IN THE HIGH COURT OF JUSTICE **CLAIM NO. KB-2024-002247**

KING'S BENCH DIVISION

IN THE MATTER OF SECTION 222 OF THE LOCAL GOVERNMENT ACT 1972 AND SECTION 187B OF THE TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N : -

THE MAYOR AND BURGESSES OF THE ROYAL BOROUGH OF KINGSTON UPON THAMES

Claimant

-and-

(1) MICHAEL CASEY
(2) BRIDGET CASEY
(3) SIMON DOHERTY
(4) KATHLEEN BERNADETTE KATRINA DOHERTY
(5) PERSONS UNKNOWN, BEING THOSE PERSONS CAUSING OR PERMITTING WORKS TO BE UNDERTAKEN, OR WASTE OR OTHER MATERIAL TO BE DEPOSITED ON THE LAND, AND/OR BRINGING ONTO OR OCCUPYING CARAVANS OR MOBILE HOMES ON THE LAND OR INTENDING TO DO SO, OTHER THAN IN ACCORDANCE WITH A VALID GRANT OF PLANNING PERMISSION.
(6) THOMAS JUDE DOHERTY
(7) THOMAS CASEY
(8) MICHAEL CASEY JUNIOR

Defendants

SKELETON ARGUMENT
ON BEHALF OF THE CLAIMANT
For Hearing on 11 October 2024

References to the Core Bundle take the format CB/pp and to the Supplementary Bundle take the format SB/pp

Suggested reading

- Amended Details of Claim **[CB/9-17]**
- W/S Byron David James Britton
- First W/S Toby Feltham **[CB/114-117]**
- W/S of Richard Dean **[CB/122-127]**
- Second W/S Toby Feltham **[CB/143-158]**
- Defendants' Witness Statements **[CB/174-175]**
- Judgment of Andrew Kinnier KC - [2024] EWHC 2252 (KB) **[SB/XX]**
- Order of Pitchers J dated 30 April 2003 **[SB/32-40]**
- Consent Order dated 24 October 2005 **[SB/53-55]**

A. Introduction

1. The Claimant has applied for an injunction to restrain various breaches of planning control pursuant to section 187B of the Town and Country Planning Act 1990 ("the **1990 Act**") and section 222 of the Local Government Act 1972.

2. This skeleton argument concerns the matters falling to be determined at the hearing on 11 October 2024, being the return date directed pursuant to paragraph 6 of the Order of Andrew Kinnier KC (sitting as a Deputy Judge of the High Court) dated 25 July 2024 ("the **25 July Order**").

3. The Defendants have also variously made other applications which may fall to be considered at the hearing.

4. In light of the above, and in summary, the main issues falling for determination would appear to be:

    a. Whether any of the Defendants have filed Acknowledgements of Service as required by CPR 8.3 and/or whether in the absence of having filed Acknowledgements of Service the Defendants should be permitted to take part in the hearing;

    b. Whether the Court should order that the 6th, 7th and 8th Defendants should cease to be parties pursuant to CPR 19.2(3);

    c. Whether (and if so on what terms) the Court should order interim relief pending final determination of the Claimant's claim, including against Persons Unknown; and

    d. The Directions for the determination of any outstanding issues arising from the Defendants' applications and the trial of the Claimant's claim.

B. Preliminary Matters

5. The Claimant seeks permission to amend the names of the Fourth and Sixth defendants, specifically in the case of the Fourth Defendant to amend the name from

Kathleen Doherty to Kathleen Bernadette Katrina Doherty and in the case of the Sixth Defendant from Thomas Doherty to Thomas Jude Doherty.

6. Following the service of evidence it has become apparent that these are the full names of the Parties in question (see [**SB/636]** and **[SB/268]**). There was no error previously as to the names of those parties, and certainly no error as to their identity. However, for clarity, the Claimant suggests that the title to the proceedings be amended and the need to re-serve dispensed with.

C. Acknowledgements of Service

7. None of the Defendants have filed Acknowledgments of Service, notwithstanding CPR 8.3 and paragraph 5 of the 25 July Order.

8. As regards the 1st-4th Defendants, Brilliance Solicitors Limited notified the Claimant of their instructions to act for those parties on 23 July 2024, and at the same time served Notices of Acting (see 2nd W/S Feltham para. 40 **[CB/154]**). So far as the Claimant is aware, however, Acknowledgements of Service have never been filed or served on behalf of those Defendants.

9. As regards the 6th – 8th Defendants, on 8 August 2024, Tony White (a planning agent purporting to act on the instructions of the 6th – 8th Defendants) wrote to Brilliance Solicitors and to the Claimant's Solicitors attaching what purported to be acknowledgments of service from the 6th-8th Defendants, saying that he had been "asked to provide the attached documents both to the Claimants Solicitors (SLLP) and the Defendants 1 – 5 Solicitors (Brilliance), so that you may individually or together file them on the E filing system with the Courts ahead of the 4pm deadline today". The email said "the defendants 6, 7 and 8 do not have legal representation but file documents in relation to the matter. I have not access to e filing. If there are any issues with the forms please get back to me as quickly as possible" **[SB/602]**.

10. The Claimant's solicitor responded the same day stating "it appears to me that the Acknowledgements of Service are defective since you are not a legal representative and cannot therefore lawfully act for the Defendants in the proceedings. They need to instruct a legal representative or act for themselves. Moreover, the Acknowledgements of Service are only partially signed since there is no signature displayed within the signature box" **[SB/601]**.

11. The Claimant's understanding is that the 6th-8th Defendants took no further action in seeking to file or serve an Acknowledgement of Service.

12. The Claimant has raised this issue both in correspondence with Brilliance Solicitors, and in the 2nd Witness Statement of Toby Feltham at paras. 39-42 **[CB/154-155]**. Nevertheless, there has been no application for relief from sanctions or to extend time to acknowledge service. Whilst Brilliance Solicitors served notices of acting for the 6th-8th Defendants on 9 September 2024, no Acknowledgements of Service for those Defendants have ever been filed at Court.

13. The sanction for failing to file an acknowledge service is that a defendant may not take part in the hearing unless the court gives permission.

14. The test for whether the court should give such permission is that set out in *Denton v TH White Ltd* [2014] 1 WLR 795 being: (1) to ask whether the breach is serious or significant; (2) to consider why the default occurred; and (3) to evaluate all the circumstances of the case to enable the court to deal justly with the application.

15. In the present case:

    a. The breach is obviously serious and significant. It is a failure to file an acknowledgement of service, which is a necessary step if a defendant intends to contest a Part 8 claim. The time limit for filing such an acknowledgement is 14 days and that time limit has been breached very significantly and notwithstanding that the Claimant has raised the issue on a number of occasions.

    b. There is no good reason for the Defendants' breaches.

    c. The Defendants have not applied promptly, or at all, for relief from sanctions or an extension of time.

16. Whilst it may be that the interests of justice require the Court to grant the Defendants permission to take part in some aspects of the hearing on 11 October 2024 (for example on the issue of mandatory interim relief), they will need to persuade the Court of that and certainly they should not be permitted to raise arguments other than in response to the Claimant's submissions.

17. For this reason, the Council's primary position is that the Defendants should not be permitted to pursue the various applications they have made to be removed as parties, to adjourn these proceedings (seemingly, as proposed in a letter of 7 October 2024 **[SB/672-673]**, on the basis of a mandatory order requiring the Council to serve an enforcement notice, which the Claimant submits the Court does not have the power to make), and/or to vary the Orders of Pitchers J dated 18 June 2003 and of Master Foster sealed 26 October 2005.

18. Those are all matters which properly fall to be determined at a final hearing, following the hearing of oral evidence (which it now appears will be necessary, with the Claimant having applied to cross-examine) and full argument.

D. The 6th, 7th and 8th Defendants' Application to Cease to be Parties

19. If the Court entertains the 6th – 8th Defendants applications to cease to be parties to the Claim (**[CB/35-39]** and **[CB/40-44]**), pursuant to CPR 19.2, the Claimant will resist those applications. At the very least, it would not be appropriate to determine that application at the hearing on 11 October 2024, but rather (if it is not dismissed) that application should be adjourned to be determined following the trial of the issues.

20. The Council's evidence is that the 6th – 8th Defendants were identified as the people unloading the mobile home at the time (W/S Dean paras. 7-11 **[CB/124]**). That is consistent with the photographic evidence **[SB/419]**.

21. It is not credible to suggest, as to the 6th – 8th Defendants, that by chance and as a matter of coincidence, shortly after the Claimant served its claim for an injunction, all three of those Defendants happened to be on the Land for the same short period, on the same day, at exactly the same time, when new mobile homes were being moved onto the Land, for reasons unconnected to the bringing of those mobile homes onto the Land.

22. In any event, the Claimant disputes the evidence filed on behalf of the 6th – 8th Defendants, on the basis of which they have applied to be removed as parties to the Claim. That evidence is inconsistent (internally and with other evidence provided historically to the Council) on issues including land ownership, the state of the land and the reasons why various of the Defendants were present on it, and the signing of documents. For this reason (amongst others) the Claimant has sought permission to

cross-examine the 6th-8th Defendants (along with the other Defendants) **[CB/45-50]**. It is not possible fairly and justly to determine the 6th – 8th Defendants' applications to be discharged as parties without cross-examination.

23. The test under CPR 19.2(3) for determining an application that a person cease to be a party is whether or not it is desirable for that person to be a party to the proceedings. That falls to be read in the context of CPR 19.2(2) where the circumstances in which the court may order a person to be added as a new party include that it is desirable so that the court can resolve all the matters in dispute in the proceedings, or that there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

24. It is desirable that the 6th – 8th Defendants remain Defendants in these proceedings. There is a clear issue between the Claimant and those Defendants regarding the extent of their involvement in the breaches of planning control against which the Claimant's claim for an injunction is directed. Whilst it *may* be that following a final hearing, and cross-examination, the Court ultimately determines not to make an order injuncting the 6th – 8th Defendants, it would be premature to remove those Defendants from these proceedings now. There are issues between those Defendants and the Claimant which fall to be resolved and those issues can only justly be resolved at a final hearing.

E. <u>Interim Relief</u>

25. There are two essential aspects of the interim injunction sought by the Claimant pending trial:

    (1) An injunction prohibiting all eight defendants from further breaching planning control on the Land, such prohibition being in the same terms as the undertakings previously given by the 1st – 4th Defendants as set out in the 25 July Order, and ordered against the 5th -8th Defendants by Andrew Kinnier KC (sitting as a Deputy Judge of the High Court) and essentially the same as that ordered previously by May J on 24 July 2024.

    (2) A mandatory injunction requiring the 1st – 4th Defendants to remove from the Land the caravans moved onto the Land immediately following service

of the Claimant's Claim and application for an interim injunction, in accordance with the permission to amend its interim injunction application to include an application for a mandatory order granted by Andrew Kinnier KC at para. 7 of the 25 July Order.

Legal Principles

26. On an application for interim relief under section 187B of the 1990 Act and section 222 of the Local Government Act 1972, the tests laid down in *American Cyanamid* apply (see *Basingstoke & Deane BC v Loveridge* [2018] EWHC 2228 (QB) at paras. 11 – 12). The Court should consider: (1) Whether there is a serious issue to be tried; (2) Whether damages would be an adequate remedy; (3) if they would not, where the balance of convenience lies; and (4) Any special factors.

27. Such interim orders may include orders for interim mandatory injunctions. Indeed, very recently in *Blaenau Gwent CBC v Salathiel et al* [2024] EWHC 1900 (KB) HHJ Keyser KC (sitting as a Judge of the High Court) made both prohibitory and mandatory interim injunctions under section 187B of the 1990 Act. In doing so he held that:

    (1) The operations carried out by the defendants were a flagrant and serious breach of planning control. They were carried out covertly over the Easter weekend, in order (as he was satisfied) that by the time anyone was able to address what had been done it would be a *fait accompli*. The resulting position was unsatisfactory, indeed intolerable, in a number of respects (see paras. 28-29); and

    (2) The balance of convenience shows no justification for allowing the defendants to continue to flout planning control (see para. 31).

28. When considering the question of 'special factors' one particularly relevant factor will be the extent to which the Defendants have acted contrary to the court's orders, or in such a manner as to 'cock a snook' at the Court (see *Mid-Bedforshire DC v Brown* [2004] EWCA Civ 1709 per Mummery LJ at paras. 25-27)

Submissions

29. There is a serious issue to be tried and damages would not be an adequate remedy for the Claimant (see *South Downs NPA v Daroubaix* [2018] EWHC 1903 (QB) at para. 16 and *Blaenau Gwent CBC* at para. 24).

30. The relevant issues are therefore the balance of convenience and the relevance of any special factors.

Prohibitory Order

31. As to the prohibitory injunction, there can be no real dispute regarding the fact that the balance of convenience weighs decisively in favour of prohibiting further breaches of planning control until the trial of the issues. It was no doubt for that reason that the 1st – 4th Defendants previously gave undertakings to that effect, and that was the judgment reached by both May J and Andrew Kinnier KC. For the reasons given at paras. 30 – 36 of the judgment of Mr Kinnier KC ([2024] EWHC 2252 (KB)) the balance of convenience weighs decisively in favour of making of a prohibitory injunction in the terms sought.

Mandatory Order

32. Turning to the mandatory injunction, this does not require all of the breaches of planning control that have taken place to date to be remedied on an interim basis. Rather it seeks only the removal of the caravans brought onto the Land following the service of the claim form and application for an interim injunction, in what, to adopt the words of Mr Kinnier KC at para. 22 of his judgment "looks like an attempt to undermine or at least thwart the claimant's application for interim relief".

33. The Claimant's submission is twofold:

    (1) The balance of convenience lies in favour of making a mandatory order in the terms sought; and/or

    (2) In any event, there are special factors which would themselves justify the making of a mandatory order in the terms sought.

34. There is significant inconsistency, and as a consequence a considerable lack of clarity, in the Defendants' evidence regarding the ownership and occupation of the Land. This is explained in detail at paras. 15 – 28 of the Second Witness Statement of Toby Feltham **[CB/147-151]**.

35. What is clear, however, from the aerial imagery **[SB/463-4]** and **[SB/466-9]** and inspections carried out on Land, as well as the contemporaneous reports to the Council (e.g. W/S Dean paras. 7-11 **[CB/124])** and accompanying photographs **[SB/149]** , is that on 23 July 2024, shortly after service of the Claimant's Claim and application for an interim injunction,on 19 July 2024, two mobile homes were moved onto the Land. That was a clear breach of the injunction Order of Pitchers J dated 30 April 2003 and the Consent Order dated 24 October 2005.

36. It is also apparent from the correspondence contained in the bundle of documents from a First Tier Tribunal Special Education Needs and Disability Appeal ("the **SEND Bundle**") involving the 4th and 6th Defendant's daughter, provided to the Council in support of an application for planning permission, that Ann Doherty lives (or at least at or around March - May 2024 was living and had for some time lived) at 93 Ruxley Lane, Ewell, Epsom, KT19 9HB), from where she accessed medical care at St George's Hospital in Tooting (see 2nd W/S Feltham para. 33 **[CB/152]**). Indeed, the Claimant's understanding is that Epsom and Ewell Borough Council is the local authority responsible for providing and paying for Ann Doherty's healthcare package. Were she to move onto the Land, then there would need to be a transition, with Ann's needs being reassessed by the Claimant. This would undoubtedly result in disruption to her current care regime.

37. In those circumstances, the Claimant's submission is that:

    (1) First, it is in Ann's best interest that she live at 93 Ruxley Lane, in Ewell, where she appears habitually to reside/ to have resided until recently. There she has access to the established package of care provided and paid for by Epsom and Ewell Borough Council. It is not in her best interests to be moved onto/ remain on the Land, in breach of the injunction ordered by Pitchers J on 30 April 2003 and the Consent Order dated 24 October 2005, not least given that she does not have access to an established care package from the Claimant, and given what might (at least) be described as the uncertainty of the position on the Land, noting that there is no valid planning application presently before the Claimant, with the application referred to by the Claimant failing to provide the information necessary to validate it, such that (despite repeated requests for that information) the Claimant has now marked the application invalid and returned the

application fee (see 2nd W/S Feltham para. 14). In circumstances where the best interests of the child are a primary consideration by virtue of Article 3 of the UN Convention on the Rights of the Child (as to which see *Stevens v Secretary of State* [2013] EWHC 792 at paras. 55-69), this weighs heavily against an order intended to facilitate Ann remaining on the Land.

(2) Second, the breach of planning control in this case is flagrant and egregious. The bringing of two further caravans onto the Land on 23 July 2024 was obviously in breach both of the injunction granted by on Pitchers J on 30 April 2003 and the undertakings given in the Consent Order dated 24 October 2005. Those were, to state the obvious, Orders of the Court. Indeed, both included a penal notice (**[SB/32-40] [SB/53-55]**). As Mummery LJ made clear in *Mid-Bedfordshire* at para. 27, there is a strong public interest in not sending a message that would diminish respect for court orders, undermining the authority of the court, and subverting the rule of law. That, again, weights strongly in favour of granting the Claimant's application for a mandatory injunction.

(3) Third, the approach the Defendants have taken in this case, namely seeking to subvert the court process following service of the Claim and application for an interim injunction, by rapidly moving to effect the unlawful action the Council was proposing to restrain (in breach of court orders) and thereby to deal the Claimant and the Court a '*fait accompli*' when the Claimant's application for interim relief fell to be considered was deplorable. Indeed, it was entirely contrary to the commitment they purported to make on 7 May 2024, through their planning agent, Mr White, not to commit further breaches of planning control pending the resolution of the outstanding breaches identified by the Claimant **[SB/236]**. Not only was the bringing of further caravans onto the Land in defiance of the 2003 and 2005 court orders, but it was action taken in response to, and designed to undermine, the application for interim relief that the Defendants well knew was imminently to be decided by the Court on 25 July 2024. To tolerate it would also set a precedent, to use the words of Mummery LJ "send[ing] out the wrong signal, both to others tempted to do the same and to law abiding members of the public" that the court is willing to tolerate contempt of its orders and to permit those who are given notice of

proceedings to act to undermine them as quickly as possible, before further orders are made by the Court. That will only serve to encourage more without notice applications, with the result that more court time will be spent dealing with cases where the application has initially been made without notice. That again weighs strongly in favour of granting the mandatory interim relief sought.

38. Whether these matters are regarded as going directly to the balance of convenience, or are considered as special factors, they far outweigh any other prejudice that would result from the making of an order requiring the two caravans brought onto the Land on 23 July 2024 to be removed and otherwise preserving the *status quo* prior to service of the Claimant's applications pending a final hearing.

F. Persons Unknown

39. The test for the grant of injunctive relief against persons unknown following the decision of the Supreme Court in *Wolverhampton CC v London Gypsies and Travellers* [2023] UKSC 47 is summarised in the Claimant's Amended Details of Claim at para. 13 **[CB/13]**.

40. In this case:

    a. There is a compelling justification for the order sought. Indeed, the circumstances which led to the Council's application to join the 6th – 8th Defendants well illustrates the justification for such an order. Following service of the proceedings on the 1st – 4th Defendants and Persons Unknown, the proposed 6th– 8th Defendants (who were not named as defendants) moved further mobile homes onto the Land shortly before the hearing listed for 25 July 2024 (at or around the same time as solicitors for the 1st – 4th Fourth Defendants wrote to the Council stating they would be grateful if the matter could be listed for a later date). For the same reason, it is apparent that there is a compelling need for the enforcement of public law not adequately met by any other remedies. In short, the absence of an order against Persons Unknown would risk undermining the effectiveness of any interim injunction.

b. The Council has accurately described the Persons Unknown against whom it seeks interim injunctive relief with sufficient clarity to enable those persons to be served with the proceedings, albeit by an alternative method.

c. The Council has taken reasonable steps to draw its application to the attention of persons likely to be affected by the injunction sought, including through correspondence with the agents for the 1st– 4th Defendants. The making of an interim injunction against Persons Unknown would not be procedurally unfair.

G. Directions for Trial

Adjournment

41. By a letter dated 7 October 2024 (Copied to the Court) the Defendants suggested that the Court direct the Claimant to serve an enforcement notice, and that the current applications be adjourned pending the outcome of an appeal against that enforcement notice (**[SB/672-673]**).

42. As stated above, the Claimant's primary submission is that the Defendants have not acknowledged service and should not be permitted to raise this argument without having done so.

43. In the alternative, and without prejudice to that position, the Claimant in any event resists that proposal:

    a. First, the Defendants entirely overlook the fact that the Council has repeatedly, but in vain, sought to take enforcement action already. It has already twice (in 2003 and 2005) secured court orders prohibiting further breaches of planning control at the Land. The Defendants have shown contempt for those orders and have not abided by them. Moreover, the Claimant has served a breach of condition notice pursuant to section 187A of the 1990 Act **[SB/95-98]**. Again, the Defendants have not complied with that notice, notwithstanding that failure to do so is a criminal offence. The Defendants' suggestion that the proceedings should be adjourned to allow an enforcement notice to

be served and an appeal made is nothing more than a transparent attempt to delay matters.

b. Second, whether or not to issue an enforcement notice is a matter of judgment for the Claimant, the test (under section 172 of the 1990 Act) being one of expediency. The Court cannot interfere with that judgment other than in circumstances where the failure to issue such a notice is found to be unlawful on a claim for judicial review. Even then, a mandatory order requiring the Claimant to issue an enforcement notice could only be made in circumstances where it is the only rational planning judgment open to the local planning authority. That plainly is not this case, such that the Court has no power to direct the Claimant to issue an enforcement notice.

c. Third, the Defendants did not, despite the Claimant's repeated requests, provide the information needed to validate the application for planning permission submitted on 7 May 2024, such that that application has now been found invalid and the fee returned (see 2nd W/S Feltham paras. 7-14 **[CB/144-147]**). If the Defendants had been serious about intending to regularise the breaches of planning control on the Land, they would, at the very least, have been expected to provide sufficient information to allow the Council to validate that application for planning permission. That they have failed to do so is indicative of the absence of any real commitment to comply with the development control regime.

44. For these reasons, the Claimant resists the Defendants' application to adjourn.

Cross-Examination

45. For the reasons already given, the Claimant seeks permission to cross-examine the Defendants on their evidence, which is inconsistent (internally and with other evidence provided historically to the Council) on issues including land ownership and occupation, the state of the Land, the nature of the breaches of planning control that

have taken place, the personal circumstances of those purporting to reside on the Land, and the reasons why various of the Defendants were present on it. These are matters which it is necessary to resolve in order justly to determine the Claimant's Claim for an injunction, such that cross-examination is required.

Variation of the Orders of Pitchers J dated 30 April 2003 and Master Foster dated 26 October 2005

46. The First and Third Defendants have applied to vary the Orders of Pichers J dated 30 April 2003 and Master Foster dated 24 October 2005.

47. Whether, or how, to vary those orders is closely related to the substance of the Claimant's substantive claim for an injunction under section 187B of the 1990 Act. At present, the Defendants have not identified any legal or evidential basis for seeking to vary those orders, which are wider than the terms of the interim injunction sought by the Claimant in these proceedings. Indeed, the terms of the interim relief the Claimant has claimed in these proceedings were predicated upon the existence of those previous Orders remaining in place in the terms granted. Were those orders not in place, the Claimant would in all probability have sought interim relief in different (more wide ranging) terms.

48. The appropriate course of action, in the Claimant's submission, is that the application to vary the Orders of Pitchers J and Master Foster should be adjourned to, and listed for, a final hearing together with the Claimant's substantive claim for an injunction under section 187B of the 1990 Act. On that occasion, the Court will have before it all relevant evidence and full argument on the issues and so will be best placed to determine that application in accordance with the overriding objective of determining cases justly and at proportionate expense.

H. Conclusion

49. The Council therefore respectfully requests that the Court make an order in the terms of the Draft provided by the Claimant.

CHARLES STREETEN
FRANCIS TAYLOR BUILDING