ENFORCEMENT ACTION AGAINST UNLAWFUL DEVELOPMENT BY GYPSIES

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Introduction

1. In discussing enforcement powers it is important to distinguish those cases where the gypsies do not own/have permission to occupy the land on which the encampment takes place from those where they do. In the former situation the gypsies will be trespassing and probably cannot have any serious expectation of being allowed to remain indefinitely: there is a variety of eviction powers vested in local authorities and the police, in addition to the power of the landowner to recover possession of his land. Use of planning powers is very unlikely, although service of a temporary stop notice would in theory be possible.

2. In the latter situation the *only* unlawfulness is likely to be the absence of planning permission.

3. The three methods for taking action against unlawful development which call for discussion are the enforcement notice (including direct action), the stop notice (including the temporary stop notice) and the s187B injunction.

The enforcement notice and direct action

4. An enforcement notice will require steps to be taken to remedy a breach of planning control within a certain time limit. It is a criminal offence to breach an enforcement notice – ie not to comply with its requirements within the time allowed (s179).

5. The following features of the enforcement notice regime are particularly relevant in the context of unlawful caravan sites.

    a. An enforcement notice requires an actual breach of planning control and so cannot be used pre-emptively, unlike an injunction.

    b. The steps imposed by an enforcement notice can be mandatory, and can include the restoration of the land.

    c. An enforcement notice must have a period for compliance. In addition there must always be a period of at least 28 days before the enforcement notice comes into effect (ie before the period for compliance even starts). During this time an appeal against the enforcement notice can be made to the Secretary of State. It follows that an enforcement notice cannot impose an immediate ban on offending activity.

    d. If an appeal is made the enforcement notice is suspended. If the appeal fails, the period for compliance in the upheld enforcement notice will run from the date of the appeal decision.

    e. One ground of appeal is that planning permission ought to be granted for the offending development: if this ground succeeds the developer will get a retrospective planning permission.

    f. Taking enforcement action against a gypsy caravan will interfere with the gypsy's A8 rights. The local planning authority and any Inspector must consider human rights issues when deciding whether to make/uphold such an enforcement notice.

    g. Because human rights issues are assumed to have been taken into account in the decision-making process which leads to the issuing/upholding of the enforcement notice, they cannot provide a defence to a prosecution under s179 (***R v Clarke*** **[2002] JPL 1372**, following ***R v Beard*** **[1997] 1 PLR 64**).

6. If an enforcement notice is not complied with, the LPA can take direct action to enforce its requirements (s178). This may involve removing caravans from a site. The local planning authority has to make ***Porter***-style inquiries when deciding whether to take such action (***R (Mitchell) v Horsham DC* [2003] EWHC 234 Admin**).

7. Direct action under s178 against gypsy caravans is an expensive and traumatic exercise. Further any decision to take such action is usually challenged by way of judicial review (see below).

Recent developments

8. Four decisions taken last year by Basildon DC to take direct action under s178 have been challenged on various grounds (***R (O'Brien et al) v Basildon DC, R (Casey et al) v Basildon DC, R (McCarthy et al) v Basildon DC*** and ***R (Coyle et al) v Basildon DC*)**. Two have been decided, although appeals are possible. The present position is as follows.

Never proportionate?

9. It has been argued that it is *never* proportionate for a local planning authority to take direct action under s178 of the Town and Country Planning Act 1990 to evict gypsies since the s187B injunction route is always a 'less interfering' measure. A challenge on this ground has been rejected.

Likely view of Secretary of State

10. In the two decided cases the decisions to take direct action were quashed because the Council had failed to consider whether the *Secretary of State* was likely to give planning permission for the development. Obviously any report would set out the judgment of officers on the balance of the planning merits/demerits of the development, but it seems that a report must also consider whether the Secretary of State is likely to decide that officers are wrong.

11. The decisions in the Basildon cases were taken before C1/2006. With the publication of the new Circular there is an increased chance of the Secretary of State granting planning permission for a site that would previously have been regarded as unacceptable.

Challenge based on the race equality duty

12. Two of the Basildon cases raise the question whether the race equality duty in s71 of the Race Relations Act 1976 (as amended) prohibits enforcement action which will deprive members of a particular racial group of access to services enjoyed by the rest of the population. Such a result is inevitable if eviction action is taken against caravan-dwelling Romanies or Irish Travellers, unless the local planning authority can offer an alternative pitch.

13. S71 states that 'in carrying out their functions' various authorities, including local planning authorities, must have 'due regard' to the need to eliminate unlawful racial discrimination and to promote good race relations and equality of opportunity between the races. In discharging this duty authorities must take into account a code of practice issued by the CRE. The code requires all authorities to have a race equality scheme, essentially a programme for assessing how the various policies of the authority achieve the race equality duty.

14. The race equality duty has existed since 2000 but has only recently begun to feature in gypsy litigation. Bearing in mind that everyone is the member of a racial group, I have some difficulty understanding what it means to have 'due regard', for example, to the need to promote equality of opportunity between different racial groups when deciding whether to enforce planning policy against a breach of planning control. I am not certain that the Secretary of State knows either. It is interesting to compare the following passages from the *Guidance on Managing Unauthorised Camping* 2004 and C1/2006. The former states, in Annex D –

> 'Since eviction of unauthorised campers and enforcement against unauthorised development are likely to have a large effect on the public and in particular on the gypsy/Traveller population, they are functions highly relevant to the RRA general duty and should be prioritised in race equality schemes. *When evicting and enforcing,*

authorities need to ensure that they act in a way which meets the three elements of the general duty and so as to have a minimum negative impact on the gypsies and travellers involved. *Local authorities … must always be able to show that they have properly considered the race and equalities implications of their policies and actions in relation to unauthorised encampments and unauthorised development by gypsies and travellers.'*

The latter states –

'71. … The duty on local authorities to actively seek to eliminate unlawful discrimination and promote good race relations does not give gypsies and travellers a right to establish sites in contravention of planning control. In line with their race equality scheme (legally required under the RRA 1976 (Statutory Duties) Order 2001) local authorities *should assess which of their functions are relevant to race equality and monitor these functions and policies to see how they impact on different racial groups.* The SCI is particularly important in this regard.

'72. *When policies are changed or new ones introduced, authorities should assess and consult on their likely impact, and where an adverse impact is identified which cannot be justified, changes should be made*. It is particularly important that authorities consider all the racial groups served by the authority in order to assess the impact of their policies on those groups. Romany Gypsies and Irish Travellers have been recognised by the courts as being distinct ethnic groups covered by the RRA 1976. Under the general duty mentioned above, there is a requirement that local authorities seek to promote good race relations between Gypsies and Travellers and the settled community. This is important in the context of gypsy and traveller site planning.'

15. I have italicised the sentences which give guidance rather than state the law. Are the two documents saying the same thing?

The stop notice

16. A stop notice (but not a temporary stop notice) is parasitic on an enforcement notice. The stop notice is designed to impose an *immediate* restriction and is effective before the period for compliance in the enforcement notice expires. It is a criminal offence to carry out the activity banned by a stop notice (s187).

17. The relevant features of the stop notice are as follows -

a. A stop notice can prohibit immediately any 'relevant activity' which is caught by the enforcement notice – this can include the use of land for the stationing of caravans. The use of a building as a dwelling house cannot be prohibited by a stop notice.

b. A stop notice cannot be used against a breach of planning control which has not yet occurred.

c. There is no right of appeal to the Secretary of State against a stop notice. However, if the underlying enforcement notice is quashed on appeal, the stop notice ceases to have effect.

d. Compensation has to be paid if the relevant enforcement notice is quashed on certain grounds. This liability is widely misunderstood and essentially only arises where the prohibited activity is not in breach of planning control (eg because it is immune from enforcement action). This is unlikely in gypsy cases.

18. As is pointed out above, a stop notice can prohibit the stationing of caravans: there are *no* restrictions on the exercise of this power. Such a notice can only be complied with by removing the caravans. It follows that a stop notice can be used to secure an immediate eviction of gypsy caravans. In theory, therefore, the stop notice is a powerful weapon in the armoury of a local planning authority. However eviction stop notices are rare, probably because local planning authorities have an exaggerated fear of compensation and are concerned that such notices will be challenged by way of judicial review.

The temporary stop notice

19. In an attempt to meet a perceived need for more effective enforcement measures, especially against caravans sites, the Government introduced the temporary stop notice in early 2005. The relevant provisions are ss171E-H of the TCPA 1990, inserted by the PCPA 2004.

20. The important features of a temporary stop notice are –

a. It does not require an enforcement notice.

b. Like an ordinary stop notice, it cannot be used where a breach of planning control has not yet occurred.

c. It only remains in force for 28 days.

d. It is a criminal offence to fail to comply with a temporary stop notice.

e. Compensation is payable where the landowner can establish (by obtaining a CLEUD) that the activity in question was not in breach of planning control.

f. There are restrictions on the use of the temporary stop notice against the stationing of caravans. A temporary stop notice can be used to prevent the arrival of *further* caravans in all circumstances, but can only be used to require the removal of residential caravans already on a site in circumstances defined in the Town and Country Planning (Temporary Stop Notices) (England) Regulations 2005. In this respect the temporary stop notice is more restricted than the ordinary stop notice.

21. The distinguishing feature of the temporary stop notice procedure is that it does not involve the prior issue of an enforcement notice and can therefore be issued very quickly. It will also be useful where the local planning authority needs a temporary restraint while it considers whether to serve an enforcement notice (carrying with it the prospect of an appeal to the Secretary of State).

Recent developments

Compatibility of stop notice regime with A14

22. In ***Wilson v Wychavon DC*** **[2005] EWHC 2970 (Admin)** it was argued that the entire stop notice/temporary stop notice regime is incompatible with A14 because it treats caravans

differently from conventional housing and hence discriminates against gypsies. Crane J rejected the challenge.

Race equality duty

23. If anything comes of the race equality duty point being pursued in the direct action cases, this could become a ground for challenging a decision to issue a stop notice.

S187B injunctions

24. A local planning authority can seek an injunction under s187B of the TCPA 1990 against an actual or apprehended breach of planning control if the authority considers that this is 'necessary or expedient'.

25. The following features of this remedy are important -

    a. The s187B injunction can be used against an anticipated breach.

    b. Although the power under s187B is to 'restrain' breaches of planning control, a s187B injunction can impose mandatory requirements. In the case of a caravan encampment, these could include the removal of caravans and hardstanding. If an enforcement notice requiring restoration of the land has not been complied with, an injunction could require restoration, I think.

    c. The order is granted by the court, either the County Court or the High Court. This means that the local planning authority has to prepare evidence and persuade a judge. The procedures for obtaining an injunction can take time, although in appropriate cases temporary injunctions can be obtained very quickly.

    d. Failure to comply with an injunction is a contempt of court, which is punishable by a fine or imprisonment. Contempt of court is normally punished severely, although this is not always the case with breaches of injunctions against gypsies.

26. When considering s187B injunctions in gypsy cases, it is important to distinguish between pre-emptive and eviction injunctions.

Pre-emptive injunctions (ie injunctions which preserve the status quo)

27. Examples of injunctions of this kind are injunctions which prevent the occupation of a vacant site or which prevent the arrival of *further* caravans.

28. A pre-emptive injunction will not involve consideration of A8 as it will not interfere with any home. Pre-emptive injunctions are therefore usually quite easy to obtain.

29. An injunction is a personal remedy, normally granted against a *named* individual. However, it is now recognised that a pre-emptive s187B injunction can be granted against unknown persons (***South Cambridgeshire DC v Persons Unknown*** **[2004] EWCA Civ 1280**). That such injunctions are still personal is clear from the rather cumbersome form of words approved by the CA for the description of unknown defendants in the title of the action –

> 'Persons unknown causing or permitting –
>
> i. caravans, mobile homes or other forms of residential accommodation to be stationed other than for agricultural purposes on [the land];
>
> ii. existing caravans, mobile homes or other forms of residential accommodation on the said land to be occupied other than for agricultural purposes; or
>
> iii. hardcore to be deposited other than for agricultural purposes on the said land'

30. Clarke LJ (as he then was) was insistent that the description of the unknown defendants should mirror the terms of the injunction itself.

31. Pre-emptive injunctions against unknown gypsies are now quite common.

32. Taking proceedings against persons unknown is only permissible where it is *impossible* to give a better description of the persons sought to be restrained. The fact that it is highly inconvenient to give a better description (eg because the persons can be named but are very numerous) is not an acceptable reason.

Enforcement of injunctions granted against persons unknown

33. An injunction is only of value to the extent that it can be enforced by proceedings for contempt. A person cannot be guilty of contempt of court unless he *deliberately* breaches the relevant injunction. This means that, at the time of the alleged contempt, he must know of the injunction.

34. It is important not to confuse this requirement with the rules about service. The normal rule for *service* is that any injunction must be given personally to the persons bound by it. If this happens there is usually no difficulty in proving that a breach is deliberate. Personal service is often not possible in the case of pre-emptive injunctions against persons unknown or absent landowners. In such cases the court will usually sanction some alternative method of service, eg by posting the injunction on the relevant land. However this does *not* obviate the need, in later contempt proceedings against a particular alleged contemnor, to prove that the breach was deliberate.

35. A way forward for local planning authorities is illustrated by ***Gammell v South Cambridgeshire DC* [2005] EWCA Civ 1429.** South Cambridgeshire DC served the injunction granted by the CA in ***South Cambridgeshire DC v Persons Unknown*** by fixing it to a stake on the site. Inevitably the injunction had disappeared by the time Mrs Gammell (a person previously unknown) arrived with her caravan. However officers spoke to Mrs Gammell, gave her a copy of the injunction and explained its terms to her. She was held to be in contempt by reason of her occupation of the land *thereafter* (note that the injunction prohibited the *stationing* of caravans on the land, not the entry of caravans onto the land). The CA held that Mrs Gammell was subject to the injunction because she had done acts which brought her within the description of the unknown defendants and that she was in deliberate breach of the injunction as soon as she had actual knowledge of it. There was no question of carrying out some kind of ***Porter*** exercise in order to establish whether she

should be subject to the injunction, although considerations of personal hardship etc would, of course, be relevant to the question of the punishment to be imposed for any contempt. The normal sanction is a sentence of imprisonment, suspended on condition that the gypsy leaves the site within a defined period (see eg ***South Beds DC v Price*** **[2006] EWCA Civ 493** and ***Mid Beds DC v Brown (no 2)*** **[2006] EWHC 1362 (QB)**).

Eviction injunctions (ie injunctions that require the removal of caravans already on land)

36. Injunctions which require the removal of a residential caravan from land are far more difficult to obtain. Removal will involve interference with the occupant's home and thus with his A8 rights. The impact of A8 was considered in ***Porter v South Buckinghamshire DC*** **[2003] 2 AC 558**, which, in summary, held that, in making a s187B injunction, the court was exercising an original jurisdiction and would consider all the circumstances of a case. Although the court would not examine matters of planning policy/judgment, which should be within exclusive purview of the planning authorities, it would consider all other matters, including personal hardship and whether the local planning authority had adequately considered this, the environmental harm resulting from the breach, the availability of alternative sites, the degree and flagrancy of the breach and the planning history. Most of these matters are, of course, relevant to the grant of planning permission and the distinction between those matters which the court will consider and those which it will leave to the local planning authority is in truth rather elusive.

37. In all injunction cases there will have been a planning judgment by a planning authority that the development in question should not be permitted. However, of the five law lords in ***Porter***, only Lord Clyde grappled with the submission that failure to grant an injunction is much the same as granting a temporary planning permission for the continuation of the offending activity. While he held that the two are not technically the same, it might be thought that there is no difference of any importance in the case of the unlawful stationing of gypsy caravans.

38. Among the list of matters which the court can take into account is the possibility that the development sought to be restrained will in fact get planning permission in the future (see paragraph 39 of the judgment of Simon Brown LJ in the Court of Appeal, cited with approval

by HL, Lord Bingham at paragraph 30 and Lord Scott at paragraph 100). These paragraphs have assumed a high degree of importance in gypsy cases. In the typical case of unlawful development gypsies will be able to generate an appeal to the Secretary of State fairly quickly, either by appealing against a refusal of planning permission or by appealing against an enforcement notice. In the period before any such appeal is determined, they will resist any eviction injunction on the ground that they have a reasonable prospect of obtaining planning permission, that they have no where else to go and that eviction *in the meantime* would cause them severe personal hardship and would violate their A8 rights. The courts are naturally reluctant to pre-empt the decision of an Inspector on the planning merits and it is usually not sensible for a local planning authority to seek an eviction injunction before it has won the inevitable planning appeal.

39. If the Secretary of State dismisses the appeal, the position is ordinarily very different. It is worth noting that HL in ***Porter*** dealt only with questions of general approach and did not decide whether an eviction injunction should be made on any particular facts. Specifically none of the appeals before the HL involved a *recent* decision by the Secretary of State to refuse planning permission and the significance of such a decision was therefore not considered. Indeed in the period of the litigation in ***Porter***, the Secretary of State had actually *granted* planning permission for two of the three sites in issue. The considerable weight which the court will ordinarily give to a recent appeal decision refusing planning permission was discussed in ***Davies v Tonbridge BC*** **[2004] EWCA Civ 194** and ***South Cambridgeshire DC v Flynn et al*** **[2006] EWHC 1320.**

Recent developments

<u>Eviction injunctions and paragraphs 45 and 46 of C1/2006</u>

40. However in gypsy cases it is now being argued that the weight to be attached to a decision of the Secretary of State to refuse planning permission/uphold an enforcement notice given before February 2006 is undermined by C1/2006. The argument is that, no matter how decisively gypsies may have lost the appeal, in a district with an unmet need and no existing quantitative assessment, there is now a reasonable prospect that the site will obtain at least a temporary planning permission by reason of paragraphs 45 and 46 of C1/2006. It is

argued that this prospect means that an eviction injunction should not be made, at least until a further application for temporary planning permission has been determined.

41. Paragraphs 45 and 46 state –

> 45. Advice on the use of temporary permissions is contained in paragraphs 108 – 113 of Circular 11/95, The Use of Conditions in Planning Permission. Paragraph 110 advises that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of the temporary permission. Where there is unmet need but no available alternative gypsy and traveller site provision in an area but there is a reasonable expectation that new sites are likely to become available at the end of that period in the area which will meet that need, local planning authorities should give consideration to granting a temporary permission.
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> 46. Such circumstances may arise, for example, in a case where a local planning authority is preparing its site allocations DPD. In such circumstances, local planning authorities are expected to give substantial weight to the unmet need in considering whether a temporary planning permission is justified. The fact that temporary permission has been granted on this basis should not be regarded as setting a precedent for the determination of any future applications for full permission for use of the land as a caravan site. In some cases, it may not be reasonable to impose certain conditions on a temporary permission such as those that require significant capital outlay.

42. The prospect of a temporary planning permission under these paragraph was said to tip the balance against the grant of an eviction injunction in ***S Bucks DC v Smith*** **[2006] EWHC 281.** On the other hand reliance on these paragraphs was unsuccessful in ***Wychavon DC v Rafferty*** **[2006] EWCA Civ 628** and ***South Cambridgeshire DC v Flynn et al*** (supra) (both injunction cases) and ***S Beds DC v Price*** **[2006] EWCA Civ 493** and ***Mid Beds DC v Brown (no 2)*** (supra) (both contempt cases). In ***Smith, Flynn*** and ***Price*** there were recent (but pre-C1/2006) decisions of the Secretary of State refusing planning permission and upholding enforcement notices. In all five cases the courts assessed the strength of the gypsies' prospects (***Smith*** - 'a real prospect'; ***Rafferty*** – 'not hopeless' but not a 'real prospect'; ***Flynn*** – prospects 'so low' that they can be disregarded; ***Price*** – 'not particularly strong'; ***Brown (no 2)*** – 'not sufficiently strong'). Only in ***Brown (no 2)*** is there much discussion of how this assessment is made, although ***Flynn*** states that pre-C1/2006 findings by an Inspector that the development causes serious environmental harm and that *temporary* planning permission should not be granted will carry great weight. As to these points, note -

a. Paragraph 45 of C1/2006 specifically refers to paragraphs 108-113 of C11/95, dealing with conditions. Paragraph 109 says that where injury to amenity cannot be acceptably mitigated by conditions, even temporary planning permission cannot be granted. It is thus possible to argue that paragraphs 45 and 46 of C1/2006 do not countenance temporary planning permission for sites which cause such injury.

b. A decision to uphold an enforcement notice can, I think, be regarded as a decision signifying that, at the end of the period for compliance, the stationing of caravans must stop. From this it can be argued that the Secretary of State must consider that continuation thereafter, even on a temporary basis, would be unacceptable.

43. All the above issues featured prominently in argument in ***Bath and NE Somerset Council v Connors***, heard by Tugendhat J last week, and in which judgment is awaited.

Approach to planning evidence

44. The Court of Appeal in ***Rafferty*** made it clear that a fairly robust approach will be taken to evidence bearing on the planning merits. In that case the judge below had taken a broad brush approach ('in relation to the planning appeal, he considered that, whilst it was not hopeless, he could not say that it had a real prospect of success and that it was not for the court to enter into the arguments, that being a matter for the Inspector hearing the planning appeal in due course …'). This was not criticised. A contention that 'by declining to enter into a more detailed examination of the merits [the judge] wrongly fettered his own discretion' and eight detailed points of criticism were rejected. The Chancellor stated 'as the decision of the House of Lords in *Porter* shows, it is not our function to second-guess the outcome of the appeal …'. In addition Tuckey and Peter Gibson LJJ stated, obiter, that evidence dealing with the prospects of obtaining planning permission should not be subject to cross-examination.

45. In ***Connors*** a recent (but pre-C1/2006) decision of the Secretary of State held that the access to the site was dangerous and should not be used, even on a temporary basis. In order to argue that they now had a reasonable prospect of obtaining planning permission, the gypsies put in an expert's report which effectively contended that the Secretary of State's conclusion on highways was wrong. The judge was invited to exclude this evidence on the basis that its admission would contravene the restrictive approach in ***Porter***.

Race equality duty

46. If anything comes of the race equality duty point being pursued in the direct action cases, this could become a factor in injunction cases.