# Injunctions, s179 and confiscation: where are we now?

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## Injunctions

1. There are four matters which you should note.

### Approach to injunctions under s106(5)

2. You will be familiar with the extent of the court's discretion in relation to s187B injunctions, as described by the House of Lords in *Porter*. You may recall that in *Porter* the local planning authorities had argued that, in a s187B case, the job of the court was merely to check that there was a breach of planning control and that the local planning authority was acting reasonably in a *Wednesbury* sense: if the answer to both of those questions was yes, the court should make the injunction. The House of Lords rejected this.

3. In *Ali v Newham LBC* [2014] EWCA 676 the Court of Appeal had to consider the approach that should be taken to an injunction to enforce a planning obligation. On the one hand you might think that something like the *Porter* approach was appropriate, given the similarity of context. On the other hand you might say that a planning obligation operates as a contract and that the court should take its normal approach to enforcing the terms of a contract. If you bear in mind that damages will often not be an adequate remedy in the case of breach of a planning obligation and that people should comply with their contractual obligations, this suggests a limited role for judicial discretion, not unlike that argued for by the local authorities in *Porter*.

4. In *Ali* buildings on a site allocated for housing were unlawfully used as a mosque. In the course of an enforcement notice appeal the trustees of the mosque gave a unilateral undertaking that, if they did not submit an application for development in accordance with the allocation within 12 months, they would remove the mosque. As a result the enforcement notice was quashed and temporary planning permission was granted. No such application was made. The Council issued a fresh

enforcement notice once the temporary planning permission had expired and the trustees appealed against this. The Council also sought an injunction requiring the demolition of the mosque in accordance with the requirements of the unilateral obligation. The Judge considered that the scope of his discretion under section 106(5) was 'quite limited' and the Court of Appeal agreed. It said that where a planning obligation was breached the court should normally grant an injunction unless the circumstance were such that the *normal equitable principles* meant that an injunction was inappropriate. It cited delay or unconscionable conduct. This is the approach you would take to an injunction to enforce a contract. The *Porter* approach was not relevant – indeed it was a matter of pure accident that the breach of the planning obligation coincided with a breach of planning control. A defendant who wanted to contend that a planning obligation no longer served a useful purpose should apply for its discharge under s106A or B. The fact that there was an outstanding planning appeal would normally be irrelevant (the mere grant of planning permission would not, of course, affect the existence of the planning obligation).

5. In fact the Court of Appeal went on to hold that the judge had not properly exercised his discretion in relation to what it called the suspension of the injunction. It held that the overall circumstances justified suspension - the imminence of the appeals, the harm which would be done to the community if the mosque was demolished but the appeals allowed, the lack of planning harm which suspension would involve. What the Court meant by suspension was merely an injunction which required demolition by a date in the future rather than immediately: the time it allowed was time for the appeals to be determined followed by a period for reflection. The Court did not mean a conditional injunction – ie that the mosque should be demolished only if planning permission were refused. But what the Court intended was that, if planning permission were to be granted for the retention of the mosque, the Council would agree to discharge the planning obligation.

6. Before I leave the question of the powers under which injunctions are made, I mention *Broadland District Council v Trott* [2011] EWCA 301. In that case the local planning authority sought to enforce a requirement in an enforcement notice by means of an injunction under s187B. It failed because the particular requirement in the enforcement notice was not also a breach of planning control. That case concerned an enforcement notice which sought to enforce the terms of a condition and there was a complicated debate about whether the requirements of the

enforcement notice were the same as the requirements of the condition. But you can see the point if you imagine a building erected without planning permission and an enforcement notice requiring the demolition of the building and the restoration and seeding of the site. Failure to seed the site would not be a breach of planning control.

7. Obviously failure to comply with an enforcement notice is a criminal offence and a local planning authority could obtain an injunction to prevent this. But it would have to proceed under s222 of the Local Government Act 1972.

B. *Gammall* and seeking the discharge of an injunction

8. In *Gammall v South Cambridgeshire District Council* [2006] 1 WLR 658 the Court of Appeal laid down the approach to be taken where a defendant discovers that he is breaching an injunction and wants to carry on doing so. The case has particular relevance to negative injunctions made against persons unknown. If a person unknown starts doing the act prohibited by an injunction (typically stationing his caravan on land) and then learns about the injunction, he becomes bound by the injunction and is breaching it. What if he does not want to remove his caravan?

9. In *Gammall* the Court of Appeal said that in this kind of situation, the person must apply to the court *forthwith* to have the injunction discharged. 'Forthwith' is measured from the date of knowledge. It was not acceptable simply to go on breaching the injunction and to ask for it to be varied when committal proceedings were started.

10. A striking example of this approach being applied in practice is *Broxbourne v Robb and Persons Unknown* [2011] EWCA 1355. The Council obtained an injunction in relation to vacant land restraining persons unknown from stationing caravans on it. Mr Beary, a gypsy, was not aware of the injunction and stationed his caravan on the land. The Council informed Mr Beary of the injunction on 24 November 2010, and gave him 14 days to leave. He stayed put. On 20 December the Council started committal proceedings alleging breach of the injunction between 10 and 13 December. On 15 January 2011 Mr Beary applied for planning permission. The first hearing in the committal proceedings was on 20 January 2011. On 27 January 2011 Mr Beary applied to have the injunction varied to allow him to stay on the site until the

planning application was determined. Cranston J said that Mr Beary had not brought himself within *Gammall*, that he had persisted in a deliberate contempt after he knew of the injunction and that to allow the variation sought would amount to condoning the breach. In other words the very fact that he had taken no action to get the injunction varied - more or less at once - was itself a reason not to vary it. The Court of Appeal agreed.

11. I should add that it is not entirely clear what approach a court would take if such a prompt application to vary were to be made – would the defendant be treated like the defendants in *Porter* (ie resisting a proposed injunction which would evict him)? There is no caselaw on this because no-one has made an application to vary quickly enough.

C. Planning Practice Guidance

12. The learning in relations to injunctions has not been greatly advanced by the Planning Practice Guidance. Injunctions only get 2 paragraphs. Most of these paragraphs merely summarise the law, which I would have thought was unnecessary and contrary to the objective of succinctness. To the extent that there is actual guidance, I am afraid that I think that it is wrong.

13. Take paragraph 50 of section 17b -

> 'In deciding whether it is necessary or expedient to seek an injunction, local planning authorities may find it helpful to consider whether:
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> > they have taken account of what appear to be relevant considerations, including the personal circumstances of those concerned;
> >
> > there is clear evidence that a breach of planning control has already occurred, or is likely to occur;
> >
> > injunctive relief is a proportionate remedy in the circumstances of the particular case;
> >
> > in the case of an injunction sought against a person whose identity is unknown, it is practicable to serve the Court's order on the person or persons to whom it will apply;

> 'A local planning authority can apply for an injunction whether or not it has exercised, or proposes to exercise, any of their other powers to enforce planning control. However, proceedings for an injunction are the most serious enforcement action that a local planning authority can take because if a person fails to comply with an injunction they can be committed to prison for contempt of court. Additionally, once an injunction has been granted, it cannot be discharged except where there has been a significant change of circumstances since the order was made. In these circumstances a local planning authority should generally only apply for an injunction as a last resort and only if there have been persistent breaches of planning control over long period and/or other enforcement options have been, or would be, ineffective. The Court is likely to expect the local planning authority to explain its reasons on this issue.'

14. I would not say that a local planning authority should only apply for an injunction where there have been persistent breaches of planning control over a long period and/or other enforcement options have been or would be ineffective. Nor would I say that the Court is likely to expect a local planning authority to explain its reasons on this issue. I am certainly not aware of any reported case where a court has refused to make an injunction to restrain a clear breach of planning control for these reasons. It is certainly true that these factors are said to be relevant in *Porter*. However, in *Porter*-type cases (ie cases involving a mandatory injunction to undo an existing breach of planning control which, if granted, would involve severe hardship), if an injunction is refused the reason is invariably *not* that there has not been a persistent breach of planning control or that the local planning authority has some other means of inflicting the hardship. The reason is invariably that the court does not think that the hardship should be inflicted at all, usually because it thinks that the defendant is likely to get planning permission from the Secretary of State in the near future to legitimise the breach.

15. If the injunction is pre-emptive (ie negative in form, preventing a defendant from starting to breach planning control) the court will generally be willing to grant an injunction if (i) it is reasonably certain that the act sought to be restrained is about to take place; (ii) this would be harmful and (iii) it is more or less completely certain that the act would involve a breach of planning control. I have never heard a defendant trying to argue that he should be allowed to start/resume breaching planning control because there have not been persistent breaches in the past or the local planning authority has other enforcement measures at its disposal.

16. In relation to injunctions against persons unknown, paragraph 51 attempts to summarise the requirements of paragraph 20 of CPR Practice Direction 8A, dealing with evidence. It refers to affidavit evidence: this is wrong. A witness statement will do. This point is quite important. It is more burdensome to produce an affidavit because you have to find a solicitor to administer the oath – and injunctions against persons unknown are often sought as a matter of urgency.

The Planning Court

17. S187B injunctions can be granted by either the County Court or the High Court. In the County Court the position always has been – and remains - that you get whichever judge is available. In the High Court we now have the Planning Court. In some cases the defendant will argue that he has a reasonable prospect of getting planning permission to legitimise what he is doing and that it would be disproportionate to make an injunction to prevent him from doing this in the meantime. You might think that this would be suitable business for the Planning Court, but the rules define a Planning Court claim as a judicial review or statutory challenge, so a claim under s187B does not count. I think that this means that the claim could not be transferred to the Planning Court even if someone wanted to do this. All s187B cases remain ordinary QBD cases. If you get a planning judge, that is a matter of luck.

**Confiscation for offences under s179**

18. It has been possible since 2003 to confiscate the proceeds of crime from a defendant convicted under s179, even where the matter has been tried in the Magistrates Court. Given that one of the main complaints about planning prosecutions has been the low level of fines, especially in the Magistrates Court, and given that confiscation would seem to be ideally suited to many s179 offences, you might think that confiscation in planning cases would immediately have become common. In fact it would appear that confiscation was more or less wholly overlooked. But this is most definitely changing. A number of London authorities have been quite assiduous in pursuing confiscation proceedings and there have been several important planning

confiscation cases in the Court of Appeal. I note that confiscation gets a mention in the Planning Practice Guidance.

Some context

19. I am going to be talking about two cases in particular, *del Basso* and *Ali*. Just to provide some context, this is what actually happened in these cases.

    a. In *Del Basso* [2010] EWCA Crim 1119 the defendant pleaded guilty in the Crown Court to 8 counts of failing to comply with an enforcement notice which alleged the use of a field for airport parking. He was fined a total of £24,000 (being £3000 on each count) with 6 months imprisonment if he failed to pay. He was ordered to pay £20,000 costs. The confiscation order was for £760,000 with 18 months imprisonment if he failed to pay. The order would have been for £1.8m if the defendant had been able to afford this.

    b. In *Ali* [2014] EWCA Crim 1658 the defendant converted a house into 12 flats. He was tried in the Magistrates Court but committed to the Crown Court for confiscation and sentence. The fine was £4,000 with 3 months imprisonment if he did not pay. The Court of Appeal reduced the confiscation order made by judge to £544,000 with 5 years in prison if he did not pay.

20. There are other examples of similar outcomes.

21. I should enter some notes of caution.

22. First the local authority has to have secured a conviction.

23. Second the process of confiscation can be quite complicated. That is inevitable given that the object is to show what benefit a defendant has obtained from a crime.

24. Third the local authority only gets a proportion of the sum recovered, normally 37.5%. The remainder goes to the Home Office and the CPS. (Usually confiscation proceedings are pursued by the CPS although this is not always so. It is not obvious to me why a local planning authority could not quite easily pursue a confiscation case

in relation to, say, the rent received in relation to premises used in breach of an enforcement notice).

25. Finally you will not be surprised to hear that the confiscation regime has came up against the EHCR, particularly A1P1, and the Supreme Court addressed this in *Waya* [2012] UKSC 51. It is clear that a number of earlier cases are no longer good law. However *Ali* is post-*Waya*. *del Basso* was before *Waya* but has been said by the Court of Appeal post-*Waya* to be correct on its facts, albeit 'close to the line'. The points that I am about to make about criminal lifestyle, benefit and the available amount are all consistent with *Waya.* However what *Waya* does say it that, if having applied the correct approach to these matters, the order would be wholly disproportionate, it should not be made.

26. The law has been summarised post-*Waya* by the Court of Appeal in *Ali* as follows -

> '(1) Under section 6(2) of POCA, it is mandatory to proceed with a view to a confiscation order being considered once two conditions are satisfied, namely that the defendant is convicted of an offence before the Crown Court and that the prosecution applies for the order to be made.
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> '(2) A central feature of Part 2 of POCA is the distinction between cases in which the defendant is, or is not, to be treated as having a **criminal lifestyle** (as prescribed by section 75) …
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> '(3) In cases where a defendant has benefited from a criminal lifestyle, the court must determine how much he has **benefited** from his **general criminal conduct**. If he does not have a criminal lifestyle, the court must determine whether he has benefited from the **particular criminal conduct**. In both cases, the first stage is to identify the benefit …
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> '(4) In cases where a defendant has a criminal lifestyle, when deciding whether he has benefited from his general criminal conduct and deciding what his benefit is from the conduct, the courts must, in accordance with section, make the assumptions contained in section 10. Broadly stated, the effect of these assumptions is that **property in the possession of a defendant in the six years** … [before the start of proceedings] is assumed to be the product of his criminal activities unless he can show otherwise on the balance of probabilities. In other words, in such a case the burden of proof is reversed since the defendant has to show how he came by his assets.
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> '(5) The second stage is the valuation of the benefit. …
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> '(6) The third stage is the valuation as at the confiscation date of all the defendant's realisable assets, described in section 9 as "the **available amount**". The "available amount" operates as a cap on the amount of the confiscation order …

> '(7) POCA laid down a procedure to enable the court to obtain the information necessary to make findings as to benefit and assets.'

Preconditions

27. The Court of Appeal stated the preconditions too narrowly.

28. First, the judge in Crown Court can initiate confiscation proceedings of his own motion.

29. Second, as I have said, there can be confiscation if a defendant is convicted in a Magistrates Court. The prosecutor has to ask for confiscation. If he does the matter is committed to the Crown Court (s70): only the Crown Court can made a confiscation order. If the matter is committed to the Crown Court for confiscation, the Magistrates cannot sentence the defendant. You will be aware that the Magistrates have power to commit a defendant to the Crown Court for *sentence* in s179 cases if they consider that their powers of punishment are not sufficient. Where the Magistrates commit for confiscation they must say if they would have committed the defendant for sentence (s70(5)). If they say that they would not, the Crown Court is bound by the sentencing limits that applied to the Magistrates (a maximum fine of £20,000 per offence).

'Benefit' and 'obtaining property' from criminal conduct

30. A defendant benefits from criminal conduct if he obtains property as a result of or in connection with the criminal conduct (s76(4)). The benefit is the value of the property obtained (s76(7)). Property is obtained by a person if he obtains an interest in it (s84(2)(b)).

31. The total benefit obtained is the 'recoverable amount' which is relevant to the amount that will be confiscated.

32. The Courts have been keen to stress that 'property obtained' must be given its ordinary meaning. The test is *not* profit (ie the turnover of a business minus

expenses) and a defendant must not be able to offset the costs of committing his crime. What matters is what property has been obtained, not retained. 'Confiscation' therefore does not have its popular meaning.

33. This produces very real issues where a defendant has used premises in breach of an enforcement notice to run what would otherwise be a perfectly legitimate business.

34. In *del Basso* two defendants operated airport parking from a site, paying rent to a Football Club. They considered that they were helping the Football Club and indeed that they were acting altruistically. However an enforcement notice was served and upheld on appeal. A first prosecution alleged failure to comply on one day (13 August 2004). A second prosecution alleged breaches in 2005. The confiscation order made by the judge was against the one defendant who was not bankrupt and related to *all* revenue from the parking business paid into a bank account held by the defendants jointly over the period from August 2004 to October 2005. On appeal it was said that the judge should have deducted money spent to meet 'legitimate' expenses incurred in the parking business: the defendant's benefit was his net profit, not the turnover of the business. The Court of Appeal said that the purpose of confiscation was to deprive defendants of the property (ie money) obtained from the criminal conduct. What a defendant did with money he obtained from his crime was irrelevant. Therefore no account was given for expenditure on the costs of operating the scheme, VAT, NI contributions or business rates.

35. Because property is 'obtained' if a defendant gets an interest in it, each defendant could be required to repay the entire sum received into the bank account.

36. Finally the Court of Appeal endorsed the following comments by the Crown Court judge about the approach to be taken to those who ignore enforcement notices -

> "I conclude with a final observation about the mentality of the [defendants] and other similar law breakers. I have received the strong impression that neither the [defendants] nor … their accountant appreciated fully the risk that the companies and individuals involved in the park and ride operation faced from confiscation proceedings. They have treated the illegality of the operation as a routine business risk with financial implications in the form of potential fines or, at worst, injunctive proceedings. This may reflect a more general public impression among those confronted by enforcement notices with the decision whether to comply with the law or to flout it. The law, however, is plain. Those who choose to run operations in disregard of

planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers ..."

Criminal conduct and criminal lifestyle

37. In a non-criminal lifestyle case the particular criminal conduct is the particular offence for which the defendant has been convicted. You have to assess the property obtained from that offence.

38. There are three ways in which a defendant can have a criminal lifestyle – the one most likely to be relevant in the case of an enforcement notice is where the offence was committed over a period of at least 6 months and the defendant has benefited by more than £5000 from the offence. This is obviously quite easy to establish with a continuing breach of an enforcement notice. If you find that you are being prosecuted for breach of an enforcement notice and that the summons alleges a period of more than 6 months, you can reasonably fear that confiscation on the basis of a criminal lifestyle will be sought.

Benefit from general criminal conduct

39. I remind you of (4). 'Broadly stated, the effect of these assumptions is that property in the possession of a defendant in the six years … [before the start of proceedings] is assumed to be the product of his criminal activities unless he can show otherwise on the balance of probabilities. In other words, in such a case the burden of proof is reversed since the defendant has to show how he came by his assets.'

40. In more detail the assumptions are that -

    a. all the property transferred to the defendant within the 6 years before proceedings were started; and

    b. all property held by defendant at any time after conviction

is property obtained as a result of general criminal conduct.

41. You also assume that *any* expenditure incurred in the within the 6 years before proceedings were started was met from property obtained as a result of general criminal conduct.

42. This is quite a startling provision. As the Court of Appeal says, it means that a defendant has to prove where he got his assets from. You can understand why this might be appropriate to drug dealers, but it is applicable to those who breach enforcement notices as well.

43. The points I have just made about benefit are still relevant. In both *del Basso* and *Ali* the defendants had a criminal lifestyle, but the court found itself considering only the property obtained from identifiable crimes: presumably the defendants had been able to show that most of their assets had been obtained otherwise than as a result of general criminal conduct.

44. But what is it that the defendant has to prove? What about crimes for which the defendant has not been convicted? In *Ali* the defendant had converted a house at 211 Willesden Lane NW6 into 12 flats; an enforcement notice was served. The summons alleged breach between 20 June 2008 and 2 February 2009. The order made by the Court of Appeal was for property (ie rent) obtained in relation to 211 Willesden Lane during that period *and* rent the defendant had obtained from using another building in a similar way in breach of another enforcement notice. And presumably the onus had been on the defendant to prove that the rent he had received had not been obtained through criminal conduct and he had failed to do this.

45. As I will show in a moment, the prosecution went even further and sought confiscation in relation to yet further buildings which had been converted to flats without planning permission and where there had been no enforcement notice.

<u>The available amount</u>

46. The Court must order defendant to pay 'the recoverable amount' unless the defendant shows that the 'available amount' is less – the available amount is the total

value of all his 'free property' (minus obligations which have priority) and all his 'tainted gifts' (s9).

47. Priority obligations are obligations to pay money imposed by criminal courts on conviction and any sums which would be included as preferential debts of defendant if he were to be made bankrupt.

48. Tainted gifts: if the defendant has a criminal lifestyle or no court has decided that he does not have a criminal lifestyle, 'tainted gifts' are *all gifts* made by the defendant in the 6 years before the proceedings started (or a gift of property obtained by the defendant in connection with his criminal conduct or which represented property obtained by him in the course of his criminal conduct). If defendant does not have a criminal lifestyle a gift is tainted if made after the date the particular offence was committed.

Confiscation orders and fines

49. The Crown Court must make the confiscation order before it imposes a fine and must take the order into account when determining the fine (s13(2)). (The fact of a confiscation order is not relevant to any other punishment (s13(4)). I am not sure what happens with the instruction in s179(9) to take into account the financial benefit to the defendant when determining the amount of the fine if there has been a confiscation order.

A fascinating thought - inchoate offences under s179?

50. Caselaw on confiscation involves interaction between the planning offences that we are familiar with and mainstream criminal law. This throws up some fascinating insights. I mentioned a moment ago that in *Ali* the prosecution had suggested that rent received for other buildings which had been converted into flats without planning permission should also be confiscated as property obtained from general criminal conduct. There had been no enforcement notices in relation to these buildings. Everyone here would say that mere breach of planning control is not an offence – it is only after the deadline in an enforcement notice has expired that there is a criminal

offence. But this would be to reckon without the ingenuity of the skilled prosecutor. What the prosecutor said in *Ali* was that the defendant was engaged in a crime - either a conspiracy to breach s179 or an attempt to breach s179 -

> 'the appellant's conduct was criminal conduct within section 76 of POCA because the appellant, with others, set out to defeat the statutory planning regime in general and in particular not to comply with any enforcement notices. … in the circumstances of this case the appellant's conduct, which was more than merely preparatory, amounted to the commission of an inchoate offence, either a conspiracy to disobey an enforcement notice or an attempt to do so. … the appellant was operating his business on the basis that it was in his interest not to comply with enforcement notices and to pay the fines because the income he continued to receive from the properties was greater than the fine … the appellant's activity qualified as "criminal conduct" within POCA because the only sensible inference from the entirety of the circumstances is that he never intended to comply with an enforcement notice and had a business model involving wholesale disregard of the planning regime …

51. The Court of Appeal did not consider that this was wrong, although it found against the prosecution on the basis that the judge had not made requisite findings of fact. As to the general law it said -

> 'We can see that in principle the conduct of a person who sets out to defeat the statutory planning regime and any enforcement notice could amount to such an offence. …
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> 'The nature of inchoate offences and their particular requirements, however, mean that the inchoate offence analysis may not be straightforward. … the inchoate offence analysis involves questions of conditional intent and conditional agreement because the conduct is not intrinsically criminal. In relation to attempt, it also involves potentially difficult questions of proximity. What the appellant intended was to make money from his breaches of planning control in the form of rents from the converted premises and, absent the service of an enforcement notice, he would do so without committing an offence.
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> 'The conditionality or contingency planning element of a person's intention or the agreement made with another does not necessarily preclude there being a criminal attempt or conspiracy … what has to be shown is that there was an *ex ante* intention or an agreement not to comply with any enforcement notice served …' (Paragraphs 60-62).