



Neutral Citation Number: [2022] EWHC 536 (QB)

Case No: QB-2022-000449

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2022

Before:

ANTONY DUNNE
(Sitting as a Deputy High Court Judge)

Between:

NORTH NORTHAMPTONSHIRE COUNCIL **Claimant**
- and -
(1) James Jason MONGAN
(2) Edward Paul MONGAN
(3) Christopher Joseph MONGAN **Defendants**

Oliver Lawrence (instructed by **North Northamptonshire County Council**) for the **Claimant**
The Defendants did not attend and were not represented

Hearing dates: 25th February 2022

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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ANTONY DUNNE

This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 11 March 2022.

Antony Dunne (sitting as a Deputy Judge of the High Court):

Introduction

1. This is the return date hearing of the Claimant's application for an injunction, pursuant to section 187B of the Town and Country Planning Act 1990 ("the TCPA 1990"). The Defendants are the Registered Proprietors of Registered Title NN 212797, and have been since 13th April 2015. This land is described as PLOT 10, Greenfields, Braybrooke Road, Braybrooke, MARKET HARBOROUGH ("Plot 10"). This land is designated as agricultural land.
2. On 11th February 2022, following a without notice application made on 10th February 2022, Cutts J issued an interlocutory injunction under section 187B of the TCPA 1990 in the following terms:

"1. Until further order, the Defendants shall not (whether by themselves or encouraging or allowing another) undertake any engineering operation on the Land or import, deposit or excavate any material on the Land without the written consent of the Claimant's solicitor. For the avoidance of doubt, the Defendants are forbidden from importing or depositing any material (including hardcore, building material, soil or domestic waste) or excavating/digging up the Land so as to alter the grounds levels.

2. The Land referred to in this order is the Land at plots 10 and 11 at Greenfields, Braybrooke Road, Braybrooke as delineated in red on the attached plan."

3. The application returns to the Court for reconsideration of the order and whether further orders are appropriate (including a mandatory order requiring full compliance with the enforcement notice). The Claimant has provided the Court with a draft order. The draft order contains paragraphs 1 and 2 from the 11 February order, as set out above, and includes two further requirements:

"3. The Defendants must fully obey the enforcement notice dated 13 December 2019. To that end, by 4pm on 24 May 2022, the Defendants must remove all of the material which has been brought on to the Land since the summer of 2019. The Defendants shall start the removal by 18 March 2022. In removing the material, the Defendants must:

a) Do so lawfully and they shall not transfer the material on to any land which does not have the benefit of planning permission.

b) Keep adequate records of each removal so that they can satisfy the Claimant and the Court that the requisite minimum volume of material has been removed. By 4pm on 30 May

2022, the Defendants shall provide to the Claimant's solicitor a written record of what material has been removed, specifying the quantity, appending documentary evidence to prove the same (including delivery invoices).

4. The Defendants may not sell or lease the Land without the consent of the Claimant's solicitor until they have fully obeyed this order"

Enforcement action

4. The enforcement history in relation to Plots 10 and 11, Greenfields, is set out in the witness statement of Lucinda Lee, a senior planning enforcement officer employed by North Northamptonshire Council.
5. The Claimant became aware of the breach of planning control at Plot 10 on 18th October 2019 when Lucinda Lee inspected the site and reported that "the site showed without planning permission a clear import and deposit of waste materials and hardstanding and laying down of various hardstanding composites to form a hardstanding base". Ms Lee concluded that "a material change of use has occurred and without planning permission to the carrying out of engineering works to the land".
6. On 30th October 2019 the Claimant gave notice to the "landowners/occupiers/land users" of Plot 10 of the breach of planning control by the deposit of mixed hardcore material and required them to stop the breach of planning control with immediate effect and to remove the material from the land within 14 days. This letter was attached upon Plot 10 and at the front entry gate.
7. On 25th November 2019 the Claimant wrote to the Defendants, the registered proprietors of Plot 10, informing them of the breach of planning control, enclosing the 30th October 2019 notice, and informing the Defendants that, as the landowners, they were responsible for rectifying the breach of planning control. The Defendants were informed that they had 7 days to respond to the letter and that an enforcement notice would be served on the land. The letter was sent to 125 Everton Drive, Stanmore, HA7 1EB. This is the address of the Defendants recorded in the Land Registry proprietorship register for Plot 10.
8. On 28th November 2019 a site visit by Ms. Lee revealed the works on Plot 10 were continuing and that the works had now expanded over Plot 11. The Defendants are not the registered proprietors of Plot 11.
9. On the 13th December 2019 an enforcement notice was issued alleging a breach of planning control on Plot 10. The reasons given for the notice were, in essence: the carrying out of engineering works on the land to facilitate a change of use of the land, which did not benefit from planning permission; and that the breach of planning control provided an adverse detrimental impact upon the land because of its incongruity with the natural landscape. The notice gave clear instructions to: (a) stop the unauthorised use within 1 month of the notice; (b) remove the hardstanding material from the land within 2 months of the notice; and (c) to restore the land to its previous condition by levelling and reseeding the land, within 2 months of the

completion of instruction (b). The effective date on the notice was 16th January 2020. The notice was served: on the land; on the Defendant's address as shown in the proprietorship register for Plot 10; in the local paper; and on the electronic enforcement register. No appeal against the notice was lodged.

10. On 30th September 2020 Ms Lee again visited Plots 10 and 11. On this occasion a man who gave his name as "George" was driving a digger on the site and was using it to pummel hardstanding material into the ground. "George" said that he was doing the work as a favour for a man called George Merrigan and gave no further details to Ms Lee. On the same day as Ms Lee's visit to Plot 10, a man telephoned the council offices for Ms. Lee and gave his name as James Mongan.
11. On 2nd October 2020 Ms Lee telephoned the number left on the 30th September and spoke to James Mongan, the First Defendant. James Mongan said that he was only the part owner of Plot 10, that he owned part A and his brothers owned parts B and C. He said that there were no works on his part of Plot 10 and that he "never knew what was going on.". Ms. Lee informed James Mongan that if the works on Plot 10 continued that would constitute a criminal offence.
12. Ms Lee again spoke to James Mongan on the telephone on 6th October 2020. James Mongan first asked if he could make a planning application. Ms Lee told him that an application for residential use could not be made as a previous application had been refused. James Mongan then said that the land was not his and that he knew nothing of the works. Ms. Lee informed James Mongan that there was an enforcement notice in relation to the land. Ms Lee's reference in her conversation with James Mongan to "a previous application" relates to an appeal by James, Edward and Christopher Mongan in 2015 to permit the residential use of Plot 10. This appeal was dismissed by a planning inspector on 22nd March 2017. In this telephone call Ms Lee arranged a face to face meeting with James Mongan for the 8th October 2020. James Mongan did not attend this meeting.
13. On 16th December 2020 Ms Lee made another site visit to Plot 10. There was no compliance with the enforcement notice. On the same day a letter addressed to the Defendants warning them of the risk of prosecution under section 179 of the TCPA 1990 was left at Plot 10.
14. Aerial drone footage was taken of Plot 10 in February 2021, on 14th December 2021 and 10th January 2022. This footage shows that Plot 10 was still in non-compliance with the enforcement notice and that a container had now been placed on Plot 10. In addition, the footage from February 2021 showed that the works had fully extended over Plot 11 and that they had been carried out by the same equipment.

History of these proceedings

15. On 10th February 2022, the Claimants applied for an injunction against the Defendants under the provisions of section 187B. The application was made without notice. As set out above the interim injunction was granted on 11th February 2022, with a review date of 25th February 2022.

Service and proceeding in the Defendants' absence

16. The interim injunction order of 11th February 2022 required the Claimant to:
- a) Personally serve each Defendant with a copy of this order together with the claim form, application and evidence in support;
 - b) Attach a copy of the order in a transparent waterproof envelope to the entrance of the Land so that it comes to the attention of any visitors; and
 - c) Display a copy of the order on its website.

The order of 11th February 2022 informed the Defendants that there would be a hearing on 25th February 2022 which would consider whether it was appropriate for the 11th February 2022 order to continue and would consider the issue of a mandatory order requiring full compliance with the enforcement notice.

17. I have read the statements of Andrew Payne. His evidence, which I accept, is:
- (a) On 16th February 2022 he made attempts to serve the required documents on the Defendants personally at 125 Everton Drive Stanmore HA7 1EB, the address of the Defendants recorded on the proprietorship register for Plot 10. He was unable to serve the documents on the Defendants personally but posted the documents to the address in envelopes addressed to each of the Defendants.
 - (b) On 16th February 2022 he served copies of the documents on Plot 10 by securely attaching the documents to a metal container situated on Plot 10.
18. The Claimant has not therefore been able to comply with the first requirement of the order, that the claimants be served with the above documents, including the claim form, personally. I therefore have to consider whether service of the claim form and associated documents required by the order of 11th February has been effective, despite the Claimant's inability to serve the claim form and associated documents personally. The issue is of importance because none of the Defendants have attended this hearing and when I come to exercise my discretion on the question of proceeding in the Defendants' absence the issue of service will be critical.
19. As is well known the purpose of service of originating process is to bring the proceedings to the Defendants' attention. Personal service is of course one of the ways in which service may be effected, but as CPR 6.3 provides it is not the only one. Whilst in certain cases the CPR mandates personal service as the method of service, a claim for an injunction with a penal notice attached is not one of those cases.
20. Based upon the proprietorship register for Plot 10 dated 13th April 2015, the last known address for all three Defendants was 125 Everton Drive, Stanmore HA7 1EB. Enquiries by Mr Payne revealed that the premises were occupied, and he therefore posted the documents to all three defendants to this address. But for the Order of 11th February 2022, this would have been good service which met the requirements of CPR 6.3 and 6.9. In addition, the Claimant has served the claim form and associated documents on Plot 10. I find that the combination of: (a) leaving the claim form and associated documents at the last known address; and (b) leaving the claim form and associated documents on Plot 10; has put the Defendants in a position to ascertain the

contents the claim form and associated documents or was reasonably likely to do so in the period between the 16th February 2022 and the 25th February 2022 hearing. I therefore find that service of the claim form and the associated documents has been effective.

21. The Defendants did not attend the hearing on 25th February. At that hearing I decided it was appropriate to proceed in the Defendants' absence for the reasons below.

First, the Claimant had taken sufficient steps to serve the claim form and associated documents for the Defendants to be in a position to ascertain their contents.

Second, no reason had been given by the Defendants for their non-attendance.

Third, an adjournment was unlikely to lead to the attendance of the Defendants. There had been no response from the Defendants to the Claimant's enforcement notice. This was despite the evidence from Ms Lee of: (a) the Service of enforcement documentation on both Plot 10 and to 125 Everton Drive; and (b) her conversations with the first Defendant in October 2020 which show that he was personally aware of the Claimant's enforcement action. There is therefore evidence that the Defendants are deliberately avoiding the Claimant's attempts to take enforcement action in relation to this breach of planning control, which is, in turn, evidence that the defendants are deliberately avoiding these proceedings.

Fourth, the Claimants have made repeated attempts to take enforcement action in relation to Plot 10, which have failed because of the Defendants lack of cooperation with the enforcement process. A further adjournment of these proceedings would further delay the Claimant's legitimate enforcement attempts and would cause unfairness to them.

22. In light of the Defendants longstanding failure to respond to the Enforcement notice and having regard to the overriding objective and the need to do justice to both sides, I did not consider that it was unfair on the Defendant to proceed with the hearing on 25th February.

Relevant law

23. Section 187B of the TCPA 1990 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 under 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.”

24. Guidance on the approach the Court should take when considering an application under section 187B was provided by the House of Lords in the leading case of *South Bucks DC v Porter* [2003] UKHL 26. In *Davis v Tonbridge & Malling Borough Council* [2004] EWCA 194 the Court of Appeal summarised the effect of the speeches in the House of Lords in the Porter case as follows:

“1) Section 187B confers on the courts an original and discretionary, not a supervisory, jurisdiction, so that a defendant seeking to resist injunctive relief is not restricted to judicial review grounds; 2) it is questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B; 3) the jurisdiction is to be exercised with due regard to the purpose for which was conferred, namely to restrain breaches of planning control, and flagrant and prolonged defiance by a defendant of the relevant planning controls and procedures may weigh heavily in favour of injunctive relief; 4) however, it is inherent in the injunctive remedy that its grant depends on a court's judgment of all the circumstances of the case; 5) although a court would not examine matters of planning policy and judgment, since those lay within the exclusive purview of the responsible local planning authority, it will consider whether, and the extent to which, the local planning authority has taken account of the personal circumstances of the defendant and any hardship that injunctive relief might cause, and it is not obliged to grant relief simply because a planning authority considered it necessary or expedient to restrain a planning breach; 6) having had regard to all the circumstances of the case, the court will only grant an injunction where it is just and proportionate to do so, taking account, inter alia, of the rights of the person or persons against whom injunctive relief is sought, and of whether it is relief with which that person or persons can and reasonably ought to comply.”

25. In addition, Lord Bingham, giving the leading speech in the House of Lords in the *Porter* case, said:

“32. When granting an injunction the court does not contemplate that it will be disobeyed. 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 that the order be one with which the defendant can and reasonably ought to comply.”

26. Finally, as this is an application for an interim injunction, I must also consider the tests laid down in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

Discussion and Conclusions

27. I conclude that the terms of the interim injunction order made on 11th February 2022 now set out in paragraph 1 of the draft order should continue and that there should also be a mandatory injunction order in the terms set out at paragraph 3 of the draft order. My reasons are as follows:

First, I see no reason to depart from the Claimant’s view that there have been breaches of planning control on the Land. The photographs and aerial drone footage produced by Ms. Lee clearly show that the Land has been covered in hardstanding and that this is incongruous with the natural landscape.

Second, that there have been flagrant and prolonged breaches of planning control by these Defendants in relation to the Land. The Land comprises of two plots: Plot 10 and Plot 11. The evidence that the Defendants are responsible for breaches of planning control in relation to Plot 10 is compelling: (a) the Defendants own Plot 10; (b) they were served with an enforcement notice in relation to Plot 10 with a return date of 16th January 2020; (c) despite the enforcement notice work in breach of planning control continued; (d) the First Defendant was personally informed of the enforcement action in relation to Plot 10 by telephone in October 2020, though he denied having anything to do with the works; and (e) Plot 10 remains in breach of planning control. The evidence in relation to plot 11 is that: whilst the Defendants are not the owners of Plot 11 the work began on the Defendants’ land, Plot 10; this work spilled over onto Plot 11 by November 2019; and photographs from February 2021 show that, by then, the work had covered the whole of Plots 10 and 11. I am therefore satisfied that there is sufficient evidence that the Defendants are responsible for planning control breaches on Plot 11 for the order to cover Plot 11, as well as Plot 10. I am conscious that, in the absence of the Defendants, I have only heard one side of the story. In addition, it is possible that the work on Plot 10 has been carried out by trespassers; however, in light of the lack of any response from the Defendants to enforcement action, I do not consider this likely.

Third, an injunction in this case is one with which the Defendants can and reasonably ought to comply. This is not a case where the Defendants will be displaced by the terms of the injunction.

Fourth, the tests laid down in *American Cyanamid Co v Ethicon Ltd [1975] AC 396* are met. First, there is a serious issue to be tried. As set out above, the Claimants have produced cogent evidence that the Defendants have acted in breach of planning control in respect of the Land and will continue to do so unless restrained by this injunction. Second, damages are not an appropriate alternative remedy. The Claimant acts in the public interest and has produced evidence that the damage to the landscape is such that it cannot be remedied by an award in damages. In addition, absent an injunction, it is clear from the circumstances of this case, that the breach of planning control will continue. Third, the balance of convenience favours the making of an injunction. The status quo is that the Land is agricultural land. The injunction requested does no more than require the Defendants to stop further damage to the Land and to restore it to its state before the breaches of planning control upon it. This injunction therefore does no more than seek a return to the status quo. In addition, the Claimant has produced powerful evidence that the Defendants are in breach of planning control and that this breach will continue unless restrained by injunction.

28. For all of the above reasons, it is just and proportionate to grant an injunction in the prohibitory and mandatory terms set out in paragraphs 1 and 3 of the draft order.
29. I now consider whether it would be appropriate to order that the Defendants not sell or lease the Land without the consent of the Claimant's solicitor until they have fully obeyed this order, as set out in paragraph 4 of the draft order. Mr Lawrence submitted that this requirement be included in the order as it would make it harder for the Defendants to escape the consequences of their breach of planning control and would make it harder for the Claimant to secure compliance with the order. The Defendants' repeated failure to respond to the Claimant's attempts to secure compliance with planning control also provides evidence that the Defendants might take further steps to avoid compliance with the order, including by disposing of the land. I therefore conclude: (a) that the requirement set out at paragraph 4 of the draft order will assist in enforcing compliance with the mandatory terms of the injunction by preventing the Defendants from disposing of the land; and (b) that the requirement is just and proportionate and that the balance of convenience favours the inclusion of such a requirement.

Further Orders

30. There was discussion at the end of the hearing about the method of service for this order. The Claimant shall effect service of the order and this judgment as follows:
 - a) Personally serve each Defendant with a copy of this order together with a copy of this judgment. If personal service cannot be effected, a copy of this order and a copy of this judgment for each of the Defendants should be left at the Defendants' last known address, 125 Everton Drive, Stanmore HA7 1EB;
 - b) Attach a copy of the order in a transparent waterproof envelope to the entrance of the Land so that it comes to the attention of any visitors; and
 - c) Display a copy of the order on the Claimant's website.

31. I have summarily assessed the Claimant's costs and order the Defendants pay to the Claimant the sum of £3,982.00.
32. I heard submissions from Mr Lawrence as to whether it would be appropriate to amend the order to provide the Defendants with liberty to apply to vary or discharge the Order the Court makes. In light of the Defendants' failures to respond to enforcement action, there will be no order allowing the Defendants liberty to apply. Of course, as this hearing proceeded in their absence, the Defendants may be permitted to make an application under CPR 39.3 to set the order aside, if they can satisfy its criteria.