Harry Potter and the John Doe injunction

By *Jonathan Barnes*

The judgment of Sir Andrew Morritt V-C in Bloomsbury Publishing Ltd & Another v News Group Newspapers Ltd & Others [2003] 3 All ER 736 is an important practical decision for any claimant seeking to protect by urgent interim injunction their intellectual property, confidential information or other proprietary interests from infringement by persons unknown to them. This is the first modern English law case where the courts have been prepared to grant relief against "Person Or Persons Unknown".

In the run up to the publication of the fifth Harry Potter book, "Harry Potter And The Order Of The Phoenix", the publishers, Bloomsbury, discovered that a number of copies had been removed from the printers without permission. Damp copies began appearing on village commons and nameless men telephoned national newspapers offering exclusives. In one instance, one national newspaper actually returned "escaped" copies to Bloomsbury. Given that the security surrounding Bloomsbury's printing arrangements had clearly been breached, and that there was a real possibility of illicit copies being published prior to the official publication date, Bloomsbury decided it had no option but to seek protection from the courts.

It was conventional enough to apply for injunctions against a newspaper group that had been approached to publish an early copy, and against four known individuals who had been arrested and charged in connection with the alleged theft of copies, but what, if anything, could Bloomsbury do about unknown transgressors? Here, English law's traditional desire for certainty in knowing precisely who is a party to litigation was put on a collision course with the potential injustice to Bloomsbury if it could not obtain an injunction banning the illicit publication of its book, by whomsoever. Should Bloomsbury be denied an interim injunction because, even though it could show a real danger that illicit copies would be published, it could not name or identify the individuals likely to be responsible? Or were Bloomsbury entitled to a "John Doe" injunction, against anyone who had offered newspaper publishers an unauthorised copy of the book but without knowing the names of such people?

The established objections to any litigation, including injunctions, against persons unknown are a mix of procedure and substance. Pre-CPR, the prescribed form of writ required the names and addresses of the defendants to be included in order to be valid. A writ would also fail if the defendants' names and addresses were "too vague". This insistence on form was said to protect against the situation where the defendant was in fact *"an infant, a lunatic, overseas or under some other disability*" and so requiring of special court directions or procedure. In short, the rules were said to be there for a purpose. Perhaps more fundamentally, other dicta pointed out that a defendant who is unknown cannot by definition appear at court and defend himself, because he would not know he was a defendant. And, if there is no defendant either at all or on notice of a particular hearing before a Court, there will be noone to be bound by any order made by the Court: in the old language, *"…an order made upon an ex parte application in ex parte proceedings will bind nobody"*.

A narrow exception in practice has developed in relation to touts selling pirated goods: if a claimant can identify one such trader, then a court will make a "representative" injunction preventing him on his own behalf and as representative of all other traders continuing the infringing activities. The Vice-Chancellor noted that even this was an anomalous position: a claimant can obtain an injunction against all infringers by description so long as he can identify one of them by name, but, by contrast, if he cannot name one of them then he cannot get an injunction against any of them.

Having reviewed this ground, and contrasted the approaches taken to the same issue in Canada and New Zealand, the Vice-Chancellor took little time in concluding that the CPR regime does not nowadays require *"undue reliance on form over substance"*. Further, in the present case he found that there was no objection that there is no defendant, since there was a defendant albeit one whose identity was not known. But if subsequently a defendant were to expose himself, by providing an advance copy of the book for publication, then his identity would become known, the injunction would bite on him, and he and anyone who assisted him in breaching the injunction would be liable for contempt of court.

The Vice-Chancellor stressed that it is crucial that any "John Doe" injunction does contain a description of the defendant or defendants that is sufficiently certain to identify both those who are included and those who are not. Common sense dictates that that is right. It is clearly not necessary to know the name of a wrongdoer in order to know that a wrong has been done or is threatened. But it is necessary to identify or describe the wrongdoer in such a way as to meet English law's requirement for certainty. Once that threshold is overcome however, as it was in this case, the Vice-Chancellor has made clear that the courts will invoke the overriding objective in order to ensure in appropriate cases that claimants' interests will be protected by injunction, even though they are unable instantly to name their opponent.

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