Neutral Citation Number: [2021] EWCA Civ 363

Case No: A2/2021/0364

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)
Mr Anthony Metzer QC (sitting as a Deputy High Court Judge)
QB-2020-004209

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
LORD JUSTICE WARBY

- -

(1) CHARLES ANDERSON
(2) BRIAN McGINLEY
(3) FREDDIE ANDERSON
(4) GERRY (JERRY) ANDERSON
(5) BRIDGET McDONAGH
(6) JOHN McDONAGH
(7) PATRICK COLLINS
(8) THOMAS CLEARY — **Appellants/ Defendants**

and

BASILDON DISTRICT COUNCIL — **Respondent/ Claimant**

- -
- -

Rebecca Hawksley (of **Claas Solicitors**) for the **Appellants**
Wayne Beglan (instructed by **Basildon District Council**) for the **Respondent**

Hearing date : 12 March 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 16 March 2021

Lord Justice Peter Jackson:

Introduction

1. At the end of the hearing of this appeal on 12 March 2021, we informed the parties that the appeal would be dismissed. These are my reasons for agreeing with that decision.

2. The eight appellants, members of the gypsy community (as they describe themselves), appeal from committal orders made on 12 February 2021 by Mr Anthony Metzer QC, sitting as a Deputy High Court Judge ('the Judge'). They were sentenced to periods of imprisonment, suspended on certain conditions. On this appeal they do not complain at the committal orders but challenge the conditions and seek reductions in the periods of imprisonment.

3. The case arises from the occupation of land south of Redlands, Hovefields Drive, Wickford, Essex, by the Appellants and others. The land is in the Metropolitan Green Belt and there has been a long history of attempts to develop it for use as a gypsy/traveller caravan site, which the Respondent, Basildon District Council, has restrained by injunctions and enforcement and stop notices. In particular, injunctions were granted by the High Court in 2004, 2006 and, in relation to adjacent land, 2007.

4. A full account of the background appears in the judgment of Foxton J, reported at *Basildon District Council v Anderson & Ors* [2020] EWHC 3382 (QB). In summary, on Saturday 28 November 2020, a planned invasion of the land took place, accompanied by an application for planning permission, filed after the close of business on the Friday evening. Foxton J described the events:

> "14. On Saturday 28 November 2020, the Council was contacted by Essex Police following reports of extensive work being undertaken on the Land. At 11.55, two police officers, PC Hadlow and PC Messenger, visited the Land. There they saw between 80 and 100 people working on the Land, with diggers and several large trucks in operation and numerous vehicles driving on and off the Land. Footage taken by an unmanned aerial vehicle operated by the police showed a substantial quantity of hardcore had been deposited on the Land, with several large trucks, numerous vans and an excavator in operation. The Land was in the process of being divided into plots (of which six had already been created). An access track had also been created from Hovefields Drive. PC Hadlow was told by one of those working on the Land that they were due to finish work on Sunday, and that those working had come "from all over the place".
>
> 15. At 8.30 am the following morning, Mr Ian Cummings, one of the Council's Planning Enforcement Officers, visited the Land. He saw a large HGV dumper truck leaving the Land, and the excavator in operation. There were a number of workmen (although fewer than 10) working, and a large-scale engineering operation appeared to be underway. However, no

> caravans or mobile homes were seen, nor are any to be seen in the photographs Mr Cummings took on this visit. Mr Cummings returned to the Land with a number of colleagues, including Ms Christine Lyons, at around 1pm that day to serve copies of an Enforcement Notice and a Stop Notice, issued following an emergency meeting of the Council's planning committee that morning. At the time of the visit, work was continuing on the Land, with about 30 men in attendance. As Mr Cummings sought to enter onto the Land to serve the Notices, an individual (now known to be Mr Patrick Collins, one of the Defendants) refused to allow entry, becoming agitated and aggressive. Mr Collins threatened to kick both Mr Cummings and Ms Lyons "between the legs" if they did not leave. The Council's party were required to leave, and Mr Cummins and Ms Lyons were followed by a large group of men as they did so. Mr Cummings left copies of the Notices stapled to a telephone pole, on a post near the entrance to the Land and across a fence line near the entrance to the Land. In the course of this visit, Mr Cummings did not see any mobile homes or caravans on the Land, and a number of photographs taken by him, which offer a wide view of the Land, do not show any mobile homes or caravans either. The Stop Notice was brought by the Council to the attention of Ms Jennings, and I was told at the hearing (and accept) that she advised the Defendants to comply with it.
>
> 16. "Before" and "after" photographs of the Land show the significant scale of the work and its impact on the appearance of the Land."

5. On the Sunday evening, the Council applied for and obtained an order from Garnham J, which prohibited any development work on the land save in accordance with planning permission, and prohibited the entry of mobile homes or caravans onto the land. The next day, a group of council officers, including Mr Cummings, together with a number of police officers, visited the land, by which time there was a large static mobile home and one or more smaller caravans on the land, and work was continuing. The police reported that some local residents described Mr Patrick Collins as having threatened to damage their houses with a bulldozer if they did not stop filming. As Mr Cummings sought to serve the order, Mr Collins picked it up and threw it in a hedge.

6. On 30 November, given the presence of dwellings on the land, the Council applied for a further injunction requiring those who had moved them onto the land to remove them. That order was granted by Cutts J, requiring all mobile homes and caravans to be removed by 4 pm on 2 December 2020.

7. On 4 December, the Appellants applied to vary the order of Cutts J and that application, together with the Council's application to continue the orders, came before Foxton J on 8 December. By this time the site contained eighteen touring caravans, one static caravan, three mobile homes, two portacabins, one wooden shed, and seventeen motor vehicles.

8. In a careful judgment, given on 9 December, Foxton J found there to be a serious issue as to a deliberate and flagrant breach of planning controls. The rapid and co-ordinated nature of the work begun on a Saturday suggested an attempt to achieve a *fait accompli* before anticipated legal countermeasures might be deployed. He considered, as required by *South Buckinghamshire District Council v Porter* [2003] 2 AC 558, the impact of the injunction on the Appellants. Having done so at some length, he accepted that being forced to leave the land involved prejudice to them, but that the evidence as to its extent and duration was less clear. He found that little weight could be given to a state of occupation that had been achieved in deliberate contravention of the Council's notices and the Court's orders. He therefore continued the orders, and included a power of arrest in the light of the history. The Appellants were required by 4.00 pm on Monday 14 December 2020 to remove from the Land any static caravans, mobile homes and touring caravans. They were prohibited, from (a) bringing a caravan, mobile home, or any other structure intended for, or capable of habitation, onto the land, or (b) erecting on the land any structure or building capable of, or intended to be put to residential use, or (c) from carrying out any works including but not limited to the laying of hardstanding on the land, and (d) allowing any persons to take up occupation of the land. They were ordered to pay the Council's costs, with an interim payment of £5000 to be made by 6 January 2021.

9. The Appellants sought permission to appeal. This was refused by Floyd LJ on 14 December, when he summarised the position in this way:

> "A striking feature of this case is that the applicants do not seek to defend their behaviour in seeking to outrun any attempt by the respondent Council to prevent their occupation of land without having previously obtained planning permission. Having built a bridgehead on the land in that way, they seek to maintain it because they contend that there was insufficient consideration given to the interests of those occupying the land and their families if the position in relation to occupation was returned to that before they entered on it. This is a highly unattractive argument."

The committal proceedings

10. The Appellants did not obey the orders. They did not remove any static caravans, mobile homes and touring caravans by the date contained in the order of Cutts J, nor by the date contained in the order of Foxton J. Instead, they carried on with further works and in some cases brought more dwellings and vehicles onto the land.

11. Inevitably, the Council issued applications for committal, on 5 January 2021 and 2 February 2021, and the matter came before the court on 10 February. The details of the breaches in relation to each Appellant were fully set out and admitted and it is unnecessary to repeat them here. The Judge, Mr Metzer QC, accepted the Council's submission that it was not easy to envisage a more flagrant and coordinated breach of planning control by a group of individuals acting in concert on previously undeveloped Green Belt land, that there had been a complete failure to comply with the orders, and that the circumstances in which further works had taken place aggravated the position. As Sullivan LJ put it in *Wokingham Borough Council v Dunn* [2014] EWCA Civ 633, the Appellants had "put two fingers up to the court".

However, Mr Beglan, acting for the Council, noted that these were the first committal applications, and did not press for immediate sentences of imprisonment.

12. On behalf of the Defendants, their solicitor Mrs Rebecca Hawksley argued that there had been a significant change of circumstances since the orders were made. As a result of the pandemic, the Basildon area went into tier 4 on 20 December and on Boxing Day 2020 it had gone into full lockdown. The Appellants had felt they might be in breach of the national law if they complied with the orders, and they did not want to cause further difficulties to the NHS and face criticism from the local public by moving. Some apologies were offered to the court on the day of the hearing.

13. The Judge found, and the Appellants accepted, that the gravity of the breaches passed the 'custody threshold'. He said that the court could not simply ignore continuing breaches of this nature. The very belated apology was of limited mitigation because it came so late and because there had so far been no attempt to comply with the orders.

14. The Judge, having fully recorded Mrs Hawksley's submissions, said this in relation to suspension:

> "34. Bearing in mind those submissions, and also taking into account other factors which are relevant…, albeit of background relevance, including the poor health of some of these Defendants and their relatives, and the uncertainty created in relation to the Covid times in which we are living, I take the view that although it would have been open to me to make terms of immediate sentences of imprisonment, I am able to suspend those terms of imprisonment."

15. The Judge imposed sentences of imprisonment varying between four and eight months, reflecting the number of breaches committed by each Appellant. The consequence, referring to each Appellant by number, was (1) 4 months; (2) 8 months; (3) 5 months; (4) 5 months; (5) 5 months; (6) 6 months; (7) 7 months; and (8) 6 months. He suspended the sentences for 12 months on three conditions, set out below. He ordered the Appellants to pay the Council's costs, summarily assessed at £24,000, by 26 February.

16. The three conditions of suspension were:

> "a. The Defendants shall by 4pm on 3 March 2021 remove from the Land any static caravans, mobile homes and touring caravans.
>
> b. The Defendants shall thereafter not (a) bring any caravan, mobile home or any other structure intended for or capable of habitation on to the Land; or (b) erect on the Land any structure or building capable of or intended to be put to residential use; or (c) allow any person to occupy the Land.
>
> c. The Defendants shall remove all of the works undertaken in relation to their respective individual plots by 10 April 2021."

17. The dates in the conditions had been the subject of submissions to the Judge. Mr Beglan had suggested one week for the site to be vacated, while Mrs Hawksley argued for five days after the end of lockdown. The Judge considered that too uncertain, but was prepared to allow three weeks, so to 3 March. The date of 10 April for the works to be removed was not contentious. In parting from the case, the Judge emphasised to the Appellants that this was their last chance to avoid immediate sentences of imprisonment.

18. To assist the Appellants, the Judge included the following text in his order:

> "AND UPON THE COURT DECLARING:
>
> 1. It shall not be in the public interest for there to be a prosecution of any of the Defendants in relation to any offence committed in contravention of the Coronavirus Regulations, or the Planning Acts, as a necessary and direct result of compliance with this Order of the court in leaving the land.
>
> 2. It shall not be in the public interest for there to be a prosecution of any of the Defendants in relation to any offence committed in contravention of the Coronavirus Regulations, or the Planning Acts, insofar as it is necessary for them to visit other land to access facilities for drinking, eating and/or washing."

The appeal

19. On 23 February, an Appellant's Notice was issued. On 1 March, Simler LJ suspended condition (a) pending the determination of the appeal "only in order to preserve the appellants' rights on appeal".

20. On 26 February, the Appellants issued another application to vary the orders so as to permit them to remain living on their land pending full determination of the injunction proceedings and the planning applications. On 5 March, Mr Roger Ter Haar QC, sitting as a Deputy High Court Judge, dismissed that application. He considered that this court would be assisted by updating witness evidence from the Respondent about the current situation. This evidence shows that since 26 February, further caravans have been stationed on a number of plots.

21. The grounds of appeal are that:

    (1) The Judge erred in law in committing the Appellants for breaches arising at a time when it would have been illegal for them to comply with the order because of Covid restrictions.

    (2) The Judge should not have sentenced with reference to breaches of the order of Cutts J as the order of Foxton J extended the time for compliance from 2 December to 14 December.

    (3) The time given by the Judge for vacating the site was inadequate in the light of the lockdown and the Appellants' personal circumstances.

(4) The Judge's order required the Appellants to break the law by moving from the land, and the declarations did not remedy that.

22. On behalf of the Appellants, Mrs Hawksley accepts that the Judge was dealing with admitted breaches and that the appeal relates only to sentence. However, she says that he went wrong in two ways. First, he should not have taken account of events between 2 and 12 December since the order of Cutts J had been superseded by the order of Foxton J, who fixed the later date as the date for compliance. Second, he should have accepted that the breaches from Boxing Day onwards were breaches in name only, as the national Covid regulations and guidance (to whose terms Mrs Hawksley accepted he had not been referred) prevented the Appellants from moving. All compliance with the orders was, she argued, 'statute suspended'. The Judge did not take any real account of that or of the individual Appellants' personal circumstances and the acute difficulties that they would face in accessing essentials, such as water, sanitation, and a safe place to live, if they are forced to leave the land in the midst of lockdown. They and the public would be placed at risk. The declarations, whilst useful, could not alter the fact that any decision on prosecution for a breach of the law is a matter for the Crown Prosecution Service. Any rehousing offered by the Council would not be suitable for members of this community. If they go to family members they risk putting them in breach of the law. In normal circumstances, these human factors would not be expected to prevail over planning law and court orders, but the circumstances have been extraordinary, and the courts below have completely overlooked that. If the Judge had sentenced only for the twelve days leading up to Boxing Day, he would have given sentences measured in weeks, not months. Finally, Mrs Hawksley argued, as she had before, that if the appeal failed the date for the land to be vacated should be postponed until lockdown ends. Facilities such as gym and leisure centres are due to open in mid-April and it is hoped that the restrictions as a whole will end in late June. However, if those dates do not materialise, proper respect for the Appellants' human rights would mean that they should be allowed to remain on the land until they do.

23. On behalf of the Council, Mr Beglan refers to the established national policy in respect of gypsy and traveller provision as contained in the guidance *Planning Policy for Traveller Sites* (2015), with specific reference to Policy E, which makes clear that Traveller sites (temporary or permanent) in the Green Belt are inappropriate development and can only be approved in very special circumstances. The further guidance document *COVID-19: guidance for those leading a nomadic way of life,* last updated on 6 January 2021, states that "The prevailing laws against unauthorised encampments or unauthorised development remain in place".

24. As to restrictions arising from the pandemic, the relevant rules are contained in the Health Protection (Coronavirus Restrictions) (All Tiers) (England) Regulations 2020, S.I. 2020 No. 1374 as amended ("the Covid Regulations"). Regulation 10 creates offences and financial penalties for contraventions "without reasonable excuse". Schedule 3A Part 1 paragraph 1(1) prohibits people from leaving the place where they are living "without reasonable excuse". Paragraph 2 contains a non-exhaustive list of reasonable excuses. These include a situation where it is "reasonably necessary" for the purposes of "moving house" (Paragraph 2(2)(f)(iv)) or "to fulfil a legal obligation" (Paragraph 2(5)(e)).

25. In this case, says Mr Beglan, the Judge made no error of principle, took all relevant matters into account, had the national situation and the Appellants' circumstances well in mind, and reached a decision that was plainly open to him. The Appellants, who moved onto the site during the second lockdown, have not complied with any orders. Had they obeyed the order of Cutts J, they would have vacated the land long before the lockdown. Foxton J fully considered their personal circumstances and did not accept their accounts of hardship. Floyd LJ noted that they sought to rely on circumstances of their own making then, and they are now doing so again. They do not identify what Covid regulation they would be breaking and any act undertaken to comply with a court order would in any case be "to fulfil legal obligations". They are committing continuing criminal offences in remaining on the land in breach of the Stop Notices. It is an unusual and egregious feature of the case that they have continued to develop the site throughout the proceedings; despite undertakings given to Foxton J not to carry out further operations, all the Appellants have engaged in further breaches by bringing "lorry upon lorry of hardcore" onto the land despite the lockdown.

Conclusion

26. The answer to this appeal, brought as of right, is a simple one. These orders were an entirely proper response to the Appellants' calculated disobedience of the court's orders against a background of serious, wholesale defiance of the planning laws. The breaches of the orders were not disputed and the sentences passed by Judge were the least that he could reasonably have imposed in the circumstances. His decision to suspend the sentences was more than fair to the Appellants. The timings he gave for compliance were similarly generous. There is nothing of any substance in the grounds of appeal.

27. The submission that the order of Foxton J relieved the Appellants of the consequences of disobeying the order of Cutts J is plainly unsound. The earlier order remained in effect and the extension granted at the later hearing was no more than a reflection of the passage of time.

28. Having shown so little regard for the law in other respects, the Appellants now claim to be troubled by their obligation to obey the Covid Regulations. However, they would plainly have a reasonable excuse for moving off the land in compliance with a court order. The Judge's declarations are not to be seen as declarations in the strict sense, but rather as a well-meaning attempt to assist the Appellants. Unfortunately, their overall conduct shows their reliance on the Covid Regulations to be just another strategy for staying on the land for as long as possible. The Regulations were in force when they moved onto the land, but they moved anyhow. The Regulations did not require the Appellants to continue to develop the land in breach of the court order (indeed they probably prohibited it), but they did it anyhow. No coherent argument was made to the Judge or to this court that the Covid Regulations prevent compliance with the orders. The Judge was right to sentence for all breaches committed since 3 December.

29. I finally reject the submission that the Judge did not take sufficient account of the Appellants' personal circumstances. The maximum term of imprisonment for a contempt of court is two years, and the breaches in this case are brazen. The level of the sentences shows that the Judge well understood the human factors, in addition to

which he suspended them when he might have made them immediate. In any case, as Floyd LJ said, it is unattractive for those who are in plain breach of the civil and criminal law to contend that insufficient consideration has been given to their interests by those taking the necessary steps to return the land to the condition it was in before they entered on it.

30. The Judge's order is therefore upheld and the appeals are dismissed. The time for compliance with condition (a) to will be varied to 12 noon on Monday 22 March 2021. The time for compliance with condition (c) will remain as 10 April 2021. The Appellants should understand that these dates are final and that they will go to prison if they do not now obey the orders.

31. These proceedings have run their course. Any further application to vary the order will surely be treated as a 'successive' application and be dismissed without ceremony (see *Woodhouse v. Consignia plc* [2002] EWCA Civ 275; [2002] 1 WLR 2558, at [55-57]), and any further application to the court below or to this court for another stay will surely be refused.

Lord Justice Newey

32. I agree.

Lord Justice Warby

33. I also agree.