic, Ltd* Lord Uthwatt explained that the reference to servants, workmen and agents in the common form of many injunctions "is nothing other than a warning against wrongdoing to those persons who may by reason of their situation be thought easily to fall into the error of implicating themselves in a breach of the injunction by the defendant".[103] A person who knowingly assists breach of an injunction is an accessory and, although not bound by the order, may be liable with the defendant for contempt.[104] It was on this ground that the argument that an injunction enjoining those represented was not necessary was rejected in *Monsanto plc* v. *Tilly*.[105] Stuart-Smith L.J[106] noted that third parties are liable for contempt "only if they are jointly involved with the existing respondents in action by those respondents in breach of the injunction" and "mere knowledge of the injunction binding on others is not enough".[107]

However, following the decision in *Attorney-General* v. *Times Newspaper Ltd*[108] "joint involvement" is not always necessary. There the House of Lords ruled that a third party who knowingly does acts which, if done by the defendant, would breach the injunction may be punished for interfering with the administration of justice by the court in the action between the parties, even though he acts "solely of his own volition" rather than aiding and abetting the defendant.[109] This does not, however, render the rationale for orders enjoining non-parties directly redundant. It has been held that *Attorney-General* v. *Times Newspaper Ltd*[110] only applies to interim injunctions[111] - final injunctions will only be enforced against a third party who acts jointly with the defendant. Moreover, even in relation to interim injunctions, it is not clear that the jurisdiction to enforce an

[102] A.M. Dugdale and M.A. Jones (eds.), *Clerk & Lindsell on the Law of Torts*, 19th ed. (London 2006), p. 1897; A. Burrows, *Remedies for Torts and Breach of Contract*, 3rd ed. (Oxford 2004), p. 511; Bean, 8th ed., 85–87 and 112–113 (in relation to freezing orders).

[103] [1948] 1 All E.R. 406, 407 concluding that "[t]here its operation, in my opinion, ends".

[104] Pettit, 10th ed., p. 591. See also Spry, 6th ed., p. 370; Burrows, *op. cit.*, p. 511. The definition of "protestor" in the cases referred to in note 46 above includes persons "acting in concert with the Defendants". This definition arguably does not extend the application of the injunction beyond those against whom it could have been enforced in any event.

[105] [2000] Environmental Law Reports 313.

[106] With whom Mummery and Pill L.JJ. agreed, [2000] Environmental Law Reports 313, 336.

[107] [2000] Environmental Law Reports 313, 333.

[108] [1992] 1 A.C. 191.

[109] *Attorney-General* v. *Times Newspaper Ltd* [1992] 1 A.C. 191, 206 per Lord Brandon. See also Spry, 6th ed., p. 370 note 8; D. Hayton and C. Mitchell, *Hayton & Mitchell Commentary and Cases on The Law of Trusts and Equitable Remedies*, 12th ed. (London 2005), pp. 875–876.

[110] [1992] 1 A.C. 191.

[111] *Attorney-General* v. *Punch Ltd* [2002] UKHL 50, [2003] 1 A.C. 1046, at [95]–[107]; *Jockey Club* v. *Buffham* [2002] EWHC 1866 (QB), [2003] Q.B. 462; *X* v. *Persons Unknown* [2006] EWHC (QB) 2783, at [72]; Burrows, *op. cit.*, p. 511.

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injunction against a third party on the authority of the *Attorney-General* v. *Times Newspaper Ltd*[112] is synonymous with the protection offered to the claimant by an injunction directly enjoining the non-party.

Both the enforcement of injunctions directed against non-parties[113] and against third parties under *Attorney-General* v. *Times Newspaper Ltd*[114] depends on the defendant's knowledge of the order. However, liability in the latter situation also depends on an assessment that the third party's conduct would "impede or interfere with the administration of justice between [the parties]".[115] Conduct which destroys the very subject matter of the proceedings, such as, for example, publication of material alleged to be confidential,[116] clearly makes it impossible for the court to do justice between the parties. Therefore, it is true that in claims for interim relief in relation to material alleged to be confidential there may well be little difference between enjoining non-parties and enforcing an injunction against third parties. However, even in this context, Dame Elizabeth Butler-Sloss P. rejected counsel's suggestion that an injunction against the world at large was not necessary as an injunction granted against the defendant newspapers "would, in practice, act in a similar way, and have the same effect".[117] While accepting that it was "somewhat of an academic exercise"[118] she justifies her decision to grant an injunction enjoining the world at large by reference to the "positive duty on the court as a public authority to take steps to protect individuals from the criminal acts of others".[119] Moreover, in other contexts, such as, for example, harassment or trespass to land, it is arguable that action by a third party which breaches the terms of an interim injunction against a named defendant done with knowledge of that injunction does not necessarily interfere with the administration of justice in the claim

[112] [1992] 1 A.C. 191.
[113] Whether represented under CPR 19.6 or enjoined by description.
[114] [1992] 1 A.C. 191.
[115] *Attorney-General* v. *Times Newspaper Ltd* [1992] 1 A.C. 191, 207.
[116] As was the case in *Attorney-General* v. *Times Newspaper Ltd* [1992] 1 A.C. 191 and *Attorney-General* v. *Punch Ltd* [2002] UKHL 50, [2003] 1 A.C. 1046. See Pettit, 10th ed., p. 591; P. Devonshire, "Freezing Orders, Disappearing Assets and the Problem of Enjoining Non-parties" (2003) 119 L.Q.R. 384; A.T.H. Smith, "Third Parties and the Reach of Injunctions" [2003] CL.J. 241, 242–243.
[117] *Venables* v. *News Group Newspapers Ltd* [2001] Fam. 430, 468. Although the injunction sought was not an interim one, the claim was heard before it was clear that *Attorney-General* v. *Times Newspaper Ltd* [1992] 1 A.C. 191 applied only to interim injunctions, see note 111 above.
[118] Contrast *Mills* v. *News Group Newspapers Ltd* [2001] EWHC Ch 412, at [37] where Lawrence Collins J. expresses but does not elaborate the view that enjoining non-parties in these circumstances has "a wider and more direct effect" than enforcing an injunction against third parties.
[119] *Venables* v. *News Group Newspapers Ltd* [2001] Fam. 430, 468, referring to the decision in *Osman* v. *United Kingdom* (2000) 29 E.H.R.R. 245. Her Ladyship was also disinclined to "achieve through the back door, that which it is submitted I cannot do through the front".

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between the parties – it may simply constitute independent infringement of the claimant's rights.[120]

Orders enjoining non-parties still therefore serve a purpose distinct from that which can be achieved by enforcement against third parties.

Future Claims for Injunctive Relief against Non-Parties?

Comparison of claims for injunctive relief brought against representative defendants under CPR 19.6 and those brought against parties by description reveals few differences. The question which arises is whether claimants are free to elect either approach and, if so, whether there are any advantages in pursuing one over the other.

From a claimant's perspective, what little difference there is between a claim brought against a representative defendant under CPR 19.6 and one brought against parties by description, speaks in favour of the latter approach. In addition to the need to identify an individual to represent those likely to infringe the claimant's rights under CPR 19.6, the claimant also faces the vagaries of the test of "same interest" and the possibility of an additional hurdle in the need to seek permission to enforce by virtue of CPR 19.6(4)(b).

There are claims for injunctive relief against parties by description which have involved identified individuals against whom a representative claim could perhaps have been, but was not, brought. In *Bloomsbury Publishing Group plc* v. *News Group Newspapers Ltd*[121] four individuals had been arrested in relation to theft of copies of the fifth book in the Harry Potter series and were joined in the proceedings. Rather than proceeding against those defendants as representatives of the unknown person/s who had possession of a missing copy, the claimant sought an order against a further defendant described by reference to their having offered the publishers of various newspapers a copy of the book or by their possession of a copy of the book without the consent of the claimants.[122] Similarly, in *Jagger* v. *Darling*[123] the claim was brought against the owner of the nightclub where the claimant's intimate encounter with her boyfriend was

[120] Although in *United Kingdom Nirex Ltd* v. *Barton* (unreported, 13 November 1986) Henry J. remarks obiter in such a context that doing an act prohibited by the injunction with knowledge of it "would *prima facie* be a wrongful interference with the administration of justice" (transcript, p. 7). For brief reference to this issue in the context of claims for defamation see R. Shillito, "New Defamation Act Procedure could Backfire" (1997) 147 N.L.J. 24. The cases referred to in note 46 above arguably anticipate the possibility that the injunction could not be enforced against third parties with notice by enjoining "protestors", defined to include persons with notice of the order.

[121] [2003] 1 W.L.R. 1633, 1635, 1641.

[122] In contrast the claim in *EMI Records Ltd* v. *Kudhail* [1985] F.S.R. 36 was *ex parte* which may suggest that the individuals identified, like those represented, still had possession of the infringing cassettes.

[123] [2005] EWHC (Ch) 683.

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recorded but against other defendants identified by description rather than by representation. In both of these cases a representative claim may have been vulnerable to the argument that the interests of the named defendant and those represented were not the "same". In *Bloomsbury Publishing Group plc* v. *News Group Newspapers Ltd*[124] the individuals arrested had already had their copies of the manuscript confiscated and so an order prohibiting them from disclosing any part of the book before the date of publication would arguably have been inappropriate, and therefore they could not be said to have the "same interest" as any person who had access to the missing copy.[125]

This may suggest that development of the jurisdiction to grant injunctions against parties by description will render reliance on CPR 19.6 to overcome problems of identification obsolete. However, claimants continue to rely on CPR 19.6, most recently in *RWE Npower plc* v. *Carrol*[126] and *Smithkline Beecham plc* v. *Avery*.[127] This may be driven by the view that the representative parties rule is the appropriate method to bring a claim against an unincorporated association,[128] however indeterminate that association may be. This explanation is undermined by the fact that the representative defendants in these, and other, claims are appointed to represent not only members of the associations but also other "protestors", more broadly described. Alternatively, there may be a perception that if it is at all possible to identify an individual then a claim ought to be brought under CPR 19.6.

This article has argued that there is no material difference between a claim for an injunction against a representative defendant under CPR 19.6 and one against a party by description.[129] Until this similarity is acknowledged, the appropriate ambit of each approach, and of the grant and enforcement of injunctive relief against non-parties more generally, cannot properly be explored.

[124] [2003] 1 W.L.R. 1633, 1635, 1641.

[125] Similarly, in *Jagger* v. *Darling* [2005] EWHC (Ch) 683 the named defendant denied ever having the CCTV footage in his possession and so arguably an order restraining him from publishing it was not appropriate. For application of reasoning of this type to defeat an assertion of "same interest" in a representative claimant action, see *Consorzio del Prosciutto di Parma* v. *Marks & Spencer Plc* [1990] F.S.R. 530.

[126] [2007] EWHC (QB) 947.

[127] [2007] EWHC (QB) 948.

[128] See discussion in *Oxford University* v. *Webb* [2006] EWHC (QB) 2490, at [43], [46]. It, like a number of other claims originally brought against unincorporated associations in their own names, now proceeds as a representative action (see, for example, *Huntingdon Life Sciences Group plc* v. *SHAC* [2007] EWHC (QB) 522).

[129] With the possible exception of the protection from enforcement afforded to those represented by CPR 19.6(4)(b).

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