Neutral Citation Number: [2023] EWHC 810 (Ch)

Claim No: G00BW214

IN THE HIGH COURT OF JUSTICE
MANCHESTER APPEAL CENTRE
BUSINESS AND PROPERTY COURTS (Chd)
ON APPEAL FROM THE BARROW-IN-FURNESS COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before :

MR JUSTICE SWEETING (sitting at Liverpool)

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Between :

1. Linemile Properties Limited **2. John Ellison**	**Appellants/Defendants**
- and –	
1. George Anthony Plater **2. Ioana Minodora Plater**	**Respondents/Claimants**

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Matthew Collings KC and Gareth Darbyshire (instructed by **Howarth Holt Bell**) for the **Appellants**
Alex Taylor (instructed by **Hart Jackson and Sons**) for the **Respondents**

Hearing dates: 12 May 2022

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Judgment Approved

This judgment was handed down remotely at 10.30am on 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Sweeting:

Introduction

1. This is an appeal from the order of HHJ Dodd made on 13 October 2021 granting injunctive relief to the respondents who are the claimants in the underlying litigation.

2. An appeal in these circumstances is limited to a review of the decision of the lower court: see rule 52.21(1). An appeal will be allowed where the decision of the lower court was: - (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

Background

3. The appellants (defendants) are the owners or occupiers of a property known as "Eden". There is a road associated with that property; Piggy Lane. The respondents (claimants) own and occupy a property known as "Moorefield" and have a right of way over Piggy Lane in two directions to two entrances. In very broad terms the litigation concerns the exercise and condition of the right of way including a dispute about contribution to the upkeep of the road over which the right of way is exercisable.

4. On the 16th of September 2021 Mr Tennyson, the solicitor representing the respondents and a partner in the firm of Hart Jackson, sought to visit their home. He came across Mr Ellison, the second defendant to the claim, close to the entrance to Piggy Lane. There was a verbal exchange which, according to his evidence, left Mr Tennyson intimidated and scared. He left without being able to see his client.

5. HHJ Dodd had granted earlier interim injunctions against the appellants on the 3rd of December 2020 and the 2nd of June 2021. These related principally to access to Piggy Lane, the removal of concrete hard standing and the provision of a walkway. The amended particulars of claim include a claim under the Protection from Harassment Act 1997 involving allegations of assault, threats and other reprehensible conduct on the part of Mr Ellison. These allegations are all denied. There is a counterclaim. As the appellants' skeleton argument put it "the parties regrettably dispute almost everything."

The Judgment of HHJ Dodd

6. There has been no challenge to the judge's findings of fact. The incident on which the application for the injunction was based was captured on CCTV and the words spoken were recorded by Mr Tennyson on his mobile phone. The judge's factual findings were:

> "6 The CCTV footage seems to me to show, tolerably clearly, Mr Tennyson about to walk past the two other gentlemen and through the gateway. He stopped. There was some brief conversation during which Mr Ellison approached and walked towards Mr Tennyson and stood, it seemed to me, very close to him.
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> 7 The audio file records Mr Ellison saying "Yes?" twice, as (it is agreed) Mr Tennyson made to walk past. In the context and with that tone it was an enquiry as to who Mr Tennyson was. Mr Ellison did not recognise Mr Tennyson and was of course entitled to ask the identity of those who were about to walk on to his land, albeit land which was the subject of a right of way in favour of the claimants.
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> 8 Mr Tennyson, as part of the exchange, said words to the effect, "And you are?" asking Mr Ellison to identify himself. Mr Tennyson accepts that he knew who Mr Ellison was. He would have it that he addressed him in that way so as to reduce rather than increase tension. However, Mr Ellison's response was not a reduction in tension: his response was to say this: "Mind your own fucking business, you little twat," and shortly thereafter, "I could kill you now." There is no more conversation on the audio file. The video file shows that after the exchange Mr Tennyson walked swiftly away.
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> 12 The defendant admits saying, "Mind your own fucking business you little twat," and saying, "I could kill you," albeit he says that he said the latter to

himself and did not think that Mr Tennyson would hear him; it is clear Mr Tennyson did hear him and it was recorded via the means I have described.

7. As far as the basis for injunctive relief was concerned, the judge concluded:

> "15 I will deal firstly with whether there is any basis for the injunction being sought. Apart from American Cyanamid, to which I have been referred rather than taken to and which it seems to me is not directly on this point, no authority of any sort has been produced before me today so I will apply the law as I understand it to be.
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> 16 An injunction, if this is not a truism, is granted for a purpose. One such purpose is the protection or enforcement of a legal or equitable right and it follows that if no such legal right is infringed there can be no injunction. So, for example, there was some litigation a long time ago in which the plaintiff sought to prevent a neighbour changing the name of his house. It was unsuccessful: there was no right to protect. On the other hand, where there is a right which the law protects then axiomatically there is a remedy.
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> 17. There is no doubt, in my judgment, that the claimants are entitled to have their legal advisers come to their property and therefore go across the defendant's land on the right of way without the fear of harassment, threats or assault.
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> 18. There are, on my understanding, two other free-standing purposes relevant here: the prevention of vexatious, oppressive or unconscionable conduct in litigation and the protection of the court's own processes."

The Order

8. The judge considered that the order proposed by the respondents was in some respects too wide and restricted the ambit of the relief both geographically and by requiring actual knowledge sufficient to identify a person to whom the restrictions applied.

9. The defendants were made subject to prohibitions in the following terms until trial or further order:

> "1. Whether by themselves or either of them or by instructing or encouraging others, the defendants shall not abuse, harass, assault, threaten, physically approach, position themselves within 10 yards of or speak directly to: (a) Jeremy Tennyson of Hart Jackson & Sons, solicitors with offices in Ulverston, or (b) any other person who is, and who the defendants have been informed is, a partner of or otherwise works for Hart Jackson & Sons. The restriction upon positioning themselves within 10 yards of such persons shall not apply when they are in a building used by HM Courts & Tribunal Services for public hearings.
>
> 2. Whether by themselves or either of them or by instructing or encouraging others, the defendants shall not abuse, harass, assault, threaten, physically approach, position themselves within 10 yards of or speak directly to any expert or other person who has been or is engaged by or on behalf of the claimants to

> assist them with these proceedings whom the defendants have been informed is such an expert or other person. The restriction upon positioning themselves within 10 yards of such persons shall not apply when they are in a building used by HM Courts & Tribunal Services for public hearings."

The Grounds of Appeal and Argument

10. The grounds of appeal are:

> "1. The learned judge erred in law by granting the injunction.
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> 2. In reaching his conclusion the learned judge failed to follow *American Cyanamid v Ethicon* [1975] UKHL 1 to which he was referred.
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> 3. The learned judge erred in granting an injunction when the test in American Cyanamid (above) could not be fulfilled.
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> 4. The learned judge erred in concluding that he was able to grant an interim injunction as a freestanding remedy concerning individuals not party to these proceedings without a claim for a final remedy at trial relating to the litigants in this case.

11. Paragraph 1.2 of the appellants' skeleton for the appeal frames the issue as:

> "...whether the learned Judge was right to grant an interim injunction relating to individuals and a firm which are not party to this litigation and which does not relate to a cause of action pleaded for determination at trial within this litigation."

12. The appellants argued that the issue was really one of settled practice and precedent and that there was no example of an injunction being granted in similar circumstances. It was not therefore a question of jurisdiction but of the exercise of the court's powers within that jurisdiction. The requirement that there should be an underlying cause of action remained extant in the absence of any practice of making such injunctions and that this was essentially an example of the claimant making an application which should in fact have been made by Mr Tennyson or his firm.

13. The argument went further by asserting that the reason why Mr Tennyson had not brought his own proceedings was because he could not make out a cause of action under the Protection from Harassment Act 1997 given that it required a course of conduct towards the victim; in other words, two or more incidents. In this way the injunction application "allowed those seeking to benefit from the injunction to subvert the statutory provisions which would have prevented such an injunction."

14. There was, accordingly, it was said, no serious issue to be tried because the protections sought and provided for in the order did not arise between the parties to the litigation and were not ordered pursuant to any relevant pleaded cause of action. The matter should be left to the police and the Crown Prosecution Service given that Mr Tennyson had reported the verbal exchange. Mr Ellison was, on his evidence, unaware that he was speaking to the respondents' solicitor. It was further argued that the injunction was

unduly restrictive for the second defendant and meaningless as far as the first defendant was concerned as it could not engage in any of the prohibited conduct.

15. The appellant's argument that the injunction was not protective of any right of the parties to litigation themselves was founded on the principle set out in the *Siskina v Distos CiaNaviera SA (The Siskina)* [1979] AC 210 at page 256 by Lord Diplock that the power to grant an interlocutory injunction can only be exercised

> "in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment."

16. It was acknowledged that the legal landscape had been reviewed recently by the Privy Council in *Broad Idea International Ltd v Convov Collateral Ltd* [2021] UKPC 24. The outcome of that case was summarised in the appellant's skeleton as follows:

> "A challenge to The Siskina was recently rejected by the Privy Council in Broad Idea International Ltd v Convov Collateral Ltd [2021] UKPC 24. This case is also valuable for its traverse and explanation of authorities concerning interlocutory relief which may be thought to exceed The Siskina's requirement of a cause of action."

17. In oral argument the appellants drew attention, in particular, to the judgment of the House of Lords in *Fourie v Le Roux and others* [2007] UKHL 1 [2007] 1 W.L.R. 320 where, at paragraph 25 Lord Scott observed:

> "Both the deputy judge and Sir Andrew Morritt V-C referred to the issue as one of "jurisdiction". But jurisdiction is a word of some ambiguity. The ambiguity was referred to by Pickford LJ in Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536 , 563. He said:
>
> "The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i e, that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."
>
> […] The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted. The various matters taken into account by the deputy judge and Sir Andrew Morritt V-C respectively in holding that Park J had no jurisdiction to make the freezing order were really, in my respectful opinion, their reasons for concluding that, in the circumstances as they stood when the matter was before him, it had not been proper for Park J to have made the order. That, in my opinion, is the real issue."

18. The respondents suggested that the grounds of appeal were imprecise and, in the course of argument, had shifted significantly from those for which permission had been given. The issues raised by the grounds were, it was said, essentially jurisdictional and went to the question of whether the injunction could have been made at all not whether it should have been made. The only relevant challenge to the making of the order was contained in ground 4 which asserted that the judge had provided a free standing remedy to a non-party.

19. *The Siskina* was, the respondents argued, no longer good law for the propositions relied on by the appellants, but in any event the court had in personam jurisdiction over the parties and the injunction was granted to protect an interest of the respondents in the proceedings and to prevent injustice. The fact that the authorities did not include a case where an injunction had been obtained to protect a solicitor acting for one of the parties did not mean that the court did not have the power to make such an order or, in the circumstances of this case, should not have exercised that power.

20. The respondents contended that the practical difficulties envisaged by the appellants in the operation of the injunction as far Mr Ellison were concerned were overstated. What was required was a practical remedy which would achieve the aim of the order without injustice. The application of the injunction to the corporate appellant was subject to the provision in the order that where it was ordered not to do something it should not do so by its directors, officers, employees or agents or in any other way. It has long been accepted that the possibility of criminal prosecution and sanctions is not a reason for delaying a remedy in the civil courts and that this was not a basis on which there could be any appeal.

The Legal Framework

21. The power of the court to grant an injunction against a party properly before the court is set out in section 37 of the Senior Courts Act 1981 but derives from the common law and equitable powers of the courts which existed prior to the Supreme Court of Judicature Act 1873.

22. Pursuant to section 38 of the County Courts Act 1984, the County Court may make any order which could be made if the proceedings were in the High Court.

23. The most recent authority cited, *Broad Idea,* was a Privy Council case. The majority judgment is not binding on lower courts. In his minority judgment the Master of the Rolls considered that it was inappropriate to decide wider issues of the court's power to order interim relief given the Board's unanimous view that the appeal should be dismissed. As he observed, the majority judgement would nevertheless be "powerful obiter dicta", a reason, he suggested, for a more cautious approach.

24. In giving the leading judgment Lord Leggatt rejected this reservation as to the course taken by the majority pointing out that a number of leading cases had decided issues of principle which were strictly obiter, not least the landmark decision in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465.

25. Lord Leggatt surveyed the developments in the law relating to interim relief after *The Siskina* had been decided and the increasing scope of the remedies which could be sought on an interim basis. These developments included the extension of the Mareva

jurisdiction (see *Stewart Chartering v Management SA (Practice Note)* [1980] 1 WLR 460, *TSB Private Bank v Chabra* [1992] 1 WLR 231, *Mercedes Benz AG v Leiduck* [1996] AC 284), website blocking orders (see *Cartier International v BSkyB* [2016] EWCA Civ 658), third party disclosure orders and Bankers Trust orders.

26. In *Castanho v. Brown & Root* [1981] A. C. 557 Lord Scarman said at page 573

> "In support of his second class, counsel cited a passage from the speech of my noble and learned friend, Lord Diplock, in *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210, 256:
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> " A right to obtain an interlocutory injunction is not a cause of action. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court."
>
> No doubt, in practice, most cases fall within one or other of these two classes. But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend <u>that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice."</u> (my emphasis)

27. In *British Airways v Laker and others* [1985] A.C. 58 Lord Diplock accepted and agreed with this qualification:

> "I would accordingly agree, as I did in Castanho's case [1981] A.C. 557, with the qualification to the statement of principle in the stark terms in which I expressed it in the Siskina case [1979] A.C. 210, 256, that was added by Lord Scarman in Castanho's case, at p. 573..."

28. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC a claim was stayed to allow arbitration. The claimants sought an injunction restraining the suspension of work pending the arbitral award. The argument, based on *The Siskina* that the court was precluded from granting interlocutory relief because it was not sought in respect of a claim for any substantive relief which the court had jurisdiction to grant was rejected by the House of Lords.

29. The appellants' submission that *Broad Idea* did not disturb *The Siskina* and can be characterised as a rejected challenge to its authority does not, in my view, bear analysis.

30. At paragraph 120 of his judgment in *Broad Idea*, Lord Leggatt said:

> "The majority of the Board considers that it is both necessary and important on this appeal to confront and decide the power issue. It is necessary to dispel the residual uncertainty emanating from *The Siskina* and to make it clear that the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound. The

> shades of *The Siskina* have haunted this area of the law for far too long and they should now finally be laid to rest."

31. The leading textbook on "Commercial Injunctions" authored by Stephen Gee KC was referred to in the course of argument before the judge. The first supplement to the 7th edition now includes the following in relation to *Broad Idea*:

> "The majority judgement has swept away the necessity for an injunction to be justified in terms of enforcement of causes of action, property rights or contractual or other rights, or within recognised extra categories such as anti-suite injunctions and Mareva injunctions. In this the recognition of the Mareva jurisdiction and its development has had a major role. Injunctions having such a basis continue to be granted applying established principles. The categories of case in which injunctions may be granted are not closed. Furthermore |*Broad Idea* recognises as a legitimate basis freezing of assets to avoid unjustified conduct which eventually could lead to a judgement being unsatisfied or the court unable in the future to grant effective relief or a breakdown in or interference with the due administration of justice."

32. *Broad Idea* is likely in practice be the starting point from now on in relation to the ambit of interim injunctive relief. The decision is persuasive authority that the restrictions on the power to grant interim injunctions, as set out in *The Siskina*, are not legally sound.

33. At paragraph 52 Lord Leggat said:

> "The proposition asserted by Lord Diplock in *The Siskina* and *Bremer Vulkan* on the authority of *North London Railway* was that an injunction may only be granted to protect a legal or equitable right. There can be no objection to this proposition in so far as it signifies the need to identify an interest of the claimant which merits protection and a legal or equitable principle which justifies exercising the power to grant an injunction to protect that interest by ordering the defendant to do or refrain from doing something. In *Beddow v Beddow* (1878) 9 Ch D 89, 93, Sir George Jessel MR expressed this well when he said that, in determining whether it would be right or just to grant an injunction in any case, "what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." As described above, however, within a very short time after *The Siskina* was decided, it had already become clear that the proposition cannot be maintained if it is taken to mean that an injunction may only be granted to protect a right which can be identified independently of the reasons which justify the grant of an injunction."

34. He continued at paragraphs 55 and 57:

> "55. In *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24, 40 Lord Brandon attempted to accommodate such cases within an overarching scheme by identifying the protection of a legal or equitable right as only one situation in which an injunction may be granted, with a second situation being where a party "has behaved, or threatens to behave, in a manner which is unconscionable". The inadequacy of this classification is apparent, however, from the fact that Lord Brandon recognised

> two exceptions which did not fit into his two categories but did not explain the basis on which these (or any further) exceptions are justified. A similar attempt at categorisation had already been rejected by the House of Lords in *Castanho* and in *Laker Airways*, and the caution sounded by Lord Goff in *South Carolina* against attempting to restrict the cases in which injunctions can be granted to certain exclusive categories was subsequently repeated by the majority of the House of Lords in *Channel Tunnel.*
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> […]
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> 57. As an exposition of the court's equitable power to grant injunctions, it would be difficult to improve on the following passage in Spry, Equitable Remedies, 9th ed (2014), at p 333:
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> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."
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> This passage (stated in the same terms in an earlier edition of Spry's book) was quoted in *Broadmoor Special Health Authority v Robinson* [2000] QB 775, para 20, by Lord Woolf MR, who described it as succinctly summarising the correct position. It was again quoted and endorsed as a correct statement of the law by Kitchin LJ (with whom Briggs and Jackson LJJ agreed on this point) in *Cartier*, para 47. The Board would likewise endorse it."

35. These principles have a long pedigree. In *Bayer v Winter* [1986] 1 WLR 497 (CA), Fox LJ said at 502D:

> "Bearing in mind we are exercising a jurisdiction which is statutory, and which is expressed in terms of considerable width, it seems to me that the court should not shrink if it is of the opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding it may, in its terms, be of a novel character."

36. In support of this formulation of the correct approach he cited Sir George Jessel MR in *Smith v Peters* (1875):

> "I have no hesitation in saying that there is no limit to the practice of the court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause."

37. *Broad Idea* supports the view expressed by Lord Nicholls of Birkenhead in *Mercedes Benz* that the law "took a wrong turn" in *The Siskina* and that Courts should take a flexible and pragmatic approach in determining whether to grant injunctions.

Conclusions

38. The judge did not fall into error in this case. He did not make an order which amounted to a free-standing remedy divorced from the litigation and the claim brought by the respondents. As the judgment indicates the interim relief granted was expressly for the benefit of the respondents and to protect their entitlement to unimpeded legal and expert advice. It was ordered to run "until trial or further order".

39. It was not a synthetic exercise to disguise an injunction for the benefit of a third party which was otherwise unobtainable by that party. Both the judgment and the transcript of the hearing show that the judge took care to limit the relief to that which was necessary in the context of the claim.

40. The judge was well placed to decide whether Mr Ellison's conduct was potentially disruptive to the litigation if repeated and whether in the context of a dispute of this nature it was likely to be necessary for solicitors and experts to visit the site. He was familiar with the case and able to take the temperature of the dispute. He had already granted injunctive relief to the respondents. He made factual findings that the appellant, Mr Ellison, had prevented the respondents from having access to their legal advisor. Although the judge acknowledged that Mr Ellison did not recognise Mr Tennyson there was no plausible explanation for the recorded exchange other than that Mr Ellison knew or suspected that Mr Tennyson, a visitor wearing a suit and tie on a day when a meeting had been planned but cancelled, was a solicitor visiting the respondents. The word "clients" can be clearly heard in the tape-recorded conversation. As the judge found, the words and actions of Mr Ellison were threatening and could not be shrugged off as a normal reaction or a turn of phrase in common use. It would be an extraordinary way to behave if Mr Ellison had simply been encountering a member of the public not connected to the litigation.

41. I do not consider that reliance on *The Siskina* assists the appellants. That authority has not been left intact, as was argued, by *Broad Idea*. The stark expression of principle in *The Siskina* had already been diluted and qualified in the case law which followed. It was not necessary to identify some reported case in which an equivalent injunction had been made nor was it fatal to the grant of an injunction that Mr Tennyson or his firm were not parties to the action or seeking to vindicate any rights in a separate action. The judge was exercising the court's power to guard its own processes and do justice by regulating the conduct of a party before it, over whom it had jurisdiction. The claim did in fact include a claim for injunctive relief to prevent harassment founded on allegations of aggressive behaviour by Mr Ellison. It would be an odd result if the court could grant interim injunctions to prevent such conduct towards the respondents (as it plainly could do taking *The Siskina* at its highest) but could not do so where the conduct was directed at the respondents' solicitors because they were instructed in the litigation.

42. The injunction was not granted "in contravention of the court's settled practice and precedent". Practice and precedent may be relied upon to determine the form and nature of injunctive relief but they are not category gateways which must be identified and passed through before any order can be made, as the discussion of their role in *Broad*

Idea makes clear. There is in any event no settled practice that an injunction should not be made in the circumstances of this case. The order was entirely conventional; it was based upon factual findings as to conduct that was inimical to the proper conduct of the litigation. It put in place restrictions to ensure that this conduct was not repeated. It was well within the broad power and discretion described in *Broad Idea.*

43. Two examples were given of why the injunction might be unduly restrictive; both of them appeared to me to be more imagined than real. The terms of the order were carefully crafted by the judge who rejected broader restrictions.

44. It follows that I do not conclude that the decision of the lower court was wrong or unjust; the appeal therefore fails and is dismissed.