Neutral Citation Number: [2023] EWHC 1246 (KB)

Case No: KB-2022-003497

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2023

Before :

THE HONOURABLE MRS JUSTICE FARBEY

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Between :

Hart District Council	**Claimant**
- and -	
(1) Helen Freeman	
(2) Matthew Silvester	**Defendants**

- -
- -

Robin Green (instructed by **Hart District Council**) for the **Claimant**
Emmaline Lambert (instructed by **Tozers LLP**) for the **Defendants**

Hearing date: 9 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE FARBEY:

1. By a notice of application dated 19 April 2023, the defendants apply to vary the terms of an injunction made by Mr Anthony Metzer KC sitting as a Deputy Judge of the High Court ("the order") which prohibited the defendants from occupying land accessed off the eastern side of Pickaxe Lane in South Warnborough ("the land"). The defendants apply to vary the order on the grounds that there has been a material change of circumstances since it was made.

2. The change of circumstances is said to be that:

> (i) On 12 April 2023, the defendants were forced to vacate the property in which they had been living. They have been unable to find suitable alternative accommodation. They need to live in a caravan on the land in order to avoid homelessness; and/or
>
> (ii) Since the order was made, the defendants have appealed against an enforcement notice issued by the claimant. At the appeal, they will argue that they should be permitted to occupy the land.

3. The defendants seek a variation of the order to live on the land until their appeal against the enforcement notice and any onward challenge has been determined. The claimant resists the application on the grounds that the defendants' circumstances do not justify their living on the land.

4. I heard submissions from the parties at a hearing on 9 May 2023. Mr Robin Green appeared on behalf of the claimant. Ms Emmaline Lambert appeared on behalf of the defendants. The claimant had served its evidence late and there was no agreed bundle of documents. Both counsel wished to proceed but I permitted the defendants to file additional evidence after the hearing in order to deal with any factual matters that they may have been unable fully to address. I have received additional evidence on behalf of the defendants. I have also received further assistance on the law from both counsel after I asked them to double check the authorities on the legal approach that the court should take when a change of circumstances is relied on.

Factual background

5. In considering the factual background, I have considered all the witness statements filed by the parties together with their exhibits. The defendants rely principally on the three witness statements of the first defendant. The claimants rely principally on the witness statement of Mrs Stephanie Ann Baker. She is a Chartered Town Planner employed as the claimant's Development Management & Building Control Manager.

6. The defendants have since June 2020 run a company which breeds, rears and produces free-range Saddleback pigs primarily for pork. They sell their produce online and at local markets and offer catering at local community events. They specialise in conserving rare bloodlines and practice regenerative farming methods to preserve grazing land.

7. The defendants' farming takes place in two areas. They use the land described above, which they purchased with a mortgage in June 2022 and which they have named

Hares Farm. They also have an agreement with the farmer who owns the nearby Priory Farm to rent between 5 and 10 hectares of arable land per year for grazing. The pigs are bred on the land and raised on Priory Farm.

8. Following the purchase of the land, the defendants began to instal infrastructure which included the creation of an engineered access track from the entrance gate at Pickaxe Lane, parking areas, a loosely stoned area, a foul water drainage system, electricity and water supply, equipment cabinets, a telegraph pole, metal storage containers and a timber storage shed.

9. The defendants were living at the time in long-term rental accommodation in Hook. In August 2022, the landlord informed the first defendant of his intention to give notice to her to leave the property. On 1 September 2022, the first defendant received notice that the landlord would take possession of the property on 1 November 2022. Upon receiving the formal notice, the first defendant searched for a new property for up to £2,000 rent per calendar month. The couple had a baby by that time and three working dogs (one of which has now died).

10. The defendants say that, for fear of being homeless, they purchased a twin-unit static caravan. On 16 September 2022, they placed it on the land and began to live in it. The caravan has been internally fitted for residential use and is externally supported by decking and brick piers. The photographs show that it has the appearance of a wooden lodge although it is a caravan.

11. It is not in dispute that the defendants needed planning permission to live in the caravan and that they did not have permission. By email dated 20 September 2022, they notified the claimant that they had moved into the caravan, saying that they would "work with [their] planning consultant immediately to submit an appropriate planning application." There is, however, no evidence to suggest that they made any effort to engage a planning consultant at that stage.

12. On 10 October 2022, planning officers and a local councillor made a pre-notified site visit. The defendants were advised to submit an application for retrospective planning permission but they did not do so.

13. On 19 October 2022, the defendants were served with an interim injunction order made by Yip J without notice. The interim injunction prohibited residential occupation of the twin-unit caravan. The defendants have at all times adhered to the terms of the injunction and have not lived in the caravan since Yip J's order was made.

14. On 24 October 2022, which was the return date, Mr Metzer KC extended the injunction. The defendants were represented by counsel (not Ms Lambert) under direct access. He produced a written skeleton argument emphasising the claimant's duty to treat the defendants' child's best interests as a primary consideration. The defendants complain that they received the evidence for the return date on a Friday for a Monday hearing so that they had no time to address the issues with counsel. They also complain that he put up only a token resistance to the claimant's case. There is, however, nothing to suggest that the defendants were denied a fair opportunity at the hearing to address the court on any matter that could have made a difference to the outcome of the hearing or to the terms of the order.

15. After Mr Metzer KC made the order, the defendants moved into a hotel for a week and then into a house in Old Basing which family members made available to them as a short-term solution. On 26 October 2022, the second defendant emailed the claimant's housing department asking whether the claimant would provide the defendants with housing. By email dated 27 October 2022, the claimant responded by giving advice to the defendants and seeking further information. The defendants have not provided the further information and have not contacted the housing department since then.

16. On 14 December 2022, the claimant issued an enforcement notice directed at the unauthorised material change of use of the site from agricultural use to a mixed use for (among other things) the siting of a twin-unit residential caravan. The enforcement notice states:

> "(ii) The site is located in countryside outside any defined settlement limit in an unsustainable location where policy NBE1 of the Hart Local Plan 2032 applies. The unauthorised development is contrary to the provisions of this policy and no justification has been provided to indicate any criterion of this policy apply [sic].
>
> (iii) The unauthorised change of use of the land and the associated engineering operations cumulatively and individually have an urbanising impact on the site which unacceptably harms the character and appearance of the countryside which should be protected for its own sake.
>
> (iv) The Council considers planning permission should not be given for the unauthorised development because planning conditions could not overcome the fundamental objections to the development."

17. The defendants lodged an appeal with the Planning Inspectorate against the enforcement notice. The original grounds of appeal did not contend that the caravan and its supports should be retained on the land. It was envisaged that the appeal would be determined using the written representations procedure. On 29 March 2023, the solicitors instructed in the planning appeal (who are also instructed in the present application) wrote to the Planning Inspectorate to expand the grounds of appeal to cover the caravan and requested a hearing on the basis that the appeal concerned the defendants' "impending homelessness" and the need for "a permanent presence on the site" in order to breed pigs throughout the year.

18. By email to the Planning Inspectorate dated 30 March 2023, the claimant objected to the defendants' sudden change of position and observed:

> "The marketing for sale of their current accommodation would have been known to the defendants prior to 29th March 2023. An online search clearly shows the property… was marketed with Rightmove last summer and then again on 14th February 2023. The estate agent's website…shows that the property was a 'featured' listing and sets out that viewings would commence

> 25th February. The reason for the [defendants] not communicating…any homelessness concerns prior to 29th March 2023 is inexplicable…"

19. On 12 April 2023, the defendants had to move out of the Old Basing house. They went to live with the second defendant's mother and step-father on a temporary basis.

20. The first defendant appears to have taken the lead in trying to find permanent accommodation since the order was made. She registered with 8 estate agents and has used Rightmove and Zoopla. In her first witness statement, she says that she requested details of, or expressed interest in, 5 properties but did not receive any "positive feedback." I have been provided with a table which is said to show some of the properties which the first defendant enquired about. The table has 17 entries between October 2022 and April 2023 when the present application was filed. A second table, dealing with the first defendant's search from the date of lodging the present application to the date of the hearing before me, shows that the first defendant made a further 14 enquiries. None of the enquiries led to a suitable rental offer. A third table provided after the hearing shows that the first defendant has very recently made enquiries about a further 7 properties but I have not been informed of the outcome of most of those enquiries.

21. The first defendant claims that some landlords refused to let property to a family with children but I have seen no satisfactory evidence beyond one landlord who did not want children because of planned buildings works in the vicinity.

22. Some landlords have been unwilling to let property to tenants with dogs. One landlord would not accept dogs because of new carpets. One would not accept "the large dog" and another "would prefer not to have pets in the house."

23. At the date of the hearing before me, the defendants and their child were still living with the second defendant's mother and step-father. The conditions were cramped and uncomfortable. They were woken in the night by a barking dog (not their own). The defendants say (without producing any independent evidence) that their child's development could have been harmed by sleeping in a travel cot.

24. Since the hearing, Ms Martine Silvester Norton (the second defendant's mother) has provided a witness statement confirming that the defendants will be unable to stay in the house because the second defendant's step-father is due to undergo major surgery and will need peace and quiet when he returns home from hospital. In addition, they have house guests coming to stay in July so that there will be no room for the defendants.

25. The defendants' evidence – which the claimant does not accept – is that finding a property that would accept two working farm dogs and a young child is "unachievable." The defendants say that, from a personal perspective, they need to live on the land as they have nowhere else to live. There are also agricultural and business reasons for wanting to live on the land: they need to stay up all night when their pigs give birth which happens all year round. They say that some piglets have died because they have not been on site.

Legal framework

26. Section 187B of the Town and Country Planning Act 1990 provides in so far as relevant:

> "(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."

27. Guidance on the exercise of the court's discretion under section 187B was provided by the House of Lords in *South Bucks DC v Porter* [2003] UKHL 26, [2003] 2 AC 558: see especially the speech of Lord Bingham at paras 27-37. I do not set out here the well-established principles laid down by *South Bucks*, which are not in dispute. It is plain from *South Bucks* that this application to vary the injunction cannot be used as an accelerated form of challenge to the enforcement notice which is the province of the planning inspector who will hear the appeal. As Lord Bingham held at para 30:

> "As shown above the [Town and Country Planning Act 1990], like its predecessors, allocates the control of development of land to democratically-accountable bodies, local planning authorities and the Secretary of State. Issues of planning policy and judgment are within their exclusive purview. As Lord Scarman pointed out in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 141, 'Parliament has provided a comprehensive code of planning control.' In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 48, 60, 75, 129, 132, 139-140, 159 the limited role of the court in the planning field is made very clear. An application by a local planning authority 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 or (as in *Hambleton* [1995] 3 PLR 8) that a local authority should have had different spending priorities. But the court is not precluded from entertaining issues not related to planning policy or judgment, such as the visibility of a development from a given position or the width of a road. Nor need the court refuse to consider (pace *Hambleton*) the possibility that a pending or prospective application for planning permission may succeed, since there may be material to suggest that a party previously unsuccessful may yet

> succeed…But all will depend on the particular facts, and the court must always, of course, act on evidence."

28. Lord Scott of Foscote held at para 100:

> "In deciding whether or not to grant an injunction under section 187B the court does not turn itself into a tribunal to review the merits of the planning decisions that the authority, or the Secretary of State, has taken. The purpose of the injunction would be to restrain the alleged breach of planning controls and the court could not in my opinion properly refuse an injunction simply on the ground that it disagreed with the planning decisions that had been taken. If the court thought that there was a real prospect that an appeal against an enforcement notice or a fresh application by the defendant for the requisite planning permission might succeed, the court could adjourn the injunction application until the planning situation had become clarified. But where the planning situation is clear and apparently final the court would, in my opinion, have no alternative but to consider the injunction application without regard to the merits of the planning decisions."

29. As regards the court's approach to the variation of the terms of an injunction, both Mr Green and Ms Lambert invited me at the hearing to apply the familiar principles of *American Cyanamid Co v Ethicon Limited* [1975] AC 396 and *South Bucks*. During the hearing, I raised with counsel the question of whether I should start by considering whether there had been a change of circumstances and, if so, turn at that stage to the *American Cyanamid* and *South Bucks* principles. Neither counsel wanted me to take that approach and so I asked them to supply me with any relevant case law after the hearing.

30. Mr Green and Ms Lambert have since the hearing jointly provided me with a copy of *Entertainment Apps Limited v Yash Patel & 6 ors* [2021] EWHC 3388 (TCC). In that case, Mr Alexander Nissan QC (sitting as a Deputy High Court Judge) held:

> "12. I need to acknowledge a preliminary point made by Mr Hodgkin [counsel for the claimant] in respect of the application to vary the order made on the last occasion. He submitted, and Ms Patel [counsel for the fifth to seventh defendants] did not disagree, that the principles were covered by two cases, namely *Willetts v Alvey* [2010] EWHC 155 (Ch) and *Chanel Ltd v FW Woolworth & Co* [1981] 1 WLR 485. His submission was that the claimant now had the benefit of an existing order against the fifth to seventh defendants and whilst the court had jurisdiction to vary it, it ought only to do so if there has been a change of circumstance or where new facts had emerged which could not have been relied on before. In other words, this application to vary should not be treated as a second bite at the cherry simply because the fifth to seventh defendants chose not to participate in the hearing on the last occasion at which orders were made in their absence.

> 13. As a general proposition, I accept that and I will have it well in mind. On the other hand, Mr Hodgkin fairly and frankly accepted that it is the duty of a party with the benefit of an existing order, such as the claimant has in this case, to ensure that it does no more than is necessary to protect the claim it has."

31. In an accompanying email, Mr Green and Ms Lambert jointly submit that an application to vary an injunction must raise a material change of circumstances or other good reason why the court should review the injunction. If that threshold is passed, it is then for the court to determine whether the injunction remains just and convenient (or proportionate) in its original form or whether it should be varied. I am prepared to adopt the approach urged on me by both counsel.

The parties' submissions

32. In her submissions, Ms Lambert emphasised the defendants' personal situation. She submitted that the defendants had made plenty of efforts to seek new accommodation. She said that the property market does not presently favour renters (without directing me to any evidence of the situation in the relevant geographical area). The working farm dogs presented a significant barrier to finding a suitable rental property but it would be very expensive to house the dogs in kennels. The defendants could not afford a suitable rental property but they did not (in their own assessment) qualify for social housing. Falling between two stools, their housing situation was very serious and they needed the caravan to solve it. The claimant had at no stage considered the welfare of the defendants' son and had not carried out any assessment of his best interests.

33. Ms Lambert acknowledged that the defendants had breached planning laws and that public confidence in the fair application of planning laws was an important public interest. She submitted, however, that public confidence in the planning system was protected because the defendants were seeking to regularise the position through the appeal process and had adhered to the terms of the order.

34. Ms Lambert directed my attention to the witness statement and expert report of Mr Peter Williams (an Associate and former Director of Reading Agricultural Consultants Limited). It was Mr Williams' expert view that there was an essential agricultural need for the defendants to live on the land. By contrast, the claimant's expert evidence from Mr Ian Firth at Bondstones contained serious caveats and rested on assumptions that could not be justified.

35. Ms Lambert observed that the site was not in a high category of protected land. It was not, for instance, in the Green Belt or in an Area of Outstanding Natural Beauty. Nor was it located in a risky place such as a flood zone. There was no urgent need to protect the site pending the determination of the planning appeal. The caravan was located in ordinary agricultural land and would be used for ordinary agricultural purposes, namely the breeding of pigs.

36. Ms Lambert submitted that, given the strength of Mr Williams' evidence and the ordinary nature of the land, the defendants had a real prospect of a successful appeal which would enable them to live in the caravan. They were seeking a variation of the

order in order to live in the caravan for a limited period, until the determination of the appeal. If the appeal was not successful, they would move out of the caravan into accommodation elsewhere.

37. On behalf of the claimant, Mr Green submitted that the court had twice already considered that the defendants' breach of planning control justified the grant of an injunction. The defendants had carried out significant development on the land without seeking planning permission in what was a clear and deliberate breach of planning control. The defendants had failed to demonstrate a compelling need (whether personal or agricultural) to live on the site.

38. Mr Green submitted that it would undermine public confidence in the planning system if the defendants were to be permitted to live in the caravan until the appeal process had run its course, which might be some time next year. It would be more difficult for the claimant to use its enforcement powers in future cases. Mr Green directed my attention to various passages in the competing expert reports and submitted that, on the evidence, the defendants had not demonstrated a good case in the appeal. There was no good reason to vary the existing order.

Discussion

Has there been a change of circumstances since the order was made?

39. I do not accept that the defendants have raised a material change of circumstances. The defendants accept that (subject only to money needed for legal fees) they can afford up to £2,000 rent per calendar month. The voluminous evidence about local rental properties that Mrs Baker has downloaded from Zoopla shows that £2,000 is adequate in the Hart area. The defendants have failed to demonstrate that they cannot afford rental accommodation.

40. The defendants have failed to show that families in the area have difficulty in renting accommodation or that their child has dissuaded landlords from accepting them as tenants.

41. I accept that some landlords would refuse to rent to the defendants because they wish to keep two working farm dogs at home. However, I reject the submission that the dogs are the cause of imminent homelessness. First, there is no satisfactory evidence as to why the dogs are needed to herd the pigs from place to place. As Mrs Baker emphasises in her witness statement, the dogs are not mentioned in Mr Williams' agricultural appraisal. Nor does Mr Williams deal with the function of the dogs in his post-hearing Note. The claimant has properly cast doubt on whether it makes sense to herd pigs across the two different sites which the defendants use for farming.

42. I gave the defendants an opportunity to produce evidence that would counter the claimant's evidence that the two sites are about 7.5 miles away from each other if ordinary roads are used and that it takes about 16 minutes to drive between them by car. If that is correct, the need for dogs to herd the pigs may be caused as much by the inefficient layout of the farm as any real agricultural need for dogs. In her post-hearing witness statement, the first defendant says that the two sites are "not far apart" but gives no precise details. She says that, on a timed journey along green byways, it took her 15 minutes to travel between the two sites but that the journey may take

around 5 minutes less. This evidence has no probative value in the present context and does not advance the defendants' case.

43. Secondly, one dog would appear to be used for catching vermin rather than herding. The other dog is a herd dog but appears also to round up pigs that escape through the electric fence but there is no evidence that this happens often. The defendants have had ample opportunity both before and after the hearing to put forward a clear case about their dogs. I am not prepared to assume that the dogs have an irreplaceable business function when the claimant properly raises the question of the role of dogs in pig farming generally and on the defendants' farmland in particular.

44. Thirdly, I do not accept that the defendants would need to house the dogs with them in a rented home. The first defendant accepts that there are three commercial dog kennels within 15 minutes' drive of the land. She has received quotes of between £840 and £1,470 for kennelling the dogs for 4 weeks and has provided no proper evidence (such as bank statements or business accounts) to show that the defendants cannot meet this business expense.

45. If commercial kennels are too expensive, the defendants can be expected to consider other arrangements. There is no evidence that they have done so, albeit that they have rejected the suggestions put forward by the claimant. Given that the dogs are used for business purposes, the court and the claimant can expect them to have the business sense to look after the dogs without resort to breaches of planning control.

46. Overall, I have concluded that the defendants have failed to demonstrate that they have at any stage been unable to afford and live in rental accommodation. They were not imminently homeless before Mr Metzer KC and I do not accept that they are imminently homeless now. They have raised, and there has been, no change of circumstances.

47. As to the planning merits of residential occupation of agricultural land, Mr Williams' opinion, as expressed in his report, is that "there is an essential functional need for a full-time worker to be available at the site at most times" and that "there is no other accommodation in the area that is suitable and available to meet the functional needs" of the defendants' business. He considers that it is "entirely appropriate to consider granting planning permission for a temporary dwelling for a trial period."

48. Even taking account of Mr Williams' guarded conclusions about a trial period for a temporary dwelling, it is not clear why the defendants' business requires a family to live on site all the time as opposed to having one adult stay overnight from time to time when the pigs' welfare requires it. Mr Firth concludes that there is an insufficient labour requirement at the breeding site (ie the land) to demonstrate an essential functional need for anyone to reside on the land.

49. I see no reason in this case to step into the shoes of a planning inspector by reaching conclusions on the relative strengths of the expert reports or by exercising a planning judgment. It is not clear that the defendants will succeed in their appeal. The mere exercise of rights of appeal against the enforcement notice is in my judgment insufficient to demonstrate a change of circumstances. The defendants still want to live on the land when they have no permission to do so. In terms of the planning

merits, the defendants have raised, and there has been, no material change of circumstances since the hearing before Mr Metzer KC.

50. For these reasons, I do not accept that there has been any change of circumstances that would justify varying the order.

Balance of convenience

51. Even if there has been a change of circumstances, or if I should need for any other reason to reconsider the application of the *American Cyanamid* principles, the balance of convenience favours the claimant. The defendants ignored the planning system when building what was intended as their home on the land. They failed to apply for retrospective planning permission and have taken months to request an oral hearing of their appeal against the enforcement notice. I am not persuaded that anything in their personal circumstances is so compelling that it outweighs the public interest in the fair and consistent application of planning laws.

52. There is no medical or other independent evidence before me to suggest that the inability to live on the land has caused or will cause any harm to the defendants' child. Taking the child's best interests as a primary consideration, I agree with Mr Green that the defendants can be expected to move into rental accommodation that is suitable for a young child. It follows that there is no real risk that the child will be removed from his parents. The absence of any formal or even informal assessment of the child's welfare by the claimant does not affect this conclusion. I do not accept that the welfare of the defendants' child or his best interests requires the order to be varied.

53. Although I have been told that the defendants would leave the caravan if their appeal was unsuccessful, they have already breached planning controls by living in the caravan before the claimant was forced to apply for an injunction; and so the claimant is properly concerned that they may do so again. The photographs of the caravan show that it has been fitted out for permanent residence. I have not been provided with a proper timescale for the appeal or for any onward challenges to the inspector's decision that either party may wish to bring. It may be many months before the issues raised by the appeal would be finally determined and so it may be many months before the defendants would leave. The defendants would receive a substantial benefit from their breach of planning controls at the expense of public confidence in the planning system.

54. I agree with Mr Green that, in these circumstances, public confidence in the planning system would be damaged by the variation sought. As before Mr Metzer KC, the balance of convenience falls in favour of an injunction in the terms that he granted. It remains just and convenient, and also proportionate, for the claimant to have the benefit of an injunction in the existing terms.

Conclusion

55. Accordingly, this application is dismissed.