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Fighting back: defending the right to protest

Katie de Kauwe explains how Friends of the Earth is taking legal action to support the right to protest against fracking.

2019 has shone a light on the vital importance of the right to peaceful protest.

Movements such as the school climate strikes and Extinction Rebellion's protests are contributing to a massive transformation in climate change discussions around the world. In October 2018 the Intergovernmental Panel on Climate Change's report set out the catastrophic impacts for the world if global warming is not restricted to 1.5 °C above pre-industrial levels.

On 3 May 2019 the UK parliament declared a national climate emergency and it has recently enacted a target to reach net zero greenhouse gas emissions by 2050. This response throws into stark relief just how important the right to protest is. It shows that government policy can be positively influenced by the actions of citizens.

Protest through history

Of course, that's not really news. There's a long and proud history of establishing progress through protest in this country - and across the world.

Protest has been a key mechanism to advocate for vitally important freedoms and causes long before they were ever accepted by the political mainstream. Issues like votes for women and the abolition of slavery, for example. Not all of this protest, so important for driving progressive change, has been lawful.

So if protest can be a catalyst for making a better society, then surely the law should make space for it? We think so, and this is actually recognised in law, even when the protest might be disruptive or cause inconvenience to others to some degree. And we've therefore been very concerned by the growing trend for oil and gas companies to take out draconian civil injunctions to prohibit so-called "unlawful" protest. We believe that these injunctions have a chilling effect on freedom of speech and the right to express dissent.

And in the context of a national climate emergency, resisting the fracking industry and voicing dissent are absolutely imperative. We urgently need to move away from fossil fuels and to promote renewable sources of energy – not support the emergence of a yet another fossil fuel industry to complement or replace the others.

So Friends of the Earth is helping to fight these injunctions. In March 2019 we intervened in the Court of Appeal to support the legal challenge to INEOS' injunction brought by campaigners Joseph Corr  and Joseph Boyd. We did this to stand up for the right to protest.

The power to say no

Fracking and other forms of onshore oil and gas extraction are highly controversial. According to a government survey published in July 2019 only 15% of the public support fracking¹.

For the anti-fracking movement, protest plays a vital role in peacefully resisting fracking developments. Around Europe, an increasing number of countries are saying no to fracking due to dissent from local communities and campaigners.²

In the UK, fracking developments lead to significant protests within the communities where they take place. The majority are peaceful, involving people motivated by good-faith beliefs to protect the environment and safeguard the rights of future generations.

The oil and gas industry's response to these protests has been disproportionate and draconian. Collectively, they've obtained five wide-ranging "persons unknown" injunctions prohibiting "unlawful" protest for sites across ten counties.

Local communities fighting fracking developments epitomise the classic David and Goliath battle. Their adversaries are powerful corporations, with far greater financial resources and extensive professional and legal expertise to call on. David's sling shot defeated Goliath. But what happens if a crucial defence is taken away?

For local communities the right to peaceful protest, like David's sling shot, is a powerful weapon to fight fracking developments. Safeguarding it is therefore essential. Without resistance from communities, fracking will not be defeated. And it must be defeated if we are to seriously tackle climate change.

Why the INEOS injunction had a chilling effect on protest

INEOS is a multinational petrochemicals company, with an estimated worth of £35 billion (reported in February 2019)³. Its principal shareholder is Sir Jim Ratcliffe, Britain's richest man. INEOS obtained an "anti-protest" injunction in the High Court in 2017 in relation to 8 of its sites.

The injunction was draconian, wide-ranging and unclear. It was brought against persons unknown, rather than against named individuals, so that it could be enforced against anyone in breach of its terms. Its effect: to deter citizens from exercising their democratic right to dissent. It extended far beyond unlawful protest, to include activities such as slow-walking – an established technique of protest which has been regularly deployed and facilitated by the police. Its vagueness and ambiguity made it unclear to citizens what conduct was prohibited. Yet breaching it risked imprisonment and asset seizure. A climate of fear was the inevitable consequence.

And it didn't stop there. INEOS' injunction was used as a template for similar orders subsequently granted to four other companies: Cuadrilla, IGas Energy, UK Oil & Gas (UKOG) and Angus Energy.

An alarming pattern was emerging. Oil and gas companies were taking out wide-ranging, persons unknown “anti-protest” injunctions on a routine basis.

Yet public order issues are ordinarily dealt with by the criminal law and the criminal courts. The decision on whether to bring a prosecution rests with the Crown Prosecution Service (CPS), which must consider whether it's in the public interest. But obtaining one of these injunctions enables a private company to bring enforcement proceedings in the civil courts, without any such consideration, against anyone allegedly in breach. The effect is a privatisation of public order matters with the CPS and police replaced by corporate lawyers and private security firms. And in these civil proceedings, both the costs risks for defendants, and the penalties for breach of an injunction are potentially much greater than for the corresponding criminal offence.

Our intervention in the Court of Appeal – a victory for civil liberties

The appeal brought by Corré and Boyd against INEOS' injunction was heard in March 2019 in the Court of Appeal. The result was a tremendous victory for civil liberties. Through our intervention⁴ in the case we have helped to reverse a dangerous trend, whereby claimants could obtain incredibly wide-ranging injunctions as a matter of course.

The Judgment was a humiliating defeat for INEOS, which was left with its injunction in tatters.

The Court of Appeal recognised that the right to protest was protected under both the common law and Article 11 of the European Convention of Human Rights. It found that INEOS' injunction had been granted unlawfully and ordered extensive changes to safeguard citizens' right to express dissent.

Two key aspects of INEOS' injunction were completely knocked out:

- Persons unknown unlawfully causing loss to INEOS by “combining together” and protesting against INEOS' suppliers and
- Persons unknown protesting on the public highway, using tactics such as slow walking.

Both of these aspects were hugely significant and have wide-ranging effects on protest.

The surviving elements of the injunction relate to private land only. Even here the Court was not satisfied.

The importance of the Human Rights Act

INEOS was ordered to go back to the High Court, so that the correct test under the Human Rights Act 1998 (HRA) can be applied to determine if its heavily reduced injunction can remain. And if so, for a time limit to be imposed for the life of the injunction.

All of this underscores the importance of the HRA. In recent times it has come under fire and some have called for it to be got rid of altogether. This case neatly demonstrates the practical importance of the HRA for safeguarding fundamental freedoms.

Using the ruling to challenge other anti-protest injunctions

The INEOS injunction is a stark example of how the law can be used by powerful economic interests to undermine citizens' rights. Crucially the case shows that while the law can be used to restrict freedoms, it can also protect and safeguard them too.

Friends of the Earth believes that following the INEOS result, the implications for other anti-protest injunctions are clear.

Challenging Cuadrilla's injunction

In another landmark case, we are taking Cuadrilla to court to challenge its injunction at the fracking site at Preston New Road, Lancashire and reduce its impact on peaceful protest.

Friends of the Earth is determined to defend the right of the community in Lancashire to peacefully voice their dissent to a fracking development which has been forced on them by central government. The community said no to fracking, and the local authority rejected Cuadrilla's application for planning permission to frack at its Preston New Road site. However, that decision was overturned by the Secretary of State, riding roughshod over local democracy in the process. But the community is not giving up and continues to voice its resistance to fracking. In taking Cuadrilla to court over its draconian injunction, we're standing shoulder to shoulder with them.

In May 2019 we sent a formal letter before action to Cuadrilla. We told the company that it needed to amend the injunction in the light of the INEOS result or face legal action. It refused. So in June 2019 we filed a court application to vary Cuadrilla's injunction in the High Court in Manchester. We believe that key aspects of its injunction are unlawful on human rights grounds, just as they were for INEOS, so we're fighting hard to get these knocked out. We'll be back in court against Cuadrilla at the start of September, represented by Stephanie Harrison QC and Stephen Clark of Garden Court Chambers, and Michael Oswald of Bhatt Murphy Solicitors.

Also in court will be the three peaceful protesters against whom Cuadrilla has already brought enforcement proceedings. They are also applying to restrict the terms of the injunction. In June 2019, they were found guilty of contempt of court for breaching the injunction. In one case, the breach was for just a 2-minute trespass. The September hearing will also deal with their sentencing. While the Judge has held that no further sanction will be imposed in relation to some of the breaches (including the 2-minute trespass) and has ruled out immediate prison sentences for the others, the protesters still potentially face serious penalties. The sentencing could be affected by the court's ruling on the lawfulness of the injunction.

Supporting the Sussex and Surrey 6

Back in 2018, we joined 6 brave Sussex and Surrey women as defendants to challenge UKOG's [injunction](#). Together, we succeeded in persuading the Court to cut its proposed injunction, so that it did not include prohibitions on "instructing or encouraging" protest or direct action. However, we still consider that the injunction is too broad so we are continuing to fight it.

Why does this matter?

Successful campaigning can only happen if people's right to participate in decision-making is recognised and respected. As a grassroots campaigning organisation, Friends of the Earth has a proud history of defending people's rights to information and freedom to protest. In October 2018 we intervened in the sentencing appeal of the [Frack Free Three](#), in which the Court of Appeal quashed the custodial sentences handed to three peaceful environmental protesters and released them from jail.

For many years, [our legal team](#) has played an active role in championing the right of citizens and communities to access environmental justice and to participate in decisions that affect them, our environment and the future of us all.

Notes

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817872/BEIS_Public_Attitudes_Tracker_Wave_3

2 <https://www.theguardian.com/news/2018/feb/26/fracking-the-reality-the-risks-and-what-the-future-holds>

3 <https://www.theguardian.com/business/2019/feb/17/brexiter-jim-ratcliffe-uk-richest-man-plans-save-4bn-pounds-tax-monaco-move>

4 Represented by Henry Blaxland QC and Stephen Clark of Garden Court Chambers, and Michael Oswald of Bhatt Murphy Solicitors