Neutral Citation Number: [2018] EWHC 2811 (QB)

Case No: E90CF030

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 26/10/2018

Before :

HIS HONOUR JUDGE JARMAN QC

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Between :

FORis FOREST OF DEAN DISTRICT COUNCIL	**Claimant**
- and -	
GRAHAM MICHAEL WILDIN	**Defendant**

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Mr Stephen Whale instructed by **the claimant**
The defendant appeared in person

Hearing date: 20 September 2018

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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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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. The claimant as local planning authority (the Council) applies to the court for an injunction pursuant to section 187B of the Town and Country Planning Act 1990 requiring the defendant Mr Wildin to comply with an enforcement notice dated 3 March 2014 which it issued against him, as varied by an inspector on appeal in a decision (the Decision) dated 19 February 2015.

2. The notice relates to land at 24 and 24A Meendhurst Road, Cinderford, Gloucestershire. The breach of planning control alleged in the notice was as follows:

> "Without planning permission, the removal of topsoil and subsoil from the land, the creation of new land form and the reprofiling of the land so as to alter the natural ground level.
>
> Without planning permission, operational development in the form of the construction of walls and the installation of drainage in connection with the proposed erection of a building on the area of land which has been excavated."

3. The reasons given for issuing the notice were that the excavation creates a risk of instability to the land and the surrounding land in an area of historic mining, that the construction of walls and/or the proposed building is harmful to the residential amenity of the surrounding in terms of the overbearing impact of the physical structure.

4. The notice required Mr Wildin to remove from the land all structures, walls and materials placed on the land in connection with the breach and to reinstate the land to its original levels within three months.

5. He did not comply with that notice, which was served at a time when the building work was nearing completion. Indeed, his contractors carried on to complete the building and to fit it out as a sports and leisure facility. He says that he was already contractually committed to doing so. Moreover, he believed, and indeed still believes, that the building constitutes permitted development within the Town and Country Planning (General Permitted Development) Order (GPDO), Schedule 2, Part 1, Class E.

6. His appeal against the notice was primarily on that ground. Development comes within Class E if it amounts to "The provision within the curtilage of the dwellinghouse of (a) any building...required for a purpose incidental to the enjoyment of the dwellinghouse as such…"

7. However, the following subsections go on to provide that development is not permitted by Class E if it comes within any of the exceptions set out, which so far as material include where (c) the building would have more than one storey, or (d) the height of the building would exceed 3 metres.

8. The Council took the view, and maintains, that the building is not incidental to the dwellinghouse at 24 Meendhurst Road, that it spans that curtilage and that of next

door 24A Meendhurst, that it is a two storey building, and that its height exceeds 3 metres.

9. The inspector considered that the building clearly has more than one storey and accordingly does not come within Class E. At paragraph 7-9 of the Decision, he said:

> "The proposed building clearly has more than one storey. It has what is identified on the plans as an elevated area, including a viewing lounge, table games area, viewing room and children's play area at the upper floor level, and portable soft play area, gym, entrance toilets and bowling alley at the lower level, with the soft play, sports hall and squash court and some of the lobby spanning the lower and elevated level. There are stairs between the different floor levels.
>
> The appellants suggest that the position where there is the elevated level does not show externally but is a basement; it is argued because the building is set in the ground, the elevated level is not apparent externally. However, a significant part of the building at the south, which is more than one storey, is not in the ground, but has its full elevation exposed and is readily apparent from outside. The south elevation has an entrance, which is seen as a small door in a tall wall, with the toilet, lobby, spiral stair and child's play areas behind it.
>
> The appellants have identified many buildings that are single storey, which are very tall, much more so than the appeal building. However, the question for section (c) is not how tall the building is, but whether it has more than one storey. In this case it has two storeys. I accept that there are parts of the building such as the sports hall and squash court that are single storey, but a significant proportion of the building is two storeys."

10. The inspector accordingly determined that the building was a two-storey building and thus not permitted development within the GPDO. He did not go on to deal with the Council's other arguments as to why the building does not come within Class E.

11. The inspector then went on to consider whether planning permission should be granted on the deemed planning application to which the appeal gave rise. He identified the two issues under this head as the effect on the character and appearance of the surrounding area, and the effect on the living conditions of neighbouring occupiers with particular reference to outlook, amenity space, shading and daylight.

12. He described the character of the area in paragraph 13 as follows:

> "The area generally consists of a mix of housing types, designs and sizes, but generally one and two storey detached dwellings. There are no specific landscape or heritage designations. The dwellings are generally facing the roads, resulting in a large space behind that generally forms the rear gardens to the

> various properties. There is a natural slope across the site down from Church Road, providing a pleasant and natural transition between houses, down the slope of the hill. There are also a significant number of relatively small ancillary type buildings in this area, but the open character remains, and in my view, this together with the domestic scale of buildings is an important characteristic of the environment."

13. The inspector than observed that the slope forming the transition between the houses was lost by the excavation and retaining walls for the building. As he accepted that the intention was to construct the building which was then nearing completion, he went out in paragraph 16 to consider its impact as follows:

> "The appeal building is a very large, bulky structure that is totally out of scale and proportion with the surrounding development. It fills a significant part of the area of land between 12, 12a & 24 Meendhurst Road and 37 Church Road. While part of the structure is below ground, the roof and much of the external walls remain visible above ground level. I do not consider that placing part of the building below ground is 'innovative' design. While I note the intention to provide high quality materials, the design where above ground level is bland, with large areas of bland walls and only, on some of the elevations, a few doors and masonry piers to articulate the elevations. In my opinion, this is a very poor design."

14. He concluded that the lack of good design conflicts with the development plan policies and the National Planning Policy Framework which aims for good design, and does not promote the environmental role of sustainable development identified in the Framework. He accepted that there is limited visibility of the building from public areas, but where views are available the building is seen to be out of place, being a large, obtrusive structure close to nearby buildings. In addition, many houses surrounding the building have plain views of the environment and building within it. It causes serious and unacceptable harm to the outlook for the occupiers of 24 Meendhurst Road, and while this is presently owned by Mr Wildin and his family, the inspector took the view that any future occupiers should have their outlook protected. The outlook of the occupiers of 22 Meendhurst Road is also unacceptably harmed from the garden area.

15. Having determined that the development should not be given planning permission for the reasons he gave, he upheld the enforcement notice with some amendments. Those related to allowing the substructure and rear wall of the building to remain, up to a certain height, to act as a retaining wall for the earth behind, and to extend the time for compliance to two years.

16. Mr Wildin applied for permission to appeal the Decision. That application was finally dismissed by Hickinbottom J, as he then was, in July 2015. There has been no further attempt to appeal, and so the Decision stands.

17. However, Mr Wildin has taken no steps since then to comply with the notice. His main reason for not doing so is that he says he does not have the money to do so. It is

now accepted by the Council that the cost of doing so is likely to be in the region of £750,000. Clearly on any view that is a very substantial sum for most individuals to find. He also says that the required demolition will render the surrounding land as unstable and give rise to a risk to life, is likely to lead to the loss of his home and business with consequent loss of jobs, and will impact severely upon the health of his partner who is already seriously ill.

18. Section 187B of the 1990 Act provides, so far as is material:

> "(1) Where a local planning authority consider it necessary or expedient for any actual...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."

19. The nature of the jurisdiction of the court to grant an injunction under that statutory power was authoritatively stated by the House of the Lords in *South Bucks DC v Porter (No 1)* [2003] 2 AC 558. In delivering the lead speech, Lord Bingham said this at paragraph 27:

> "The jurisdiction of the court under section 187B is an original, not a supervisory, jurisdiction. The supervisory jurisdiction of the court is invoked when a party asks it to review an exercise of public power. A local planning authority seeking an injunction to restrain an actual or apprehended breach of planning control does nothing of the kind. Like other applicants for injunctive relief it asks the court to exercise its power to grant such relief. It is of course open to the defendant, in resisting the grant of an injunction, to seek to impugn the local authority's decision to apply for an injunction on any of the conventional grounds which may be relied on to found an application for judicial review....But a defendant seeking to resist the grant of an injunction is not restricted to reliance on grounds which would found an application for judicial review."

20. At paragraph 29 he said:

> "The discretion of the court under section 187B, like every other judicial discretion, must be exercised judicially. That means, in this context, that the power must be exercised with due regard to the purpose for which the power was conferred: to restrain actual and threatened breaches of planning control. The power exists above all to permit abuses to be curbed and urgent solutions provided where these are called for. Since the facts of different cases are infinitely various, no single test can be prescribed to distinguish cases in which the court's discretion should be exercised in favour of granting an

> injunction from those in which it should not. Where it appears that a breach or apprehended breach will continue or occur unless and until effectively restrained by the law and that nothing short of an injunction will provide effective restraint (*City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, 714), that will point strongly towards the grant of an injunction. So will a history of unsuccessful enforcement and persistent non-compliance, as will evidence that the defendant has played the system by wilfully exploiting every opportunity for prevarication and delay, although section 187B(1) makes plain that a local planning authority, in applying for an injunction, need not have exercised nor propose to exercise any of its other enforcement powers under Part VII of the Act. In cases such as these the task of the court may be relatively straightforward. But in all cases the court must decide whether in all the circumstances it is just to grant the relief sought against the particular defendant."

21. The limited role of the court of the court in determining issues of planning permission, when dealing with such an application was also emphasised in paragraph 30 as follows:

> "As shown above the 1990 Act, 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...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, as the cases of Mr Berry and Mrs Porter show. But all will depend on the particular facts, and the court must always, of course, act on evidence."

22. It is clear that the personal circumstances of the person against whom injunctive relief is granted must be taken into account. At paragraph 31, Lord Bingham said:

> "When application is made to the court under section 187B, the evidence will usually make clear whether, and to what extent, the local planning authority has taken account of the personal circumstances of the defendant and any hardship an injunction

> may cause. If it appears that these aspects have been neglected and on examination they weigh against the grant of relief, the court will be readier to refuse it. If it appears that the local planning authority has fully considered them and none the less resolved that it is necessary or expedient to seek relief, this will ordinarily weigh heavily in favour of granting relief, since the court must accord respect to the balance which the local planning authority has struck between public and private interests."

23. It is also clear that the rights of such a person under the European Convention (the Convention) on Human Rights, brought into force in the domestic jurisdiction by the Human Rights Act 1998, must be respected. At paragraph 37, Lord Bingham continued:

> "These cases make plain that decisions properly and fairly made by national authorities must command respect. They also make plain that any interference with a person's right to respect for her home, even if in accordance with national law and directed to a legitimate aim, must be proportionate. As a public authority, the English court is prohibited by section 6(1) and (3)(a) of the Human Rights Act 1998 from acting incompatibly with any Convention right as defined in the Act, including article 8. It follows, in my opinion, that when asked to grant injunctive relief under section 187B the court must consider whether, on the facts of the case, such relief is proportionate in the Convention sense, and grant relief only if it judges it to be so. Although domestic law is expressed in terms of justice and convenience rather than proportionality, this is in all essentials the task which the court is in any event required by domestic law to carry out."

24. I turn to apply those principles to the facts of this case. Whilst disavowing any intention to seek to go behind the Decision, Mr Wildin cross-examined Stephen Colegate, the Council's principal planning officer, at some length as to the meaning of the phrase "more than one storey" within the GPDO. He put to him several instances of large buildings with structures extending above the ground floor which are nevertheless regarded as single-story buildings, such as sports halls with elevated seating for spectators. He also put to Mr Colegate that in respect of the building in question only 25% of it had rooms upstairs. Mr Colegate was unable to comment on this as he had not carried out the calculation.

25. In my judgment, in light of Lord Bingham's observations about the limited role of the court, in this regard, it is not appropriate for me to conclude that the appeal against the enforcement notice should have succeeded on the basis that the building is of no more than one storey. Even if it were, I can see no basis for interfering with the inspector's decision in this regard. Like the inspector, I carried out a site inspection of the building and its surrounds. Parts of the building are no more than one storey, such as, unsurprisingly, the sports hall and the squash court. However, other parts have upstairs rooms, such as a kitchen, toilets, a games room and a cinema. As Mr Wildin observed, there is no definition of the phrase "more than one storey" as used in Class

E. In my judgment it is a matter of fact and degree, but it is too simplistic to have regard only to the percentage area of the building with upstairs rooms. The inspector was entitled to conclude that the building taken as a whole has more than one storey.

26. Accordingly, the building amounts to a clear breach of planning control and impacts adversely on neighbouring properties and the character of the landscape. Moreover, Mr Wildin knew before or within a couple of months of the commencement of the development that the Council took the view that it would not constitute permitted development and was unlikely to be given planning permission due to the scale of what was proposed. Mr Wildin made a pre-application enquiry to the Council and sent in plans of the proposal. The reply came from Mr Colegate in a letter dated 10 December 2013, in which his views as senior planning officer were made clear as set out above. Mr Wildin carried on regardless because he thought that his view that the development came within Class E was correct, and the view of the Council's officers was wrong. As he accepted in an email to them in 2014, he knew that he was risking the cost of the development and that the building may have to be demolished if it turned out that the Council's view was correct. He has not taken any steps to comply with the enforcement notice and it is clear to me that he will not do so unless and until ordered to do so by the court. All these factors point very strongly in my judgment to the grant of an injunction.

27. However, these factors must be balanced against the factors relied upon by Mr Wildin in submitting that the court should refuse to grant an injunction.

28. The first is that he does not have the money to comply. He is a chartered accountant and the sole owner of an accountancy practice called Wildin & Co. He has been involved in property development but has no expertise in property or business valuation.

29. He is the sole owner of 24A Meendhurst Road, which is a large dormer bungalow which he occupies as his residence with his partner of 17 years. He owns 80% of the next-door dwelling, 24, which is also a large dormer bungalow. The remainder is owned by a company, of which his adult children are the directors and shareholders. That property is currently unoccupied, although has been let out. No figures or documents were given in evidence as to this income. He owns two terraced houses which back onto 24A Meendhurst Road. Both of those are used for holiday lets. All of these properties are subject to mortgages.

30. He also owns a three-bedroom apartment in Tenerife which he uses as a holiday home and which is mortgage free. He has a classic car collection which he keeps in a large garage at 24A Meendhurst Road.

31. He and his grandchildren are the shareholders in two luxury holiday companies, but he says that these have not traded.

32. He relies upon his own valuations of his business, the car collection and these properties in order to show that the net equity of his interests in them amount to just under £193,000 as at the end of August 2018. No professional valuations have been obtained. He puts no value on his accountancy business, "due to large redundancies/close down losses." He says that if an injunction is granted he will have to close down his business with a loss of 40 jobs. He accepted in cross examination

that he sold that business in 2003 for a sum of £1.6 million to a company of which his children were the shareholders. Part of the deal involved the allocation of preference shares to him. The business continued and there were no redundancies at this time. In 2009 that company went into liquidation, but Mr Wildin says he drew out £600,000 which he used to fund the development in question. He purchased the goodwill of the business from the liquidator for the sum of £1 and continues the business. On its website it is described as having a wide client base in the UK and Ireland and the largest and most successful accountancy practice in Gloucestershire with a growth rate which is unsurpassed. In these proceedings, he filed unaudited financial statements for the year ended 31 March 2017 for the business, carried out by the business itself. That showed fees and charges received in the sum of £1,368,336, with a net profit of £166,472. Net assets were shown at £391,473. No such statements were filed for the most recent year.

33. I do not accept that any of the valuations which Mr Wildin has put upon any of his assets show their true worth. In particular, in my judgment, it is implausible on the evidence before me to attribute a nil value to the business, given the history of sale and repurchases, the net profit and net assets, and the descriptions of the success of the business. For the same reasons, I do not accept that the granting of the injunction is likely to lead to the closure of the business or the loss of jobs. In my judgment it is likely that the true worth of Mr Willdin's net assets is substantially more than figure which he relies upon and is likely to be sufficient to fund the works set out in the enforcement notice, notwithstanding the substantial cost of so doing.

34. The next point which he relies upon is that the granting of an injunction is likely to lead to the loss of his home and that of his partner, namely 24A Meendhurst Road. He relies upon a letter dated 28 July 2018 from a mortgagee of that property saying that the mortgage term expired in 2017 and the amount due is just under £263,000. The letter continues:

> "Thank you for sending in the required evidence showing how you propose to settle the outstanding mortgage balance. We are therefore prepared to postpone any further action until 30 September 2018. Should settlement not be made by this date, we reserve the right to instigate proceedings to recover our debt, which could lead to us taking possession of the property… This will always be our last resort."

35. Despite the wording of that letter, Mr Wildin maintained in cross-examination that he had not submitted evidence showing how he was going to repay the balance, but merely informed the mortgagee of these proceedings. He said that the reference to postponement was simply to allow the result of the proceedings to become known. That version of events is not consistent with the clear wording of the letter and is unlikely to be accurate. It is more likely that he did put forward the "required evidence" as to how he was going to settle the loan. That may be compromised if he is required to pay for the costs of the works set out in the enforcement notice, but it is difficult to envisage the mortgagee taking possession whilst any injunction remains in force.

36. However, the risk of repossession of 24A Meendhurst Road if an injunction is granted cannot be discounted. Whilst that would have an adverse impact upon Mr Wildin and his partner, they have other properties in the area in which they could reside.

37. Mr Wildin also says that an injunction would severely impact upon the health of his partner, who is already seriously ill. He relied upon a hospital discharge letter dated 25 July 2018, after his partner had been admitted for a heart transplant assessment. Due to concerns about other aspects of her health, it was decided not to proceed with a transplant at that time, but to optimise medical therapy and to reassess in clinic in 6 months.

38. Mr Wildin says that having to carry out the works in the enforcement notice would mean that his partner would have to move out of 24A Meendhurst Road, because the potential adverse impact upon her health in having to live in close proximity to such intrusive works would be too great. Whilst there is no medical evidence to confirm that position, it is not difficult to see from the discharge letter that that may well be the case. Again, this is a potential impact which needs to be weighed in the balance. Again however, the impact is likely to be mitigated to an acceptable level by Mr Wildin and his partner moving into one of the nearby properties whilst the most intrusive elements of the work are being carried out.

39. Another point taken by Mr Wildin is that because of the unstable nature of land beneath and around the building, the works will present a risk to injury or even death. A mining report from the Coal Authority based on records held by the Authority as at June 2018 indicates no relevant mining or geological faults near to the building.

40. He relies upon a letter dated 9 June 2017 from the deputy gaveller of the Forestry Commission, in reply to an email of his, who says he could not give any opinion regarding the effect of placement of such quantities of materials (presumably those referred to in the enforcement notice) without a full geotechnical appraisal of the site. He said that advice should be taken from a geotechnical specialist before carrying out work, as the letting down of the surface will be to the detriment of the under-lying gale interests. Those investigations have not been carried out.

41. It is not clear how much of the information regarding the operations and the development referred to in the enforcement notice or the Decision of the inspector was made known to the deputy gaveller. Before the inspector, both sides called engineering evidence, and there are single joint experts reports in these proceedings as to what needs to be done to comply with the enforcement notice. The engineers before the inspector agreed that removal of the retaining walls would be like to result in the instability of the land adjacent and that it would be necessary to retain these. The inspector agreed and amended the requirements of the enforcement notice accordingly, by allowing the retention of the retaining walls to a certain height and also by allowing the retention of the substructure.

42. That substructure will assist the stability of the works and of course the soil and subsoil removed was previously in place without this feature. Clearly it will be wise to follow the advice of the deputy gaveller before works are carried out, but I am not persuaded on the evidence before me that there is such instability as to justify the refusal to grant an injunction.

43. Balancing all these factors, I have come to the conclusion that the balance tips in favour of the grant of an injunction requiring the works set out in the notice to be carried out. I accept that there will be adverse impacts upon Mr Wildin and his partner and in particular upon finances, housing and health to the extent that I have set out above. These are not such to outweigh the public interest in compliance with planning control to remove a building which has very serious impacts upon the character and appearance of the surrounding area and the effect on the living conditions of neighbouring occupiers. In my judgment the granting of the injunction is proportionate in all the circumstances.

44. Mr Whale for the Council submitted that the injunction should require the works set out in the amended notice to be carried out in 12 months. He accepts that the inspector granted 2 years, but submitted that Mr Wildin has done nothing to comply, and has only himself to blame if he is now given a lesser time. Whilst that may be true, the fact remains that such works are very substantial and in granting an injunction with potentially serious consequence in the event of non-compliance, a realistic time must be given for compliance. The inspector said that 2 years would allow a reasonable time scale for submitting a planning application or Lawful Development Certificate application. No such valid applications have been submitted. In my judgment an appropriate time for compliance is 18 months.

45. I will deal with any consequential matters either on the basis of written submissions or at a further hearing as the parties prefer. Any such submissions or a request for a further hearing should be filed within 14 days of handing down.