Neutral Citation Number: [2023] EWHC 2906 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

No. KB-2023-002150

Royal Courts of Justice
Strand
London WC2A 2LL

Monday 16 October 2023

Before:

HIS HONOUR JUDGE TINDAL

(Sitting as a Deputy High Court Judge)

B E T W E E N :

EPPING FOREST DISTRICT COUNCIL — **Claimant**

- and -

PAUL RUDOLPH HALAMA — **Defendant/Respondent**

- and -

(1) GRAHAM COURTNEY
(2) NIGEL RICHARDSON — **Applicants**

MR J CANNON appeared on behalf of the Claimant.

MR P HALAMA appeared In Person assisted by his brother acting as his McKenzie Friend.

APPROVED JUDGMENT

JUDGE TINDAL:

Introduction

1 This is an application for a planning injunction under Section 187B of the Town and Country Planning Act 1990 ('TCPA'). In the High Court, often these cases relate to injunctions against people from the Travelling Community, for example, the leading case I will return to of *South Buckinghamshire District Council v Porter* [2003] 2 WLR 1547 (HL). Or such applications can raise high profile and controversial issues of planning law, such as *Ipswich Borough Council v Fairview Hotels* [2022] EWHC 2868 which related to alleged change of use of ordinary hotels booked out to accommodate asylum-seeking people.

2 The context of this case is, for want of a better word, much more homely. It relates to applications for planning injunctions under s.178B TCPA to enforce requirements of planning permission for domestic construction. Such cases may more commonly appear in the County Court, where injunctions under s.178B TCPA can also be made, rather than in the High Court. Yet, from my own research and preparation for this case and the wide planning experience of Mr Cannon for the Claimant, there is not very much guidance for busy County Court judges who might be expected to deal with such injunctions urgently or even without notice. With long experience in the County Court of miscellaneous applications being 'fitted in' to a busy list with little reading time, I know the value of cases which pull together relevant guidance on a topic. I hope this judgment may similarly offer some assistance to busy County Court judges. (Obviously, it is much less likely to be of any relevance to cases in the High Court).

3 Indeed, another aspect of this case which is likely to reflect many s.187B injunction applications in the County Court is the fact the Defendant, Mr Halama as I shall call him, represents himself, albeit with the able assistance of his brother as a *McKenzie Friend*. I

must add Mr Cannon has acted in the best traditions of the Bar in his fair presentation of the case.

4 This case concerns a large extension at Mr Halama's property at 46 Russell Road, Buckhurst Hill, Essex in Epping Forest on the north-east edge of London. It is a semi-detached residential dwelling in a suburban area. Mr Halama may be unrepresented, but he has literally and metaphorically lived this dispute over the last five years and has a command of the detail which is, of course, second to none. However, my impression from the evidence is that he has developed a rather entrenched way of looking at the situation. He sees the Claimant Planning Authority's actions as unfair, obstructive and uncooperative. Of course, he is entitled to his opinion and I do not doubt for a moment that is genuine. Indeed, it is a view shared by some others including Parish Councillors, whose statements I have read carefully; and most importantly of his now next-door neighbour at the adjoined semi-detached home. Nevertheless, I must be careful with the weight I can attach to the evidence of Mr Halama and his supporters who have 'taken his side', as their evidence is tendentious rather than objective.

5 However, just as Mr Halama sees the Claimant as obstructive and difficult, many of its officers appear to see him the same way. That is all too common when an individual homeowner is 'locked in battle', as they would see it, with the local planning authority about extensions to their home. However, that is not true of the planning officer Mr Stubbs who gave evidence. Whilst his planning experience is unquestionable, Mr Stubbs only joined the Claimant a year ago, very late on in this five-year saga. But it is precisely that lack of involvement in the earlier and more fractious aspects of this case that lends Mr Stubbs a degree of objectivity. Whilst employed by and giving evidence for the Claimant, he answered Mr Halama's detailed questions carefully, fairly and making concessions where appropriate. I found his evidence reliable and useful, especially as he helpfully exhibited many important documents over the period of dispute, even before his time with the

Claimant. I place more weight on those contemporaneous documents than on Mr Halama's perspective, which is rather distorted by time and the dispute. Those documents are the main foundation for my findings of fact.

6 However, before turning to those findings, I should briefly address the witnesses the Claimant did not call, albeit briefly as I gave a ruling on this issue earlier. Mr Halama witness summonsed Mr Richardson the Planning Director, and Mr Courtney, his assistant. As I explained in my earlier judgment when discharging those witness summonses, Mr Halama wished to ask Mr Richardson only about one topic – his decision to seek an injunction, but that was something Mr Stubbs was able to (and did) deal with as he was the planning officer at the time of that decision. Mr Halama's questions of Mr Courtney would have ranged more widely, but also have generated more heat than light, because Mr Halama felt that Mr Courtney was personally responsible for being obstructive throughout the dispute. Yet, as I shall explain, Mr Halama accepted that he was in breach of planning control, that he would like to remedy it and the only reason he had not done so as because he could not afford to do so. In those circumstances, Mr Courtney's evidence would not have assisted me much.

7 I will make findings of fact on the balance of probabilities on the evidence. As I say, I am particularly assisted by the contemporaneous documents and the evidence of Mr Stubbs, but also take into account the evidence of Mr Halama and his supporters. I will not necessarily refer to every document to which I have been referred, but I will detail the essence of this dispute, bearing in mind the limited nature of the issues and the concession made at trial today by Mr Halama that he is in breach of planning control and wants to be able to remedy it, but cannot afford to do so. For those reasons, my findings of fact will be relatively short.

Findings of Fact

8 Mr Halama bought 46 Russell Road in 1996 and it is registered in his sole name. It is a large semi-detached house with a garden which falls away sharply, so there is a marked difference in height between the front and the back of the property. No.44 is No.46's adjoined semi-detached property. Until 2018, there was a bungalow at No.48 on its other side.

9 In 2015 Mr Halama applied for planning permission to make quite modest adjustments to his home with a loft conversion and a single-storey rear extension. On 22 October 2015 the Claimant granted planning permission on this basis:

> "Hip to gable roof extension with rear dormer window, Juliet balcony and front facing roof lights to facilitate loft conversion. Single storey rear extension. Relocation of existing external steps from the south east to south west of site."

10 However, in 2018, once Mr Halama had started work on this extension, he discovered the unattached bungalow next door (No.48) had planning permission to be demolished and replaced by a much larger building comprising of three flats. Mr Halama considered that it would dominate his property. So, he applied for wider planning permission to build an extension on the flat roof of the garage, a wider dormer window and a deeper rear extension.

11 Mr Halama discussed that with one of the Claimant's planning officers, Mr Resolva, whom I accept was supportive of Mr Halama's proposals. However, there is no suggestion that Mr Resolva 'gave the green light' to Mr Halama to start building his larger extension without waiting for his amended planning permission. Yet that is what Mr Halama did – he 'jumped the gun'. I find that reflects a degree of naivety on Mr Halama's part, rather than a deliberate attempt to 'play the system'. Nevertheless it was very unwise, because when he did submit an application for planning permission on the basis of that larger extension in January 2019, it was refused. Whilst the refusal was in the name of Mr Richardson, I accept the actual decision-maker may well have been more junior, for example Mr Courtney as Mr Halama believes.

12 Whoever made and drafted the decision, it concluded that Mr Halama's larger extension would negatively affect the adjoining semi-detached house at no.44 (before its present occupant lived there) and have a significant effect in relation to other neighbouring properties. However, whilst the decision-maker felt the proposed roof and side extensions without the rear extension may have been acceptable, it did not grant planning permission limited to those.

13 By that stage, Mr Halama had already built the large rear extension and started the other work. Photographs from 2018-19 show there was already a large two storey rear extension, which because of the fall-away of the garden was deeper on the lower ground floor than the open 'Juliet balcony' on the ground floor. It also had a large dormer window running most of the width of the roof. The photographs show it dominates the rear garden at No.44. So even if its present resident is relaxed about the development, it is unsurprising his predecessor was not.

14 Having refused planning permission in January, in March 2019 the Claimant then issued an enforcement notice which required the whole development that Mr Halama had built to be demolished saved for the works covered by the original roof extension planning permission. Mr Halama then appealed the enforcement notice, although one of his grounds of appeal was an application for retrospective planning permission to be granted. This is something that the Planning Inspector in his decision in February 2020, only a month before the COVID Pandemic, considered for himself but refused.

15 With the exception of a slight adjustment to the enforcement notice (which is immaterial), the Inspector dismissed the appeal against the enforcement notice and refused additional time to undertake works to comply with it. The Inspector found that the side extension alone was unobjectionable but that more widely, the development as a whole caused significant harm to the character and appearance of the surrounding area, notwithstanding the fact that

it could not be seen from the road. More markedly, the Inspector found the size of the development would cause significant harm to living conditions of those occupying the adjoining property and that it was also in breach of the local development plan. The Inspector also refused Mr Halama extra time to demolish to comply with the original planning permission because:

> "The appellant has not made a case that the required steps cannot reasonably be completed within that period. It seems to me that in the absence of submitted evidence to the contrary the demolition works and removing the debris can be reasonably completed within three months."

16 However, whilst effectively dismissing the appeal, the Inspector did note that Mr Halama had put forward amended plans to address the planning harm he had identified. Those were: (1) for the side extension that had been accepted as reasonable but not yet granted permission; (2) a reduction of the width of the dormer by 800 millimetres from the boundary (which is an actual adjustment of slightly less because the current building is inset slightly already); and (3) a reduction in depth of the large rear extension from 6 metres on the lower ground floor and 5 metres on the ground floor to 4 metres in each case, albeit that on the ground floor there would be a 3 metre wall and a 1-metre privacy screen at the side for privacy.

17 Following the Inspector's report, the Claimant in stages granted the planning permission to reflect those proposals, which under s.180 TCPA had the effect of reducing the extent of demolition and reconstruction required by the enforcement notice, with which it also granted additional time to comply. In April 2021, the Claimant granted the side extension and the dormer applications and in October 2021 granted reduction of the rear extension from 6 and 5 metres to 4 and 4 metres. As Mr Halama put it, effectively there was now planning permission for about 85% (his calculation) of his original proposal. Nevertheless, he did not make the ('15%') of changes necessary to comply even with the new planning permission.

18 Indeed, this ongoing failure had led to prosecution by the Claimant for breach of the enforcement notice earlier in 2021, although that was discontinued in October 2021 on the basis that Mr Halama undertook to the Magistrates Court that he make the necessary changes to reflect the new revised planning permission that I have described. In particular, Mr Halama undertook to comply in full with the October 2021 planning permission and so in practical terms, reduce the former window width and reduce the depth of the rear extension by 15 July 2022. He also agreed to pay costs, which he did do promptly. I would also note the planning permission was later slightly adjusted one final time to change the Juliet balcony in the rear extension to bi-fold doors (although it did not change the footprint of the permission granted).

19 However, when June 2022 arrived, Mr Halama had still not completed the works he had undertaken to the Magistrates Court he would do by that time, in accordance with his amended planning permission. Mr Halama emailed the Claimant's planning officers to explain that his financial position had been severely affected by COVID and when he gave the undertakings in October 2021, this had been dependent upon funding from his brother, which had fallen through and he now had no resources to complete the required work. The Claimant's planning officers visited Mr Halama on 16 August 2022 and he told them he estimated the overall cost of the works would be about £100,000 and that he could not afford that. He gave no information or evidence either of the cost or of his means, nor was he asked for that.

20 In December 2022, after the slight change from the 'Juliet balcony' to the 'bifold doors' had been granted planning permission, Mr Halama tried a different tack. He applied for revised planning permission for the dormer window to remain as it was, even though he had earlier proposed and been given planning permission to reduce it so that it was 800mm from the boundary. Hardly surprisingly, this new application was summarily rejected using the abbreviated process under Section 70C TCPA on the basis that it had already been dealt

with in a previous application, which despite Mr Halama's protestations, it plainly had been. I note that Mr Halama did not apply to retain the rear extension as he had built it. Doubtless, if he had done, it would have been rejected in the same way for the same reason.

21 On 5 January 2023, the Claimant finally lost patience with Mr Halama's prevarication. As is clear from a recently-disclosed decision, Mr Richardson decided to apply for an injunction. He recorded the history I have detailed and specifically considered whether the Claimant should exercise its power under Section 178 TCPA to carry out the work themselves and bill Mr Halama for it, but decided against that given the complexities of the work required and what was said to be the likelihood of his obstruction. Mr Richardson concluded an injunction was required to address the longstanding breach of planning control.

22 A few days later on 9 January 2023, before he was aware of the Claimant's decision to seek an injunction, Mr Halama happened to email to reiterate his lack of finances, but also added that he had health conditions, in particularly 'long-Covid' and a vitamin deficiency. Again, he did not provide any evidence of that, nor was any evidence requested by the Claimant. In April 2023, the claim for an injunction was issued and directions having been given the matter has come on for trial before me on 16th October. The work has still not been done.

23 I will take stock of the facts before I turn to the legal framework. On one hand, I acknowledge Mr Halama's point that he now has approval for 85% of his original proposals. However, rather than showing the intransigence of the Claimant, this shows its willingness to make concessions from its original rather austere position prior to the Inspector's report in 2020. Yet that report upheld the enforcement notice, which even as adjusted under s.180 TCPA by the successive increased scope of planning permission in 2021-22, has still not been complied with, so that he has now been in breach for five years. That is despite Mr Halama's formal undertaking to the Magistrates Court to complete the necessary demolition

and works by June 2022 on the strength of which the Claimant discontinued its prosecution of him.

24 Mr Halama accepts all that, but now says he cannot afford to do what he formally promised a Court he would do. Yet he has not provided any independent documentary evidence either of the cost of the works, his means or his health conditions because he says no one has asked him to do so. However, he has clearly spent time producing other documentation and material, so it is strange he has not provided evidence of what he now says is the reason he has not done the works. Moreover, on the question of Mr Halama's health, I accept what he says but as Mr Stubbs said, no one is asking him to do the work himself. It seems to me this case is not really about Mr Halama's health; this is about his means and willingness to address the very long-standing and significant breach of planning control which he accepts there has been.

Legal Framework

25 The legal framework for planning decisions by local planning authorities ('LPA's) is still largely found in the Town and Country Planning Act 1990 ('TCPA'), as amended and supplemented by various other statues since 1990. Section 57 TCPA provides that (subject to the rest of that section) 'planning permission is required for the carrying out of any development of land'. 'Development' is defined by Section 55 TCPA:

> "(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, 'development' means [i] the carrying out of building, engineering, mining or other operations in, on, over or under land; or [ii] the making of any material change in the use of any buildings or other land."

[I interpose to say I have added [i] which is often called 'operational development'; and [ii] which is often called 'material change of use'. Section 55 continues]:

> "…(1A) For the purposes of this Act 'building operations' includes—(a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder.

> (2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land— (a) the carrying out for the maintenance, improvement or other alteration of any building of works which — (i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building…."

26 Lord Bingham explained in *South Bucks DC v Porter* [2003] 2 WLR 1547 at para. 11:

> "The cornerstone of this regime, regulated by sections 55-106B [TCPA]…is the requirement in section 57(1) that planning permission be obtained for the carrying out of any development of land as defined in section 55. Applications are made to, and in the ordinary way determined..by,...local planning authorities, which are local bodies democratically-elected and accountable….But the local planning authority's decision is not final. An appeal against its decision lies to the Secretary of State, on the merits, which will be investigated by an expert, independent inspector empowered to hold an inquiry at which evidence may be received and competing interests heard before advice is tendered to the Secretary of State. The final decision on the merits rests with the Secretary of State, a political office-holder answerable to Parliament. The courts have no statutory role in the granting or refusing of planning permission unless, on purely legal grounds, it is sought to challenge an order made by the local planning authority or the Secretary of State: in such event section 288 of the Act grants a right of application to the High Court. In addition, there exists the general supervisory jurisdiction of the High Court [i.e. Judicial Review]…But this is not a jurisdiction directed to the merits of the decision under review."

27 Enforcement of planning law by LPAs is dealt with in Part VII TCPA. This starts with a definition of 'breach of planning control' under Section 171A(1) TCPA:

> "For the purposes of this Act—(a) carrying out development without the required planning permission; or (b) failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control."

Part VII TCPA (which has qualified time limits of four or ten years under Section 171B) contains several enforcement tools for a LPA, including Planning Contravention Notices, Stop and Temporary Stop Notices, Breach of Conditions Notices, Enforcement Warning Notices and Enforcement Notices. The latter are made under s.172 TCPA and can be appealed under Section 174 TCPA to a Planning Inspector; and breach can lead to prosecution under Section 179 TCPA in a Magistrates Court (which happened here).

28 Yet, as Lord Bingham explained in *Porter* at paragraphs 13 to 16, in the late 1980s a report by Lord Carnwath (as he later became) recommended the addition of a bespoke statutory planning injunction which could be tailor-made to an individual case by the court. This led to the amendment of the TCPA in 1992 to add Section 187B TCPA (applying under Section 187B(4) to County Courts as well as the High Court). It states:

> "(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 under this Part.
> (2) On an application under subs. (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach…."

29 As I have said, *Porter* concerned injunctions in the very different context of people in the Travelling Community placing hardstanding and caravans on rural land. As well as giving his own general guidance on Section 187B TCPA, some of which I will explain in a moment, Lord Bingham also approved the guidance given by Simon Brown LJ (as he then was) in the Court of Appeal. That guidance was summarised by Holgate J in *Ipswich BC v Fairview Hotels* [2022] EWHC 2868 (KB) (concerning alleged 'material change of use' for the use of hotels by asylum-seeking people) at paragraph 93:

> "i) The need to enforce planning control in the general interest is a relevant consideration and in that context the planning history of the site may be important. The 'degree and flagrancy' of the breach of planning may be critical. Where conventional enforcement measures have failed over a prolonged period the court may be more ready to grant an injunction. The court may be more reluctant where enforcement action has never been taken;
>
> ii) On the other hand, there might be urgency in the situation sufficient to justify the avoidance of an anticipated breach of planning control;
>
> iii) An anticipatory interim injunction may sometimes be preferable to a delayed permanent injunction, for example, where stopping a gypsy moving on to a site in the first place, may involve less hardship than moving him out after a long period of occupation;
>
> iv) While it is not for the court to question the correctness of planning decisions which have been taken (e.g. decisions to refuse a planning permission or to dismiss an appeal), the court should come to a broad view as to the degree of

environmental damage resulting from the breach and the urgency or otherwise of bringing it to an end;

v) The achievement of the legitimate aim of preserving the environment does not always outweigh countervailing rights (or factors). Injunctive relief is unlikely to be granted unless a 'commensurate' remedy in the circumstances of the case

vi) It is the court's task to strike the balance between competing interests, weighing one against the other."

30 In *Ipswich*, Holgate J also added at paragraph 88:

> "… [An LPA] cannot exercise the power to apply for an injunction under s.187B unless they consider it 'necessary or expedient' to restrain a breach of planning control by injunction. Based on the clear language of the statute, it was common ground that the claimants in this case had to be satisfied not only that it was necessary or expedient to take enforcement action against the proposed use of the hotels, but also that it was necessary or expedient to do so in this particular way, by seeking an injunction, rather than by other methods of enforcement. Although the decision on expediency is a matter for the LPA, it was also it was also common ground that the matters which the LPA must have regard to are relevant to the exercise of the court's discretion on whether to grant an injunction."

Moreover, in *Ipswich* at paragraph 97, Holgate J clarified that whilst irreparable harm if the injunction was not granted is a requirement for an anticipatory (in the Latin, *'Quia Timet'*) injunction, that is not something which is required as a threshold under Section 187B, although the extent of harm if an injunction were not granted is relevant to the discretion.

31 I turn from that general guidance on injunctions under Section 178B TCPA to such help as I can offer to busy County Court judges dealing with such injunction applications in the specific context of domestic construction. It seems to me helpful to approach this in five stages, although obviously, not adopting this approach would not itself be a good ground of appeal.

32 The first stage is to ask: 'is there an actual or apprehended breach of planning control ?' Even if that would not be a requirement for an injunction under the general power of the High Court under Section 37A of the Senior Courts Act 1981 or for an ordinary injunction in the County Court, it is an explicit threshold requirement for an injunction under Section

187B TCPA. Moreover, as Lord Bingham said in *Porter* in the House of Lords at paragraph 29: '[T]he power must be exercised with due regard to the purpose for which the power was conferred: to restrain actual and threatened breaches of planning control'. Therefore, in *Broadland District Council v Trott* [2011] EWCA Civ 301, it was held an injunction should not have been granted under Section 187B TCPA as there was no actual or apprehended breach of planning control as defined by Section 171A(1) TCPA - namely development which is not supported by planning permission or breach of a planning condition - but rather a breach of an enforcement notice, which was not necessarily exactly the same thing. Examining 'breach' does not involve a court questioning LPA planning decisions as criticised in *Porter*. The issue will not be whether planning permission *should have* been granted, but what permission – if any – *has in fact* been granted. However, this exercise might require the court to interpret the terms of planning permission to decide whether there was a breach of a condition or of its other terms. If so, the court may be reassured the interpretation of a grant of planning permission is a similar exercise as interpretation of other texts, as Lord Carnwath explained in *Lambeth LBC v DCLG* [2019] 1 WLR 4317 (SC) paragraph 19:

> "….[W]hatever the legal character of the document in question, the starting point (and usually the end point) is to find the 'natural and ordinary meaning' of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

In any event, in this case, a long-standing breach of planning control is actually conceded.

33 The second stage is to ask whether the LPA's decision to apply for the injunction was unlawful on public law grounds. As Lord Bingham said in paragraph 27 of *Porter*:

> "It is of course open to the defendant, in resisting the grant of an injunction, to seek to impugn the local authority's decision to apply for an injunction on any of the conventional grounds…to found an application for judicial review. As Carnwath J observed in *R v Basildon District Council, Ex p Clarke* [1996] JPL 866, 869:
>
> > 'If something had gone seriously wrong with the procedure, whether in the initiation of the injunction proceedings or in any other way, it was difficult to see why the County Court judge could not properly take it into account in the exercise of his discretion to grant or refuse the injunction'…."

However, I stress this scrutinises the LPA's *decision to apply for an injunction rather than its decision on planning permission itself*. As Lord Bingham said in *Porter* at paragraph 30:

> "An application…under section 187B is not an invitation to the court to exercise functions allocated elsewhere. Thus, it could never be appropriate for the court to hold that planning permission should not have been refused or that an appeal against an enforcement notice should have succeeded …"

This is confirmed with Sections 284 and 285 TCPA itself. Section 284 is a complex provision which, as discussed in *Trott*, effectively is an 'ouster clause' providing that a court cannot question the 'validity' (i.e. enforceability – see *Davy v Spelthorne BC* [1984] AC 262 (HL)) of certain planning decisions, not including refusal of planning permission but including any decision on appeal. Section 285 provides that an enforcement notice is valid and can only be challenged in court on the same grounds as it could be appealed, as also discussed in *Trott*. Practically, unless it is under appeal or is quashed, the enforcement notice must be obeyed.

34 For this second stage, challenges to a LPA's decision to apply for an injunction relevant to the County Court could include procedural unfairness as described in *Clarke*, departure from policy without good reason, 'irrationality', failure to take into account a relevant consideration or taking into account an irrelevant one, or breach of the Public Sector Equality Duty under Section 149 Equality Act 2010. In *Hackney LBC v Manorgate* [2015] EWHC 2025 (QB) the judge decided that a failure *to consider at all* alternatives to an injunction meant that the decision to seek an injunction was irrational. However, as Section 187B TCPA and *Porter* make clear, the LPA does not have to *try* other steps first. That leads to the third stage.

35 The third stage is to ask what other enforcement steps, if any, has the LPA taken ? It does not have to do so, as I have just stressed and as Lord Bingham said in *Porter* at paragraph 29:

> "Where it appears that a breach or apprehended breach will continue or occur unless and until effectively restrained by the law and that nothing short of an injunction will

> provide effective restraint…that will point strongly towards the grant of an injunction. So will a history of unsuccessful enforcement and persistent non-compliance, as will evidence that the defendant has played the system by wilfully exploiting every opportunity for prevarication and delay, although section 187B(1) makes plain that a local planning authority, in applying for an injunction, need not have exercised nor propose to exercise any of its other enforcement powers under Part VII of the Act."

Having said that, a LPA should first *consider* the appropriateness of alternative enforcement steps to an injunction, for the reasons explained by Lord Scott in *Porter* at paragraph 99:

> "The criteria that govern the grant by the court of the injunction make clear… that the court must take into account all or any circumstances of the case that bear upon the question whether the grant would be 'just and convenient'. Of particular importance, of course, will be whether or not the local planning authority can establish not only that there is a current or apprehended breach of planning control but also that the ordinary statutory means of enforcement are not likely to be effective in preventing the breach or bringing it to an end. In a case in which the statutory procedure of enforcement notice, prosecution for non-compliance and exercise by the authority of such statutory self-help remedies as are available had not been tried and where there was no sufficient reason to assume that, if tried, they would not succeed in dealing with the breach, the local planning authority would be unlikely to succeed in persuading the court that the grant of an injunction would be just and convenient."

36 The fourth stage is whether an injunction is 'necessary and expedient'. Whilst Section 187B TCPA states that an LPA may apply for an injunction when it 'considers it necessary or expedient', as Lord Bingham stressed in *Porter* at paragraph 27, the court has 'an original not supervisory jurisdiction'. Therefore, the court must reach its own decision on 'necessity and expediency' of an injunction, not just review the LPA's decision as it would in a Judicial Review context. As Lord Bingham said in *Porter* at paragraphs 28 and 29:

> "The court's power to grant an injunction under section 187B is a discretionary power. The permissive 'may' in subsection (2) applies not only to the terms of any injunction the court may grant but also to the decision whether it should grant any injunction. It is indeed inherent in the concept of an injunction in English law that it is a remedy that the court may but need not grant, depending on its judgment of all the circumstances…Thus the court is not obliged to grant an injunction because a local authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction and so makes [an] application.
>
> The court's discretion to grant or withhold relief is not however unfettered…. The discretion of the court under section 187B, like every other judicial discretion, must be exercised judicially. That means, in this context, the power

> must be exercised with due regard to the purpose for which the power was conferred: to restrain actual and threatened breaches of planning control."

Lord Bingham went on in paragraph 29 of *Porter* to illustrate more 'straightforward' cases for an injunction I have quoted, such as where a breach will continue or occur unless restrained by injunction or where there has been a history of unsuccessful enforcement. Yet at paragraph 31 he stressed the importance of the personal circumstances of - and effect on - an occupier:

> "If it appears that these aspects have been neglected and on examination they weigh against the grant of relief, the court will be readier to refuse it. If it appears that the local planning authority has fully considered them and nonetheless resolved that it is necessary or expedient to seek relief, this will ordinarily weigh heavily in favour of granting relief, since the court must accord respect to the balance which the local planning authority has struck between public and private interests. It is, however, ultimately for the court to decide whether the remedy sought is just and proportionate in all the circumstances."

37 In particular, in *Ipswich* at paragraph 84, Holgate J endorsed an earlier observation that 'expediency involves the balancing of the advantages and disadvantages of a course of action'. This is an exercise which County Court Judges who also sit in Family cases may find familiar. As the Court of Appeal in Family cases has consistently said on the welfare of children, in an evaluative judgment (akin but not identical to a discretion as with Section 187B TCPA), courts should identify the realistic options and weigh their advantages and disadvantages. Whilst not by itself justifying an appeal if that is not done, if it has been done that it may help to show the discretion has been exercised 'judicially': see Lord Bingham in *Porter* at paragraph 29.

38 The final stage is to consider whether it is 'necessary and expedient' and 'commensurate' with actual or apprehended breach to grant the injunction following the guidance in *Porter* and if so on what terms. Whilst Section 187B TCPA talks about 'restraining breach', mandatory as well as prohibitory conditions can be attached: see *Croydon LBC v Gladden* [1994] 1 PLR 30. In *Morris v Redland Bricks Ltd.* [1970] AC 652 (HL), whilst concerned

with anticipatory injunctions, Lord Upjohn at page 666 emphasised the following about mandatory injunctions:

> "Unlike the case where a negative [i.e. prohibitory] injunction is granted to prevent… a wrongful act, the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account. (a) Where the defendant has…acted wantonly and quite unreasonably ….. he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff…..*(b)* But where the defendant has acted reasonably, though in the event wrongly, the cost of remedying by positive action his earlier activities is most important….So the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damage to the plaintiff…If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions."

39 Facing a potential mandatory injunction, a defendant may argue that he cannot not comply with its terms, as Mr Halama argues here. In *Porter* at paragraph 32, Lord Bingham said:

> "Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent. When making an order, the court should ordinarily be willing to enforce it if necessary. The rule of law is not well served if orders are made and disobeyed with impunity. These propositions however rest on the assumption that the order made by the court is just in all the circumstances and one with which the defendant can and reasonably ought to comply, an assumption which ordinarily applies both when the order is made and when the time for enforcement arises. Since a severe financial penalty may be imposed for failure to comply with an enforcement notice, the main additional sanction provided by the grant of an injunction is that of imprisonment. The court should ordinarily be slow to make an order which it would not at that time be willing, if need be, to enforce by imprisonment. But imprisonment in this context is intended not to punish but to induce compliance, reinforcing the requirement the order be one with which the defendant can and reasonably ought to comply."

Moreover, on the specific subject of a plea that an injunction cannot be complied with due to lack of financial means, in *Wildin v Forest of Dean* [2021] EWCA Civ 1610, albeit in the context of committal rather than an injunction, Laing LJ observed at paragraph 74 that:

> "The position is that if….the respondent wishes to contend that he cannot comply with an order because he cannot afford to (and that is a possible defence to a committal), there is an evidential burden on him. He must adduce some evidence to support his case. It is then for the applicant to make the court sure that, despite that evidence, the respondent can comply with the order."

It seems to me that point applies with at least as much force to an application for an injunction, albeit the standard of proof on the claimant would be the civil not the criminal one.

Conclusions

40 Against that legal background I can turn to my conclusions which I can take relatively shortly. Firstly, was there an actual or apprehended breach of planning control ? Yes, that is conceded. There is a longstanding breach which, as Mr Halama put it, was addressed in part by the subsequent planning permission grant but not fully. The reality is that at least to the extent of one and two metres of the rear extension and the 800 millimetres in relation to the dormer, perhaps more like 650 millimetres when set in from the edge, these aspects have never had planning permission and that has now continued for five years.

41 Secondly, was the authority's decision to apply for an injunction unlawful ? Whilst Mr Halama's statement made much of this point and criticism of various officers of the Claimant, ultimately, as I said, the question is not the merits of the original planning decision but rather the decision to seek an injunction. Whilst I do not have the oral evidence on that of Mr Richardson for reasons I have given, I do have a record of his decision which was explained by Mr Stubbs in his evidence, which I read earlier on. In my judgment, save in one respect, that decision entirely properly sets out a legitimate line of reasoning as to the different attempts at compliance that have been tried, namely: an enforcement notice, a prosecution, undertakings (one could also add, additional planning permissions by means of a compromise situation which overtook the enforcement notice under Section 180 TCPA) and in particular, specific consideration of the default powers under Section 178 TCPA to carry out the requirements of the notice. Whilst the Claimant assumed Mr Halama would have been obstructive and I do not accept that he would have been, nevertheless the complexities of the works required would also tell against that sort of direct action and

whilst Mr Halama now suggests that it should have been done, he did not propose or agree to it at the time.

42 The only respect in which the Claimant's decision to apply for an injunction can be queried is Mr Richardson's conclusion that there are no relevant personal circumstances that prevent compliance with the enforcement notice from being secured. This is the point on which Mr Halama wanted to cross-examine Mr Richardson. However, there are three answers to it. The first is that when Mr Richardson made that decision on 5th January 2023, Mr Halama had not raised his health – he did not do so until 9th January 2023. When he did, Mr Stubbs explained it was taken into account, but the perfectly sensible view was reached that no-one is asking Mr Halama to do this work and the real question was therefore not his health but his finances. Secondly, whilst finances had been discussed with the officers in the meeting in August 2022, it seems to me that 'I can't afford it' is a plea which is sufficiently easy and common from a homeowner that a LPA can really expect more than assertion and actually can expect some degree of evidence or plan as to when an individual will be able to afford the necessary works. Thirdly, Mr Cannon was surely right that it would be a very rare case where a court would refuse an injunction because of a failure to take into account a particular factor if the court were in just as good a position to take into account that factor itself when determining itself whether to grant or refuse an injunction. In those circumstances, there is nothing about the decision to seek an injunction in this case which really tells against the grant of such an injunction. The real issue is whether I should do so or not.

43 I turn to the third stage: what enforcement steps, if any, have been taken ? Here, there is not only the enforcement notice but also prosecution which ended in the undertakings and a detailed explanation as to why self-help remedies would not work. In those circumstances, it seems to me that the Claimant is entitled to take the view that given that this has not been remedied for five years and Mr Halama has not complied with an undertaking to the court to

do so by July 2022 over a year later, we are now in the territory where the only legal step that is likely to make any difference and address the breach of planning control is the grant of an injunction. But whether that injunction should therefore be granted is a different question.

44 The fourth stage is whether an injunction is necessary and expedient and in deciding that, I will weigh the advantages and disadvantages of the different realistic options.

(i) The first realistic option is that I should simply refuse the injunction and leave the Claimant to its other remedies, which is Mr Halama's argument. On one hand, the advantages of that course are that it would not be reliant upon his means (whatever they are) and it appears his current adjoined neighbour would be relaxed about that not least because he is building an extension himself. The disadvantages are that that would effectively leave a serious and long-standing breach of planning control completely unaddressed and self-help would require public money to be spent, which if Mr Halama is right that he cannot afford to do the work, would not be recovered.

(ii) The second option, which I raised, is an injunction limited to the rear extension rather than doing the work to the dormer window. The advantages of that course are that it was potentially cheaper and there is very little evidence of negative environmental effect from the dormer window. As Holgate J said in *Ipswich* at paragraph 93(iv) quoted above, it is not to trespass into the LPA's planning judgement to consider the realistic effect on the extent of environmental harm and urgency. The disadvantages are that I have no evidence of the actual costs of just changing the rear extension or what the saving of not changing the dormer would be. When I put that to Mr Halama, he said it would be between £7,000-£10,000 but that feeds into a wider problem which is fundamental to this case that I simply do not have any *evidence* of costs of the repairs or evidence of Mr Halama's means. I just

have a series of assertions and estimates by him. In any event, it would not address the fact that it was Mr Halama himself who proposed the 800mm reduction of the dormer window in order to get planning permission and it would seem a strange thing not to hold him to his own proposal. Perhaps this second option was neither party's case before I raised it because it is not really a realistic option at all.

(iii) The third option – and the Claimant's case - is an injunction requiring Mr Halama not only to move in the dormer window so it is 800mm from the boundary, but also to reduce the depth of the rear extension from 5 and 6 metres on the ground and lower ground floors to 4 metres on each floor. The disadvantages of that course are that Mr Halama's current adjoined neighbour, is saying the current extension does not have a significant impact on him and Mr Halama is saying that he cannot afford to do it. However, the advantages of taking that course is that it would uphold the planning decisions as adjusted and compromised by the Claimant and would address any planning harm which might affect other residents, including the successors in title of the current adjoined neighbour living at 44 Russell Road in the future. It would also reflect the factors present in this case consistent with those emphasised by Lord Bingham in *Porter* as pointing to an injunction. Here, there is a clear history of the Claimant trying different enforcement measures and indeed Mr Halama undertaking to do the works to address that breach, yet it still continues to this day and clearly will simply continue as it has for several years now unless an injunction is granted.

45 The final stage is the conclusion as to whether it is 'necessary and expedient' and 'commensurate' with the breach for an injunction should be granted and if so on what terms. I remind myself that there is a strong interest in upholding planning control but that must be weighed against other factors, in particular personal circumstances. As I have said, a breach of planning control has continued and clearly will continue to occur unless and until

effectively restrained by the law and that nothing short of an injunction will provide an effective restraint. It is also a case where there has been unsuccessful enforcement and persistent non-compliance, although I do not say it is a case where Mr Halama has played the system. Those factors weigh heavily. Weighed against them is the personal circumstances of Mr Halama, which I must take into account. However, ultimately, as I have already said, there needs to be some evidence of that from Mr Halama and there is precious little such evidence.

46 I am prepared to take Mr Halama's word for it that he has health problems with 'Long-COVID', vitamin deficiency and depression that has an effect on him personally and on his earning capacity. I also accept he has had to live, as has his family, in a building site for the last few years and that if he could afford to repair it, he would do so. The difficulty is that he asserts he cannot afford to do so but I do not have any evidence in relation to the costs of the work, let alone any evidence in relation to his means. I have absolutely no idea, and I would be guessing, how much this work would take to do now that all that would need to be done is effectively knocking off a couple of metres off the depth of the rear extension and moving in the dormer window wall about 650 mm. In those circumstances, it seems to me that I have to determine the case based upon the *evidence* before me, not just on assertion. On the evidence, there is a strong interest in enforcing the breach of planning control and there is precious little evidence that a more limited injunction would make any difference to Mr Halama whether he would still do the rear extension anyway. Indeed, it is obvious that if there were direct actions taken, Mr Halama would be saying the same thing as he is now - that he cannot afford to pay the bill. In short, this situation will just drag on and on as it has now for five years. In those circumstances, when those strong factors point towards an injunction enforcing planning control, weighed against Mr Halama's personal circumstances but the absence of evidence of his financial position and the cost of the works, I am driven to

the conclusion that it is necessary and expedient to make an injunction in the terms sought by the Claimant.

47 However, I will give Mr Halama six months to comply with the injunction rather than three months because the planning inspector said it would take three months to do the work and I am prepared to accept that now Mr Halama will have to get the money together, someway or other, which will take a little bit more time. If it transpires in the meantime that the parties can compromise the position by means of additional planning permission then, of course, the injunction can be amended. For those reasons, I uphold the injunction in the terms sought but I will give Mr Halama six months to do the work.

COSTS

48 Whilst the above judgment is the approved transcript of my oral judgment in court on 16th October 2023, by the time I had finished, it was after 6pm and I made directions for costs submissions from the Claimant and Mr Halama, which I now have on 16th November 2023. For ease, I propose to give my ruling on costs here. However, notwithstanding Mr Halama's representations on the costs of the witness summons applications to Mr Courtney and Mr Richardson, I dealt with those on 16th October and I will not re-open that issue.

49 There can be no question that Mr Halama should pay the Claimant's costs – it succeeded in its application in full and therefore should receive its reasonable and proportionate costs under CPR 44. Its costs schedule is relatively modest – only £23,969 for several months' litigation ending in a one-day trial in the Royal Courts of Justice. Whilst the original level of profit costs was slightly on the high side at £22,303.60, they were capped at £14,000 which is entirely reasonable and proportionate for a case of complexity where they had to undertake the preparation of the bundle and deal with voluminous correspondence and documentation from Mr Halama (if not on his personal circumstances or the costs of the works). Mr Cannon's fees are also entirely appropriate and the rest is court fees etc. I

approve the costs at £23,969. Mr Halama's means are not relevant to that assessment, but to the time I give him to pay them.

50 On that subject, Mr Halama has finally provided some evidence of his means which I accept is limited to his pension income of £871pcm and a few thousand pounds in savings. More concerningly (although I do not recall him mentioning this on 16th October), there is a possession claim of the house by a lender which went to court on 11th October, although I do not have a copy of the order made, only the claim form. It may be this will concentrate minds on an agreed solution as I mentioned at court. However, it plainly justifies some indulgence in time to pay. But £50pcm is far too low. Instead, I give Mr Halama 12 months to pay the costs of £23,969. That way, those costs are less likely to jeopardise him keeping his home.

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