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Albion Chambers REGULATORY NEWSLETTER

Plan for a long wait...

Practitioners in all areas will have experienced the profound impact the Covid-19 crisis has had on court listings. The criminal justice system has been the worst hit, with recent figures suggesting there are now well over 50,000 cases waiting to be heard in the Crown Court and over 500,000 in the Magistrates'. Clearly the courts need to prioritise the most serious cases, in particular those where defendants are remanded in custody. This is bad news for local authorities seeking to enforce planning control through the criminal courts. Judges are understandably reluctant to use up precious court time on planning enforcement when they have defendants languishing in the cells facing serious charges.

The problem is exacerbated by the fact that breach of a planning enforcement notice under s.179 of the Town and Country Planning Act 1990 ("TCPA") is triable either way, even though the maximum penalty is a fine whether tried in the Crown Court or the Magistrates'. The Crown Court is even more reluctant to devote jury time to planning matters than the lower court, so any defendant looking to string enforcement out for as long as possible has an obvious incentive to elect.

This was an issue even before Covid struck, as was brought home to me when I was instructed by a local authority to prosecute an offence under s.179 in the Crown Court in late 2019. The defence made an abuse of process argument which was rejected, however in his ruling the judge specifically invited the authority to pursue injunction proceedings in the County Court where the case would sit "far more happily". Needless to say, when the lockdown was imposed in March 2020 the criminal trial was vacated and it became quickly obvious the case was at the very bottom of the court's priority list.

As a matter of law, there is nothing to prevent a local authority seeking injunctive relief in the County Court at the same time as pursuing criminal proceedings for breach under s.179, or indeed without instigating criminal proceedings at all. Section 187B TCPA provides that:

"where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by an 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."

The difficulty is that a civil injunction is an equitable remedy which the court will only grant where it is just and proportionate to do so. The local authority will be expected to have carefully considered the National Planning Practice Guidance before instigating proceedings. The guidance on enforcement states that:

"…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… 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 a long period and/ or other enforcement options have been, or would be, ineffective."

A local authority that moves directly to an injunction application without being able to demonstrate that they have, at least, considered criminal prosecution as an alternative therefore risks being accused of taking a disproportionate approach not in accordance with the National Guidance.

Further support for this argument can be found in the leading case of *South Bucks District Council v Porter* [2003] UKHL 26 in which the House of Lords upheld the observations of Simon Brown LJ in the Court of Appeal that:

"If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be readier to use its own, more coercive powers."

In my case, the local authority did instigate injunction proceedings in the summer of 2020. It will rely on the observations of the criminal judge, together with the lack of available space in the Crown Court and the defendant's long history of non-compliance, to demonstrate that an injunction is still "a measure of last resort". Other authorities seeking relief through the civil courts would be wise to ensure they can demonstrate the same.

As a method of enforcement, an injunction has more teeth than a criminal conviction, since breach can be prosecuted as contempt and the defendant imprisoned. For that very reason, however, the County Court will weigh the competing interests of the parties carefully before granting relief. The issue of proportionality is particularly acute in Gypsy/Traveller cases in which the granting of an injunction may force the defendant out of their home. As was observed by Simon Brown LJ in Porter:

"…the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he had considered for himself all the questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites."

Unlike in criminal proceedings, a local authority will need to provide evidence that they have considered a defendant's accommodation needs and engaged – or

at least attempted to engage – with them about finding alternatives when they apply for injunctive relief.

A further potential hurdle to the granting of an injunction is that the court is entitled to take into account the likelihood of the defendant being granted planning permission at some future date, or successfully appealing a refusal.

Section 285(1) TCPA prevents "the validity of an enforcement notice" being questioned in any proceedings outside of a planning appeal, and the case law is clear that "the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the merits of the case" (Porter).

However, in *Brentwood Borough Council v Ball* [2009] EWHC 2433 it was held that:

"if the court thinks that there is a real prospect that an appeal against an enforcement notice or a fresh application by the Defendant for the requisite planning permission might succeed the court can adjourn the injunction application until the planning situation is clarified."

So, whilst the court is barred by s.285 from hearing evidence on the merits of the original planning decision, the defendant can call evidence on whether there is a "real prospect" that a subsequent application or appeal may succeed. This opens the door for the admission of expert planning evidence which the claimant authority may need to meet, incurring further expense and delay.

One final wrinkle that can complicate civil proceedings is the difficulty defendants have in obtaining legal aid. Litigants in person inevitably slow down proceedings, not only because they must get to grips with law and procedure with which they are unfamiliar, but in the case of Gypsies and Travellers, because they do not have access to the digital technology on which proceedings (particularly in lockdown) increasingly rely.

In my case, the defendant managed to obtain legal aid at the eleventh hour, which led to the injunction proceedings being adjourned for the preparation of further expert evidence on both the prospects of success of a future planning application and the defendant's health. Meanwhile, the criminal proceedings are still live but have been adjourned until some months after the injunction application which will not be heard until July.

The lesson for local authorities seeking to enforce planning control through the courts? Be prepared for a long wait.

Rupert Russell

No reverse for the reverse burden

R v AH Ltd & Mr SJ [2021] EWCA Crim 359

The Health & Safety at Work etc. Act 1974 ('the Act') has been described as visionary legislation. It has made workers and the public safer and it has proved adaptable to the many changes in the workplace in the years since it came into force.

Nonetheless, those facing prosecution under the Act and hoping to find solace in decided cases may sometimes be reminded of the 'two rules' within the movie 'Fight Club'. To paraphrase - Rule 1) there is very little good news; Rule 2) don't forget Rule 1.

In 2019/2020 the Health & Safety Executive reported a conviction rate of 95% (for cases where a conviction was secured for at least one offence where a verdict was reached). The proportion of cases resulting in a conviction has been between 93% and 95% for the last six years[1]. These figures are unsurprising in a regime which allows for a 'reverse burden of proof'.

Sections 2 and 3 of the Act are those most frequently resorted to. Section 2, in common with section 3 creates an absolute duty subject only to the qualification by reference to what is reasonably practicable. Proof of harm is not necessary and a risk of harm—a possibility of danger—is sufficient:

S.2(1) - It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

S.3(1) - It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

The Act - and the direction of travel in cases such as *R v Chargot Ltd* [2008] UKHL 73 – is clear. It is sufficient for the prosecution to prove that the result required has not been achieved or prevented, without identifying precisely which obligations have been breached. Once such a prima facie breach has been established, the onus passes to the defendant under s.40 of the Act to prove on the balance of probabilities that they had done everything reasonably practicable to prevent the risk - the "reverse onus" or "reverse burden of proof".

The 'reverse' is of course from the burden of proof being on the prosecution to establish facts beyond reasonable doubt.

That the imposition of the burden of proof was justified and compatible with Article 6 of the European Convention on Human Rights (and hence the Human Rights Act 1998) appeared to have been emphatically settled in *David Janway Davies v Health and Safety Executive* [2002] EWCA Crim 2949. The Court of Appeal concluded that the imposition of a legal burden of proof by s.40 was justified, necessary and proportionate.

The decision of the Court of Appeal in Davies was to be approved by the House of Lords in Chargot. Nevertheless, given the implications of Davies, it was perhaps inevitable that this would not prove the final word.

Section 40 has now been revisited and the interpretation in Davies confirmed in the case of *R v AH Ltd & Mr SJ* [2021] EWCA Crim 359 (judgment handed down 16.03.2021).

By way of background (and to resort to the present tense) AH Ltd ('the Company') and Mr. SJ, a director of the Company, are due to stand trial on charges arising out of the death of a resident at a nursing home owned and operated by the company in 2015.

It is alleged that the company failed to conduct the operation of the nursing home in such a way as to ensure, so far as was reasonably practicable, that residents were not exposed to the risks of scalding by hot water, in contravention of s.3(1) of the Act.

It is further alleged that Mr. SJ consented to or connived at the commission of the offence by the Company or the commission of that offence was attributable to neglect on his behalf.

On 28.04.2020 both AH Ltd and Mr.

1. https://www.hse.gov.uk/statistics/enforcement.pdf: Enforcement statistics in Great Britain 2020 published 04.11.2020 (at page 4).

SJ pleaded not guilty to all counts. A case management hearing of 18.01.2021 at the Central Criminal Court before Thornton J served as a preparatory hearing for the judge to give a ruling as to where the burden lay of proving "reasonable practicability" under s.40 of the Act.

Following the hearing, Thornton J handing down a written ruling (on 05.02.2021) finding in favour of the prosecution's submissions (no detail is provided, though it might be expected they simply reflected the decision in *Davies*). The Company and Mr. SJ appealed against the ruling. The Court of Appeal heard submissions on 04.03.2021.

Arguments were advanced that *Davies* should be reconsidered and that it was wrongly decided. Counsel for Mr. SJ also submitted that when *Davies* was decided a custodial sentence could not be imposed in respect of an offence under s.3 (and s.37) of the Act (that a custodial sentence could not be imposed having some relevance in *Davies*).

These arguments (and their essence - that s.40 did not place a legal burden on a defendant facing a prosecution under the Act) were given polite but short shift in the judgment delivered by Bean LJ:

34. For all the elegant and carefully argued criticisms which Mr Hodivala made of Davies, we think that the short and simple answer is that given by Mr Oliver Glasgow QC for the prosecution, namely that the House of Lords expressly approved the decision in Davies in the speech of Lord Hope of Craighead in Chargot. This may have been obiter in the limited sense that the question of law of general public importance on which leave was given to appeal to the House of Lords in Chargot was not exactly the same point as that which is before us in this case. Nevertheless the approval of Davies in Chargot is clear and, in our judgment, binding. There is nothing disproportionate in the reverse burden imposed on defendants by s 40 of the Health and Safety and Work Act 1974.

35. As regards … the individual defendant, the introduction of a maximum sentence of two years imprisonment [by the Health and Safety Offences Act 2008] had already occurred by the time that Chargot was before the House of Lords, but it did not deter the House from giving its approval to Davies. In those circumstances it is simply not open to either a trial judge or this court to hold that Davies was wrongly decided.

36. We would add that even if the case of Chargot had never reached the House of Lords, we would have had great difficulty in accepting that Davies was decided per incuriam. But it is not necessary to develop this point, nor to consider the authorities on the limited circumstances in which this court can depart from one of its own previous decisions.

So, direction of travel maintained and no change to Rule 2.

Alun Williams

Regulatory healthcare

Arguing against a finding of 'Congregate or Campus Setting' in adult supported living or care home environments

Following Winterbourne View and similarly horrendous examples of abuse of those receiving care, the idea of a secluded, isolated provision of care services has rightly fallen out of fashion. But is the CQC always right in its defining of, or application of the term congregate or campus setting?

A sound rationale

The logic which stands behind the undesirability of campus or congregate living is simple: those receiving care should be plugged into the community, not only for their own well-being and development, but also to help avoid the 'behind closed door' abuses that have happened in the past. If the accommodation is in or close to the community, it is argued, there is a greater opportunity for scrutiny and discovery. That logic is sound, so far as it goes.

What's the problem?

The CQC, doing a very difficult job, has adopted this 'ban' on campus or congregate accommodation, and has applied its understanding of the rules strictly. However, on occasion, that strict approach can be applied too aggressively, and also, the definition of 'congregate' or 'campus' has been drawn too widely. This means that on occasion, some first-class care providers, who simply want to help additional people, are prevented from doing so due to a dogmatic approach to this issue.

Occasionally, this blinkered approach fails to appreciate the individual person's needs, and ultimately, acts to the detriment of the person the CQC is seeking to protect. Sometimes, the needs of the individual need to outweigh the formulaic application of the ban on congregate or campus settings.

Legal framework

As noted in Centurion Health Care (Health, Education and Social Care) 3265. EA (2018), there is a dearth of case law in this area (see para 16) to assist the CQC, providers or legal practitioners in navigating this difficult and sensitive area.

That said, a good starting point is the 'Registering the Right Support' guidance, which gives an initial definition of Campus or Congregate as:

"Campuses: group homes clustered together or on the same site and usually sharing staff and some facilities"

The oft cited number of residents which may fall into such a definition is six or more. Despite this number being relied upon quite regularly by the CQC as a hard 'ceiling' in its decision making in refusing a provider's application, the guidance is, in fact, more nuanced and goes on to state:

"We will not adopt 'Five' as a rigid rule for providers of any service for people with a learning disability and/or autism. We may register providers who have services that are small scale, but accommodate more than Five people, where providers are able to demonstrate that they follow all of the principles and values in Building the Right Support guidance".

In addition, often, a number of subsequent paragraphs of the guidance are not always referred to in the CQC's decision making, and therefore for convenience, those passages are worth repeating here:

*"Congregate settings are separate from communities and without access to the **options, choices, dignity and independence** that most people take for granted in their lives"* [emphasis added]

and

"We do not wish to be overly prescriptive, and it is not our intention to create a 'one size fits all' approach".

The difficulty is, by applying the guidance strictly, it allows less room for options, choices, dignity and independence to be incorporated, and also steps onto the toes of its own guidance - that the CQC doesn't want to create a one-size-fits-all approach.

How to approach the CQC

The CQC isn't trying to get this wrong: it isn't trying to stop good providers from providing good accommodation and care. The CQC is trying to prevent another Winterbourne View and is doing so, like many government bodies, with limited resources and ever-increasing pressures.

However, it does mean that every so often, there can be *"a whiff of this being a policy decision"* (Centurion Health Care, para 34), rather than an individual consideration of the individual circumstances.

Therefore, if there is such a 'whiff', a provider or practitioner may wish to study the work of Professor Julie Beadle Brown, a leading academic in the area of campus or congregate settings. Her work very much urges a person-centred approach, whilst still maintaining the worthy objectives in guarding against the risks associated with campus or congregate settings.

One size does not fit all.

Richard Shepherd

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