IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT (QBD)

Case No: CO/478/2021

Birmingham CJC
Bull Street
Birmingham

Wednesday, 10th November 2021

Before:
HIS HONOUR JUDGE TINDAL
(Sitting as a Deputy High Court Judge)

B E T W E E N:

SCOTT HALBORG

Claimant

and

HINCKLEY & BOSWORTH BOROUGH COUNCIL

Defendant

MR JOHNSON (instructed by Deals and Disputes Solicitors)
appeared on behalf of the Claimant

MS BHOGAL was instructed by and appeared on behalf of the Defendant

Hearing date: 2nd November 2021

Approved Judgment

HHJ TINDAL:

Introduction

1. This is a claim for Judicial Review brought with my permission against Hinckley & Bosworth Borough Council (which I shall refer to as 'the Defendant') brought by Mr Scott Halborg (whom I shall refer to as 'the Claimant'). The Claimant is both a solicitor (acting through his own Leicester firm 'Deals and Disputes Solicitors') and a landlord of various residential properties within the Defendant's borough (and elsewhere), including No.12, Strutt Road, Burbage, Leicestershire LE10 2EB ('12 Strutt Road').

2. In essence, this claim challenges a 'Community Protection Warning' ('CPW') under s.43(5) Antisocial Behaviour, Crime and Policing Act 2014 ('the Act') the Defendant issued against the Claimant on 12th February 2021 ('the February CPW'), which was an amended and abbreviated version of a CPW issued on 18th January 2021 ('the January CPW'). Whilst the claim was issued on 10th February 2021 challenging the January CPW, this prompted its withdrawal by the Defendant and replacement with the February CPW. By the time I considered permission to claim Judicial Review on 26th May 2021, the Claimant had served draft Amended Grounds challenging the February CPW. To avoid delay and reduce costs, I gave permission to claim Judicial Review on those draft Amended Grounds on condition the Claimant filed a formal application by 4th June 2021. Whilst the Claimant was a few days late in filing the application, I granted relief from sanction on 13th August 2021. Therefore, this claim now proceeds purely against the February CPW, the January CPW having been withdrawn. Yet, as I shall explain, the January CPW remains highly relevant.

3. Both CPWs made the same allegations against the Claimant of conduct against his former tenant of No.12 Strutt Road Dr Mark Poole ('Dr Poole') and some his neighbours (who are not the Claimant's tenants): Mr and Mrs Rowe of 10, Strutt Road and Ms Rivers of 14, Strutt Road. I emphasise at the outset the Claimant vehemently denies those allegations and in a Judicial Review claim without oral evidence or cross-examination, I am in no position to find on the balance of probabilities precisely what he has or has not done. I did point this out when granting permission and yet have been presented with long witness statements and voluminous exhibits in bundles exceeding 850 pages: on behalf of the Defendant from its Environmental Health Officer Mr Connor, together with Dr Poole, Mr and Mrs Rowe, Ms Rivers and various others; and a long statement in reply by the Claimant (served without permission that I granted pragmatically as I am not making contested factual findings).

4. Therefore, the allegations against the Claimant made by the Defendant, on information I accept was provided by the residents of Strutt Road, remain just that: mere allegations (I summarise below with the Claimants' responses). Mr Johnson for the Claimant sensibly focussed on the key point that the Defendant accepts the allegations were not disclosed to the Claimant prior to the CPWs; and on the four grounds of challenge to the February CPW:

   4.1 Ground 1 is the allegations in the CPWs could not satisfy the statutory preconditions for issue under s.43 of the Act and so the February as well as the January CPW were improper uses of that statutory power (the 'improper use of power ground', although in argument it sub-divided into substantive and procedural aspects: 1(a) and 1(b));

   4.2 Ground 2 alleges the Defendant acted procedurally unfairly in issuing the February CPW which made such allegations against the Claimant in a formal 'warning' document for the purposes of s.43(5) of the Act without prior discussion of those allegations with him for his response ('the procedural unfairness ground');

   4.3 Ground 3 alleges the Defendant's failure to have prior discussion with the Claimant before the CPW was in breach of the 'incremental approach' in the Defendant's own October 2020 Antisocial Behaviour Policy ('the ASB Policy') ('the policy ground').

   4.4 Ground 4 alleges the Defendant's decision to issue the February CPW was irrational, unreasonable and disproportionate ('the unreasonableness ground').

5. Ms Bhogal for the Defendant firmly resisted all those grounds on the bases that:

   5.1 The allegations against the Claimant fell within the statutory criteria and purpose of s.43 of the Act, as allegations of 'unreasonable conduct having a detrimental effect of a persistent or continuing nature on quality of life of those in the locality'.

   5.2 That a CPW under s.43(5) of the Act in itself does not give rise to formal sanctions, but is simply the precondition for a 'Community Protection Notice' ('CPN') under s.43(1) of the Act, breach of which is a criminal offence under s.48 of the Act. Accordingly, a CPW is in itself a fair warning to which an individual can respond, as the Claimant did to the January CPW prior to the issuing of the February CPW.

   5.3 The Defendant complied with its 'incremental approach' in its own ASB Policy by first issuing 'advice' or a 'warning' prior to taking any 'enforcement' action.

   5.4 The February CPW was reasonable and proportionate.

   In any event, Ms Bhogal submitted that prior discussion with the Claimant would have made no difference to the outcome, though I will consider whether it made no substantial difference to the outcome for the Claimant and if so, refuse relief under s.31(2A) SCA 1981

Background

6. As I have said, the Claimant is both a solicitor and a landlord. Whilst I cannot make contested factual findings, from his own statement and voluminous emails and messages in the bundle, it is clear the Claimant is not afflicted by self-doubt; is highly conscious of and focussed on his own legal rights; and strident - indeed can be relentless - in asserting them. He contends the Defendant is motivated against him because it has been 'embarrassed' by 'national stories and widely reported legal cases' brought by his solicitors' firm. Wisely this contentious factual allegation has not been pursued on his behalf and has no permission as a ground of challenge. However, it is also equally plain from Mr Connor's statement that he disapproves of the Claimant's litigious conduct and has 'taken sides' with the complainants against him and indeed decided against asking him for his 'side' before issuing the CPWs.

7. As shown on Land Registry Office Copies (pgs.155-163), No.12 Strutt Road is a small terraced house. It has a long thin strip of land behind it adjoining No.10 Strutt Road which is a similar property owned by Mr and Mrs Rowe. Each share a joint right of way to the back of their properties from an alley next to No.10, though No.12 and No.14 (currently occupied by Ms Rivers) also enjoy a right of way over part of No.10's garden to theirs.

8. Even before Dr Poole became tenant of 12 Strutt Road, one of his predecessors Ms Adams who moved out in 2019 complains in a statement in September 2020 (pgs.487-492) of disrepair and the Claimant's legal action over the deposit. This makes a passing appearance in the fifth of the five allegations in the CPW. The Claimant admits he later lost the case at Court but maintains that was wrong and that he was entitled to bring the claim.

9. On 29th May 2020, at the height of COVID, the Claimant granted Dr Poole a 6 month Assured Shorthold Tenancy of 12 Strutt Road (pgs.247-55) defined at clause 1.5.1 as:

> *"The Property situated at and being 12 Strutt Road, Burbage, LE10 2EB together with the fixtures, fittings, furniture and effects therein and more particularly specified in the Inventory signed by the Tenant and all grounds. It shall include the right to use, in common with others, any shared rights of access, stairways, communal parts, paths and drives"* The Claimant shared the right of way with him.

However, clauses 4.3.11 and 12 of that tenancy required Dr Poole:

> *"To permit the Landlord or others, after giving 24 hours' written notice and at reasonable hours of the daytime, to enter the Property…to view the state and condition and execute repairs or other works upon the Property or other properties..*

Where the Landlord has served a valid written notice of the need to enter to view the state and condition or to effect repairs (except in the case of emergency when access shall be immediate), the Tenant agrees to them using their keys to gain access if the Tenant is unable to grant access to the Landlord…."

Nevertheless, clause 5.2 of that tenancy also required the Claimant:

"To allow the Tenant quiet enjoyment of the Property during the tenancy without any unlawful interruption from the Landlord…."

10. The Claimant and Dr Poole plainly had a very difficult landlord-tenant relationship. For his part, the Claimant contends in his witness statement that Dr Poole complained about the boiler which he swiftly replaced but described Dr Poole as *'seeming to take a perverse pleasure in being as awkward as possible'*. The Claimant contends that Dr Poole failed to tend the garden and cut the lawn and challenged him about this in an email on 6th August attaching photographs that he had taken of the unkempt garden when removing the boiler. The Claimant contends that Dr Poole failed to maintain the property and refused access for repairs, so on 16th August 2020, he served a notice seeking possession of 12 Strutt Road.

11. For his part, Dr Poole in a witness statement on 18th September (pgs.464-481) contended that since the start of his tenancy only just over three months earlier, he had received 206 texts and emails from the Claimant, 51 of which he maintained were of a harassing nature, and legal action was threatened 15-20 times. He explained he had mental health concerns prior to the tenancy at 12 Strutt Road which was supposed to be a new start but that:

"I have never had a sense of stability of feeling at home during the tenancy….I have also suffered with stress and anxiety and it has impacted on my relationship and my social life..I don't feel like I can relax…I need to be on constant alert in case Mr Halborg suddenly arrives…The stress is seven days a week…Mr Halborg seems hellbent on conflict rather than compromising of resolving any issues. I would describe him as a bull at a gate. He seems to have zero empathy or concern for what people might be going through already when he crashes into their lives with his persistent bullying, intimidating approach."

As I have said, I am no position to make findings myself on these allegations against the Claimant. However, I would observe the emails appended to a later statement from Dr Poole from the Claimant after he visited on 6th August threatened possession proceedings against Dr Poole in what might be thought by some (and was certainly in due course thought by Mr Connor) an uncompromising, even inflammatory, tone (pgs.545-9).

12. Accordingly, on 17th August, Dr Poole complained of harassment and alleged the Claimant had attended the property three times in the last ten days without giving 24 hours' notice and had perturbed neighbours by walking round taking photographs and looking into windows (pg.550). The same day, the Claimant denied the accusations and added (pg.551):

> *"If you want to leave, as you clearly won't ever follow the terms of the tenancy agreement and recognise that you have a landlord that won't be cowed by your ridiculous assertions and difficult nature, I will release you from the forward obligations of the lease subject to your liability to date. There is clearly no future in this landlord-tenant relationship given your behaviour and attitude to date and that is another point that we will be making at Court."*

13. Mr Connor at the Defendant was contacted by Dr Poole's guarantor for the tenancy Ms Hughes on 16th August alleging harassment by the Claimant and then by Dr Poole himself on 17th August. Mr Connor was told the Claimant had attended the property without 24 hours' notice on three occasions and had been observed by neighbours taking photographs or filming in the rear garden and peering in through the rear windows of 12 Strutt Road. This became the first of the five allegations against the Claimant in the CPWs. The Claimant maintains he visited once and gave 24 hours' notice so was entitled to do so. Mr Connor was 'very concerned' at the frequency and tone of the messages (including of 17th August) from the Claimant to Dr Poole and the psychological effect on him (supported by a statement in September from his partner Ms Gill). Mr Connor says he considered that:

> *"I have never come across a landlord who contacts his tenant so frequently…. Mr Halborg's relentless communication with [Dr] Poole was excessive to the point of harassment and designed to exercise control over [Dr] Poole who was ill-equipped to deal with the repeated threats of litigation."*

14. At the same time, it appears the relationship between the Claimant and his neighbours Mr and Mrs Rowe was becoming more difficult. In a witness statement dated 6th October 2020 (pgs.493-6), Mr Rowe contended that on 15th August, the Claimant had attended the padlocked metal gate on his right of way and was 'verbally aggressive' towards them. However, as the Claimant says, it appears from Mr Rowe's own statements he padlocked the gate, which unless the Claimant had a key was an arguable interference with his right of way. The Claimant had retained use of the right of way and even if he had to give 24 hours' notice to visit 12 Strutt Road itself, from his relentless email correspondence to Dr Poole at the time, there is little doubt he repeatedly gave such notice.

15. On 2nd September, Mr Rowe contended he was visited by the Claimant complaining the side-gate locks had been changed by Mr Poole. Mr Rowe maintained the Claimant again became 'aggressive' and 'threatened' to take him to Court and 'do him for every penny' (that the Claimant denies). The following day, the Claimant through his solicitors' firm sent Mr Rowe a letter before action demanding Mr Rowe remove a wooden gate from elsewhere on the right of way and the padlock on the metal gate (pgs.497-8). Mr Rowe complained to the Police who contacted the Defendant. On 25th September, the same day as another complaint about another of the Claimant's tenants elsewhere reached Mr Connor (which does not form part of the CPW), the Claimant issued proceedings against Mr and Mrs Rowe for interference with the right of way on 25th September 2020. This allegation became the fourth and part of the fifth allegation in the CPWs. As I say, the Claimant says Mr and Mrs Rowe infringed his legal rights and he was entitled to challenge them about it.

16. I note from contemporary emails Mr Connor considered an injunction against the Claimant (pg.289). However, on 14th October 2020, on advice from the Defendant's legal team about the need to have the Claimant's personal address for service, Mr Connor wrote to the Claimant at his solicitors' firm address making a formal 'Requisition of Information' under s.16 of the Local Government (Miscellaneous Provisions) Act 1976 for his personal address and details of his tenancies. The notice did refer to a number of statutory functions, including Community Protection Notices under the Act as well as Council Tax). However, no details of any of the existing allegations against the Claimant were given to him, nor any invitation made for his perspective on his relationship with Dr Poole or Mr and Mrs Rowe.

17. On 21st October 2020, the Claimant responded from his solicitor's firm (pgs.333-335) stating it was instructed to accept service by post but not providing his home address. He referred to a history of disputes with the Defendant, primarily focussing on Council Tax issues, but he also referred to his intention to seek possession against Dr Poole and added:

> *"It is clear that the Council's actions in respect of our client are improperly motivated by malice and indeed misfeasance in public office……We are of course taking legal action against HBBC already….Any further attempts by the Council to take action against our client, no doubt premised by the same improper and unlawful and vindictive motives, will likewise be robustly defended and will result in additional claims against HBBC, including if appropriate the individuals involved."*

As Mr Connor observed, this was a remarkably combative response by the Claimant to a fairly routine request for information from the Defendant, previous disputes or not.

18. On 30th October, Dr Poole confirmed he was vacating No.12 Strutt Road on 2nd December (which he then did). On 13th November, the Claimant enforced the guarantee for unpaid rent against Ms Hughes as his Guarantor, as he was entitled to do. Moreover, on 27th November, even though Dr Poole had already agreed to surrender the tenancy, the Claimant issued possession proceedings seeking costs. Mr Connor clearly took the view the Claimant's conduct was inconsistent with the (non-binding) guidance to landlords in the COVID Pandemic. In his statement, the Claimant explains why he feels he was within his rights to seek possession. This issue also made its way into the fifth allegation in the CPW.

19. Another part of the fifth allegation in the CPWs arose from a conversation on 23rd October 2020 when Mr Connor visited Strutt Road and spoke to Dr Poole's neighbour on his other side, Ms Rivers. She told him the Claimant had threatened to sue her because of where she parked outside her house and had now received a letter from his solicitor's firm. Mr Connor formed the view that Ms Rivers was parking on her own land (pg.292). Ms Rivers gave more detail in an email to Mr Connor on 20th December 2020 (pgs.296-7) and on 24th December referring to another solicitor's letter from the Claimant. He maintains she caused a nuisance and trespass by her parking and again he was entitled to assert his rights.

20. However, on 20th December, both Ms Rivers and Mr Rowe also made another accusation about an incident on 19th December (which comprises the second and third allegations in the CPWs). Mr Rowe reported to Mr Connor (pg.294) that he, his wife and their daughter saw the Claimant outside their property and he appeared to be filming or taking videos of them. Mr Rowe said their daughter questioned the Claimant who reacted abusively and swore at her and took a photograph of her. Separately, in her email to Mr Connor, Ms Rivers said she saw the Claimant shouting and swearing at a female resident after she had confronted him about photographing two other residents whom he was taking to Court (clearly a reference to Mr and Mrs Rowe). In his witness statement the Claimant does not directly address what is said by Mr and Mrs Rowe and Ms Rivers but discusses an altercation on 19th December with other residents of Strutt Road including Mr Conley (whom he then thought was Mr Gallagher) against whom the Claimant now has judgment for damaging his car. Other allegations against the Claimant postdate the CPWs and cannot have played a part in the Defendant's decisions about them. Nevertheless, by the end of 2020, Mr Connor had received witness statements dated from September and October from Dr Poole (and his partner Ms Gill), Ms Hughes, Ms Adams and in December received emails about the later allegations from Mr Rowe and Ms Rivers.

The issuing of the CPWs

21. In January 2021 Mr Connor was considering these statements and 'enforcement options' against the Claimant. He admits that he considered but then decided against discussing any of the allegations with the Claimant before taking such action for the following reasons:

> *"I and our legal department gave careful consideration to how the matter should be managed to discuss matters. Both the January and February CPW included a section headed 'enquiries' and gave [contact] details….but Mr Halborg failed to engage without making threats of litigation from his solicitor's firm… Mr Halborg was reminded that he could engage with the Council's internal complaints procedure should he consider that any officer has acted improperly at an informal stage but this he chose not to do….My impression is that Mr Halborg is not interested in hearing about how his actions have been impacting on others, he believes he is in the right and that he is entitled to treat his tenants (and others) in the way in which has been described…I am firmly of the view that any attempt to discuss matters prior to the January CPW would have resulted in further correspondence from Deals and Disputes Solicitors. In my view, there was little prospect of a constructive dialogue taking place…"*

22. The 'enforcement options' Mr Connor was considering included an injunction or prosecution for offences of harassment under s.1 Protection from Harassment Act 1997 or s.1(3A)(a) Protection from Eviction Act 1977 (relating to Dr Poole). As Mr Connor said:

> *"[Dr] Poole's repeated requests for intervention by the Police had been all but unsuccessful, therefore the Council felt it had no alternative but to step in."*

Mr Connor discussed taking action with the Legal team at the Defendant but having sought Counsel's advice they decided to issue the Claimant with the January CPW. As he said:

> *"We felt a CPW was a broader, more encompassing, yet less draconian measure that would also give Mr Halborg a framework to work within in the management of his properties and dealings with other residents and tenants. This approach seemed wholly appropriate given the volume of complaints and evidence at hand that Mr Halborg's unreasonable conduct was certainly having a detrimental effect of a persistent or continuing nature, on the quality of life of those in the locality."*

As I explain, this refers to s.43 of the Act. It is also plainly a conclusion the Defendant was satisfied the Claimant *had behaved as had been alleged* and his conduct fell within s.43. It was not merely a conclusion *that if the allegations were true*, they would fall within s.43.

23. The Defendant also felt a CPW reflected their 'Corporate Enforcement Policy' (p.171)

> *"HBBC uses compliance advice, guidance and support as a first response in the case of many breaches of legislation. Advice is provided, sometimes in the form of a warning letter, to assist individuals and businesses in rectifying breaches as quickly and efficiently as possible, avoiding the need for further enforcement action. A warning letter (sometimes referred to as an 'informal letter') will set out what should be done to rectify the breach and prevent re-occurrence. If a similar breach is identified in the future, this letter will be persuasive in considering the most appropriate enforcement action to take on that occasion…."*

24. Mr Connor also explains they considered a CPW (rather than injunction or prosecution) was consistent with the 'lowest possible level of enforcement action' before further 'incremental' action was taken under the Defendant's ASB Policy (pgs.212-4):

> *"Hinckley and Bosworth Borough Council follows an incremental approach to responding to and taking action against those individuals causing anti-social behaviour in our borough. We aim to provide a consistent and proportionate response towards all perpetrators of anti-social behaviour. We recognise that in some circumstances individuals causing anti-social behaviour will not realise that their behaviour is impacting on others, therefore where appropriate and necessary, referrals to other supportive agencies will be made…..*
>
> *Advice: Letter/verbal: Issued to highlight allegations of anti-social behaviour which have raised concern.*
>
> *Warning: Issued to highlight a person's ongoing or more serious involvement in anti-social behaviour and a request for this behaviour to stop.*
>
> *Acceptable Behaviour Contract: Voulntary contract issued to address a person's anti-social behaviour and to support them in stopping this behaviour*
>
> *A person can enter the incremental approach at any stage dependant on the severity of the incident reported and/or the timeframe since any previous incidents. In the majority of cases, the officers are guided by a 6 month timeframe when determining the most appropriate stage to enter the tiered approach. If deemed…appropriate, an individual can also be issued with the same sanction on multiple occasions.*
>
> *….Mediation….Mediation is not applicable in all circumstances.*
>
> *.Enforcement Enforcement action is sometimes the only measure available to the council to prevent further anti-social behaviour.*

There are a number of legal sanctions the council is able to utilise to legally challenge a person causing anti-social behaviour. This list is not exhaustive but includes: Injunction; Community Protection Notice; Closure Order; Noise Abatement Notice; Possession. The Council will work in partnership with the Police to consider criminal sanctions where appropriate.

Neighbour Disputes. Not all neighbour disputes should be dealt with as anti-social behaviour. Depending on the circumstances of a complaint, a complainant may be advised to get their own legal advice in relation to their complaint….

Insufficient Evidence to Proceed. During the course of an investigation there may be a number of reasons why an investigating officer cannot take action….Reasons may include…mitigating circumstances with regards to the perpetrators…."

25. In an email of 18th January 2021 (pgs.375-6) Mr Connor then sought approval for a CPW from the Defendant's Head of Housing Ms Shellard. He summarised the Strutt Road complaints (and also referred to other housing issues which did not feature in the CPW). He noted, amongst other things, there was pending litigation between the Claimant and Mr and Mrs Rowe and also a legal dispute with Ms Rivers. He noted Counsel had advised prosecution for harassment would be difficult and had recommended a CPW. He concluded:

> *"We expect Mr Halborg to raise significant objection against the council for this. We also expect he will ignore this in order that we may change the warning notice for a CPN so that he may appeal it to a Magistrates Court."*

The Defendant's Litigation Solicitor Ms Thakrar the same day (pg.373-4) emailed Ms Shellard to say she can suspected a prosecution would take a long time and may not succeed, it could take months even to get an interim injunction. However, a CPW (which the Claimant could not appeal) was a *'prelude to what may eventually become a CPN'* (which he could appeal). She felt any breach of the CPW would evidentially support a CPN (or indeed an injunction) and if convicted of breach, a Criminal Behaviour Order ('CBO').

26. Ms Shellard approved issuing the January CPW making the following allegations that I have already discussed above (but I add the following numbering for convenience):

> *"<u>You are alleged to have</u>*
>
> *(1) Been seen walking around the shared rear yard of 12 Strutt Road…. when it was occupied by the previous tenant [i.e. Dr Poole] and without the tenant's consent, peering in through the windows and appearing to take photographs or videos….*

(2) Appeared to take photographs or videos of residents on Strutt Road and their family members without their permission.

(3) Shouted and sworn at residents on Strutt Road or their family members.

(4) Been verbally aggressive, knocking on persons door and demanding they do certain things, including giving you a key to a padlock or removing the padlock or gate that restricted your access to the rear of 12 Strutt Road even though this right of way was freely exercised by the previous tenant to whom you assigned rights of possession.

(5) Threatened to sue or have started civil proceedings to sue at least two residents of Strutt Road [and] last two former tenants of 12 Strutt Road or their guarantor

In addition, the January CPW described itself as a 'Community Protection Notice Warning' and imposed a number of stringent requirements on the Claimant: limiting his attendance at 12 Strutt Road, prohibiting contact with other residents and even with his own tenants more than once a month save in emergencies, as well as prohibiting threatening any tenant or guarantor with legal proceedings save through a solicitor (not being his own firm). It added:

> *"IF YOU FAIL TO COMPLY without reasonable excuse [with] the requirements of this Warning Notice you may be issued with a Community Protection Notice."*

On any view, the January CPW was a strange document. It not only mixed its title, it mixed its approach between a 'warning' and 'requirements' which, as will appear, are more consistent with a Community Protection Notice itself, albeit it merely warned of one. Moreover, whilst the January CPW set out the conduct 'alleged' against the Claimant, that seems to have just been 'softening language'. It is perfectly apparent from Mr Connor's evidence (for example as cited above) the Defendant was satisfied what Dr Poole, Mr Rowe and Ms Rivers etc alleged was true even without hearing the Claimant's perspective.

27. On 1st February, the Claimant through his own firm (though he clearly authored it himself) sent a Judicial Review pre-action protocol letter (pgs.140-148), which amongst other things stated that he owned properties including Strutt Road, adding (I use roman numerals):

> *"[iii] The previous tenant…Mr Mark Poole, did not maintain the garden…changed the locks…installed a new lock preventing access to the rear of [it]…refused to allow inspection of [it] as well as damaging [it]… and on occasion not paying the rent, all of which were clear breaches of the tenancy agreement. Our client served various reminders (including photos of the unkempt garden) and was eventually forced to serve s.8 notices and commence possession proceedings as a result of*

which Mr Poole vacated rather than be evicted by the Court. There are still proceedings… seeking various orders including as to costs.

[iv] At all times during the tenancy of Mr Poole our client was lawfully entitled to use his right of way to access the rear of 12 Strutt Road. Granting a tenancy does not of course in fact prevent the owner of a property from using his own right of way over neighbouring land; and likewise a landlord is entitled to a copy of keys to any padlock or other lock preventing access to a right of way which is installed by a tenant….In breach of the right of way, Mr Poole and the neighbours at 10 Strutt Road – Mr and Mrs Rowe – conspired to block use of the right of way (which was over land not even rented to Mr Poole) by unlawfully installing a padlock which Mr Rowe refused to remove upon reasonable request by our client.

[v] Mr and Mrs Rowe are also maintaining an adverse possession claim over land which they do not own and in this regard as regards use of our client's gate (the key to which Mr and Mrs Rowe have wrongfully obtained) as well as their unlawful blocking up the right of way, there are also civil proceedings underway…..

[vi] Ms…Rivers, the owner of 8 Strutt Road, has been unlawfully parking her vehicle on the pavement of Strutt Road……Such parking has included parking in front of the windows of 12 Strutt Road and repeatedly reversing her vehicle in front of the property, causing nuisance and also trespass….She also admits supplying a key to our client's gate to Mr and Mrs Rowe without our client's consent and has refused to return [it]. Proceedings are to be issued…in due course.

[vii] On 19th December 2020, Mr and Mrs Gallagher of 1 Strutt Road, seemingly motivated by annoyance that our client had parked in 'their' parking space (but actually on the public road) tried to block our client in and when our client and his passenger managed to manoeuvre out of the space, Mr and Mrs Gallagher falsely accused them of having damaged their vehicle, whereupon Mr Gallagher shouted and swore at our client and threatened to assault him and then caused criminal damage to the rear of our client's vehicle…A civil claim has been issued and judgment obtained against Mr Gallagher. HBBC are expressly aware of this criminal damage and affray by Mr Gallagher…..HBBC could not seriously maintain there is any convincing evidence of our client shouting and swearing at anyone in Strutt Road – an allegation which he strenuously denies and which Leicestershire Police do not themselves support…."

28. Pausing there, I find the Claimant gave his answer all the 'allegations' in the January CPW:

- At paragraphs (iii) and (iv), the Claimant explained his concerns about Dr Poole and his entitlement to attend the rear of the property along his right of way: CPW allegation 1. He did not deny peering in through windows and taking photographs and may obviously be taken as contending he had the right to do so in the exercise of his landlord rights.
- At paragraphs (iv) and (v), the Claimant answered Mr Rowe's allegations about his behaviour over the padlock and the right of way: CPW allegation 4. Again, the Claimant set out his property rights over the right of way which he said Mr Rowe had interfered with but he did not deny the suggestion of 'verbal aggression', despite the opportunity.
- At paragraphs (iii), (iv), (v), (vi) (and in an another uncited paragraph where he says judgment is awaited against Ms Adams, which as I say he lost), the Claimant explained his reasons for his civil proceedings against Dr Poole, Mr and Mrs Rowe, Ms Rivers and Ms Adams respectively: CPW allegation 5. Indeed, Mr Johnson accepted as much.
- At paragraph (vii), the Claimant responded to CPW allegations 2 and 3: appearing to take videos or photographs of Strutt Road residents without permission and shouting and swearing at them or their family members. He correctly identified the allegation as relating to 19th December 2020 although he did not mention Mr and Mrs Rowe and Ms Rivers but Mr and Mrs Gallagher. In fact, on 19th January Mr Connor had spoken to Mr Conley, Mr Gallagher's tenant at 1 Strutt Road, who denied causing damage to the Claimant's car whom he alleged had damaged his car then shouted and sworn at him. In his recent statement, the Claimant maintains his account but admits it was Mr Conley. In any event back in his 1st February letter he denied the allegations 2 and 3 in the CPW.

For good measure, in that letter the Claimant went on over several pages to take issue, point by point, with all requirements in the January CPW in clear (and indeed cogent) terms.

29. On 4th February, the Defendant requested a further two weeks to reply (pgs.150-1) but on 8th February, the Claimant only agreed one week (pgs.152-3), but then issued his claim on 10th February against the January CPW (pgs.1-19). He sought interim relief and anonymity, refused by Davis J (as he was) on 15th February (pg.124). However, on 10th February, the Defendant had resolved to amend the CPW to relabel it a 'Community Protection Warning' and to delete all the requirements. In a letter to the Claimant of 12th February (pgs.403-6) Ms Thakrar denied they *accepted* the Claimant's arguments in the letter and claim but I find they clearly *prompted* the change. Ms Thakrar emphasised the CPW did not create obligations and there was an alternative to Judicial Review by challenge to any later CPN.

30. With that letter on 12th February, the Defendant issued the Claimant with the February CPW which is now challenged. This was labelled 'Community Protection Warning' and recited:

> *"This is a warning issued by [HBBC] under the provisions of s.43 of the Antisocial Behaviour, Crime and Policing Act 2014. [It] is satisfied that your conduct is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and is unreasonable insofar as you are alleged to have…"*

The February CPW then repeated the same factual 'allegations' I have found the Defendant was actually satisfied were true - and to which the Claimant had responded - then added:

> *"If you fail to stop the anti-social behaviour immediately without reasonable excuse you may be issued with a Community Protection Notice."*

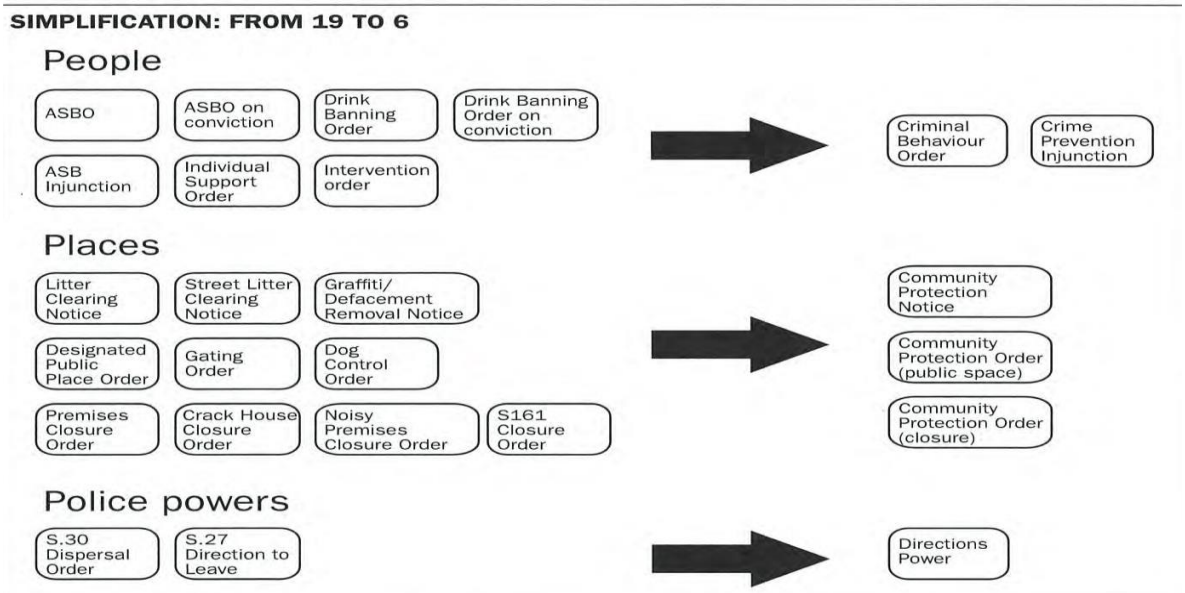
The CPW then did not set out any requirements but concluded with the statutory rubric for CPNs under s.43(7): that breach of a CPN was a criminal offence punishable with a fine; and setting out the Court's powers on breach e.g. for enforcing the requirements of the CPN, carrying out work (including entering the land) or surrendering any items used in the conduct etc. I have already set out above how I granted permission on 26th May on draft amended grounds to challenge the February CPW (which is my focus) in substitution for the January CPW and the course of proceedings since. I now turn to the statutory framework.

The Statutory Framework

31. Whilst it may be slightly unusual, I agree with Mr Johnson that it assists to interpret the relevant provisions of the Antisocial Behaviour, Crime and Policing Act 2014 ('the Act') by starting with the 2012 White Paper which proposed it: *'Putting Victims First'* (to which Ms Bhogal also referred me). I am in the very best of company as this was also the approach of Lord Bingham in *R(Quintavalle) v SoSH [2003] 2 WLR 692 (HL)* in which he summarised the Court's approach to statutory interpretation in an oft-cited passage at p.9:

> *"The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So, the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

32. As Mr Johnson observes, the historical context of the situation leading to the 2014 Act by the Coalition Government was the miscellany of statutory powers on anti-social behaviour under legislation from the previous Government. The White Paper in 2012 proposed to streamline these into a smaller number of new powers and orders presented in a diagram:



33. One new order discussed by the White Paper at pgs.27-8 was the Community Protection Notice:

> *"3.18…[W]e propose introducing a Community Protection Notice* [I abbreviate to 'CPN'], *issued to an individual….to deal with a particular problem negatively affecting the community. It could be used to tackle the impacts of a range of anti-social behaviour (for example graffiti, littering, dog fouling or using a skateboard inappropriate[ly]).The notice would be issued to stop persistent, unreasonable behaviour that is detrimental to the amenity of the locality or is having a negative impact on the local community's quality of life. The notice would replace Litter Clearing Notices, Street Litter Control Notices and Defacement Removal Notices.*
>
> *3.19 This notice is not designed to be issued for a single incident – guidance would make it clear that informal measures…. should be used at first to try to elicit a change in behaviour. Only where such measures have proved ineffective would a notice be used – by which time the subject would have been given ample warning that the behaviour was unacceptable and have chosen to continue regardless.*
>
> *3.20 The notice could be used in a variety of other situations not addressed by the powers it is directly replacing, allowing areas to respond flexibly to local issues as they arise. For example, relatively low level, but persistent, neighbourhood noise….*
>
> *Our proposals would enable the police to issue a notice to stop the behaviour, with criminal sanctions if the individual failed to comply, rather than simply attending or taking a call and referring on, as..currently. This would extend the powers the police have to deal with noise problems (as they currently only have some limited powers to control noise from road vehicles)*

3.21 Examples of where the notice could be used, and how this differs from the current system, include:

• An individual who regularly allows their dog to foul in a communal garden (this situation is not covered by current notices);

• A group regularly taking the same route home late at night whilst drunk, making noise and waking their neighbours (...not covered by the statutory nuisance regime);

• A takeaway which persistently allows its customers to drop litter on the pavement outside and causes noise nuisance late at night, being required to put bins outside the shop and to ensure that customers leave quietly after 10pm (current notices can only be used to deal with one type of behaviour).

3.22 Community Protection Notices could be issued by a range of professionals including the police and…providers of social housing, although we anticipate that most will be issued by local authorities. It would be for the local authority to work with private registered providers of social housing to agree which (if any) of them should be given the power to issue notices in their area and for all the relevant competent authorities to ensure the necessary liaison arrangements are in place to avoid duplication of effort or complaints falling between the gaps….

3.23 A notice could only be issued where the behaviour is occurring without reasonable excuse, and we propose having a defence on breach if all practical measures have been taken to avoid or prevent the problem. For example, someone may find a baby crying in the night has a negative impact on their quality of life, but it would not be reasonable for an agency to serve a notice on someone to stop a baby crying so the notice couldn't be used."

34. A new statutory order the 'Community Protection Notice' was provided by s.43 of the Act:

"(1) An authorised person may issue a community protection notice to an individual aged 16 or over, or a body, if satisfied on reasonable grounds that— (a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and (b) the conduct is unreasonable…..

(3) A community protection notice is a notice that imposes any of the following requirements on the individual or body issued with it— (a) a requirement to stop doing specified things; (b) a requirement to do specified things; (c) a requirement to take reasonable steps to achieve specified results.

(4) The only requirements that may be imposed are ones that are reasonable to impose in order— (a) to prevent the detrimental effect referred to in subsection (1) from continuing or recurring, or (b) to reduce that detrimental effect or to reduce the risk of its continuance or recurrence.

(5) A person (A) may issue a community protection notice to an individual or body (B) only if— (a) B has been given a written warning that the notice will be issued unless B's conduct ceases to have the detrimental effect referred to in subsection (1), and (b) A is satisfied that, despite B having had enough time to deal with the matter, B's conduct is still having that effect.

(6) A person issuing a community protection notice must before doing so inform any body or individual the person thinks appropriate.

(7) A community protection notice must—(a) identify the conduct referred to in subsection (1); (b) explain the effect of sections 46 to 51.

(8) A community protection notice may specify periods within which, or times by which, requirements within subsection (3)(b) or (c) are to be complied with."

35. As Mr Johnson says, the statute contemplates a two-stage procedure. Firstly, an authorised person under s.53 (including a local authority), issues the individual a warning (called in *Staffordshire Moorlands DC v Sanderson [2020] EWHC 962 (Admin)* at p.5 a 'Community Protection Warning' ('CPW') but I come back to its status below). Only then and if satisfied 'that despite B having had enough time to deal with the matter, B's conduct is still having the prohibited effect', is the authorised person permitted to issue a Community Protection Notice ('CPN'). The individual then has 21 days to appeal the CPN to the Magistrates Court under s.46 of the Act on various grounds: e.g. the conduct did not happen, did not have the requisite 'detrimental' effect; has not been persistent or continuing in nature; is not unreasonable; the requirements in the notice are unreasonable; or there is a material defect. In *Sanderson*, the Magistrates (upheld by the Court) set aside the CPN as s.43 did not allow a CPN to be issued against one person (there a mother) for conduct of another (her son).

36. Any failure to comply with a CPN is a criminal offence under s.48 of the Act punishable by a fine (and other ancillary orders under ss.49-51 of the Act). There is a defence if the person took all reasonable steps to comply with the notice or there is some other reasonable excuse for the failure to comply. However, in *R(Stannard) v CPS [2019] 1 WLR 3229 (DC)* it was held that on prosecution under s.48, an individual cannot assert as a defence the invalidity of the CPN itself, as it could have been the subject of an appeal under s.46 of the Act.

37. I was not referred by Counsel to Explanatory Notes to the Act. However, they accompany a Bill through Parliament (although are not endorsed by it) and are an admissible aid to interpretation of the ensuing Act (but cannot gloss it): *Sanderson* ps.19/21. Here, they offer a little more insight without affecting Counsel's submissions. Notes 160, 172 and 165 state:

> *"160. The community protection notice is intended to deal with unreasonable, ongoing problems or nuisances which negatively affect the community's quality of life by targeting the person responsible (section 43(1)). The notice can direct any individual over the age of 16, business or organisation responsible to stop causing the problem and it could also require the person responsible to take reasonable steps to ensure that it does not occur again (section 43(3)). For instance, where a dog was repeatedly escaping from its owner's back garden due to a broken fence, the owner could be issued with a notice requiring that they fix the fence to avoid further escapes and also, if appropriate, ensure that the owner and dog attended training sessions to improve behaviour (if this was also an issue)….*
>
> *172. Community protection notices will be different from the powers they replace in the following ways: a. They cover a wider range of behaviour (all behaviour that is detrimental to the local community's quality of life) rather than specifically stating the behaviour covered (for example, litter or graffiti); b. Noise disturbance could be tackled, particularly if…occurring in conjunction with other anti-social behaviour; c. The notices can be issued by a wider range of agencies: the police, local authorities and private registered providers of social housing (if approved by local authorities), thereby enabling the most appropriate agency to deal with the situation; d. The notices can apply to businesses and individuals (which is the same as for some of the notices they will replace but not all); and e. It would be a criminal offence if a person did not comply, with a sanction of a fine (or fixed penalty notice) for non-compliance.* [This only applied to litter not defacement removal notices].
>
> *165. Before issuing a notice, an authorised person is required to inform whatever agencies or persons he or she considered appropriate (for example the landlord of the person in question, or the local authority), partly in order to avoid duplication (section 43(6)). The person would also have to have issued a written warning in advance and allowed an appropriate amount of time to pass (section 43(5)). This is to ensure that the perpetrator is aware of their behaviour and allows them time to rectify the situation.*

It will be for the person issuing the written warning to decide how long is appropriate before serving a notice. In the example above where a dog owner's fence needs to be fixed, this could be days or weeks, in order to allow the individual to address the problem. However, it could be minutes or hours in a case where, for example, someone was persistently playing loud music in a park."

38. Those Explanatory Notes are also consistent with the Guidance the Home Office has issued under s.56, which does not expressly require police or local authorities to follow it. So, I adopt the approach in ***R(Munjaz) v Mersey NHS*** *[2005] 3 WLR 793 (HL)* to similar not expressly-binding guidance (a Code of Practice) where Lord Bingham said at p.21:

"*[T]he Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But… the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so… In reviewing any challenge to a departure from the Code, the Court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires."*

That is consistent with Counsel's approach. However, as stressed in *Sanderson* at p.21, the Guidance cannot gloss the statutory language but may be useful to test constructions of it.

39. The Home Office Guidance (revised Jan 2021) on CPNs states so far as relevant (pg.49-53):

"The Community Protection Notice can be used to deal with ongoing problems or nuisances which are having a detrimental effect on the community's quality of life by targeting those responsible.

Putting victims first: To understand the impact that the behaviour is having on the quality of life of those in a locality, the agency considering the use of a Community Protection Notice should first speak to members of the community to gain a proper understanding of the harm that is being caused to individuals and the community. This will help to ensure that victims feel that the issue is being taken seriously…that the decision to issue a [CPN] is based on evidence of the impact that the perpetrator's behaviour is having…[and] that officers do not use the notice to stop activities which are not causing anti-social behaviour.

The legal tests: These focus on the impact that the behaviour is having on victims and communities. A Community Protection Notice can be issued by one of the bodies mentioned above if they are satisfied, on reasonable grounds, that the conduct of an individual, business or organisation: • is having a detrimental effect on the quality of life of those in the locality; • is persistent or continuing in nature; and • is unreasonable. Agencies should have sufficient evidence to satisfy themselves that the behaviour in question is genuinely having a detrimental effect on others' quality of life, in terms of the nuisance or harm that is being caused to others, rather than being a behaviour that others may just find annoying. Similarly, decisions on whether behaviour is persistent or continuing in nature should be taken on a case by case basis….The issuing officer must also make a judgement as to whether the behaviour in question is unreasonable. For instance, a baby crying in the middle of the night may well have a detrimental effect on immediate neighbours and is likely to be persistent in nature. However, it is unlikely to be reasonable to issue the parents with a [CPN] if there is not a great deal that they can do to control or affect the behaviour. In addition, the issuing body should be satisfied that it has enough evidence that the activity in question is having a detrimental effect on others' quality of life, is persistent or continuing and is unreasonable

The written warning: In many cases, the behaviour in question will have been ongoing for some time. Informal interventions may well have been exhausted by the time the applicant decides to proceed with a [CPN]. However, before a Notice can be issued, a written warning must be issued to the person committing anti-social behaviour. [It] must make clear to the individual that if they do not stop the anti-social behaviour, they could be issued with a [CPN]. However, local agencies may wish to include other information in the written warning, for instance: • outlining the specific behaviour that is considered anti-social and which is having a detrimental effect on others' quality of life, as this will ensure there is little doubt over what needs to be done to avoid the formal Notice being issued; • outlining the time by which the behaviour is expected to have changed in order to give the alleged perpetrator a clear understanding of when the [CPN] might be served; • setting out the potential consequences of being issued with a [CPN] and in particular the potential sanctions on breach, which could act as an incentive for the individual to change their behaviour before a formal Notice is issued.

How the written warning is discharged is up to each agency. In cases where a problem has been continuing for a period of time, the written warning may be included in other correspondence. However…a written warning is required more quickly, it could be a standard form of words, adaptable to any situation….a pre-agreed form of words that can be used by the officer on the spot. Enough time should be left between the issue of a written warning and the issue of a [CPN] to allow the individual or body to deal with the matter. It will be for the issuing officer to decide how long is allowed on a case by case basis…where a garden is to be cleared of waste, several days or weeks may be required… where an individual is playing loud music in a park…..the officer could require [it]… to stop immediately."

'Community Protection Warnings'

40. So, the key provisions for 'Community Protection Warnings' ('CPW's) are ss.43(1) and (5):

"(1) ['A'] may issue a community protection notice to an individual…if satisfied on reasonable grounds..(a) the conduct of the individual is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and (b) the conduct is unreasonable….(5)…'A' may issue a community protection notice to an individual… 'B' only if (a) B has been given a written warning that the notice will be issued unless B's conduct ceases to have the detrimental effect referred to in subsection (1) and (b) A is satisfied that, despite B having had enough time to deal with the matter, B's conduct is still having that effect...

Before turning to the grounds of challenge, I note three short preliminary points.

41. First, whilst s.43(1) clearly creates a statutory power to issue a new statutory order - the 'Community Protection Notice' ('CPN') - the 'warning' in s.43(5) is quite different. Unlike a CPN, there is no 'breach' of it, let alone a 'sanction' for that. Instead, s.43(5) sets two preconditions *for a CPN* on top of the s.43(1) criteria: (a) a written warning of the requisite description ('*the notice will be issued unless B's conduct ceases to have the detrimental effect referred to in subs.(1)')* has been given to 'B'; and (b) 'A' is 'satisfied' despite B *'having had enough time to deal with the matter'* (i.e. since the warning) '*his conduct is still having that effect'*. s.43(5) does not state A need be 'satisfied' of *anything* when issuing such a warning, but reference to conduct '*still* having that effect' suggests A must have been 'satisfied' when issuing a warning there was a *'detrimental effect referred to in s.43(1)'*. However, s.43(5) is completely silent on being satisfied of 'unreasonable conduct'.

42. Second, the primary statutory purpose of a warning falling within s.43(5) (called in *Sanderson* p.5 a 'Community Protection Warning' ('CPW')) was stated in *Sanderson* p.31:

> *"s.43(1) provides where a CPN is served on an individual the[ir] unreasonable conduct must have a persistent and continuing detrimental effect on those in the locality….It seems clear…Parliament intended that a CPN (and any prior warning) should be served on the person who is engaging in the anti-social behaviour, with a view to getting that person to desist, ultimately on pain of a criminal sanction."*

This purpose 'puts victims first' by deterring individuals from continuing conduct within s.43 (I return to 'anti-social behaviour' below). However, the statutory context of s.43(5) (c.f. *Quintavalle*) indicates two subsidiary purposes. First, p.165 of the Explanatory Notes suggests a s.43(5) warning also *'ensures the perpetrator is aware of their behaviour and allows them time to rectify the situation'.* Second, whilst p.3.19 of the White Paper merely spoke of prior informal measures giving 'ample warning', s.43(5) explicitly set a CPW as a formal precondition to a CPN, so a CPW is extra procedural protection for the individual.

43. Third, I am satisfied the issue of CPWs is amenable to Judicial Review on the usual grounds: illegality, procedural unfairness and unreasonableness. (I would add there may be other grounds beyond those raised in the present case, for example non-compliance with the detailed statutory Guidance on issuing written warnings on the principle in *Munjaz*). The Court in *Stannard* at p.54 described CPNs as *'significant interference with an individual's freedom'.* A 'CPW' is a precondition to this 'interference' which itself seeks to change behaviour (and may appear on Police Enhanced CRB checks and 'fit and proper person' checks for landlords of 'HMO's under s.66 Housing Act 2004). The Court in *Stannard* at p.47 said: '*in principle any decision pursuant to section 43 is amenable to judicial review',* including a refusal to discharge a CPN (which was an implicit statutory power) as there was no right of appeal. The same is true of 'CPWs'. Here, the January CPW not only warned of the risk of a CPN but also purported to set several stringent conditions which would interfere with the Claimant's life. Whilst individuals can and clearly should ask for a CPW to withdrawn as an alternative remedy before they judicially review it, here the Claimant did just that in his pre-action letter against the January CPW. That led to its replacement with the February CPW by which time he had issued the claim. To require another complaint would be unrealistic, especially as proceedings were already on foot against the January CPW: far more draconian than the February CPW. Having determined it is amenable to Judicial Review, I turn to the particular challenges about it.

Ground 1(a): 'Improper use of statutory power' (substantive)

Introduction

44. In Mr Johnson's Skeleton Argument, he set out the kernel of this ground:

> *"The Claimant's case is the statutory test was not met, in that (a) there was no conduct that could have had a detrimental effect on the quality of life of those in the locality; (b) that the conduct was not unreasonable. Both of those propositions derive from a central principle there is and can be no anti-social behaviour in seeking to assert legal rights. To find otherwise would sanction an approach whereby, for example, a local authority in its capacity as landlord was acting in an anti-social manner by seeking possession for a tenant in arrears where the accommodation was not affordable, or was acting in an anti-social manner by seeking enforcement of other statutory powers….the matters complained of are not "conduct having a detrimental effect" as it is not anti-social conduct (at which the Act is aimed) nor can it have a detrimental effect because there can be no detriment in the sense the term is used in the statute by lawfully exercising rights;* [and] *the conduct is not unreasonable….The question of reasonableness is perhaps key. The statutory test is whether conduct was unreasonable. While that is primarily a matter for the defendant, that is subject to the oversight of this court. The claimant's primary case is exercising his lawful rights over his property is not unreasonable…"*

45. When I raised the point at para 41 above that s.43(5) of the Act did not appear to require the Defendant when issuing a CPW to be 'satisfied' the Claimant's conduct was 'unreasonable' Mr Johnson indicated he had been expecting the point but that it had not been taken by the Defendant. However, as Ms Bhogal observed the Defendant's February CPW had stated it:

> *"….is satisfied that your conduct is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and is unreasonable insofar as you are alleged to have…"*

Therefore, Ms Bhogal accepted both conclusions could be challenged irrespective of what s.43(5) required, but submitted the February CPW had only set out 'allegations'. However, I have explained I do not accept that. The Defendant was plainly 'satisfied' the allegations were true in reaching its 's.43 conclusion' and is required to defend that position, not dilute it. However, the legal issue raised by this argument ('Ground 1(a)') was whether lawful conduct / exercise or assertion of legal rights falls within the 'legal scope' of s.43(1) itself.

46. However, in oral argument, Mr Johnson also teased out a 'procedural' strand to Ground 1: even if such conduct as alleged *could* fall within the scope of s.43(1)(a)/(b), the Defendant could have no 'reasonable grounds' for being 'satisfied' of this without first seeking the Claimant's response. He accepted this procedural strand of his argument had more in common with Ground 2 (procedural unfairness) and Ground 3 (breach of policy). I therefore will label this procedural strand 'Ground 1(b)' and deal with it below before Ground 2.

47. In setting out the Claimant's factual 'reasonable grounds' case on the five allegations in the CPWs, whilst submitting the CPW allegations (1), (4) and (5) involved the Claimant simply exercising or asserting his legal rights; Mr Johnson submitted allegations (2) and (3) (which relate to whatever happened on 19th December 2020) were 'insufficient and insufficiently precise'. He accepted this was more a point of procedural fairness and I deal with it under Ground 2. However, as Ground 1(a) raises the legal scope of 's.43 conduct', I will initially assume all the CPW allegations are of lawful conduct / the exercise or assertion of legal rights when considering whether that can amount to (i) conduct 'having a detrimental effect' within s.43(1)(a); and (ii) 'unreasonable conduct' within s.43(1)(b), including 'anti-social behaviour'. However, under each I will then (subject to Ground 1(b)) consider whether the Defendant had reasonable grounds for being so 'satisfied'.

'Detrimental Effect'

48. Under this heading, Mr Johnson faced an uphill task in arguing that lawful conduct or exercise or assertion of legal rights cannot as a matter of law cause a *'detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality'*. This criterion is plainly concerned with the *effect* of conduct, not its *lawfulness*. In argument I posited Heathrow Airport as an example of lawful conduct with a detrimental effect on the quality of life of those in the locality. Examples can be multiplied: factories, motorways and the homely one in the White Paper and Guidance of a baby's crying regularly disturbing neighbours' sleep when the issue is whether conduct was 'reasonable'.

49. Moreover, there is authority in the context of 'Public Space Protection Orders' ('PSPO's) within s.59 of the Act. Whilst its structure is different from s.43, it has a similar provision:

> *"(2)…..(a) activities carried on in a public place within the area have had a detrimental effect on the quality of life of those in the locality*….[*(3)*]*…the effect…of the activities (a) is…of a persistent or continuing nature, (b) is…such as to make the activities unreasonable, and (c) justifies the restrictions imposed by the notice."*

50. In *Summers v Richmond LBC [2018] 1 WLR 4729 (HC)*, May J held that a PSPO which prohibited anyone from walking more than four dogs in restricted areas of the (leafy) borough of Richmond complied with s.59, as multiple dog there walking on the facts had a '*detrimental effect on the quality of life of those in the locality……the effect…of [which] is…of a persistent or continuing nature" (*etc). *Summers* was approved in *Dulgheriu v Ealing LBC [2020] 1 WLR 609 (CA)* where a PSPO was upheld to prohibit protests outside an Abortion clinic which had a substantial impact on women visiting it and on local residents affected by the protests. In both cases, the relevant 'activities' (walking more than four dogs at one end of the spectrum, abortion protest at the other end) were perfectly lawful. Nevertheless, they were made unlawful by the issuing of PSPOs because the activities were found to have, on the facts, the requisite 'detrimental effect'.

51. Moroever, I accept the submission of Ms Bhogal (who incidentally appeared in *Dulgheriu*) that such is the similarity between s.59(2)(a) and (3)(a) and s.43(1)(a) of the Act that an authorised person such as the Defendant should follow the approach set out in *Summers* and *Dulgheriu* in deciding whether it was 'satisfied' on reasonable grounds under s.43(1)(a) that

> "*the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality."*

The relevant analysis of May J in *Summers* was at ps.25-8:

> *"The Act therefore envisages use of PSPOs to curb activities which it is possible that not everyone would view as detrimentally affecting their quality of life. Taken with the absence of further definition of the key terms 'activities' or 'detrimental' this strongly points to local authorities being given a wide discretion to decide what behaviours are troublesome and require to be addressed within their local area. This requires local knowledge, taking into account conditions on the ground, exercising judgment (i) about what activities need to be covered by a PSPO and (ii) what prohibitions or restrictions are appropriate for inclusion in the order. There may be strong feelings locally about whether any particular activity does or does not have a detrimental effect, in such cases a local authority will need to weigh up competing interests. Deciding whether, and if so what, controls on certain behaviours or activities may be necessary within the area covered by a local authority is thus the very essence of local politics.*

26 It is important to bear in mind, however that the behaviours which PSPOs are intended to target are those which are seriously anti-social, not ones that are simply annoying….The following passage [is] in the Home Office information note….

> *"Our aim in reforming the anti-social behaviour powers is to give the police [and] councils…more effective means of protecting victims, not to penalise particular behaviours. Frontline professionals must use the powers… responsibly and proportionately only where necessary to protect the public"*

27 The second requirement, under section 59(3)(a)—(c) of the 2014 Act, is that the effect, or likely effect, of the activities is, or is likely to be, of a 'persistent or continuing nature', such as to make them unreasonable and so as to justify the restrictions imposed by the order. The wording plainly excludes one-off activities, or those which might occur more than once but rarely. In an analogous statutory context…the word 'persistent' was [held to be] an ordinary English word commonly understood to mean 'continuing or recurring, prolonged': Ramblers Association.."

In *Dulgheriu,* Turner J at first instance followed May J in *Summers,* adding at p.31 and 34-6

"31…[T]he fact that Parliament did not choose to define what may amount to "detrimental effect" should not, *of course, be treated by the courts as an invitation to fill the vacuum a definition of their own. The circumstances in which PSPOs may be considered are many and various and attempts to lay down any general threshold level of conduct having detrimental effect by deploying various permutations of the concepts of "intimidation", "harassment", "alarm", "distress" and such like would almost certainly prove to be unhelpful and inappropriate.*

34…There is no merit in the argument [that detriment must be 'objective']. *The statutory language is clear and the introduction of the concept of "objectivity" takes the claimant's case no further. Some individuals are more robust than others. The defendant was entitled to assess the impact of the activities of the protestors on all those whose quality of life it was the object of the Act 2014 to protect: the vulnerable and resilient alike……*

35. Further the argument lapses into a non sequitur. Feelings of upset, offence, anger and annoyance are perfectly capable of having a detrimental effect on the quality of life of any given individual, even on one of average or greater resilience, a fact to which many commuters by rail or car or omnibus could doubtless attest. Such feelings are not simply to be disregarded as in some way not being 'objective'..

36. Ultimately, the task of the defendant was to exercise its judgment on the application of the words of the statute. The superimposition of a freestanding test of "objectivity", however it may be defined, would serve not merely to confuse but to impede this process. Of course, a local authority will take into account the possibility that those whose quality of life is said to have been adversely affected are being oversensitive when deciding whether a detrimental effect has been made out and in whether the activities have been rendered unreasonable…."

Both Turner J's decision and May J's analysis was upheld in the Court of Appeal:

"47 We agree with May J in Summers…that the 2014 Act gives local authorities a wide discretion to decide what behaviours are troublesome and require to be addressed within their local area. Equally, in deciding who is 'in the locality' for the purpose of protection from such activities by way of a PSPO a local authority will …use its local knowledge, taking into account local conditions on the ground."

52. It is perfectly plain that lawful activities (and the assertion of legal rights) can nevertheless have '*a detrimental effect, of a persistent or continuing nature on the quality of life of those in the locality'.* That was the conclusion on the very similar statutory wording in *Summers* and *Dulgheriu* with otherwise lawful conduct. The analysis of May J in *Summers* (endorsed in *Dulgheriu*) about a local authority exercising its own judgment about what is *'troublesome and required to be addressed within their area'* and *'the weighing up of competing interests'* does not presuppose the activities are unlawful: quite the contrary.

53. In argument, Mr Johnson seemed to recognise the difficulty of this argument and refocussed on his other argument on s.43(1)(a): (*"the conduct of the individual is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality")* that it required the *conduct* be 'of a persistent or continuing nature' rather than the *effect.* Again, both Counsel referred me to *Summers* p.27 which applied the common sense meaning of persistent as meaning *'continuing or recurring, prolonged'* adopted in a related statutory context in <u>*Ramblers Association v Coventry City Council*</u> *[2009] PTSR 715 (HC).* This does not determine whether 'of persistent or continuing nature' qualifies 'detrimental effect' or 'conduct' in s.43(1)(a). I am satisfied it is the former for three reasons:

53.1 Firstly, this is the literal wording of s.43(1)(a). If intended to qualify 'conduct', s.43(1)(a) it would have read *'the persistent or continuing conduct of the individual is having a detrimental effect…etc'* or indeed a further subsection s.43(1)(c) would have stated *'the conduct is of a persistent or continuing nature'* (compare s.46(1)(c))

53.2 Secondly, this interpretation is consistent with the statutory context of s.43, in addition to being consistent with the approach in PSPOs: *Summers* ps.27-8. However, whilst May J in Summers at p.27 suggested the wording of s.59 "*plainly excludes one-off activities, or those which might occur more than once but rarely",* in *Dulgheriu* at p.44, the Court recognised that the experience of women running the gauntlet of abortion protests could stay with them for years and so rejected the submission that visiting only once or twice could not have a 'persistent and continuing detrimental effect on their quality of life'. That was plainly referring to the 'persistent or continuing nature' of the 'effect' on a woman, not of the 'activities'. Moreover, returning to s.43(5), I have observed above at para 41 that the wording of s.43(5) as a whole suggests A must have been 'satisfied' when issuing a warning there was a *'detrimental effect referred to in s.43(1)'* and that s.43(5)(b) explicitly requires A to be 'satisfied' before issuing a *CPN* that *'B's conduct is still having that effect'* (despite B having had enough time to deal with the matter). Parliament surely cannot have intended that a CPN could be issued if the 'effect' had continued but the 'conduct' had not: that would conflict with the statutory purpose of deterring conduct within s.43 and would be an anomalous result so may be rejected: *Stannard* p.40. It follows when issuing a *CPN* (as opposed to a *CPW*), A must be satisfied B's *conduct* is ongoing: i.e. 'of a persistent or continuing nature'. This explains why s.46 gives a right of appeal against a CPN on that ground and the Explanatory Notes and Guidance on *CPNs* talk about ongoing or persistent *conduct.*

53.3 Thirdly requiring A to be 'satisfied' before issuing a CPW that the detrimental effect on the quality of life of those in the locality be 'of a persistent or continuing nature' due to B's conduct is not only consistent with the statutory purpose of deterring such conduct and 'puts victims first' by focussing primarily on the effect on them, it also ensures that *only* conduct with a 'persistent detrimental effect' falls within s.43(1)(a)

54. However, I am bound to say this seemed an arid argument on the facts here. Even on the Claimant's own case, his conduct 'alleged' (in fact I found, believed) was unquestionably 'persistent': it related to ongoing issues with Dr Poole, Mr and Mrs Rowe and Ms Rivers. Moreover, the 'effect' on 'those in the locality' had also been 'persistent': the disputes were continuing and whilst Dr Poole had moved out, he was still facing a legal claim and the others remained on Strutt Road and in dispute. The real question for s.43(1)(a) is surely whether that 'effect' on them amounted to a 'detrimental effect on their quality of life'.

55. In my judgment, the Defendant plainly had reasonable grounds for being satisfied when issuing the February CPW the Claimant's (persistent) conduct was having *"a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality"* (going beyond what the Guidance described as not covered: conduct which was 'annoying')

55.1 So far as Mr Poole was concerned, Mr Connor specifically addressed this question:

> *"…The regular unannounced attendances at the property or back garden were interfering with Mr Poole's entitlement to have quiet enjoyment in the property. Of particular concern was Mr Poole had made it clear…that his actions were having this effect and yet Mr Halborg did not relent in the slightest. Mr Poole clearly felt…Mr Halborg's actions were interfering with his life to such an extent he repeatedly told me that he just wanted to leave the property to get away from it all or give [him] whatever he wanted.…"*

Whilst Mr Poole was no longer 'in the locality' by the time of the February CPW, that was because, in the Defendant's view, he had been driven out of his home (even if legally). In any event, the Court in *Dulgheriu* at p.47 recognised authorities were entitled to use their judgment and local knowledge as to who 'is in the locality'.

55.2 Secondly, so far as Mr and Mrs Rowe (who remained 'in the locality' in February) were concerned, the 'detrimental effect' of the dispute with the Claimant was continuing and plainly affected their quality of life. Mr Connors in his statement at ps.22-26 traced Mr Rowe's complaints (from his perspective in his statement) that a dispute over a key to the gate in his right of way had led to the Police being called on 2nd September in response to what Mr Rowe said was 'verbal abuse and aggression', legal proceedings followed and another altercation on 19th December.

55.3 Thirdly, Ms Rivers (who again remained 'in the locality') likewise complained that a dispute with the Claimant over her parking was deteriorating into litigation. In her December email to Mr Connors she explained that she had suffered a stroke previously and she was so stressed by the situation with the Claimant that her parents had bought her a smaller car to reduce the conflict over parking.

It was open to the Defendant to find any of these complaints had the requisite 'detrimental effect' and the cumulative effect on 'those in the locality' was substantial. To the Claimant, litigation may be 'everyday', but these residents of Strutt Road are not unusual in feeling that an ongoing legal dispute was having a detrimental effect on their quality of life. Indeed, on this issue, the Defendant hardly needed the Claimant's perspective to be satisfied it was.

'Unreasonable Conduct'

56. The more difficult issue, especially without seeking the Claimant's perspective, is whether the Defendant had reasonable grounds to be satisfied his conduct was 'unreasonable'. I deal with this question in three stages: whether: (i) in principle conduct which is lawful / in the exercise or assertion of legal rights can be 'unreasonable'; (ii) such conduct can be 'anti-social behaviour'; and (iii) the Defendant here 'reasonably believed' it was both.

57. Whether lawful conduct can be 'unreasonable' at first sight feels like a philosophical question, or a variation on the old distinction between 'illegal' and 'unlawful'. However, I prefer to focus on interpreting 'unreasonable conduct' on the language, syntax, context, history and purpose of s.43 of the Act: *Quintavalle*. I conclude conduct which is lawful and/or in exercise or assertion of legal rights can still be 'unreasonable conduct' under s.43:

57.1 Linguistically, 'unreasonable' - and its antonym 'reasonable' - are two of the most commonly-occurring words in legal experience. Yet a *Westlaw* 'Term Defined' search for each yields single figures results. This may be because, like 'persistent' in *Ramblers* and *Summers*, 'unreasonable' is an ordinary English word that does not require definition. However, Judges have tended approach '(un)reasonable' as open-textured, as Lord Greene MR did in *Cumming v Danson [1942] 2 All ER 653 (CA):*

> *"In considering reasonableness. . . the duty of the Judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad common-sense way as a man of the world and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account."*

(Indeed, Lord Greene a few years later made similar points on 'unreasonableness' in *Associated Pictures v Wednesbury Corp [1948] 1 KB 223 (CA) p.*229). The simple point here is 'reasonable' and 'unreasonable' in a variety of legal contexts almost always connote an evaluative judgment on consideration of all the circumstances. 'Unreasonable' is not a synonym for 'unlawful'. Nor is there any precedent for 'unreasonable conduct' and 'exercise or assertion of legal rights' being mutually exclusive. For example, Civil Procedure Rule 44.4 on costs suggests otherwise. As Ms Bhogal observed, it will depend on the facts and the *manner* of the exercise of those legal rights. 'Unreasonable' simply does not exclude lawful conduct.

57.2 Syntactically, given the established open-textured meaning of 'unreasonable', it is notable that Parliament chose the phrase 'unreasonable conduct' in s.43(1)(b) without definition or proviso: not 'unlawful', still less 'illegal' or 'prohibited' etc. If Parliament intended to set the threshold for s.43 at 'unlawful conduct' or to carve out a more targeted proviso for 'exercise or assertion of legal rights', it would have done so, at least by such definition or proviso to 'unreasonable'. Whilst I was not addressed on this, only by example, there is the exception in s.1(3) Protection from Harassment Act 1997 ('PHA') for conduct *'pursued under any enactment or rule of law or to comply with any condition or requirement…under any enactment'*. Parliament in 1997 separated this exception from that for 'reasonable conduct': suggesting it thought then not all conduct pursued under any enactment or rule of law is 'reasonable'. Likewise, it created an exception for conduct 'pursued for the purpose of preventing or detecting crime', in *Hayes v Willoughby [2013] 1 WLR 935* at p.14 noted to be based on rationality as opposed to objective 'reasonableness'. I do not suggest the 1997 Act affects the interpretation of the 2014 Act. I simply use it to make the point that there is an established legislative technique of carving out exceptions and provisos, which Parliament had used in a not unrelated field not long before 2014 for conduct broadly related to legal rights. Yet despite that model, it did not use that approach for 'unreasonable conduct' in s.43(1)(b) of the 2014 Act.

57.3 Contexually, the 2014 Act uses different terms for different orders. Whilst s.1 injunctions require 'anti-social behaviour' (to which I return along with the use of that expression in cases or Guidance on s.43), CPNs under s.43 and PSPOs under s.59 speak of 'unreasonable' conduct. Under s.59 in both *Summers* and *Dulgheriu* – I emphasise again both cases of otherwise lawful conduct (dog walking and protest respectively) the Court found the conduct had a 'detrimental effect' (as discussed) 'such as to make the activities unreasonable'. Moreover, Closure Notices and Orders use different terminology again. Police can issue a notice under s.76 excluding non-owners and non-residents from premises if satisfied on reasonable grounds it is associated with 'nuisance' or 'disorder' and such a notice is necessary. Police must then apply to a Court under s.80 which may close premises completely if satisfied they are associated with 'disorderly, offensive or criminal behaviour', 'serious nuisance' or 'disorder'. These terms suggest when Parliament wanted to set the threshold higher than 'unreasonable' (including 'criminal') it did so explicitly.

57.4 Legislative history of a statutory provision forms part of its context and as noted in *Quintavalle*, assists in its interpretation. Nowhere in the statutory materials such as the White Paper, Explanatory Notes or Guidance is there any hint that conduct which is lawful or in exercise or assertion of legal rights is excluded from s.43. Again, quite the contrary. As discussed in the White Paper at p.3.18, 3.20 and p.3.21, the 'mischief' this part of the 2014 Act was addressing was the 'patchy' coverage of the miscellany of powers on litter, graffiti etc in predecessor legislation whilst streamlining the number of legal powers. Some conduct envisaged to be covered by the new 'Community Protection Notices' would be otherwise unlawful, like graffiti (criminal damage) or litter / dog fouling (byelaws). However, some conduct: like 'skateboarding somewhere inappropriate', or persistent drunken noise by a group wandering home late at night, was not unlawful. When the White Paper and later the Guidance was at pains to exclude a baby crying it suggested issuing a CPN would not be reasonable, not that the conduct was lawful. Moreover, the example in the Explanatory Notes of a dog regularly escaping through a broken fence was not unlawful yet envisaged as covered: by then by the Bill. In short, there is no contextual indication 'unreasonable' was intended to exclude lawful conduct.

57.5 Purposively (which is ultimately the Court's task: *Quintavalle*), I described above the purposes of the CPW being to get individuals to desist from conduct within s.43, to allow them time to change their ways and as procedural protection prior to a CPN. The statutory purposes of the s.43(5) warning in different ways 'put victims first' by bringing home to individuals the perceived 'unreasonableness' of their conduct. Such a warning would be unnecessary if 'unreasonable conduct' entailed only conduct which was *unlawful*: individuals are presumed to know the law (certainly the Claimant does). Moreover, the statutory purpose of s.43 and CPNs more widely – to broaden the range of conduct covered beyond the miscellaneous targeted pre-existing powers - is perfectly consistent with s.43's purpose being to cover lawful but 'unreasonable' conduct and indeed inconsistent with an exclusion the statutory language simply does not make. (Whilst that may suffice, I merely add p.165 of the Explanatory Notes points out a CPW will ensure an individual is 'aware of their behaviour and allow them time to rectify it'. This suggests some conduct with a s.43(1)(a) 'detrimental effect' may not be seen by its 'perpetrator' as 'unreasonable': a point made in the context of the 1997 Act by Lord Sumption in *Hayes* at p.12).

58. ‘Anti-social behaviour’ is a specific term of art within the 2014 Act, defined at s.2(1):

> *“ In this Part “anti-social behaviour” means—(a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person, (b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or (c) conduct capable of causing housing-related nuisance or annoyance to any person.”*

The ’Part’ of the Act covers the issue of injunctions under s.1 for which such ‘anti-social behaviour’ is a precondition. Yet strikingly, despite the title of the Act, Parliament did not use the same threshold for Community Protection Notices, Public Space Protection Orders or indeed ‘Closure Orders’ (indeed used different thresholds for each one). The expression ‘anti-social behaviour’ does not appear in s.43 at all, whether as a precondition for a CPW or indeed a CPN. On the face of it, this appears to reflect a deliberate choice by Parliament not to use the ‘off the peg’ expression of ‘anti-social behaviour’ (already commonly understood given ‘ASBO’s) but have a specific threshold for CPNs (and slightly differently PSPOs) with s.43(1)(a) ‘detrimental effect’ and s.43(1)(b) ‘unreasonable conduct’.

59. However, the expression ‘anti-social behaviour’ is used when discussing Community Protection Notices in the White Paper (to describe various conduct like graffiti and litter), Explanatory Notes (noise nuisance) and Guidance (‘a written warning must be issued to the person committing ‘anti-social behaviour’) and used discussing CPNs in *Sanderson* at p.31:

> *“….Parliament intended that a CPN (and any prior warning) should be served on the person who is engaging in the anti-social behaviour, with a view to getting that person to desist, ultimately on pain of a criminal sanction.”*

Nevertheless, this does not suggest that ‘anti-social behaviour’ is some additional statutory test for a CPN (or CPW) under s.43. It is not being used to mean ‘anti-social behaviour for the purposes of s.2 of the Act’. That would be to use the Explanatory Notes or Guidance to gloss the Act: precisely what the Court in *Sanderson* had warned against at p.21. Rather, it is an example of how a legal expression (such as ‘duty of care’) has become so familiar that it has entered ordinary English as convenient *shorthand* for a sort of recognisable conduct. It has the added legitimacy of being the title of the 2014 Act (even though, as I noted, it is primarily injunctions which use the expression). Indeed, s.43(1): “*(a)…the conduct of the individual…is having a detrimental effect of a persistent or continuing nature on the quality of life of those in the locality…and (b)…the conduct is unreasonable”,* does not lend itself to a ‘label’ and I can understand the attraction of shorthand like ‘anti-social behaviour’.

60. Indeed, ‘anti-social behaviour’ is a convenient shorthand for s.43 because far from being an *additional* hurdle on top of the two criteria in s.43(1), it seems to be a slightly *lower* hurdle. It is difficult to envisage any ‘unreasonable conduct’ which has a ‘detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality’, at least to local residents, that would not also amount to ‘conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises’ or even ‘conduct which has or is likely to cause harassment, alarm or distress’. s.43 appears to be a deliberate Parliamentary choice to reject the more generalised concept of ‘anti-social behaviour’ for a more targeted and rather higher threshold as set out in s.43, albeit at the price of a pithy description. In the absence of that, ‘anti-social behaviour’ can legitimately be considered a subset of ‘s.43 conduct’ and so convenient shorthand for it, provided that it is not used to gloss - indeed to *dilute* - the statutory threshold in s.43 (which of course was not the issue in *Sanderson*, which was concerned with what might be called ‘statutory vicarious liability’).

61. Therefore, in fairness to Mr Johnson, he is in good company in using ‘anti-social behaviour’ to describe what I might call ‘s.43 conduct’. He gives the example of a local authority landlord seeking possession for arrears when accommodation was not affordable which he contends would not be ‘anti-social behaviour’. However, Ms Bhogal replied that the manner in which a landlord deals with a tenant (e.g. unannounced visits contrary to the tenancy, breach of privacy etc) and repeated unjustified threats of possession proceedings could very well in theory amount to ‘anti-social behaviour’. I agree with Ms Bhogal, although given the conduct is by a public landlord (who along with the Police is generally charged with addressing anti-social behaviour) it is more likely in practice such conduct would be alleged as ‘harassment’ under the PHA. Whilst I was not addressed on these cases, I add for good measure this was found in *Worthington v Metropolitan Housing Trust [2018] HLR 32 (CA)* and in *Birmingham CC v Afsar [2020] 4 WLR 168* at p.33, Warby J rejected the submission that protest was excluded from ‘anti-social behaviour’ in s.2 of the Act, noting the Court in *Dulgheriu* had made a PSPO concerning a protest. Therefore, different statutory wording between s.2 in *Afsar* and s.59 in *Dulgheriu*, but same basic outcome: limitation of lawful protest. In conclusion, the same is also true here. I see no warrant at all for excluding conduct which is lawful or in exercise or assertion of legal rights from the definition of ‘anti-social behaviour’, even if that were the legal test for s.43, which in my judgment it is clearly not. I therefore turn to the final aspect of Ground 1(a): whether the Defendant *reasonably* believed that the conduct was ‘unreasonable’ and/or ‘anti-social behaviour’.

62. Under s.34(1), a local authority issuing a CPN must be 'satisfied on reasonable grounds' the two statutory criteria are met: s.43(1)(a) 'detrimental effect'; and s.43(1)(b) 'unreasonable conduct'. As I have observed, s.43(5) is not structured in the same way, but I accept here the Defendant's 'satisfaction' that the conduct was 'unreasonable' and its labelling of it as 'antisocial behaviour' must also be based on 'reasonable grounds', in the sense that it is challengeable on Judicial Review if 'unreasonable' in a public law sense. As Lord Atkin famously said in his stinging dissent in *Liversidge v Anderson [1942] AC 206 (HL)*, being 'satisfied of something on reasonable grounds' is a matter scrutinisable by the Court: only in Alice in Wonderland do words mean whatever the person using them chooses.

63. I was addressed on the 'standard of review' for 'reasonableness': a vitally important and ongoing debate in Public Law discussed in the context of PSPOs by Turner J in *Dulgheriu* at ps.23-27; and May J in *Summers* at ps.34-39. Neither adopted what might be described as 'full-blown proportionality review' (legitimate aim, rational connection, 'less restrictive alternative' and 'fair balance': c.f. *Bank Mellat v HM Treasury (No.2) [2014] AC 700 (SC))* at one end of what has been called 'the sliding scale of review', but neither adopted what is often called '*Wednesbury* Review' at the other end. In fairness, Lord Greene in *Wednesbury* itself adopted (as I have noted) quite an open-textured approach, it was Lord Diplock in *CCSU v MCS ('GCHQ') [1985] AC 374 (HL)* who, anticipating the possible adoption of proportionality review in the future, said traditional '*Wednesbury* Review' applied to:

> *"…a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

In *Dulgheriu*, Turner J at p.27 adopted an approach a step down from proportionality review *"Considering alternative ways…that the defendant could and should have secured its objectives short of imposing a PSPO"* whereas in *Summers*, May J at p.39 adopted the approach of Lord Lowry in *R v SSHD exp Brind [1991] 1 AC 696 (HL) 765* (where despite Lord Diplock's anticipation in *GCHQ*, common law proportionality review was not adopted): *"Could a decision-maker acting reasonably have reached this decision ?"* There is no inconsistency. *Dulgheriu* involved protest and the fundamental common law right of freedom of expression (indeed much of the argument was about Art.10 ECHR): an area fertile for proportionality review c.f. *R(Keyu) v FCO [2016] AC 1355 (SC)*. *Summers* did not. Moreover, Turner J's standard in *Dulgheriu* is concerned with alternative measures more apt to questions of reasonableness of a CPW generally and I shall use it in Ground 4.

64. In my judgment, May J's use in *Summers* of Lord Lowry's test: *"Could a decision-maker acting reasonably have reached this decision ?"* seems more apt to review of whether the Defendant had 'reasonable grounds' to be 'satisfied' the Claimant's conduct was 'unreasonable' within s.43(1)(b), had a 'detrimental effect' within s.43(1)(a) and also amounted to 'anti-social behaviour'. Moreover, in considering 'reasonableness' as May J discussed in *Summers*, it is legitimate to consider factors such as whether the Defendant went wrong in law, misinterpreted the statute, acted on no evidence, came to a conclusion on the evidence it could not reasonably reach, took into consideration factors which it ought not to have done and failed to take into account factors which it should have done (which in fairness are the issues Lord Greene identified back in *Wednesbury*). However, whilst I reject the loaded term 'deference', I bear in mind that in considering 'detrimental effect' May J in *Summers* (upheld in *Dulgheriu*) emphasised at p.25 that s.59:

> "….*strongly points to local authorities being given a wide discretion to decide what behaviours are troublesome and require to be addressed within their local area. This requires local knowledge, taking into account conditions on the ground, exercising judgment (i) about what activities need to be covered by a PSPO and (ii) what prohibitions or restrictions are appropriate for inclusion in the order."*

In my judgment, similar factors apply to the Defendant's assessment of 'unreasonableness'.

65. Applying that approach, save one important argument I will address under 'Ground 1(b)' below, I am entirely persuaded the Defendant was reasonable in being 'satisfied' that the Claimant's alleged ongoing conduct was 'unreasonable' and indeed 'anti-social behaviour':

65.1 Firstly, even simply focussing on Dr Poole, Mr Connor explains convincingly his concerns that on the information from Dr Poole, including his statement but also those emails Mr Connor had seen from the Claimant that he had crossed a line from what might be termed 'reasonable landlord behaviour' to 'unreasonable landlord behaviour' (if not on quite the scale in *Worthington*). Of course, the Claimant was entitled to enforce his property rights and visit to inspect on notice, but Mr Connor concluded that the Claimant 'had not relented in the slightest' despite Dr Poole making his concerns clear and indeed Mr Connor was concerned (given the email of 17th August) that the Claimant 'was deliberately behaving in this way in order to get Dr Poole to leave' which of course Dr Poole then said he would, only for the Claimant still to pursue him by proceedings. In my judgment, the Defendant was reasonable in its conclusions that the Claimant was acting unreasonably.

65.2 Secondly, the Claimant's disputes had spread beyond his tenant (and indeed his previous tenant of 12 Strutt Road) to the neighbours. Even assuming in each case that the Claimant was asserting and exercising his legal rights, as Mr Connor describes the Defendant considered, he was doing so with several people in several ways in a similarly combative manner and indeed was continuing to do so. Mr Rowe was complaining of 'aggression' from the Claimant and Ms Rivers joined him in criticising the Claimant's conduct on 19th December and indeed further combative pre-action correspondence with Ms Rivers on Christmas Eve, as Mr Connor put it *'at a date and time calculated or likely to cause harassment alarm or distress to Ms Rivers as there was no urgent matter to resolve other than the arbitrary timeframe that was set in the letter'*. The Defendant was reasonably entitled to reach this conclusion and indeed more broadly that the allegations were true and the Claimant's conduct towards the various residents of Strutt Road was 'unreasonable'.

65.3 Thirdly, save with allegation (5) which alleged conduct which was clearly lawful and in exercise or assertion of legal rights, I accept the Defendant acting reasonably could conclude allegations (1)-(4) entailed unlawful conduct. Indeed, Mr Johnson submitted allegations (2) and (3) (taking photographs without permission and shouting and swearing at residents – i.e. Mr Rowe) were 'insufficiently precise' (considered under Ground 2 below) not that they were lawful or in exercise or assertion of legal rights. The Defendant could reasonably conclude this was not only 'unreasonable conduct' but unlawful, especially along with allegation (4) of 'verbal aggression' in demanding a key or the removal of a padlock from Mr Rowe. Mr Connor considered whether there was a course of conduct amounting to harassment under s.1 PHA and in my judgment could reasonably reach that conclusion (even if a prosecution would be extremely difficult). Likewise, even assuming the Claimant was entitled to use the right of way, as Mr Connor noted, allegation (1) - using the right of way and peering in the windows and appearing to take photographs or videos 'without the tenant's consent' - raised issues about Dr Poole's covenant of quiet enjoyment (*'a tenant's lawful possession…will not be substantially interfered with by the..lessor': Tanner v Southwark LBC [1999] 3 WLR 939 (HL)).* The Defendant could reasonably conclude that covenant was breached. I go no further than finding the Defendant *had reasonable grounds for believing* the *manner* of the Claimant's conduct on allegations (1)-(4) was unlawful despite his legal rights.

65.4 Fourthly, whilst the February CPW stated (and Ms Bhogal submitted) the conduct was merely 'alleged' against the Claimant, I have found the Defendant was actually 'satisfied' the allegations were true. Therefore, I have scrutinised the reasonableness of that conclusion and I find the Defendant indeed had reasonable grounds to be satisfied the allegations against the Claimant were true and 'unreasonable conduct'. Moreover, I also accept the Defendant could reasonably conclude it was 'anti-social behaviour', which I have observed is a lesser threshold than 'detrimental effect' and 'unreasonable conduct' combined in s.43. In any event, I find the Defendant was only using the expression 'anti-social behaviour' as shorthand following the statutory Guidance which tells 'authorised persons' the CPW *'must make clear to the individual that if they do not stop the anti-social behaviour, they could be issued with a CPN'*. To the extent the February CPW departed from the literal terms of s.43(5)(a), it did so in compliance with the statutory Guidance. (No complaint is made about that in this case and once one realises that 'anti-social behaviour' is used as shorthand, no complaint could be made within the parameters of challenging statutory Guidance as recently clarified in *R(A) v SSHD [2021] 1 WLR 3931 (SC)*).

65.5 Finally, though I need not rely on it, for good measure there is also the judgmental point raised in *Summers* about the wide judgment given to local authorities *'to decide what behaviours are troublesome and require to be addressed within their local area'* which in my judgment includes considerations of 'unreasonable conduct' and 'anti-social behaviour'. The particular aspect of relevance here to this is the spreading and continuing impact of the Claimant's conduct (whether lawful etc or not) on Strutt Road: that his disputes were spreading from his own property and starting to affect others' properties and were also continuing e.g. the incident in December 2019. This is directly relevant to the issue of 'unreasonableness' for the purposes of s.43 of the Act. In other words, this was not just legal action from afar from the Claimant who was not visiting Strutt Road: it was an ongoing and escalating set of disputes which manifested itself in conflict there: it was the sort of 'unreasonableness' at which s.43 was 'targeted' and certainly within the reasonable judgment of the Defendant 'required to be addressed'. Moreover, as I consider later under Ground 4, the Defendant considered more serious options like prosecution and injunction before choosing a CPW as a 'more encompassing but less draconian measure' for the unreasonableness of the conduct.

Ground 1(b): Could the Defendant be reasonably satisfied of the allegations without speaking to the Claimant first ?

66. I can address the other grounds of challenge more briefly as they overlap. They all, in various ways, address what Mr Johnson called 'the short point at the heart of the case':

> *"Is it lawful for a local authority to issue a statutory warning notice where the decision to issue is based on allegations received about the recipient to which the recipient has not been afforded any opportunity to respond, in circumstances where the warning is a precursor to service of a formal Notice that has potentially far-reaching consequences. The Claimant submits that it is not lawful to do so because to do so would be either (a) unreasonable; or (b) procedurally unfair."*

In fact, Mr Johnson puts that point in five slightly different ways:

66.1 Ground 1(b) alleges the Defendant could not reasonably have been satisfied of 'anti-social behaviour' (or as I would prefer to call it, 's.43 conduct'), given the CPW ostensibly 'alleged' conduct which was lawful or in exercise / assertion of legal rights, without first disclosing the 'allegations' to the Claimant for his response.

66.2 Ground 2 alleges even aside from the reasonableness of the Defendant's conclusion, that issuing a CPW without doing so to the Claimant was procedurally unfair.

66.3 Ground 3 alleges that even aside from Grounds 1(b) and 2, issuing a CPW without doing so breached the Defendant's own 'incremental' ASB policy.

66.4 Ground 4 alleges that taken in the round (including not discussing the allegations first with the Claimant, especially as they were of lawful conduct) issuing the CPW was public law unreasonable given there were less intrusive options.

66.5 Mr Johnson also submits that the Court cannot conclude that the failure to disclose the allegations to the Claimant before issuing the CPW made no difference or even 'no substantial difference' to the outcome given what the Claimant would have said.

67. Mr Johnson is right to submit that what I have teased apart as Ground 1(b) is not really a 'procedural fairness' ground. It is not so much concerned with fairness to the Claimant as the quality of the Defendant's decision-making. I shall return in Ground 2 to the recent discussion of procedural unfairness in *Pathan v SSHD [2020] 1 WLR 4506 (SC)*. There Lady Arden noted *R(Osborn) v Parole Board [2014] AC 1115 (SC)* where Lord Reed gave three justifications for procedural fairness: satisfaction of intuitive expectations of fairness, congruence with the Rule of Law; and overall costs of public decision-making. These factors were quite separate from the quality of the actual decision, as Lord Reed said at p.69

"This point can be illustrated by Byles J's citation in Cooper v Wandsworth Board of Works (1863) 14 CBNS 180, 195 of a dictum of Fortescue J in Dr Bentley's Case (R v Chancellor of Cambridge, Ex p Bentley (1723) 2 Ld Raym 1334): "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, on such an occasion, that even God himself did not pass sentence on Adam before he was called on to make his defence." The point of the dictum, as Lord Hoffmann explained in AF (No 3) p.72, is Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making."

68. By contrast, the issue in Ground 1(b) here *is* the quality of the Defendant's decision-making - Mr Cooper and his colleagues are *not* omniscient. The issue, in the light of the approach to 'reasonableness' as explained and applied in *Summers,* boils down to this: Could the Defendant, acting reasonably, have been 'satisfied' as it stated in the February CPW '*that your conduct is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and is unreasonable'* having regard to the conduct it acknowledged was 'alleged' as it had not heard the Claimant's response to it, yet of which it was 'satisfied' without hearing that response ? In my judgment, it is necessary to consider the different elements of that conclusion: 'detrimental effect', 'unreasonableness' (and also 'anti-social behaviour') on the different allegations made (briefly given the discussion above). I then finally turn to question the underlying premise of this ground of challenge.

69. As to 'detrimental effect', as I indicated above, I struggle to see why the Defendant needed the Claimant's answer to the allegations to be 'satisfied on reasonable grounds' that the Claimant's alleged conduct was having a 'detrimental effect' within s.43(1)(a) of the Act. As analysed, 'detrimental effect' concerns the extent of impact on 'those in the locality'. In argument I inelegantly suggested that 'detrimental effect' was the *'actus reus'* of s.43 whereas 'unreasonableness' was the *'mens rea'*. Rightly, Mr Johnson questioned the analogy, but the point is that 'detrimental effect' is concerned with the *impact* on the alleged 'victims' of conduct, not the *state of mind* of the alleged 'perpetrator'. Indeed, in *Dulgheriu,* Turner J rejected an argument that the 'detrimental effect' even had to be objective. Therefore, in terms of the reasonableness of the Defendant's decision-making (as opposed to fairness of the process to the Claimant), in my judgment the Defendant had all the information it needed to conclude reasonably that the Claimant's alleged conduct was having a 'detrimental effect' within s.43(1)(a) without first getting his side of the story.

70. ‘Unreasonableness’ is more difficult. There are distinctions between the allegations:

70.1 Allegations (2) and (3), related to the alleged incident on 19th December, were allegations of taking photographs and videos of people without their consent; and shouting and swearing at them, so it was plainly open to the Defendant to conclude this would be ‘unreasonable’ (indeed it could reasonably conclude it was unlawful): the issue is its conclusion it was *true* in the absence of the Claimant’s perspective. However, before the January CPW, Mr Rowe complained of the incident on 19th December and had an eyewitness (if not independent), Ms Rivers. Therefore, especially given material from the Claimant himself on the other allegations about both Mr Rowe and Ms Rivers, I accept even before the January CPW, the Defendant could reasonably accept allegations (2) and (3) even without the Claimant’s account. In any event, by the February CPW, the Defendant also had the information from Mr Conley who said the Claimant had shouted and sworn at him but then wrongly obtained a judgment against his landlord Mr Gallagher. Then on 1st February, the Claimant’s response to this allegation described his perspective on the altercation supposedly with Mr Gallagher. Therefore, by the time of the February CPW, three different people (Mr Rowe, Ms Rivers, Mr Conley) had made allegations about the Claimant’s conduct on 19th December and he had put his side in detail as to the incident with Mr Conley. In my judgment, the Defendant was reasonably entitled to conclude on the information it had, including from the Claimant, that he had photographed and videoed Strutt Road residents without consent and shouted and sworn at them and this amounted to ‘unreasonable’ (indeed unlawful) conduct.

70.2 Allegations (1) and (4) I have already found the Defendant could reasonably be satisfied were ‘unreasonable conduct’ even if lawful or in exercise or assertion of legal rights (indeed could reasonably find were unlawful) and I find there were reasonable grounds for this belief even without seeking the Claimant’s perspective. Even leaving aside the Claimant’s detailed account on 1st February, the information the Defendant had even prior to the January CPW included not only the perspective of Mr Rowe and Dr Poole but also the Claimant’s perspective through his emails to Dr Poole and other litigation correspondence etc. Given that the Defendant already had the Claimant’s contemporary perspective and reasons for his conduct in his own words, I accept the Defendant could reasonably conclude that if asked, he would just re-iterate that (probably in the same combative tone as in October or worse).

70.3 On allegation (5), there is force in Mr Johnson's point that decision-makers will usually struggle to conclude the exercise or assertion of legal rights (e.g. legal disputes and litigation in CPW allegation (5)) was 'unreasonable' without first getting the perspective of the individual. I need not lengthen an already over-long judgment with judicial citations on the importance of hearing from both sides even in a 'clear case' (although that is more of an issue of procedural fairness under Ground 2). Could the Defendant here reasonably have concluded that allegation (5) was 'unreasonable conduct' from the Claimant without first hearing his 'side' ? In my judgment, it was reasonable to conclude that in this case for three reasons:

70.3.1 Firstly, the material the Defendant already had was not just limited to the perspective of Dr Poole, Mr and Mrs Rowe, Ms Rivers (and Ms Adams). As noted above, the Defendant had access to the Claimant's emails and correspondence to them, indeed it was that correspondence (and the written Court documentation) which constituted not just evidenced the allegation. Therefore, the Defendant already had the Claimant's perspective and his reasons for taking the action he did. Speaking to him again would add little.

70.3.2 Secondly, given the Defendant's experience in asking the Claimant for simple information in October yielded extremely combative correspondence making serious allegations of misfeasance against the Defendant, in my judgment in terms of the *reasonableness of the evidential material* the Defendant already had (as opposed to fairness discussed in Ground 2), I consider the Defendant reasonably concluded that putting the allegations to the Claimant would generate (considerably) more heat than light and on the material it already had in the Claimant's own words, it had enough.

70.3.3 Thirdly, the real issue was whether the manner of his litigation in allegation (5) was 'unreasonable'. The Defendant was entitled to take into account its conclusions I have accepted were 'reasonable' in being satisfied the Claimant had committed the conduct alleged in allegations (1)-(4). Moreover, as I have already said, in relation to allegations (1), (4) and (5) it already did have the Claimant's 'side' in contemporary communication and was reasonably entitled to conclude that the conduct of his disputes and litigation referred to in allegation (5) was indeed 'unreasonable'.

I accept the Defendant's conclusions were reasonable even without the Claimant's 'side'.

71. Those conclusions on 'detrimental effect' and 'unreasonableness' apply equally to 'anti-social behaviour' which was not a separate conclusion or threshold but shorthand in the CPW following Guidance. If anything, s.2 like 'detrimental effect' focusses on the 'victim' and of course Courts routinely make interim ASBIs without hearing from a Defendant. Although they have their 'Day in Court', a CPW is not enforceable in contempt.

72. This is enough to reject Ground 1(b) and Ground 1(a). However, one reason I can take the remaining grounds relatively shortly is that I simply do not accept the underlying premise that the Defendant 'did not have the Claimant's side before issuing the CPW'. It certainly did not have the Claimant's 'side' before issuing the *January CPW*, but that is not the decision now under challenge. Indeed, even if is now 'invalid' (which is not part of the challenge and on which I have not been addressed) it still had practical consequences: see e.g. *R(Majera) v SSHD [2021] UKSC 46* at ps.27-42). The practical consequence here was the Claimant was informed of the same allegations as later appeared in the *February CPW* (which is the one under challenge) and whilst not formally offered an opportunity to respond certainly took it in great detail in his pre-action letter of 1st February which I have quoted above. For reasons given above, in my judgment, save for the incident on 19th December, the Claimant correctly identified the underlying events and complainants which gave rise to the allegations and answered them fully. Indeed, even in relation to the 19th December, whilst the Claimant responded about an altercation with 'Mr Gallagher' (i.e. Mr Conley) rather than the incident with Mr Rowe, it is striking it was *the same day* despite the fact no date being given (and the allegations not being in chronological order). Moreover, even now after full disclosure of the underlying material, statements the Defendant gathered and Mr Connor's Court statement, in his own the Claimant still maintains essentially the same case (save swapping Mr Conley) and ignores the allegation from Mr Rowe and Ms Rivers. (I come back to that at the end of this judgment under the 'no difference' issue).

73. In any event, when issuing the CPW under challenge on 12th February, the Defendant had the Claimant's detailed (and predictably combative) response to all the 'allegations'. Mr Johnson submits that there is no evidence it considered them because Mr Connor's statement does not say so in terms. However, the point is that this was precisely the sort of combative response Mr Connor had anticipated and why he felt seeking representations was unnecessary. It did not affect, and in my judgment entirely reasonably did not affect, the conclusion that the Claimant's conduct on the specific allegations of which the Defendant was 'satisfied' had a 'detrimental effect' (etc) and was 'unreasonable conduct'

Ground 2: Procedural Unfairness

74. As discussed in *Osborn* and noted in *Pathan*, procedural fairness is a different challenge to 'reasonableness'. Indeed, as noted in *Pathan*, Lord Reed explained in *Osborn* at p.65:

> *"[Some] dicta might be read as suggesting the question whether procedural fairness requires an oral hearing is a matter of judgment…reviewable by the court only on Wednesbury grounds. That is not correct. The court must determine for itself whether a fair procedure was followed….Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."*

75. *Pathan* was a complex decision. In short, the claimant had limited leave to remain based on his sponsorship by his employer. Without telling him, the Secretary of State revoked his employer's licence, in effect meaning his application for leave was bound to fail unless he varied it. One majority of the Supreme Court (Lord Kerr and Lady Black as well as Lady Arden and Lord Wilson, with Lord Briggs dissenting) held that the duty of procedural fairness had obliged the Secretary of State to *inform* the claimant of this development so he had the opportunity to apply to vary even though any representations about the existing leave were bound to fail or 'pointless'. However, a different majority (Lord Kerr, Lady Black and Lord Briggs, Lady Arden and Lord Wilson dissenting) held that the duty of procedural fairness did not extent to the granting of a particular period of time to do so as that would amount to granting a *substantive benefit* akin to temporary leave to remain itself.

76. I referred the parties to *Pathan* because it illustrates the issue that *if* procedural fairness (assessed objectively, not on the *Wednesbury* standard) required the Claimant to have been notified of the allegations to give him an opportunity to comment before the CPW, it was no defence to that failure of procedural fairness that the Defendant considered (as it plainly did) the Claimant's representations would not make any difference. That was one way of interpreting Ms Bhogal's 'no difference' submission. However, as I clarified at the start of oral argument, another way of putting Ms Bhogal's submission was that even if there had been unlawfulness, relief should be refused under s.31(2A)(a) SCA 1981:

> *"The High Court…must refuse to grant relief on an application for judicial review…if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."* (I cited *R(Gathercole) v Suffolk CC [2021] PTSR 359 (CA)*)

s.31(2A) concerns the Court's retrospective view: *Pathan* the Defendant's prospective view.

77. Therefore, Mr Connor's prospective view that to get the Claimant's response to the allegations before issuing a CPW would be pointless is no defence to an allegation of procedural unfairness about that, even if it is highly relevant (and I return to it) on s.31(2A). However, that really begs the question whether there was procedural unfairness in this case.

78. Mr Johnson relied on Lord Loreburn in *Board of Education v Rice [1911] AC 179 (HL),*182

> *"The Board of Education will have to ascertain the law and the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial."*

Nevertheless, those words need to be read in the particular context of that case: a statutory inquiry by the Board of Education into whether a local education authority had fulfilled its statutory duties in paying teachers and whether the salaries were reasonable. In other words, the Board of Education were resolving an employment relations dispute under a statutory power and acting, in the language of the age: 'quasi-judicially'. That is a long way from the present case. In his classic analysis in *Ridge v Baldwin [1964] AC 40 (HL)* Lord Reid was at pains at pgs.65/72 to distinguish between the extent of the requirements of what was then called 'natural justice' in different contexts. In the context before him, the dismissal of a police constable without the chance to defend himself, hardly surprisingly Lord Reid (applying old authority on such dismissals) found a breach of natural justice. However, Lord Loreburn's comment in *Rice* about a duty "*fairly to listen to both sides, for that is a duty lying upon everyone who decides anything"* cannot be read as determining the duty of procedural fairness in a case where a public authority acting reasonably (as I have found) is giving a CPW to an individual, partly as a procedural protection prior to a CPN.

79. In *Pathan*, there was no dispute from any Justice about Lady Arden's reliance at p.55 on the 'modern classic' analysis of Lord Mustill in *R v SSHD exp Doody [1994] 1 AC 531 (HL)*:

> *"Procedural fairness is adaptable to the environment in which it is applied. Procedural unfairness does not entail the decision-maker must comply with a pre-designed set of rules. As Lord Mustill held in..Doody…560, what fairness requires in any particular case will depend on the circumstances and may change over time:*
>
> > *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that*

(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

80. With that in mind, I start with an analysis not of fairness in the abstract but what procedural fairness required in the particular statutory context, reminding myself that is assessed objectively. The context of s.43 of the Act is that it creates a statutory order - the CPN - the breach of which is a criminal offence. s.43(6) it requires someone issuing a CPN to inform any body or individual 'the person thinks appropriate'. The statute plainly does not require the potential subject of the CPN to be informed. However, this is because s.43(5) (as I observed, in a development from what was proposed in the White Paper) provides other preconditions to the issue of a CPN, namely a written warning to B within s.43(5)(a) and A being satisfied under s.43(5)(b) that despite having enough time, B's conduct is still having a detrimental effect. As I observed, the statutory purpose of the s.43(5)(a) warning is certainly to get the individual to desist from the conduct (as stated in *Sanderson* at p.31) but also to give the individual the opportunity to change their ways and indeed to *give them the procedural protection of a warning before a CPN is issued*. The statute does not expressly provide for any 'pre-warning' of the CPW, nor does the statutory Guidance. I am satisfied that the common law duty of fairness does not require that either, for five reasons.

81. Firstly, there is no procedural unfairness in failing to give a 'pre-warning about a warning'. As Ms Bhogal understandably asked, if it is necessary to warn of a warning, is it also necessary to warn of that warning about a warning ? Whilst Lord Mustill in *Doody* stressed the importance of giving someone who will *be adversely affected* by a decision an opportunity to make representations on his own behalf, he also observed what fairness demands *depends on the statutory context*. In s.43, Parliament chose through s.43(5)(a) to provide a specific written warning before a CPN can be issued. It did not specifically give the individual the right to make representations about a CPN first as it could easily have done (e.g. through s.43(6)). So, the Claimant's submission asks the common law duty of fairness for a CPW (itself a procedural protection) to go further than the statute does for a CPN (the real 'adverse decision') against which it provided only a retrospective appeal under s.46. This make little sense: fairness does not require a 'pre-warning about a warning'

82. Secondly, Lord Mustill in *Doody* spoke of a right to make representations about an adverse decision before or afterwards. Whilst there is no specific statutory *right*, the practical effect of the CPW is that it gives an individual an *opportunity* to make representations in response to the CPW before a CPN is issued. By analogy with the discussion in *Stannard* of the opportunity to request a CPN be rescinded and Judicial Review of refusal rather than appeal, there is plainly also an opportunity to request a CPW be withdrawn and to make representations about its contents before a CPN exposes an individual to criminal sanction. Whilst I rejected the Defendant's argument this meant a CPW was not judicially reviewable I also stressed this informal approach should be tried first (as the Claimant did). The Defendant's submission about this approach seems to me to have much more force on procedural fairness rather than amenability to Judicial Review. Ultimately, the CPW creates a 'statutory space' prior to a CPN in which there is an opportunity to make representations. I am satisfied in the context of a CPW that is all the common law duty of fairness requires.

83. Thirdly, the CPW not only provides this 'statutory space' but what Lord Mustill in *Doody* called the 'gist of the case an individual must answer' (as well as warning them of the consequences of carrying on s.43 conduct). Moreover, if a CPW is vague, the ability to make representations afterwards following *Stannard* (and *Doody*) includes the ability to ask for more detail. Mr Johnson states allegations (2) and (3) were 'insufficiently detailed' so the Claimant focussed on the incident with Mr Conley and did not know of Mr Rowe / Ms Rivers' allegation. However, the Claimant did not ask for clarification yet correctly identified the date of the incident (and has still not engaged with what Mr Rowe says).

84. Fourthly, in any event, the practical effect of the January CPW which was subsequently replaced after the Claimant's letter of 1st February, was that he had the opportunity to make representations in response to the allegations *prior to the CPW under challenge*. (Whilst this argument would not have been available to the Defendant had they not responded to that letter by amending the CPW, they did so and so it is available to them). Therefore, whilst given *Pathan* the Defendant's view that to invite representations was pointless before the January CPW would have been no answer to procedural unfairness (although I would not have accepted unfairness anyway for the three reasons above), by the February CPW the Claimant had given the Defendant detailed representations in any event. It does not matter that he was not specifically invited to do so: he took the opportunity and that and the Judicial Review claim prompted change from the January to the February CPW. Therefore, the January CPW served the (unintended) purpose of being precisely the 'pre-warning' which the Claimant says he should have had and gave him the opportunity to make the representations he chose to make. Even if the Defendant merely saw that letter as what they had been expecting and as adding little, I have already rejected the argument that they were not satisfied on reasonable grounds of the s.43 criteria when issuing the February CPW.

85. Finally on Ground 2, insofar as Mr Johnson submitted there was procedural unfairness in the sense of a failure to follow statutory Guidance or internal policy, I will deal with the latter under Ground 3 below. However, in Ground 2, as I have said the scheme of s.43 provides a 'statutory space' in which representations can be made about a CPW (with no direct sanction) which has been issued before a CPN (with a direct sanction) can be issued. The statutory Guidance does not suggest there is any greater obligation than that. Indeed, it does not talk of giving individuals the opportunity to make representations before, or even after, a CPW. Rather, the Guidance directs authorised persons as to the *content* of a CPW and 'making clear to the individual if they do not stop the anti-social behaviour, they could be issued with a CPN' (which the Defendant echoed in the February CPW). It also suggests other information authorities 'may wish' to include in it: which the Defendant did in part 'outlining the specific behaviour' and 'setting out the potential consequences', if not giving a specific timeframe (which would be inapposite in a case such as this as opposed to the example given of clearing up rubbish). Indeed, the statutory Guidance indicated that how a warning could be given was up to the agency: here the Defendant opted for a more formal approach than the Guidance required, but no complaint could be made - at least about the February CPW. For those reasons individually and cumulatively, I also reject Ground 2.

Ground 3: Breach of Defendant's Policy

86. Here the Claimant moves above the statutory or common law requirements into those adopted by the Defendant itself, in particular its 'incremental' ASB Policy (which I shall re-quote below) which sets out stages of action: 'Advice', 'Warning', 'Acceptable Behaviour Contract', 'Mediation' and 'Enforcement'. The Claimant argues that in failing to discuss the issues with him first and proceeding straight to a CPW, the Defendant jumped straight to the 'enforcement' stage - in breach of their own policy and so that this was unlawful.

87. Whilst Mr Johnson did not refer to any authority on this ground in his Skeleton, I referred Counsel to *Mandalia v SSHD [2015] 1 WLR 4546 (SC)* where Lord Wilson said at ps.29-31

> "29…[T]*he applicant's right to the determination of his application in accordance with policy is now generally taken to _ow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363 at [68]: "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.*
>
> *30 Thus, in R (WL (Congo)) v Secretary of State for the Home Department [2012] 1 AC 245…., Lord Dyson JSC said simply, at para 35: "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute."….*
>
> *31 But, in his judgment in the WL (Congo) case, Lord Dyson JSC had articulated two qualifications. He had said, at para 21: "it is a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers." But there was ample flexibility in the process instruction to save it from amounting to a fetter on the discretion of the caseworkers. Lord Dyson JSC had also said, at para 26, "a decision-maker must follow his published policy . . . unless there are good reasons for not doing so."*

But the Secretary of State does not argue that there were good reasons for not following the process instruction in the case of Mr Mandalia. Her argument is instead that, properly interpreted, the process instruction did not require the caseworker to alert Mr Mandalia to the deficit in his evidence before refusing his application. So the search is for the proper interpretation of the process instruction, no more and no less. Indeed in that regard it is now clear that its interpretation is a matter of law which the court must therefore decide for itself: R (SK (Zimbabwe)) v Secretary of State for the Home Department [2011] 1 WLR 1299, para 36, Lord Hope of Craighead DPSC). Previous suggestions that the courts should adopt the Secretary of State's own interpretation of her immigration policies unless it is unreasonable…are therefore inaccurate."

There was no doubt the ASB policy was a lawful exercise of the statutory discretion to adopt a policy by the Defendant. However, Ms Bhogal submitted that (i) on its proper interpretation, the ASB policy enabled the Defendant to choose the stage at which they started; (ii) in any event, the Defendant had not started at 'enforcement' but at 'Advice' or at most 'Warning'; (iii) (in no quite so many words) even if not, there were good reasons to depart from Policy given the Claimant's stance in October correspondence.

88. In the course of adopting my own construction of the ASB Policy following *Mandalia*, I will set it out again so far as is material to this case (the emphasis is my own):

"Hinckley and Bosworth Borough Council follows an incremental approach to responding to and taking action against those individuals causing anti-social behaviour in our borough. We aim to provide a consistent and proportionate response towards all perpetrators of anti-social behaviour. We recognise that in some circumstances individuals causing anti-social behaviour will not realise that their behaviour is impacting on others, therefore where appropriate and necessary, referrals to other supportive agencies will be made…..

Advice: Letter/verbal: Issued to highlight allegations of anti-social behaviour which have raised concern.

Warning: Issued to highlight a person's ongoing or more serious involvement in anti-social behaviour and a request for this behaviour to stop.

Acceptable Behaviour Contract: Voluntary contract issued to address a person's anti-social behaviour and to support them in stopping this behaviour

A person can enter the incremental approach at any stage dependant on the severity of the incident reported and/or the timeframe since any previous incidents. In the majority of cases, the officers are guided by a 6 month timeframe when determining the most appropriate stage to enter the tiered approach. If deemed…appropriate, an individual can also be issued with the same sanction on multiple occasions.

….Mediation….Mediation is not applicable in all circumstances.

.Enforcement Enforcement action is sometimes the only measure available to the council to prevent further anti-social behaviour.

There are a number of legal sanctions the council is able to utilise to legally challenge a person causing anti-social behaviour. This list is not exhaustive but includes: Injunction; ***Community Protection Notice****; Closure Order; Noise Abatement Notice; Possession. The Council will work in partnership with the Police to consider criminal sanctions where appropriate.*

Neighbour Disputes. Not all neighbour disputes should be dealt with as anti-social behaviour. Depending on the circumstances of a complaint, a complainant may be advised to get their own legal advice in relation to their complaint….

Insufficient Evidence to Proceed. During the course of an investigation there may be a number of reasons why an investigating officer cannot take action….Reasons may include…mitigating circumstances with regards to the perpetrators…."

89. Likewise, I repeat and emphasise part of the Defendant's 'Corporate Enforcement Policy'

"HBBC uses compliance advice, guidance and support as a first response in the case of many breaches of legislation. ***Advice is provided, sometimes in the form of a warning letter, to assist individuals and businesses in rectifying breaches as quickly and efficiently as possible, avoiding the need for further enforcement action. A warning letter (sometimes referred to as an 'informal letter') will set out what should be done to rectify the breach and prevent re-occurrence.*** *If a similar breach is identified in the future, this letter will be persuasive in considering the most appropriate enforcement action to take on that occasion…."*

This passage in the Defendant's general Enforcement Policy (including prosecution) in my judgment fits in snugly to its more specific ASB Policy in that the 'warning letter' or 'informal letter', despite the word 'warning', in substance fits into the 'Advice' stage in the ASB Policy as is made clear by the beginning of that highlighted passage.

90. Returning to the ASB Policy, central to it is this paragraph which I repeat one more time:

> *"A person can enter the incremental approach at any stage dependant on the severity of the incident reported and/or the timeframe since any previous incidents. In the majority of cases, the officers are guided by a 6 month timeframe when determining the most appropriate stage to enter the tiered approach. If deemed…appropriate, an individual can also be issued with the same sanction on multiple occasions."*

This is certainly located oddly within the ASB Policy, sandwiched between 'Acceptable Behaviour Contract' and 'Mediation'. Yet, it is plainly general in application and not limited to either of those stages, as would be perfectly clear if it were cut and paste upwards above 'Advice'. Such idiosyncratic paragraph ordering does not affect the meaning of the ASB Policy as a whole. Whilst interpretation is a matter for the Court, I do not interpret it as if it were a statute, but as a practical document to be read by the Defendant's officers and the public in a common-sense way. As pointed out in *Mandalia*, a policy cannot be so inflexible as to fetter a public body's discretion. Its meaning to its intended audience is quite clear: "*A person can enter the incremental approach at any stage dependant on the severity of the incident reported and/or the timeframe since any previous incidents."* In short, the Defendant's policy specifically enables it to start higher than 'Advice' depending on the severity of the incident (that must be a matter for the Defendant to judge, at least subject to the constraints of public law reasonableness). Therefore, even if the Defendant had started at 'enforcement', it would not have been a breach of its ASB policy, even if 'unreasonable'.

91. However, whilst Mr Connor spoke of 'enforcement options' in his statement, that is because he was for a while considering prosecution or an injunction, both of which were clearly 'enforcement' under the ASB Policy. However, in that same statement he indicated that he and his colleagues came down some degrees to the CPW. Mr Johnson submits that as Mr Connor and his colleagues clearly anticipated a CPN would be issued that this was in truth a 'Community Protection Notice' and so 'enforcement'. However, the fact the Defendant anticipated matters may lead to a CPN does not turn a CPW into a CPN. Not least, as I have discussed above, s.43(5)(b) provides an additional precondition of being 'satisfied' before issuing a CPN that the conduct was 'still' having a detrimental effect. The Defendant's officers could make predictions but they had a statutory requirement to give the Claimant 'enough time' and to reassess the 'detrimental effect' before a CPN. Therefore, in my judgment, the CPWs were plainly not – yet - the 'enforcement' stage.

92. Mr Connor suggested and Ms Bhogal submitted the CPWs were at the lowest stage: i.e. 'Advice'. I disagree: this was not an informal advice letter, it was a statutory warning and immediate precursor to 'enforcement action' in the form of a CPN. In terms of the ASB Policy, it was plainly in my judgment a 'warning' at the second stage. However, this was not a breach of the ASB Policy as I have explained, because the Policy enabled the Defendant to start at a higher level than 'Advice' due to the severity of the incidents. Whether that was 'reasonable' in all circumstances I consider in a moment under Ground 4.

93. Finally, even if I am wrong on my interpretation of the ASB Policy as enabling the Defendant to start at 'Warning' rather than at 'Advice', I would have found there were 'good reasons' to depart from the policy in that respect. As Ms Bhogal submitted the Claimant's combative response to a simple request for information in October justified the view of Mr Connor and his colleagues that 'Advice' to the Claimant would have achieved little. Whilst *Pathan* makes clear 'pointlessness' is not an answer to a charge of procedural unfairness, the Defendant's reasonable decision (as I consider it was) that the 'Advice' stage would have been unproductive in my judgment constituted 'good reasons' to proceed to the 'Warning' stage. Therefore, for those reasons I also reject Ground 3 and turn to Ground 4.

Ground 4: Unreasonableness

94. Mr Johnson's Skeleton Argument on Ground 4 was four short paragraphs alleging the CPW was based on untested and unfounded allegations on which the Claimant was not consulted despite being a condition precedent to a CPN; without findings of fact a requirement to 'stop the anti-social behaviour' was unreasonable; and the CPW was disproportionate. As Mr Johnson engagingly accepted, sometimes such an unreasonableness Ground which pulls together strands of other Grounds is simply "0 + 0 + 0 + 0 = 0", but in this case he contended it was at least "¼ + ¼ + ¼ + ¼ = 1". I will consider the proportionality point after first returning to those strands on 'reasonableness' of the Defendant's conclusions.

95. I fear reiteration of other grounds here does add up to zero. I have not allowed the Defendant to fudge its conclusions the 'allegations' were true and 'detrimental effect' under s.43(1)(a) and 'unreasonable conduct' under s.43(1)(b). Nevertheless, I have explained why I consider those conclusions were reasonable notwithstanding that the January CPW was issued prior to having the Claimant's perspective and how the CPW under challenge in February did have the Claimant's perspective even if it did not change their conclusions. Therefore, in substance, I maintain my detailed conclusions for the reasons given above.

96. However, perhaps the Claimant's challenge of the *form* of the February CPW does need a little further analysis. I have already explained how in 'requiring the Claimant to stop the anti-social behaviour', the CPW was simply echoing the statutory Guidance's approach to the terms of the warning required by s.43(5)(a) of the Act. However, this does rather jar with the description of the conduct as 'allegations', especially as I have found the Defendant in fact was plainly satisfied the allegations were true. However, this does not mean the issue of the CPW in that form was *unreasonable* even if it was slightly confusing. When issuing the January CPW, it was more understandable for the Defendant to describe the conduct as 'alleged' because it had not yet been disclosed to the Claimant for his comment, even though the Defendant was by then satisfied the allegations were true (even if the rest of the January CPW and its 'requirements' undermined the point of that). However, by the February CPW, the Claimant had responded to the allegations (even if the Defendant could reasonably consider it was what they might have anticipated, added little to the information they already had and did not change their conclusions). It probably would have been better if the February CPW had deleted the phrase 'it is alleged that' (the statutory Guidance suggests setting out the actual conduct relied on, not merely 'alleging' it). However, this infelicity in drafting does not render an otherwise reasonable CPW 'unreasonable'. The Defendant was understandably more concerned to delete the stringent requirements upon the Claimant which was rather more important and the 'softening' of conclusions into 'allegations' at least in form was not unreasonable.

97. I turn however to the substantive decision to issue the CPW itself on the basis the Defendant was satisfied on reasonable ground the allegations were true and within s.43. Should the Defendant nevertheless have first chosen a less intrusive option ? In examining that issue, I adopt Turner J's approach in *Dulgheriu* at p.27 of *"Considering alternative ways…that the defendant could and should have secured its objectives short of imposing a [CPW]."* Having reasonably found the allegations against the Claimant were true and fell into s.43, in my judgment it was perfectly reasonable and proportionate to issue a CPW rather than a mere 'advice letter' or 'informal warning' even without speaking to the Claimant first. As discussed under Ground 3, it could reasonably conclude 'advice' would not work and in any event, the Defendant's conclusions were that the Claimant's conduct was having a 'detrimental effect' on various people in Strutt Road (including Dr Poole who it reasonably concluded had been driven away). This conduct fell within s.43 and under the Defendant's own policy was serious enough to move up to the warning stage, as I also found.

98. Therefore, the Defendant actually did *"considering alternative ways…that it could and should secure its objectives short of imposing a [CPW]"*and concluded a CPW was justified. Indeed, as Mr Connor describes, the Defendant had already considered *more* intrusive options such as an injunction of prosecution and had 'come down' to a CPW on Counsel's advice. Therefore, the Defendant itself had conducted something akin to its own 'proportionality' exercise which is to be given some weight. In my judgment, the Defendant's decision that the Claimant's conduct merited a CPW was reasonable. I therefore dismiss Ground 4 as well as all the other grounds and so the claim is dismissed

'No substantial difference'

99. However, in case I am wrong, especially Mr Johnson's key point: it was unlawful to issue the CPW without first seeking the Claimant's representations, I turn to s.31(2A)(a) SCA:

> *"The High Court…must refuse to grant relief on an application for judicial review…if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."*

In *R(Gathercole)* Coulson LJ referring to earlier authority observed at ps.36 and 38:

> *"**36** The argument that, in some way, this power was restricted to procedural or technical errors was comprehensively rejected in R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] 1 WLR 5161. This court said:*
>
> > *"47… the proposition that the section 31(2A) duty applies only to 'conduct' of a merely 'procedural' or 'technical' kind, and not also to 'conduct' that goes to the substantive decision-making itself, is a surprising concept. The duty has regularly been applied to substantive decision-making across the whole spectrum of administrative action, including in the sphere of planning, both at first instance and in decisions of this court…*
> >
> > *73 Although we did not hear full argument on the point, we would be prepared to say that the narrow construction of section 31(2A) contended for by the parish council is, on the face of it, mistaken…..The concept of 'conduct' in section 31(2A) is a broad one, and apt to include both the making of substantive decisions and the procedural steps taken in the course of decision-making. It is not expressly limited to 'procedural' conduct. Nor, in our view, is such a qualification implied. But this, we must stress, is not a necessary conclusion for the purposes of our decision…*

> *55. The mistake in Mr Streeten's submissions here is that, in the context of a challenge to a planning decision, they fail to recognise the nature of the court's duty under section 31(2A). It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker: see the judgment of Lindblom LJ in the Williams case [2018] 1 WLR 439, para 72. If, however, the court is to consider whether a particular outcome was 'highly likely' not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision making process, and what its result would have been if the decision maker had not erred in law…."*
>
> ***38** It is important a court [on] judicial review does not shirk the obligation imposed by s.31(2A). The provision is designed to ensure that, even if there has been some flaw in the decision making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure the judicial review process remains flexible and realistic."*

Indeed, Ms Bhogal went so far as to submit that any 'failure' to invite the Claimant to make representations before the CPW made 'no difference'. Whilst she made her submission on the old common law approach to relief, now Parliament has intervened on s.31(2A)(a) SCA, I prefer to consider that provision. In any event, I entirely agree with Ms Bhogal that the Defendant's 'failure' *to invite the Claimant to make representations* prior to the February CPW made no difference whatsoever, especially given the Claimant had *taken the opportunity to make detailed representations* in his letter of 1st February. That letter means I need not embark in any mental gymnastics in concluding that a failure to invite him to do something he had taken the opportunity of doing anyway made no difference at all to the outcome. I have found the Defendant received and considered the letter but it did not change its conclusions although that and the claim did lead to the change in the CPW. Even if the 'conduct complained of' was some failure to 'keep an open mind' on that letter, again it told the Defendant little it did not already know about the Claimant's perspective as set out in all his correspondence so the outcome would not have been substantially different.

Conclusion

100. Therefore, I dismiss all the Claimant's grounds of challenge to the February CPW and even if I am wrong about the 'representations' point I would still have refused relief under s.31(2A). Accordingly, I dismiss the Claimant's claim for Judicial Review of the February CPW and invite representations when handing down this judgment as to the order and costs.

Judge Tindal **9th November 2021**
