Neutral Citation Number: [2018] EWHC 179 (QB)

Case No: HQ17X04688

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
INTERIM APPLICATIONS COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 February 2018

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

BETWEEN :

Basingstoke & Deane Borough Council	**Claimant/ Respondent**
- and -	
John Eastwood & Others	**Defendants**
-and-	
MMT	**Applicant**

- -
- -

Alex Grigg (instructed by **BPS Solicitors**) for the **Applicant**
David Lintott (instructed by the **Borough Solicitor**) for the **Respondent**

Hearing date: 5 February 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. On 21 December 2017, the Claimant applied, without notice, for an injunction under s.187B Town & Country Planning Act 1990 ("the 1990") to restrain anticipated breaches of planning control. The respondents to the application were all Gypsies or Travellers. The named Defendants were those known to the Claimant to have control of the various plots of land situated within the Borough near Basingstoke. Martin Spencer J granted the injunction which was then sealed on 22 December 2017 ("the High Court Injunction"). The operative parts restrained the Defendants from causing or permitting any or all of the following:

   i) the further deposit of hardcore or other materials on upon (sic) the land marked upon the Plan annexed to this order ("the land");

   ii) works relating to or creating a residential use on the said land;

   iii) entry onto the land of any caravans, touring caravans or mobile homes;

   iv) the use of any caravans, touring caravans or mobile homes currently present on the said land, save those that are already in use; and/or

   v) the taking of any steps in the construction of any day room and the use thereof.

2. The land had actually been divided into 51 individual plots each owned by one of the Defendants. The land comprises an agricultural field lying outside of any settlement boundary. Under the relevant planning controls, the land was protected from development, and in particular residential development, because it lay outside the settlement boundaries and within open countryside. The land was also situated in an identified flood zone.

3. At the time of the injunction, some of these plots had already been occupied by Traveller families and their caravans. Planning permission had not been obtained for residential use. Some families had submitted applications to the Claimant for such permission.

4. The Claimant's intention in applying for the injunction was to preserve the status quo by allowing only the caravans and development present on the land at the time of the injunction to remain there. That status quo would be maintained until the planning applications had been determined.

Prior history

5. An injunction prohibiting the use of some parts of the land for residential purposes had previously been granted by His Honour Judge Everall QC at Reading County Court on 15 August 2014 ("the County Court Injunction"). However, the area covered by the injunction covered only part of the land. In particular, a strip of land to the east of the field and an area of land to the west of the field were omitted from the area covered by the previous injunction.

6. On or around 10 March 2017 two caravans were brought onto Plot 3 on the site along with two other wooden structures and various residential items. The First Defendant stated that he believed that he was not in breach of the County Court Injunction as the

caravans were situated at the end of the site which he did not believe was covered by the County Court Injunction.

7. On 1 December 2017, the Claimant wrote to the First Defendant stating that it intended to apply to vary the County Court Injunction and giving 2 months to cease the residential use of the land.

8. Over the weekend of 9-10 December 2017, works were undertaken on plot 6. The works related to the laying of hardstanding and the positioning of caravans on the site. The works that had occurred on site related to the area that was not covered by the County Court Injunction. Three caravans had been located on the site on land that was not covered by the County Court Injunction

9. On 11 December 2017, three copies of the County Court Injunction, addressed to the First Defendant, the occupier and to "persons unknown" were delivered to the site. The Third Defendant was found in occupation of the site along with a further occupier, the Fifth Defendant, who was present on Plot 6. The Fifth Defendant stated that she was living on the site with her husband, the Fourth Defendant. She told the Claimant's planning officer that a planning application had been submitted. The officer explained to the Fifth Defendant the terms of the County Court Injunction and that further works on site may result in a breach of the order and advised that no further works should occur on the site.

10. It was this activity in December that gave rise to concern on behalf of the Claimant that more of the plots might be occupied in breach of planning control over the holiday period and so it applied to the High Court seeking an order preventing this.

11. The injunction application was supported by a witness statement of Mark Fletcher, Principal Planning Officer of the Claimant ("Mr Fletcher"), who set out the full history of the land and the basis on which the injunction was sought.

Service of the Order

12. The High Court Injunction contained the following provisions as to service of the order on "persons unknown":

    "This order may be served, and shall be treated as properly served … by placing the Claim Form, application notice, and injunction in clear plastic envelopes nailed to a stake or gatepost, or other prominent location on the Site."

    Similar provisions provided for service on the identified Defendants by nailing the plastic envelopes on stake or gateposts on plots 3 and 6.

13. The High Court Injunction was served by Mr Fletcher during the afternoon of 22 December 2017, in accordance with the service provisions I have set out. In his witness statement, Mr Fletcher confirmed that the High Court Injunction was displayed at the northern entrance to plot 3, which is immediately adjacent to plot 4.

14. Mr Grigg accepts that the Claimant has served the High Court Injunction in accordance with the service provisions in the order. That does not dispose of the issue of when the High Court Injunction came to the attention of the Applicant.

Occupation of plot 4

15. Mr Fletcher states that, on 2 January 2018, he started to receive reports from members of the public and emails suggesting that a new entrance had been created to the land, hardstanding had been deposited and additional caravans had arrived. Prior to that, reports were made to a local Parish Council Clerk on 30 December 2017 about trees being cut down and the siting of caravans.

16. As a result of that, he undertook a site visit on 2 January 2018 and established that an entrance had been created to plot 4 on which were now situated a number of caravans. A further site visit took place 4 January 2018 with the Claimant's Gypsy Liaison Officer to assess the works that developments works that had occurred on plot 4. It appeared that the new entrance had been created by the filling in of a bank and the importation of hard standing to allow access to the piece of land from the adjoining lane. Trees had been removed in order to allow the creation of this access. Hardstanding had been brought onto the site, 3 caravans had been positioned there and a structure been erected.

17. It is Mr Fletcher's evidence that he spoke to a woman who was present on plot 4 who said that her family (including the Applicant) had moved onto the plot on 25-26 December 2017. Mr Fletcher expresses doubt as to the correctness of the date as no activity was reported prior to the 30 December 2017. It is submitted by the Claimant that public concern was such that, had the activity described taken place earlier, then it would have been reported by member of the public.

Application to vary the High Court Injunction

18. By Application Notice dated 12 January 2018, the Applicant, MMT, applied to vary the High Court Injunction. It appears that the Applicant was at this stage acting in person. He made reference in the Application Notice to his having sought pro bono advice at the Royal Courts of Justice. In the evidence section of the Application Notice, he explained that he had moved onto plot 4 on 22 December 2017 and his family (including his mother and sister) moved onto the land on 26 December 2017. He stated that he had applied for planning permission on 2 January 2018 to site 3 caravans on the plot for residential use. He added that his mother was unwell and required a permanent place to live and had what he described as "life threatening" medical conditions.

19. The Application Notice did not set out the variation of the High Court Injunction he sought (although it can clearly be inferred that he wished to vary it to permit his continued occupation of plot 4). At this stage, the Applicant provided no other evidence beyond that stated on the Application Notice.

20. It was not until 1 February 2018 that further witness statements were provided by the Applicant.

    i) The Applicant provided a witness statement dated 1 February 2018. In relation to his family's history: "*We have never been able to find either a Local Authority site or land of our own and this has become increasingly desperate as the years have gone by.*" He stated that he purchased the plot on 16 December 2017, borrowing the money from other family members. He said

that he instructed solicitors who had told him that there was no injunction on the front of the land and that the firm had previously acted for people who were already living on the land. He added that he could see, when he purchased the plot, that there were Traveller caravans on an adjoining plot. He stated that he contacted Brian Woods, a planning agent, and asked him to put in a planning application. It was after that that he moved onto the land "*about midday on 22 December 2017, having cleared some of the briars on the entrance*". He claimed that he was unaware of the High Court Injunction until 4 January 2018. He concluded his statement: "*We have nowhere else to go and were we to leave the land, would be forced back onto the roadside… I would be prepared to give undertakings to the Court that we would not carry out any work in breach of planning control and ask the Court to allow us to remain on the land whilst our planning application is being determined, including any appeal.*"

ii) The Applicant's mother also provided a witness statement dated 1 February 2018. She wished to be joined as a defendant to the proceedings and to support the application to vary the High Court Injunction. She stated that she had five children: the Applicant and four other children (two of whom were aged 12 and 15). One of her daughters had a son who had turned 2 in July 2017. The Applicant's mother said that the family had travelled together and had always been on the roadside; they occupied three caravans. She provided details of medical conditions from which she suffered – kidney problems and seizures - and provided letters supporting this. I note that these are from doctors in the Brighton and Sussex area. She said that "a cousin" had purchased a plot of land and, on the evidence, it appears this is plot 6. She stated that the Applicant "*moved onto the land on 22 December 2017*" and that the rest of their family moved on 26 December 2017. She was, she said, not aware of the High Court Injunction until 4 January 2018 when the plot was visited by officials from the Claimant who served it. Finally, she stated: "*My family and I have nowhere else to go and it is becoming dangerous and harmful to be on the roadside. We would like to obtain planning permission to stay on the land and ask the Court to vary the Order so that we can remain here until the planning procedure has been gone through…*"

iii) On 2 February 2018, Mr Woods, the planning agent, provided a witness statement. He stated that he was first approached by the Applicant on 18 December 2017 and asked to submit a planning application. Mr Woods told him that it would not be possible to submit an application before Christmas and that it would not be lodged until the New Year. He stated that the Applicant was aware that Mr Woods' firm had submitted planning applications for two other people who had plots on the land. As to the prospects of success of the Applicant's application for planning permission he stated:

"… the first matter to note is the inability of the Council to be able to demonstrate a 5 year supply of pitches. This is a failure of policy to meet the needs of Gypsies and Travellers. I am satisfied that those occupying the site fall within the planning definition of Gypsy/Travellers as set out in the [Planning Policy for Traveller Sites (2015)]. To support my assertion with regard to the lack of a 5 year supply I attach a copy of an appeal decision in the same Borough from January [this] year.

I am also aware of some special medical circumstances that need to be considered in this case. As to the landscape the site is not located within the Green Belt and I note that there are dispersed frontage dwellings along the lane. With regard to access good visibility is available onto the lane. With regard to flood risk [a flood risk assessment] has been undertaken and was submitted with the application".

21. In response to the Application, but prior to receipt of the further evidence relied upon by the Applicant, the Claimant had filed a witness statement from Robert Sims dated 31 January 2018. After service of the Applicant's further evidence, the Claimant filed a second witness statement of Mr Fletcher dated 2 February 2018.

i) Mr Sims' statement deals with the planning applications received by the Claimant in relation to the land. The first application was received by the Claimant on 13 March 2017 in respect of plot 3 to change it to residential use. The Applicant's similar application was received on 2 January 2018. There had been previous applications relating to the land. The Claimant had received and refused (on 23 August 2013 and 9 March 2010) two similar planning applications for change of use of the land to permit residential caravans. The earlier of the two decisions was challenged by way of appeal. The planning inspector dismissed the appeal.

ii) Mr Sims set out the framework for planning decisions, including the requirement that decisions be taken in accordance with policies adopted by the Claimant unless material considerations indicate otherwise. The Claimant has adopted a Local Plan 2011-2029. It includes the Claimant's strategy for providing Gypsy and Travellers pitches under Policy CN5. Mr Sims stated that the Claimant's policy in this respect was scrutinised in a planning appeal. He has exhibited the decision of the Inspector dated 7 September 2016. At paragraph 35, the Inspector held that, notwithstanding that the Claimant had no provision for sites, there was not "*an ongoing failure of policy in relation to the provision of Gypsy and Traveller sites*".

iii) In his careful and detailed witness statement, Mr Sims stated his view, as a planning officer, of the Applicant's planning application. This was not prejudgment, but (as I understand it) an assessment made, in light of the application to vary the High Court Injunction, as to whether the Claimant ought to resist the application (or grant temporary planning permission, which was also an option available to the Claimant). He was of the view that the change of use sought under the planning application would be contrary to three policies: (1) flood risk (EM7); (2) highway safety (CN9); and (3) sustainability (CN5). However, he stated also that all relevant circumstances had to be considered, including the personal circumstances of the Applicant and his family, especially school-age children.

iv) In a section headed "Conclusions and Planning Balance", Mr Sims summarised:

45. The Council is unable to demonstrate a five year supply of gypsy and traveller sites and it is likely to be some time until the sites allocated within the Local Plan become available. This matter, together with the lack of alternative sites adds significant weight in favour of the

proposal. The provision of a settled base from which some of [the Applicant] and his family could access education and health services adds further weight in favour of the proposal.

46. However, the proposal would conflict with Policy CN5, CN9 and EM7 of the … Local Plan 2011-2029 and the guidance contained within the NPPF and PPTS in that [it] has not been demonstrated that the development would be safe from flooding, would not increase flooding elsewhere or appropriately demonstrating that there are no other appropriate sites outside areas that are at risk from flooding. Furthermore, previous and current planning applications have been deficient in their detail regarding the ability of the proposed access arrangements to integrate safety with the existing highway network. Furthermore the proposals would not achieve sustainable development as it would be physically isolated from the nearest settlement, as defined within the Local Plan, and would not encourage sustainable means of travel, which would conflict with criterion (c) of Policy CN5 of the Local Plan. These significant issues identified would exist for the duration of any planning permission and therefore a temporary consent would not be appropriate in this instance.

47. The DCLG letter dated 31 August 2015 sets out changes to national planning policy to make intentional unauthorised development a material consideration. The letter introduces a planning policy to make intentional unauthorised development a material consideration that would be weighed in the determination of planning applications and appeals. This policy applies to all new planning applications and appeals received from 31 August 2015. In this instance the [Applicant] has clearly carried out intentional unauthorised development, which constitutes a material consideration that weighs against permission being granted and would not be in accordance with the development plan as a whole.

48. On this basis the identified harm which would be caused by the development would outweigh the lack of five year supply of Gypsy and Traveller pitches and personal circumstances of the occupiers of the site.

49. Furthermore, in light of Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC) and Article 8 of the European Convention of Human Rights, regard has been had to the best interests of the children occupying the site. The concerns against granting planning permission represent existing issues associated with the site, public safety and the occupants themselves. It is proportionate to continue to resist the application to vary the injunction…

v) In his second witness statement, Mr Fletcher responds to the factual matters raised in the Applicant’s evidence. As to knowledge of the grant of the High Court Injunction, he points to the fact that the owner of plot 6 – who was served on 22 December 2017 – was a family member of the Applicant. The

Claimant invites me to conclude that it is likely that – even if they had not seen the various notices that had been affixed to the land on 22 December 2017 - the Applicant and his family would have been aware of the injunction through that connection.

22. Mr Grigg on behalf of the Applicant has made a number of criticisms of the Claimant's failure to carry out an assessment of the needs of the children on plot 4. He submits that the Claimant has performed only a "tick-box" exercise by completing a form that has simply noted the presence of children but done nothing to identify their needs.

Law

23. Section 187B of the 1990 Act provides:

"(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers in this Part.

(2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

(3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.

(4) In this section 'the court' means the High Court or the county court."

24. ***South Bucks District Council -v- Porter*** **[2003] 2 AC 558** is authority for the following propositions:

i) s.187B confers on the court an original and discretionary, not a supervisory, jurisdiction, to be exercised with due regard to the purpose for which it was conferred, to restrain actual or threatened breaches of planning control;

ii) it was inherent in the injunctive remedy that its grant depended on the court's judgment of all the circumstances of the case;

iii) although the court would not examine matters of planning policy and judgment (which lay within the exclusive purview of the authorities responsible for administering the planning regime), the court was not obliged to grant relief because a planning authority considered it necessary or expedient to restrain a planning breach; and

iv) the court would have regard to all, including the personal, circumstances of the case, was required (by s.6 Human Rights Act 1998) to act compatibly with Convention rights, and, having regard to the right guaranteed in article 8, the court would only grant an injunction where it was just and proportionate to do so.

25. A material consideration when considering the Article 8 rights of the respondent will be whether s/he is being required to vacate land that had been occupied. In some cases, that will require a determination of whether the original occupation of the land was lawful. In ***Mid Bedfordshire District Council –v- Brown*** **[2005] 1 WLR 1460**, the Court of Appeal considered the situation where the Claimant Council obtained an interim injunction under s.187B to restrain use of land for residential purposes and, in breach of that injunction, the respondents had moved their caravans onto the land. Subsequently, the respondents submitted an application for planning permission for a change of use to a Gypsy residential site. At first instance, the judge granted a final prohibitory order, but suspended it pending the determination of the planning application on the ground that the interests of the safety and stability of the young children on the site overrode the objective of safeguarding the environment. The Court of Appeal allowed the council's appeal. Mummery LJ, giving the judgment of the court, said [23]-[28]:

> [24] On the issue of the justice and proportionality of granting an immediate injunction the judge considered the countervailing factors, which, applying the principles laid down in ***South Bucks District Council -v- Porter*** **[2003] 2 AC 558**, he thought were against the grant of an immediate injunction: although the council had indicated that the permission was unlikely to be granted, the judge placed little weight on a view which he thought had been expressed without detailed consideration, and there was a possibility that the council would make a different planning decision, the time for making a decision expiring on 27 October 2004; although the judge found that there would be some environmental damage caused by the breach of planning control, it would not be serious and the injunction would not remove it; there were no alternative local official or private sites to which the defendants could move; and there would be hardship if the defendants were required to move, as that would affect the safety and stability of the defendant's small children. He thought that an injunction would not bring the defendant's unlawful activities to an end…
>
> [25] In our judgment, the judge's decision to suspend the injunction pending the determination of the planning application did not take proper account of the vital role of the court in upholding the important principle that the orders of the court are meant to be obeyed and not to be ignored with impunity. The order itself indicated to the defendants the correct way in which to challenge the injunction. It contained an express provision giving the defendants liberty to apply, on prior notice, to discharge or modify the order. The proper course for the defendants to take, if they wished to challenge the order, was to apply to the court to discharge or vary it. If that failed, the proper course was to seek to appeal. Instead of even attempting to follow the correct procedure, the defendants decided to press on as originally planned and as if no court order had ever been made. They cocked a snook at the court. They did so in order to steal a march on the council and to achieve the very state of affairs which the order was designed to prevent. No explanation or apology for the breaches of the court order was offered to the judge or to this court.
>
> [26] The practical effect of suspending the injunction has been to allow the defendants to change the use of the land and to retain the benefit of occupation of the land with caravans for residential purposes. This was in defiance of a court order properly served on them and correctly explained to them. In those circumstances there is a real risk that the suspension of the injunction would be perceived as condoning the breach. This would send out the wrong signal, both to others tempted to do the same and to law-abiding members of the public. The message would be that the court is

prepared to tolerate contempt of its orders and to permit those who break them to profit from their contempt.

[27] The effect of that message would be to diminish respect for court orders, to undermine the authority of the court and to subvert the rule of law. In our judgment, those overarching public interest considerations far outweigh the factors which favour the essential suspension of the injunction so as to allow the defendants to keep their caravans on the land and to continue to reside there in breach of planning control."

26. ***Broxbourne Borough Council -v- Robb and Others*** **[2011] EWHC 1626 (QB)** was a similar case, but without the element of defiance that the Court had found in ***Brown***. In ***Robb*** the local authority had obtained a without notice injunction prohibiting the stationing and occupation of residential accommodation, mobile homes or caravans on plots of land within a leisure park. The appellant had purchased one of the plots in ignorance of the injunction. He and his family permanently occupied the plot in a mobile home structure and caravan. The local authority's planning compliance officer advised him of the injunction and gave him 14 days to comply. The appellant maintained that he had nowhere else to go and had become settled. Cranston J refused to vary the injunction.

27. On appeal (**[2011] EWCA Civ 1355**), Tomlinson LJ held ([41] and [72]-[73]) that Cranston J had been right to decide that an application to vary an injunction is governed by the principles set out not only in ***Porter***, but also in ***Brown***. That required a consideration of:

i) planning issues (including whether the prospects of success are sufficiently strong to provide a factor of real weight weighing the balance in favour of granting a variation of the injunction pending the outcome of the appeal ([57]);

ii) the personal circumstances (including the implications of Article 8 of the European Convention of Human Rights and the best interests of any children); and

iii) the overarching public interest in ensuring that court orders are respected and obeyed.

28. Given a number of similarities between the ***Robb*** case and the case I have to decide, it is worth setting out the paragraphs from Cranston J's decision:

[44] As to the planning merits, Mr Willers has not persuaded me that there are real prospects that Mr Beary will succeed before the planning inspector. There are a series of hurdles which Mr Beary must surmount and I cannot be confident that he will do so. First, there are the green belt objections and whether there are the very special circumstances to justify a grant of planning permission. Mrs Heine's statement puts heavy emphasis on the significant unmet need for gypsy and traveller sites in the area as part of her case on very special circumstances. That rests in part on circular 1/2006 and the pitch requirements imposed on the council by the regional strategy. Even if circular 1/2006 is still in force at the time of the appeal before the inspector, and even if the Localism Bill abolishing regional strategies has not been enacted at that point, the direction of travel given the Secretary of State's clearly stated intentions is clear. That will be a material consideration in the determination of Mr Beary's appeal, with

the planning inspector having to calibrate the weight these factors should attract in accordance with what Sullivan LJ said in the Cala Homes case.

[45] Once the regional strategy is abolished it will be up to the council to decide the general level of need to be met through its own development plan documents. The council's intention is that it will not take enforcement action against existing long term residents at Wharf Road in the absence of alternative sites for them. It is undertaking a search for a site with some seven pitches elsewhere in the borough. One possibility which the March draft report suggests is a new site at Wharf Road, although there is the very strong objection by the Lea Valley Regional Park Authority to any such development, given its aspirations for the park. The council advances the not unreasonable contention that its approach is a legitimate and reasonable planning assessment which would be frustrated if empty plots at Wharf Road could be occupied by new gypsy and traveller households, who could obtain planning permission to remain until a new site elsewhere was allocated, since typically they would be able to raise analogous personal circumstances to Mr Beary.

[46] Then there are the flooding issues. There is the disagreement about the risks to the site between Mr Walton, Mr Beary's expert, and the Environment Agency, which the planning inspector will need to resolve on the appeal. There are situations where inspectors have granted planning permission, notwithstanding the breaches of PPS25, which does not allow caravans for permanent use in zone 3 flood plains. Thus Mr Beary will have to persuade the inspector that the site does not fall within the area of hazard contended for by the Environment Agency, alternatively that a state of affairs should be permitted which is regarded as unacceptably risky. Surmounting either of these hurdles casts further doubt on the reasonable prospects of Mr Beary's case.

[47] Even if the planning appeal does not have a real prospect of success, Mr Willers submits on Mr Beary's behalf that it would be disproportionate not to vary the injunction. The effect otherwise would be to force his family to leave the land in the absence of an alternative site. That would bear heavily on him and his family. In particular Article 8 would be engaged. The position of Mr Beary's children is strengthened by the recent decision of the Supreme Court to the effect that under the UN convention on the rights of the child their best interests must be a primary consideration in public policy making: ***ZH (Tanzania) -v- Secretary of State for the Home Department*** **[2011] UKSC 4, [2011] 2 WLR 148** [22]-[26].

[48] A leading case is ***Chapman -v- United Kingdom*** **(2001) 33 EHRR 18**, where the European Court of Human Rights held that there was no breach of Article 8 where a gypsy who lived with her family on her own land was refused planning permission and subject to consequential enforcement notices. The court accepted that her occupation of a caravan was an integral part of her identity as a gypsy. Thus measures which affected its stationing had a wider impact than on the right to respect for her home, because they also affected her ability to maintain her identity and to lead her private and family life in accordance with her tradition. Since the refusal of planning permission and the enforcement measures constituted an interference with her right to respect for her private life, family life and home, the issue then became whether interference was proportionate under Article 8(2).

[49] The court held that the fact of being a minority with a traditional life style different from the majority did not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, albeit that

this may have an impact on the manner in which such laws are to be implemented. It was however, a positive obligation on states to facilitate the gypsy way of life: [96]. The court did not accept the argument that because there is an unmet need for gypsy and traveller sites, the decision not to allow the applicant gypsy family to occupy land where they wished constituted a violation of Article 8. That would be tantamount to imposing on contracting states an obligation to make available an adequate number of suitably equipped sites. Article 8 did not give a right to be provided with a home. The court wisely noted that many people do not have adequate housing but that is a matter for political, not legal, action: [98]-[99]. The court continued:

> '[102] …When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established this factor would self evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community"

Where there was no alternative accommodation available the interference was more serious than where there was: [103]. In the result the court was not persuaded that there were no alternatives available to the applicant besides remaining on the land in the green belt without planning permission.

[50] In this case a primary consideration is the position of Mr Beary's children. There is the disruption to their education should the family have to leave the site, the children having settled into their new school over the last year. There are also implications for their future health and safety should the family have to take to the road. In his witness statements Mr Beary speaks eloquently of the need for his children to obtain a better education than he did and of his concerns for their safety. Fortunately, there are no health issues. Apart from the position of the children there is the self evident interference with the home and family life were they to be obliged to move. But on the other side of the balance, in considering proportionality, are the planning laws and their enforcement. The passage quoted from Chapman underlines the very great weight given to the conscious defiance of the law when establishing ones home on an environmentally protected site, and that a person in that position cannot expect the courts to be quick in defending them. While Mr Beary's conscious defiance of the law since he knew of the injunction cannot be visited on his children nonetheless, as Z H (Tanzania) made clear, their interest as a primary consideration does not mean that it cannot be outweighed by other factors in the balance so that interference with their Article 8 rights is proportionate.

[51] That leads to the third point, which in my view is decisive as the final nail in Mr Beary's case for a variation of the injunction. The fact is that there is properly in place an injunction prohibiting residential occupation of the site. To vary the injunction so as to permit the very action that it is designed to prevent would fail to acknowledge the force of the injunction. In ***Mid Bedfordshire District Council -v- Brown***, ***South Cambridgeshire District Council -v- Gammell*** and ***Wychavon***

District Council -v- Rafferty the Court of Appeal has made clear that, where there is a continuing breach of an existing injunction, and the application is to vary it for the future, so as to allow a person to continue to do the very act which the injunction prohibits, the need to uphold the authority of the court is of overarching importance in the exercise of the court's discretion.

[52] Mr Willers submits that the facts of ***Mid Bedfordshire District Council -v- Brown*** are distinguishable from those in the current case: there there were lies on the part of the travellers, a flagrant breach in going on to the land contrary to the injunction, apparent obfuscation on the part of the applicant for the variation, and a lack of apology to the court. In this case Mr Beary had been open and frank with the council, the council accept that he did not know of the injunction before moving on, his representatives had been diligent and Mr Beary has apologised to the court. In my view, however, although the facts of the present case may be distinguishable the crucial element is the principle which ***Mid Bedfordshire District Council -v- Brown*** establishes for the exercise of discretion by this court: the court should be slow to tolerate contempt of its orders, for to do so would diminish respect for them and undermine its authority.

29. Mr Lintott submits, rightly in my judgment, that s.187B injunctions in cases such as this are designed to preserve the status quo pending the determination by the relevant authority of any planning application.

30. In ***Basingstoke and Deane Borough Council -v- Thompson*** **[2018] EWHC 11 (QB)** HHJ Bidder QC considered an application by 10 Gypsy families to vary an injunction obtained pursuant to s.187B, to permit their residential occupation of a site in the countryside. This injunction had been obtained *after* the gypsies had begun works on a site but *before* they had moved on with their families. An application for planning permission had been made. In refusing the vary the injunction, the Judge held [137]-[150]:

(1) There is an overarching public interest in ensuring that court orders are respected and obeyed.

(2) It was a main purpose of Parliament in creating section 187B of the Act to ensure that the system of local and democratically-based planning grant was effective.

(3) The object of the original injunction was to preserve the status quo pending the determination of the planning process. Those who moved on to the site after the injunction in this case did so in "*conscious defiance of the injunction*".

(4) The variations sought were, effectively, sufficiently wide to render the original purpose of the injunction nugatory, that purpose being to preserve the status quo at the time of grant, which did not include any residence on the site, pending resolution of grant of permission or appeal.

(5) The flagrancy of the initial planned unauthorised occupation was such that it was, in many ways, more important in this case than in the cases of ***Brown*** and ***Robb*** to uphold both the authority of the court and to support the fundamental tenets of the planning system.

(7) The hardship to the defendants themselves, more significantly to their families and particularly their children, who had at present no alternative site to go to and would be forced on to the side of the road again, was obvious. However, that was their situation before the injunction was granted.

(8) While the best interests of the children must be a primary consideration they do not trump other considerations and, similarly, while a decision not to vary the injunction may lead to interference with their and their parents' Article 8 rights, there were other competing interests and the court must assess proportionality.

31. The assessment of proportionality is required when considering whether any interference with the rights protected by Article 8 is '*necessary in a democratic society'*: ***R (Daly) -v- SSHD*** **[2001] 2 WLR 1622**. Lord Steyn said:

> 'The contours of the principle of proportionality are familiar. In de ***Freitas -v- Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*** **[1999] 1 AC 69** the Privy Council adopted a three stage test. Lord Clyde observed, at p80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > "*whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it: and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.*"'

Submissions

32. Mr Grigg has submitted:

i) In relation to the children of the Applicant's family (two school age siblings and his 2-year-old nephew), the Claimant:

a) has not carried out a 'best interests' assessment. It could not reasonably be contended that to render children homeless on the roadside is in their best interests. The Supreme Court in ***Zoumbas -v- Secretary of State for the Home Department*** **[2013] 1 WLR 3690** has warned against penalising children for the actions of their parents; and/or

b) has failed to treat the best interests of the children as a primary consideration, or at all. It has made no attempt to "*identify the principal needs of the children, both individually and collectively, and have regard to the need to safeguard and promote them when making the decision*" (Baroness Hale in ***Nzolameso -v- City of Westminster*** **2015] UKSC 22**; **[2015] 2 All ER 942**; **[2015] PTSR 549**; **[2015] HLR 1** [27]).

ii) It was incumbent on Mr Fletcher and his fellow officers to give the question whether enforcement action (and particularly drastic action in the form of an application for an injunction) anxious consideration having regard not only to the personal circumstances of the Applicant and his family but also to:

a) the lack of alternative sites;

b) the inevitable consequence of a refusal to vary; unlawful roadside encampment for families with young children;

c) the Article 8 rights of the Applicant and his family; and

d) the question whether less intrusive measures could secure the legitimate aim (such as the issue of an enforcement notice or the grant of temporary planning permission with conditions) - the proportionality principle requires *inter alia* that the interference with a Convention right, here Article 8, is no more than is necessary to achieve the objective: see ***R (Daly)***.

iii) In the overall context it would be disproportionate for the families to have to move to hardship, instability, and real danger on the roadside, particularly when the best interests of their children are a primary consideration.

iv) ***Porter*** makes it clear that, while the court has original, not just a supervisory jurisdiction, it is still important for the court to consider the approach taken by the local authority. The court must consider the extent to which the Claimant has taken into consideration such issues as hardship, lack of provision, the best interests of children and (where there is no lawful site provision available) the risks associated with the alternative, i.e. roadside encampment. In the present case, there is no evidence that the Claimant has considered these important matters.

v) In relation to the planning issues, he submits that the Applicant's prospects of being granted planning permission are sufficiently favourable:

a) Relying upon the evidence of Mr Woods:

- the site is not being located within the Green Belt;
- there are 'dispersed frontage dwellings along the lane'; and
- as to highway safety, there is 'good visibility is available onto the Lane'.

b) He contends that the flood risk has not been properly demonstrated.

c) The Applicant and his family have never had a Local Authority site or been able to buy a site of their own in the past. The Applicant describes his family as 'increasingly desperate' in this respect.

vi) When determining the Applicant's planning application the Claimant (or on any appeal, the appointed Inspector) will have to consider:

a) the planning history of the site and the lawful use to which it can be put;

b) the relevant development plan policies;

c) the impact that the development would have on the appearance and character of the countryside – given the planning history and lawful use of the land;

d) highway safety; and

e) whether there are other material considerations which when taken together clearly outweigh the harm by reason of inappropriateness and any other perceived harm that has been identified including –

- site specific considerations,
- the adequacy of the development plan policy and whether and to what extent it will cater for the accommodation needs of Gypsies and Travellers in the District,
- the need for Gypsy sites nationally, regionally and in the District itself,
- the availability of alternative site provision,
- the need of the Defendants' families for a caravan site,
- the personal circumstances of the Defendants, their children and the members of their families,
- the human rights of the Applicant and other family members, and
- the race equality duty.

vii) Overall, bearing in mind the prospects of success, the Applicant's family personal circumstances (including his mother's ill health), the best interests of their children and the clear and urgent need for additional Gypsy sites in the Region and more particularly in the Claimant's area, it would be proportionate to vary or discharge the injunction.

viii) Insofar as the Court feels that it does not have sufficient evidence to make a decision, then the application to vary should be adjourned to enable that evidence to be obtained and for the Court to rule on any disputed issues of fact. In the meantime the Court should not require the Applicant and his family to vacate the land.

33. Addressing the three factors identified in ***Robb*** (see paragraph 27 above), Mr Lintott submitted the following:

Planning issues

i) The Court is required to make an assessment of the likelihood of the Applicant being successful in his planning application (or appeal). He submits that the change of use of plot 4 is plainly contrary to the Local Plan and similar development on the same land has been the subject of a dismissed appeal to a

planning inspector. These issues have not been addressed by the Applicant. In the circumstances, the Applicant cannot demonstrate that his prospects of success in obtaining permission are sufficiently strong to provide a factor of real weight weighing the balance in favour of granting a variation of the injunction pending the outcome of the appeal. In summary, for the reasons stated by Mr Sims, he submits that the likelihood of success is poor.

Personal circumstances (including Article 8 considerations and welfare of children)

ii) Relying upon ***Robb*** and ***Thompson***, he submits that the interference with the Article 8 rights of the Applicant and his family is proportionate (as it was in those cases) and that is so even taking into account the best interests of the children. He relies on the fact that, on the evidence, only the Applicant's mother is said to have particular health issues. Those issues do not require her to be present on this site and she was not present there until, at the earliest, 25-26 December 2017, after the injunction had been granted. No evidence has been provided by the Applicant as to any particular impact on the children on the site beyond what would be the self-evident interference with their home and family life were they to be obliged to move. Against that, he submits there is the public interest in maintaining the planning laws and their enforcement. The Applicant and his family have occupied the plot after the grant of the injunction and they have had a very limited time in occupation. The scale of the interference is comparatively lower.

The overarching public interest in ensuring that court orders are respected and obeyed

iii) He accepts that this is not a trump card; it does not relieve the Court of giving careful consideration to all the factors. Nevertheless, it is an important factor particularly in a case where there has been occupation *after* the grant of the injunction. As was noted by the Court in ***Thompson*** it was a main purpose of Parliament in creating s.187B of the Act to ensure that the system of local and democratically-based planning grant was effective. On the facts in this case, he submits this element should be given more weight against any variation than in ***Robb***. There, the appellants had occupied the site in ignorance of the injunction and had lived on the site for a period in excess of a year before steps were taken to remove them. He submits that the Court should conclude (a) that the Applicant must have known (at least in general terms) of the High Court Injunction before he occupied the land; and (in any event) (b) the period of occupation is very short.

iv) For these reasons the Court should refuse the application to vary. The Court should not adjourn for further evidence. The Applicant has had a proper opportunity to put whatever evidence upon which he wants to rely before the Court.

Decision

34. I need to determine an issue of fact before turning to address each of the factors that the Court must consider.

35. The injunction was granted on 21 December 2017. It was served (by being affixed to the land) on 22 December 2017. In his witness statement, the Applicant says that he moved onto the land "*about midday on 22 December 2017*". The Applicant's evidence, particularly having been filed *after* the evidence of the Claimant, is surprisingly lacking in detail. I was told at the hearing that he had moved a small touring caravan onto the land at this time. Mr Fletcher was at the site on 22 December 2017 carrying out service of the High Court Injunction. He did not see any caravan on the site. Could it be that the caravan was moved later, or given the time of year, was it too dark for Mr Fletcher to see it? There is an issue as to whether it would have been physically possible to move a caravan onto the site without the trench being filled in between the site and the road. Further, as recorded in Mr Fletcher's second witness statement, the Applicant's mother told him on 4 January 2018 that her family had moved onto the plot on 25 or 26 December 2017. She did not suggest that her son had moved onto the land on 22 December 2017.

36. On this evidence, I am not satisfied on the balance of probabilities that the Applicant had moved onto the land (in any meaningful sense) on 22 December 2017. Mr Grigg submitted that the Applicant could produce further evidence to support the Applicant's account. I am not prepared to proceed on that basis. The Application Notice was issued by the Applicant as long ago as 12 January 2018. The question of when the Applicant and his family began occupying the land is well-recognised by the Applicant to be very important. It is not a minor piece of the evidence which a party might overlook. If the Applicant had further evidence to support his claim that he had moved onto the land (in a caravan) on 22 December 2017 he should have provided it. I am not adjourning this application on the speculative basis that something might be forthcoming. I also consider that the point is not so significant that fairness would require the Applicant to be given further time to submit any additional evidence. Indeed, had the point been critical, a question would have arisen as to whether I ought properly to make a determination on paper and without hearing evidence. But it is not critical. The relevance of this evidence is really only to (a) the issue of the status quo at the time of the injunction; and (b) the time of occupation of the land. If the Applicant was in occupation of the plot *before* the grant of the High Court Injunction, then he would have an argument that the status quo favoured protection of his continued occupation. But it is plain that the Applicant, even on his evidence, did not begin occupying the land until *after* the injunction. Subsequent knowledge of the terms of the injunction goes only to the issue of whether there has been defiance of the order and for how long.

37. I also cannot reach a decision on the evidence as it stands as to when the Applicant and other family members became aware of the injunction. I struggle to believe the Applicant and his mother's evidence that it was not until 4 January 2018. Another family member, who lived on another plot, had been served with the injunction, and there was a post with the injunction affixed to it on the adjacent plot. It strains credibility that neither the Applicant nor any other family member became aware of this for nearly two weeks. I do not need to resolve this point in order fairly to determine the application because the dispute is only over a relatively short period of time. On the Applicant's evidence, he and his family had notice of the High Court Injunction on 4 January 2018 and would have been aware from that point (a) that their original occupation of the land had been in breach of the High Court Injunction; and (b) that their continued occupation of the land was in breach as well.

38. My assessment of the planning issues is that, on the evidence, I consider that the Applicant's prospects of success with his planning application are remote. They are certainly not of an order that would provide "*a factor of real weight*" when considering the overall balancing process. I regard the evidence given in Mr Sims' witness statement to be detailed, reasoned and cogent. Mr Sims has fairly and properly recognised the points that support the Applicant's planning application, but he nevertheless clearly articulates why these would be insufficient to outweigh the other planning considerations. Mr Grigg has not really advanced any answer to the points that he makes. Mr Woods' assessment of the Applicant's prospects of success with the planning application (see paragraph 20(iii) above) is not convincing; he does not state that the prospects of success are good. At best, it might be thought that he has identified what are the Applicant's best points.

39. It is plain that the Applicant's (and his family's) Article 8 rights are engaged. However, the extent of that interference appears to me to be limited. First, for the reasons I have given, the occupation of the land for residential purposes was never lawful. Second, the period of occupation was only a matter of weeks. They have known, on the Applicant's evidence, since 4 January 2018 that their occupation of the land was prohibited by the High Court Injunction. In ***Thompson***, HHJ Bidder QC held (asking himself similar questions):

> [144] The hardship to the defendants themselves, more significantly to their families and particularly their children, who have at present no alternative site to go to and will be forced on to the side of the road again, is obvious. However, that was their situation before the injunction was granted…
>
> [145] This is not a case, I accept, where any of the children have ill-health. None of the families have lived for very long on this site. The Council had no opportunity before making the application for the injunction to assess welfare issues because there was no one in residence…
>
> [147] I have reviewed the interests of the children. It is very clear that stability is a pressing need in their lives and their best interests lie in a stable base, and continuous schooling and health care…

40. In the present case, I have very little evidence (beyond general assertions) as to any particular impact that refusing to vary the order would have on the Applicant or his family (and in particular the children). I have no evidence at all about the particular circumstances of the children, their schooling, their care and whether they have any medical issues. Of course, as a general proposition, I readily accept that the best interests of, particularly, the 2-year-old nephew of the Applicant would be promoted by his being able to live in a stable environment free from the hazards of living by the roadside or the disruption of a life moving from place to place. But that was the status quo for this 2-year-old up until the 25-26 December 2017 when, on the Applicant's evidence, he moved, with the rest of his family, onto the plot. I do not accept the criticism of the Claimant for having failed to carry out a detailed assessment of the welfare needs of the relevant children. Mr Sims did consider this issue (as explained in his witness statement). I do not regard his conclusion as being obviously wrong or flawed. There is no suggestion that he failed to take into account evidence that was available. The complaint is that he failed to obtain such evidence. In that context, it is important to note that (a) no-one was occupying the land when the original order was

sought; and (b) the Applicant has not provided the Claimant with any information about the children to enable it to carry out any more detailed assessment and so it is impossible to make any assessment of what it is said Mr Sims would have obtained had he carried out the investigation that it is said he should have carried out.

41. I have noted the Applicant's mother's evidence about her health. But the evidence does not establish that her health would either be improved by remaining on the plot or made worse by being required to leave.

42. Turning finally to the overarching principle that court orders are to be respected and obeyed. I cannot improve on the expression of the principle by Mummery LJ in ***Brown***. Of course, I have not decided that the Applicant and/or his family moved onto the land after they had knowledge of an injunction restraining them from doing so. The case therefore does not have the element of deliberate defiance that was present in ***Brown***. But the absence of this factor does not render the overall principle any less cogent. In this case, the Court made an order, at a time when the land was not occupied, that it was not to be used for residential purposes. That order was made to protect the proper planning process. There is no suggestion that that order was not properly made. The Applicant and his family took up residence on the land after the making of that order. Even removing the element of defiance, the policy considerations that require the enforcement of court orders identified by Mummery LJ in [26] and [27] are just as compelling in this case. In my judgment they are weighty matters in the overall assessment of whether the Court should grant a variation of the High Court Injunction.

43. Balancing all these factors, I am satisfied that it would not be appropriate to vary the High Court Injunction to enable the Applicant and his family to continue their occupation of the land. I am satisfied that the interests of the Applicant and his family and the evidence that they present will be considered carefully as part of the planning process.