Enforcement by injunction – a practical guide

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A.Nature of injunction

1. An injunction is a remedy, namely an order, granted by a court. Injunctions have been a feature of the general law for centuries and some of their most significant features derive from the rules of court procedure (the Civil Procedure Rules, now a uniform regime for both the County Court and the High Court).

2. An injunction is an order that an unlawful act should not take place/should be undone. Before 1992 the courts had begun to accept that local authorities could seek injunctions to restrain breaches of the criminal law, under s222 of the Local Government Act 1972. Some injunctions were granted to compel compliance with enforcement notices, breach of an enforcement notice being a criminal offence (see eg *Runnymede BC v Ball* [1986] 1 WLR 353 and *Runnymede BC v Smith* [1986] JPL 592). The position in relation to enforcement notices is still quite interesting, see below.

3. In January 1992 s187B was added to the TCPA 1990. This empowers local planning authorities to seek injunctions to restrain actual or anticipated breaches of planning control 'whether or not they have exercised or are proposing to exercise any of their other powers under this Act'. That means what it says – the injunction can now be weapon of first resort.

4. Note also -

    a. S214A TCPA 1990 (added 1992) – a local planning authority can seek an injunction to prevent an actual or apprehended offence under s210/211 (felling a tree in breach of a TPO);

    b. S44A Listed Building Act 1990 (added 1992) – a local planning authority can seek an injunction to prevent unlawful works to a listed building;

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c. S106(5) TCPA 1990 (substituted 1991) – a local planning authority can seek an injunction to enforce a section 106 agreement (which involves neither a criminal offence nor a breach of planning control).

5. I am going to concentrate on s187B injunctions, although a good deal of what I say applies to injunctions of any kind.

Enforcing an enforcement notice under s187B

6. S187B is about restraining breaches of planning control. 'Breach of planning control' is defined in s171A as carrying out development without planning permission or failing to comply with a condition or limitation subject to which planning permission has been granted. S187B injunctions are often sought to enforce compliance with enforcement notices (injunctions have a lot of advantages over prosecution or direct action) and 'restraining' a breach of planning control can include requiring positive steps, eg demolition (*Croydon LBC v Gladden* [1994] 1 PLR 30). However failure to do something required by an enforcement notice may not involve a breach of planning control (eg reseeding), see *Broadland DC v Trott* [2011] EWCA 301. In such a case the local planning authority will still have to rely on s222 LGA 1972.

7. There are a couple of other interesting points about the relationship between s187B and enforcement notices, viz -

a. What if an enforcement notice wrongly alleges that something involves a breach of planning control but there is no appeal? *Buckinghamshire CC* v *NW Estates* [2003] 3 PLR 46 confirms that s285 operates according to its terms in injunction proceedings. Does this mean that an enforcement notice can effectively create a breach of planning control for the purposes of s187B?

b. Suppose an enforcement notice requires the demolition of a building within 6 months. Does the presence of the building during this period constitute a breach of planning control?

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B. Interim and final injunctions

8. A married footballer hears that someone has been telling the tabloid press about his errant activities. He considers that publication of this information would be unlawful because it would violate his Article 8 right to privacy and he wants to prevent this.

9. The civil courts exist to resolve disputes. All court proceedings and remedies therefore require a *claim* to have been started by a *claimant* against one or more *defendants*. A claim will eventually be determined at a *trial*. The footballer needs to start a claim asking for a permanent (or *final*) injunction preventing publication, to be granted at the trial.

10. A trial will probably not take place for 12-18 months. If the information is published in the meantime, the privacy/confidentiality of the information will be lost. The footballer will be entitled to damages but will consider that these would not be an adequate remedy, just like Mr Moseley did not. Having made his claim he will therefore ask the court to make an *interim* injunction, to prevent publication in the interim period, ie 'until trial or further order'. Such injunctions used to be known as *interlocutory* injunctions, and are still sometimes (wrongly) so called. He will have to give an undertaking in damages (see below). All the recent super injunctions have been interim injunctions.

11. The great advantage of an interim injunction is that it is (i) quick, (ii) likely to be effective and (iii) pre-emptive. As to (i) see further below. As to (ii), very few people dare to breach an injunction (and see further below). As to (iii), in many contexts there is no alternative pre-emptive remedy. This is notably true of planning: none of the other enforcement remedies really operates pre-emptively (a stop notice assumes an enforcement notice which requires a breach to have occurred).

12. Statistically most s187B injunctions are interim injunctions. Although in all cases claims will have been started, most never get to trial. If an interim injunction has been granted the developer often just gives up - or he gets planning permission, meaning that the development will no longer be in breach of planning control.

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C. More about interim injunctions

Invariably negative

13. The essential purpose of an interim injunction is to prevent the trial from being frustrated by some action which has not yet occurred - ie to preserve the status quo. If the offending development has already taken place, it is virtually certain that an interim injunction to require its removal will not be granted. Interim injunctions are invariably negative and relatively unambitious.

Quick and very quick

14. The normal procedure is that, having started its claim, the claimant *issues* an application asking the court to make an interim injunction - which he *serves on* (= sends to, see further below) the defendant(s). When the application is issued the court fixes a date for the interim injunction hearing, which is usually 2-3 weeks hence.

15. In appropriate cases, however, the court will be prepared to make an interim injunction more or less at once, including at night and over week ends, and even if no warning has been given to the defendant(s) (ie *without notice,* previously *ex parte*): there is always a High Court judge available for this purpose. The judge will only entertain such an application if he is satisfied that it cannot be made in the normal way: such an application should therefore only be made if there is an immediate threat that the development will take place or an immediate threat if the defendant is warned of the application.

16. The courts do not like making orders where they have only heard one side of a story. Any injunction made without notice will therefore only last for a couple of days. A further hearing will then be held at which both sides can argue over whether the injunction should be continued until trial.

Issues at interim stage

17. The general law says that, when a court is being asked to make an interim injunction, the issues are: is there a triable issue? what does balance of convenience require? and would damages be an adequate remedy?

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18. I deal with triable issues and damages below. The reality in planning cases is that, where arguably unlawful development is threatened, it is almost always better to prevent it from happening until a trial can take place (by making an interim injunction) than to allow it to happen, thereby presenting the local planning authority with a fait accompli (by not making an interim injunction). A defendant is likely to have a hard time persuading a court that he should be free to carry out arguably unlawful development. This means that there are normally only two issues at the interim stage: is development actually being threatened? and, if so, will it involve a breach of planning control? The former is often a real issue – a local planning authority will often suspect that something unpleasant is about to happen on a site, but may have difficulty proving that there is a real threat. The courts do not act unnecessarily and do not make injunctions just to be on the safe side. I am not aware of any judicial authority on what degree of threat is required (probably because you hardly ever get a judgment on an interim application and, even if you do, it is never reported).

Undertaking in damages

19. The normal rule is that the party getting an interim injunction must give an *undertaking in damages* (sometime referred to as a *cross undertaking*) – ie he promises that he will pay damages to the defendant if it turns out at trial that the interim injunction should not have been made. This is a fairly powerful disincentive in cases brought by private individuals/bodies. So far as public authorities acting to enforce the general law are concerned, the theory is that the court has a discretion not to require an undertaking in damages. However local planning authorities never give undertakings in damages in planning injunction cases and I have never known a defendant to take a point on this (*I* might, however, if there was some real doubt about whether the activity in question was in breach of planning control).

D. The final injunction

20. The issues at a s187B trial are often quite different from what they were/would have been at the interim stage.

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21. A trial will most commonly be needed where the unlawful development has taken place (ie the developer has acted before the local planning authority could get an interim injunction) and the authority wants a *mandatory* (ie positive) injunction to remove it.

22. Mandatory injunctions often raise questions of hardship.

23. Is quite likely that something will have happened in terms of a planning application/enforcement notice since the claim was started. The developer may have made an application, which will presumably have been refused. In any event the local planning authority ought to have served an enforcement notice, if only to prevent immunity from being acquired. An appeal may be pending, or there may already be a negative decision from the Secretary of State.

24. The nature of the court's task at trial was analysed by the Court of Appeal and the House of Lords at some length in *South Buckinghamshire DC v Porter* [2003] 2 AC 558. The theoretical position which results was summarised in *Davies v Tonbridge* [2004] EWCA 194 at paragraph 34 as follows -

    1) 'section 187B confers on the courts an original and discretionary, not a supervisory, jurisdiction, so that a defendant seeking to resist injunctive relief is not restricted to judicial review grounds;

    2) 'it is questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B;

    3) 'the jurisdiction is to be exercised with due regard to the purpose for which was conferred, namely to restrain breaches of planning control, and flagrant and prolonged defiance by a defendant of the relevant planning controls and procedures may weigh heavily in favour of injunctive relief;

    4) 'however, it is inherent in the injunctive remedy that its grant depends on a court's judgment of all the circumstances of the case;

    5) 'although a court would not examine matters of planning policy and judgment, since those lay within the exclusive purview of the responsible local planning authority, it will consider whether, and the extent to which, the local planning authority has taken account of the personal circumstances of the defendant and any hardship that injunctive relief might cause, and it is not obliged to grant relief simply

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because a planning authority considered it necessary or expedient to restrain a planning breach;

6) 'having had regard to all the circumstances of the case, the court will only grant an injunction where it is just and proportionate to do so, taking account, inter alia, of the rights of the person or persons against whom injunctive relief is sought, and of whether it is relief with which that person or persons can and reasonably ought to comply.'

25. The real point about *Porter* and the emphasis on discretion is that the court is free *not* to grant an injunction even though a clear breach of planning control has taken place. Since not granting an injunction will mean that the offending development will remain, it is much the same as granting planning permission (despite what is said in *Porter* paragraph 72). A local planning authority might be reluctant to prosecute for failure to comply with an enforcement notice (assuming one is in place) if a court has just refused to make an injunction.

26. The practical upshot is that potential issues at trial (ie the 'triable issues', see above) will be (i) is the offending action/activity a breach of planning control? (ii) if it is, and if an application has been made or an enforcement notice served, is there a prospect that it will get retrospective planning permission from the Secretary of State? (iii) what harm is the development doing? and (iv) what hardship/interference with human rights will be caused if the injunction is made?

Propsects of planning permission

27. Quite often a trial takes place while an appeal to the Secretary of State is pending. The mere fact that a defendant has made an application for planning permission is not a reason not to grant injunction (*Connors v Reigate and Banstead BC* 7.10.99). However, where there is a real prospect that planning permission will be granted by the Secretary of State, the court will take this into account (*Porter* paragraph 31 and 100), almost certainly by not making an injunction which requires the removal of the development before the Secretary of State's decision is known. Where this kind of argument is raised it is hard to avoid having a quasi planning inquiry in the High Court (see *South Cambs DC v Price* [2008] EWHC 1234 and *Broxbourne BC v Robb* [2011] EWHC 1626), despite

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the fact that judges hate being asked to second guess Inspectors (see eg *Wychavon DC v Rafferty* [2006] EWHC 628).

28. On the other hand, where there is a recent decision of the Secretary of State refusing planning permission/upholding an enforcement notice, this deserves 'judicial loyalty' (*Davies v Tonbridge & Malling BC* supra).

Harm

29. This includes the fact that planning laws should be obeyed, rather than breached (*Davies v Tonbridge* supra). But this is a factor in every case and is not decisive.

Local planning authority decision to seek injunction

30. A related point is that, if a local planning authority has carefully considered the questions of hardship and interference with human rights when deciding to apply for an injunction, this will normally 'weigh heavily' in favour of grant of an injunction (see *Porter* paragraph 31).

Hardship and human rights

31. Hardship arguments will really only get anywhere if the effect of the injunction will be to deprive someone of his home and therefore interfere with his Article 8 rights. *Any* negative planning decision/injunction will almost invariably interfere with a defendant's enjoyment of his property and therefore his rights under Article 1 of Protocol 1, but this interference is much easier to justify.

E. Some other points applicable to both interim and final injunctions

Available against persons unknown

32. An injunction operates *in personam*, ie against the persons listed as defendants (cf an enforcement notice). CPR 8APD paragraph 20 allows injunctions to be made against persons unknown, but it seems to contemplate identifiable individuals who will not give their names (it talks about describing them, eg by reference to a photograph etc, sufficiently clearly 'to enable the defendant to be served with the proceedings'). *South*

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Cambridgeshire DC v Persons Unknown [2004] EWCA 1280 holds that, in appropriate cases, an injunction can be made against unidentifiable individuals, albeit that an attempt should be made to describe them as precisely as possible. The practical effect is that the injunction can be breached by anyone and so effectively binds the land concerned.

33. You cannot have a mandatory injunction against persons unknown.

Application to vary injunction

34. A defendant can apply to the court to have an injunction varied or lifted at any time. Any injunction must inform defendants of this right. This applies even to final injunctions: by the time these are actually made (at the end of the trial) you might have thought that the litigation was finished.

Service

35. '*Service*' is the lawyers' term for the process of one party informing the other parties that an application/claim has been made to the court or that the court has made an injunction etc.

36. Court rules specify how an application to the court/claim has to be served (CPR 6 – posting to an address provided by a party, to his solicitor or to his last known residential address will suffice). Surprisingly there is no very clear rule about how an injunction has to be served (see only RSC O.45r.7, which is dealing with enforcement, not service), but the clear understanding is that, if a unrepresented defendant is not present in court when an injunction is made, it must be handed to a him (*personal service*).

37. If the claimant cannot achieve the above he must ask the court to sanction some other method of service (an order for *substituted service*). Nailing an injunction in a clear plastic envelope to a stake at entrance to a site is a common form of substituted service.

38. Issues about service usually only arise at the interim stage, when defendants may well not have lawyers and be hard to find (unregistered landowners, persons unknown). By

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the time a trial takes place the local planning authority will invariably know how to make contact with the important defendants.

Challenge to decision to start s187B claim

39. A defendant who cannot sensibly deny that what he is doing is in breach of planning control may seek to challenge the local planning authority's decision to start injunction proceedings on public law grounds. It is accepted that such a challenge can be made in the injunction proceedings – the defendant does not have to start a separate judicial review (*R v Basildon BC ex p Clarke* [1996] JPL 866, *Porter* paragraph 27, *South Cambs DC v Gammell* [2008] EWCA 1159, paragraphs 30 and 33). If it is shown that the local planning authority did not go through the correct procedures when making its decision (eg the officer who purported to authorise the proceedings was not empowered under the standing orders to do so), the authority will not be able to proceed (see *Kirklees MBC v Brook* [2005] 2 PLR 40). However, the position is different if the challenge alleges a failure to take into account a material consideration, or even a statutory duty. There is quite alot of law on what local planning authorities have to take into account/investigate before deciding to take enforcement action, especially action which may involve hardship/interference with human rights (*R v Wealden DC ex p Wales* [1997] JPL 65, *R v Kerrier DC ex p Uzell* 71 P&CR 566, *South Cambs DC v Gammell* supra). In injunction proceedings, where the court itself decides whether to make an order, any failure by the authority to take into account a relevant consideration can be remedied by the court taking the consideration into account itself (eg *Broxbourne v Robb* [2011] EWHC 1626). This can be contrasted with a decision to serve a stop notice or to take direct action under s178.

Enforcement of injunction

40. Deliberate breach of an injunction is a *contempt of court*. If you are in contempt you can expect severe punishment – the default sanction is imprisonment. An injunction must carry a warning to this effect (the *penal notice*). Someone who is in contempt of court is a *contemnor* and has acted *contumaciously*.

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41. Proceedings for contempt of court are called *committal* proceedings. Committal applications have separate procedural rules. The gist of all contempts is interference with the administration of justice and the courts take committal application very seriously. High Court judges used to wear their criminal robes for committal applications. The tipstaff turn up with their handcuffs. Committal applications tend to be heard very quickly – within a couple of weeks (cf criminal proceedings) – and the approach is pretty robust. Evidence is written (cf criminal proceedings) although the criminal standard of proof is applied.

42. Contempt proceedings can obviously only be taken against an identified individual – a 'person unknown' must have become known before he can be committed.

Breach

43. To breach an injunction an individual must be subject to it (ie be a defendant to the proceedings) and he must do the prohibited act/fail to do the required act. A person also commits a contempt if, though not a defendant himself, he knowingly aids and abets a defendant to breach an injunction.

44. If an injunction is made against unidentified persons unknown, anyone becomes subject to it, and breaches it, when he does the act it prohibits etc.

Deliberate

45. The alleged contemnor must actually know of the injunction before he does the offending act. This means being aware of what the injunction prohibits/requires. In theory the alleged contemnor does not need to realise that what he is doing will involve a breach of the injunction.

46. Nothing short of actual knowledge will suffice. Proving that the injunction has been delivered personally or sent to lawyers is prima facie sufficient to establish actual knowledge. However the fact that the injunction has been served in accordance with an order for substituted service (posted, displayed on site) will not suffice. In practice this often means that, despite having served the injunction in accordance with an order for

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substituted service, the local planning authority has to hand the injunction to the alleged contemnor (and preferably explain its terms to him).

Application to vary injunction made in the course of contempt proceedings

47. Some interesting problems arise where a local planning authority applies to commit a defendant and the defendant wants to carry on breaching the injunction. He may not be able to dispute that he has been in contempt, but what if he applies to have the injunction lifted? He will argue that there should never have been an injunction and that any punishment should be essentially nominal.

48. There has been a line of cases dealing with this situation - *Mid Beds DC v Brown* [2005] 1 WLR 1460, *South Cambs DC v Gammell* [2006] 1 WLR 658, *King's Lynn Council* v *Smith* [2009] EWHC 2615 and *Broxbourne BC v Robb* [2011] EWHC 1626. The position is that, if a defendant wants to be freed from an injunction, he is expected to apply to vary it as soon as he learns about it. Named defendants will know about an injunction as soon as it is made (indeed they will normally be at the hearing) and they are expected to argue about whether there should be an injunction against them at the outset. But a 'person unknown' may only get to know about the injunction some time afterwards. If he wants to do what the injunction prohibits he is expected to apply to have it varied at once. It is not good enough to wait until contempt proceedings are started. You might think that the approach to whether there should be an injunction (and whether an existing injunction should be varied) should not change according to the time at which an application to vary is made, but the reality is otherwise. If the application to vary is made after a defendant has been knowingly breaching the injunction for a time, the court will be much less likely to grant the variation than if the application had been made as soon as the defendant learned of the injunction. The very fact that a defendant has knowingly breached an injunction becomes a reason for not lifting it.

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim No.

The Honourable Mr Justice ...
Dated this 10th day of November 2011

BORCHESTER DISTRICT COUNCIL

Claimant

and

1. WILLIAM GRUNDY
2. EDWARD GRUNDY

3. PERSONS UNKNOWN

causing or permitting hardcore or other material suitable for use in the creation of hard surfacing to be brought onto or spread on land known at 'Grundy's Field', Ambridge, Borchester ... shown edged in black on the plan attached ('the Site');

causing or permitting the pole barn on the Site to be used for non-agricultural purposes, namely the manufacture and sale of cider

Defendants

ORDER FOR AN INJUNCTION

IMPORTANT NOTICE TO DEFENDANTS

The injunction herein requires you to refrain from the acts set out in the Order. You should read the injunction carefully. You are advised to consult a solicitor as soon as possible.

If you disobey this injunction you may be found guilty of Contempt of Court and you may be sent to prison or fined or your assets may be seized.

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THE APPLICATION

An application was made to the Court by counsel for the Claimant. The application was made without notice to the Defendants.

The judge read the documents listed in Schedule 1 herein and accepted the undertakings in Schedule 2 herein.

There will be further hearing in respect of this order at 10.30am on 17 November 2011.

The application relates to land known at 'Grundy's Field', Ambridge ... shown edged in black on the plan attached ('the Site')

THE ORDER

IT IS ORDERED that –

1. Until 4.30pm on 17 November 2011 the Defendants must not -

    a. cause or permit hardcore or other material suitable for use in the creation of hard surfacing to be brought onto or spread on the Site;
    b. cause or permit the pole barn on the Site to be used for non-agricultural purposes, namely the manufacture and sale of cider.

2. If personal service of this order on the First and Second Defendants is not possible it may be served on them by delivering it to [residential address]. Service shall be deemed to have been effected at the time of such delivery.

3. This order may be served on the Third Defendant by placing the same in a clear plastic envelope attached to a stake in a prominent location at the entrance to the Site. Service shall be deemed to be effected at the time the said steps are taken.

4. Costs reserved.

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INTERPRETATION OF THIS ORDER

A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

The requirements of this order apply to each Defendant.

VARIATION OF THIS ORDER

A Defendant may apply to the Court to vary or discharge this order upon giving 24 hours notice in writing to the solicitor to the Council, tel...., fax ....

COMMUNITCATIONS WITH THE COURT

All communications to the Court about this Order should be sent to … The offices are open between 10 am and 4:30 pm Monday to Friday.

Schedule 1

The claim form and application notice herein
First and second witness statements of ... dated ... and the exhibits thereto.

Schedule 2

The Claimant gave the following undertakings to the Court –

1. As soon as practicable to serve this order, the application herein, the above witness statements and the claim form by the means referred to in paragraphs 2-3 above.

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2. As soon as practicable to issue an application returnable on 17 November 2011 to continue this injunction and to serve the same by the means referred to in paragraph 2-3 above.

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