Neutral Citation Number: [2024] EWHC 1782 (KB)

Case No: Claim No: H01LE078
Appeal Ref: KA-2022-BHM-000042

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
ON APPEAL FROM LEICESTER COUNTY COURT

Birmingham Civil Justice Centre,
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

Date: 11/07/2024

Before :

THE HONOURABLE MR JUSTICE TURNER

- -

Between :

(1) LEICESTERSHIRE COUNTY COUNCIL **(2) BLABY DISTRICT COUNCIL**	**Claimants / Respondents**
- and -	
MR LOUIS MILES	**Defendant / Appellant**

- -
- -

Mr Barney McCay (acting through Advocate) for the **Claimants**
Mr Jack Smyth (instructed by Blaby District Council) for the **Defendant / Appellant**

Hearing date: 4 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE TURNER

The Honourable Mr Justice Turner :

INTRODUCTION

1. This is an appeal brought, with the permission of Tipples J, against the order of HHJ Hedley ("the Judge"), dated 27 September 2022, which, subject to certain specified exceptions, granted the Respondents an injunction to prevent the Appellant from keeping *"any vehicle on land in the district of Blaby… without the grant of planning permission or the written consent of [Blaby District Council's] solicitor…"*.

2. The injunction was granted under s.187B of the Town and Country Planning Act 1990 ("TCPA 1990"), which permits the court to grant a local planning authority injunctive relief for the purpose of restraining an actual or apprehended breach of planning control.

3. The Appellant argues on this appeal that the decision of the Judge was wrong because he ought to have found that the planning breach complained of related to a state of affairs which had been persisting for a period in excess of ten years before the enforcement action was taken and, as a result, he was entitled to statutory immunity.

THE BACKGROUND

4. The Appellant is the owner of land known as Sandpit Farm, which is located on the western side of Croft Lane near Thurlaston in Leicestershire. There is a grass verge adjacent to Sandpit Farm on both sides of the lane.

5. Since shortly after the Appellant moved there in 2002, Sandpit Farm has been subject to planning enforcement action at various times. After moving in, he lost no time in accumulating and storing a wide variety of vehicles and equipment on his farm including: cars; lorries; a JCB; a mobile catering trailer; several touring caravans; skips and a cement mixer. The presence of such vehicles and equipment was treated as a commercial use for which the Appellant did not have planning permission. An enforcement notice was issued but he did not comply with it as a result of which he was later convicted of an offence of breaching planning control.

6. A further enforcement notice was issued on 4 April 2012 relating to unauthorised development which also involved the storage of vehicles and other equipment on the farm. No purpose would be served by providing further particulars of the history of this ongoing planning dispute.

7. In 2021, the Respondents carried out inspections specifically of the verges outside Sandpit Farm and concluded that the Appellant was by then using the verges as a storage area for vehicles and that this amounted to a change of use for which planning permission had not been obtained.

8. On 19 November 2021, Leicestershire County Council sought a mandatory order requiring the removal of vehicles from the verges and prohibitory relief to prevent the Appellant from storing vehicles elsewhere in Leicestershire. Blaby District Council was later joined as a claimant in its capacity as the local planning authority.

9. On 2 September 2022, the Judge heard the Respondents' application.

10. At the hearing, the central issue was as to whether the Appellant had either been using the verges on Croft Lane to *store* vehicles which the Respondents alleged would constitute an unlawful material change of use or, alternatively, as an area upon which merely to *park* them which the appellant argued would not.

11. On 27 September 2022, the Judge handed down judgment. He considered that three issues arose in the case:

> *"a. What are the planning controls which apply to the location complained of?*
>
> *b. Is there any actual or apprehended breach of planning control?*
>
> *c. If the Court is satisfied that there has been a breach of planning control, should it exercise its discretion to grant an injunction, bearing in mind that no injunction should be granted which unless it is both proportionate and no more than reasonably necessary to control the activity complained of?"*

12. The Judge came to the following conclusions with respect to each of the issues:

    (a) Under Issue 1, the Judge held that "the primary use of highway verges is to enable vehicles to pass and repass safely on the highway itself and that the storage of vehicles on the highway

changes the use" and "whilst parking is a permitted activity, storage of vehicles is not";

(b) Under Issue 2 the Judge held that "the use of the verges" amounted to "storage as opposed to parking". He considered that the verges were "unsuitable for parking", and concluded that taking into account the length of time over which the vehicles were left on the verges by the Appellant, the verges had been used for storage rather than parking; and

(c) Under Issue 3 the Judge considered that an injunction should be granted, albeit not on a county-wide basis.

13. The Judge granted an injunction in the following terms:

> *"1. Until 4pm on 1 September 2027, the Defendant shall not (whether by himself or by instructing, allowing or encouraging any other person) keep any vehicle on Land in the District of Blaby (including on or adjacent to the highway and land owned by the Defendant) without the grant of planning permission or the written consent of the 2nd Claimant's solicitor, except for the Exception set out at para 2 herein. The extent of the Land is shown in the attached plan which sets out the administrative boundary of Blaby.*
>
> *2. This order shall not prevent the Defendant storing/parking up to 6 of his own vehicles for personal use provided that the Defendant has given the registration numbers of such vehicles in writing to the 2nd Claimant's solicitor and provided that each vehicle has valid road tax or SORN. If the Defendant wishes to update the excepted vehicles he shall email the 2nd Claimant's Solicitor identifying which vehicle(s) is no longer for personal use and nominate additional vehicle(s). The Defendant may update the list of excepted vehicles up to 5 times in each calendar year.*
>
> *3. The Defendant shall by 11 October 2022 pay the 2nd Claimant's costs of the claim summarily assessed in the sum of £15,000. ..."*

PERMISSION TO APPEAL

14. The Appellant's application for permission to appeal was refused by the Judge and subsequently, on paper, by Ritchie J. However, following an oral renewal hearing on 21 December 2023, Tipples J granted the Appellant permission to appeal observing that:

> *"... the Appellant's case is that this had been going on for period of more than 10 years (and this appears to be supported by the evidence filed with the Respondent's evidence for trial). If that is right, then that provides a defence or a potential defence to the Respondent's enforcement proceedings contained in the claim: see sections 171B and sections 191(2) and 191(3) of the Town & Country Planning Act 1990.*
>
> *The Appellant acted at trial in person with the assistance of Ms Bateman as his McKenzie Friend. The legal nature of this defence or potential defence open to him should, out of fairness to a litigant acting in person, have been identified in the Counsel's skeleton argument, and all reasons for and against this defence explained to the trial Judge by the represented party. That does not appear to have happened and, at the hearing today, Counsel for the Respondent accepted that this was not addressed in his skeleton argument at trial.*
>
> *In these circumstances, the Court considers that the Appellant's first ground of appeal has a real prospect of success and there is compelling reason for the appeal to be heard in relation to ground one. Save for the issue of fairness identified in ground 7 (in relation to ground 1), all other grounds of appeal do not have a real prospect of success, and there is no other compelling reason for them to be heard. Further, they were not pursued by the Appellant at the oral renewal hearing. ..."*

THE TEN YEAR RULE

15. Section 171B(3) of the Town and Country Planning Act 1990 provides that no enforcement action may be taken with respect to certain breaches of planning control, including those alleged in this case, "after the end of the period of ten years beginning with the date of the breach".

16. The ten year period must relate to a period over which the breach in question was continuous (see, for example, ***Swale Borough Council v First Secretary of State*** [2005] EWCA Civ 1568).

17. In the instant case, the claim form having been issued on 19 November 2021, it is agreed that the continuous period relied upon must, in order to provide immunity, have started on or before 19 November 2011.

SHOULD THE RESPONDENT HAVE DRAWN THE COURT'S ATTENTION TO THE TEN YEAR RULE?

18. Tipples J accepted, for the purposes of giving permission to appeal, that the onus was upon the Respondents to have identified the ten year rule defence in its skeleton argument and that "all reasons for and against

this defence" ought to have been explained to the trial Judge. She did not, however, identify the source and scope of this obligation. Within the context and constraints of a renewed permission hearing, this is entirely understandable.

19. In my view, a good starting point is the Bar Standards Board Handbook version 4.3 which provides:

> *"Part 2 Code of Conduct:*
>
> *rC3(4) you must take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions…*
>
> *gC5 Your duty under Rule rC3.4 includes drawing to the attention of the court any decision or provision which may be adverse to the interests of your client. It is particularly important where you are appearing against a litigant who is not legally represented."*

20. It is to be noted that the obligation upon counsel is not "to ensure" but "to take reasonable steps to ensure" that the court has before it "all relevant decisions and legislative provisions". There is no formal professional obligation upon counsel to have "all reasons for and against this defence explained to the trial Judge". However, I readily accept that such a course or a similar course may, on the facts of any given case, be consistent with the obligation imposed by CPR 1.3 requiring the parties to help the court to further the overriding objective to deal with cases justly.

21. The "relevant …legislative provisions" in this case must be taken to be Section 171B(3) of the 1990 Act which establishes the ten year rule.

22. In this case, those representing the Respondents did not discern either from the evidence in the case or the way in which the appellant had presented his case prior to closing submissions that the ten year rule was relevant to the court's determination.

23. In my view, it is only with the benefit of hindsight and not the wisdom of reasonable foresight that the potential relevance of this legislative provision could be categorised as one to which the attention of the court ought to have been drawn. In their skeleton argument, the Respondents said they had "been unable to detect a legally recognisable defence (save for submissions disputing the proportionality of remedy)". In my view, this was not only an honest (which has never been in dispute) but also a

reasonable conclusion for them to have reached. I deal with the relevant material in the trial bundle later in this judgment.

24. I am satisfied, even taken at their highest, the obligations imposed on the Respondents and their counsel, whether by the application of the Civil Procedure Rules or the relevant professional standards, against the background of this case were not so stringent to require them to put before the court the statutory provision relating to the ten year rule, still less to articulate all reasons for and against this defence.

25. In any event, and importantly, it is expressly admitted that both the court and the Appellant knew about the ten year rule because the Appellant referred to it, albeit for the first time, in his closing submissions. Accordingly, the Judge had been made aware of the "legislative provisions" which the Respondents are now criticised for not having drawn to the attention of the court. It must follow that even if, contrary to my findings, the Respondents ought to have brought the ten year rule to the court's attention then such failure was not relevant to the merits of this appeal.

26. Notwithstanding the fact that the Appellant knew about the ten year rule, he chose not to make any reference to it until raising the point during his closing submissions and after the evidence in the case had concluded. It is to be noted in particular:
    (i) No reference was made to the ten year rule in the written material which the Appellant relied upon at trial. It is to be observed in this context that the Judge had given case management directions on 12 April 2022. These included orders that the Appellant should in the witness statements which he served, including his own, set out all grounds of opposition to the claim. In a detailed thirteen page statement he made no assertion and relied upon no evidence to suggest that the circumstances comprising the alleged breach had been persisting for more than ten years.
    (ii) Ms Hartley, Group Manager of the Blaby D.C. planning team was called to give evidence by the Respondents. She was aware of the background history relating to complaints of vehicles being stored on the verge as set out in her witness statement. The Appellant asked no questions seeking to elicit any responses in evidential support of his subsequently articulated proposition that the ten year rule had been engaged.
    (iii) The Appellant chose not to give evidence himself notwithstanding the fact that the burden of proof lay upon him to establish that he could take advantage of the ten year rule.

(iv) The lonely reference to the ten year rule during the Appellant's closing speech was in the context of the scattergun deployment of a very considerable number of other contentions of varying relevance.

27. In the circumstances, it is unsurprising that the Judge did not make reference to the ten year rule in his judgment.

28. When the point was given greater prominence during the Appellant's application for permission to appeal, the Judge explained in his written reasons of refusal why he had not dealt with the point in his judgment and, importantly, clarified that his finding was that the evidence was that the change of use started in about 2015 and was increased in about 2021.

29. He was entitled to make this finding and, in the circumstance of this case. it was open to him to do so in response to and in the context of an application for permission to appeal (see ***English v Emery Reimbold & Strick Ltd*** [2002] 1 W.L.R. 2409 paragraph 25).

30. The fragments of evidence now relied upon by the Appellant to support the application of the ten year rule are vague and cherry-picked from a trial bundle some 460 pages in length. The evidence of Ms Hartley, which the Judge accepted, was that such activity had been ongoing since at least 2015. The period subsequent to this, of course, fell comfortably outside the scope of the application of the ten year rule.

31. Furthermore, the material before the court fell far short of being capable of demonstrating, on a balance of probabilities, that the storage of vehicles on the verge had persisted continuously for over ten years.

32. In this context, there was an email of complaint in the bundle dated 1 July 2018 saying that "this has been going on for 16 years" followed by a description of vehicles left outside the complainant's house. It is to be noted, however, that the anonymous author stated that, following police intervention, things got moved but, after an unspecified period, they were returned. This is not evidence of a continuous breach but of intermittent breaches. In any event, the Appellant did not rely upon the contents of the email at the hearing below or argue for any alternative construction of its contents.

33. It may further be noted that the Respondent's Highways Management System recorded only three examples of reports of vehicles parked on the verge out side Sandpit Farm prior to 19 November 2011. These

comprised two complaints, close in time, of vehicles parked on the verge on 4 June and 15 July 2008 respectively. An enquiry trace form of 10 June 2008, which would appear to relate directly to the first report, refers to just two vehicles. These reports were followed by a gap of three years before the next report of 7 July 2011 which makes an allegation about a single vehicle parked on the verge. This pattern is, even if put at its highest, one which falls short of demonstrating continuous storage use over the relevant period.

34. An internal Leicestershire CC email of 9 May 2014 states the Appellant had been ordered to clear his site of a number of vehicles parked there in response to which he had moved them on to the verge. Accordingly, although there had been reports of problems with parking vehicles on the verge since 2002 the problem of continuous long term storage would appear likely to have arisen in 2014.

35. Furthermore, none of these documents or any other documents which were drawn to my attention during the course of the hearing of the appeal had been deployed by the Appellant during the course of argument on his behalf at trial. This is not surprising. In my view, none of them, whether taken singly or together, unambiguously established a continuous breach so as to discharge the burden of proof on the issue.

36. It would have been open to the Appellant to have given oral evidence to support the application of the ten year rule but he chose not to do so. This was a legitimate tactical decision but he must live with the consequences. He chose to present his case, before making passing reference to the rule in his final submissions, on different grounds. His central point was that there has been no storage of vehicles at all but merely parking. It was thus understandable that he would not wish to undermine the thrust of this contention by arguing, in the alternative, that if it were storage then it had gone on continuously for ten years.

CONCLUSION

37. For the reasons given above, I readily conclude that the decision of the Judge below was one that he was fully entitled to reach.

38. This appeal is dismissed.