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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 17 May 2019

BEFORE:

MS LEIGH-ANN MULCAHY QC
(Sitting as a Deputy Judge of the High Court)

BETWEEN:

LONDON BOROUGH OF BROMLEY

Claimant

- and -

PERSONS UNKNOWN

Defendants

-and-

LONDON GYPSIES AND TRAVELLERS

Intervenor

MR J SMYTH appeared on behalf of the Claimant
The Defendants did not attend and was not represented
MR M WILLERS QC & MS T BUCHANAN appeared on behalf of the Intervenor

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JUDGMENT
(Approved)

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1. MS. LEIGH-ANN MULCAHY QC: This is the hearing of the claim issued on 15 August 2018 for a final injunction against Persons Unknown prohibiting unauthorised occupation and/or deposition of waste on land owned or managed by Bromley London Borough Council.

2. The procedural history is as follows. An interim injunction was granted by Goose J on a without notice basis on 15 August 2018. A return date was set, being 26 November 2018, with a time estimate of one hour. On 14 November 2018, the London Gypsies and Travellers group (a registered charity which has been working with Gypsies and Travellers for decades) applied to intervene. On 26 November 2018, Nicol J gave that group permission to intervene and adjourned the final hearing to a date to be fixed with a time estimate of three hours. He continued the interim injunction until further order. Directions were given for the claimant to amend the claim form to add a claim for an order to prevent trespass on the basis that the claimant has the right to possession as landowner in respect of some of the sites. He also directed evidence be filed in relation to the claim based on trespass. Those directions were complied with.

3. The claim came before me this week, on Wednesday, 15 May 2019, by way of a final hearing of the claim, and the local authority is seeking a final injunction. Mr Jack Smyth of counsel appeared for the claimant and the intervenor was represented by Mr Marc Willers QC and Ms Tessa Buchanan acting on a **pro bono** basis. I am told this is the first case where there has been representation by counsel and where evidence has been submitted on behalf of the Gypsy and Traveller community in relation to applications such as this one. The result has been that the contentions advanced by the local authority have been challenged and tested to an extent that has not occurred in previous cases, which were undefended, although I note that in at least one case, *London Borough of Sutton v Persons Unknown* on 7 November 2018, the court permitted a representative of the intervenor in this case, the chief executive of the London Gypsies and Travellers group, to address the court and took what she said into account.

4. A fairly lengthy time has elapsed since the last hearing, which I am told was the result of the need to find a date when both counsel were available. This has had the result that the interim injunction has been in effect for some nine months now.

5. The local authority has filed evidence in the form of four witness statements from Mr Toby Smith, who is the street enforcement manager for the Environmental Services Department of the Borough (and has been for the last 18 years). Those statements are dated 14 August 2018, 1 November 2018, 19 November 2018 and 10 December 2018. The intervenor has filed two statements from Ms Deborah Kennett, the chief executive of the intervenor, dated 20 November 2018 and 18 December 2018, and a further statement from Ms Ilinca Diaconescu, policy officer of the intervenor, dated 26 April 2019.

6. I received two skeleton arguments from counsel on behalf of the claimant and a further two on behalf of the intervenor and heard oral argument over the course of nearly four hours, on 15 May 2019.

7. It is right to record (and it is clear from the evidence filed by the local authority) that at least part of the reason for this claim is because of the grant of an injunction in similar terms to other local authorities in the Greater London and South East area, which have firstly caused the claimant in this caseto suffer a displacement effect as gypsies and/or travellers have moved from other boroughs to Bromley, and secondly has led it to change its approach to unauthorised incursions and seek the same relief as has already been successfully sought by other local authorities.

8. The fact that an injunction may cause difficulties for local authorities elsewhere was raised by Jay J in *Harlow District Council v McGinley & Ors* [2017] EWHC 1851. At paragraph 28 he stated as follows:

> "It might be argued that all that an injunction is doing is creating difficulties for districts, boroughs and County Councils elsewhere. As I pointed out to Ms Bolton [Ms Bolton appeared for the district council in that case] during the course of argument, there is some force in that argument, but only some force. It is of course open to other County Councils…to take appropriate action on the available evidence. That is the better way forward, in my judgment, rather than to deny these claimants relief in the instant case just because problems are being created elsewhere."

The course suggested by Jay J in what may have been the first case of this type is the one that has been taken by other local authorities and with increasing frequency. Another claim of this type (this time by Epsom and Ewell) came before me yesterday.

9. Whilst it was not in evidence, I was told by Mr Willers, having taken instructions, that the intervenor is currently aware of 34 injunctions having been granted nationwide.

10. Whilst these injunctions, taken purely individually, were no doubt entirely properly granted on the evidence and submissions before the court, given the scale on which injunctions are now being sought by local authorities and have apparently been granted, their cumulative effect does now merit consideration.

11. If the effect of each injunction is to cause difficulties instead for the next borough, which in turn achieves an injunction because of the difficulties it then has, there is the potential, in time, for all or most of the green spaces and public car parks in England and Wales to become subject to injunctions.

12. As the intervenor points out, if this pattern of seeking and granting injunctions by local authorities continues, in the absence of authorised provision of suitable alternative sites, Gypsies and Travellers pursuing their traditional nomadic lifestyle may be left with nowhere to go except for private land (which would then push the problem from the public sector to the private sector but would not resolve it). I bear in mind in that regard that I have received evidence in this case that there is a longstanding and serious shortage of sites for Romany Gypsies and Irish Travellers and that a recent briefing by the Race Equality Foundation found that Romany Gypsies and Irish Travellers were 7.5 times more likely than White British households to suffer from housing deprivation. This lack of suitable and secure accommodation is said by the intervenor to be forcing many Romany Gypsies and Irish Travellers onto unauthorised encampments and developments.

13. The intervenor also draws attention to the risk that if the pattern of granting injunctions continues, the courts are in danger of effectively supplanting the existing statutory scheme put in place by Parliament, namely the Criminal Justice and Public Order Act 1994 which contains specific powers for the police, for local authorities and

magistrates' courts in sections 61, 77 and 78 of the Act respectively to take action in relation to unauthorised encampments. There are also other civil powers that can be used in this regard, such as possession orders, as well as the ability to prosecute criminal offences.

14. The statutory scheme is supplemented by specific Government guidance such as the DOE Circular 18/94, which has set down policy towards unauthorised encampments of Gypsies. I will read paragraphs 6 and 9 of that policy guidance. Paragraph 6 states:

> "Whilst it is a matter for local discretion to decide whether it is appropriate to evict an unauthorised Gypsy encampment, the Secretary of State believes that local authorities should consider using their powers to do so wherever the Gypsies concerned are causing a level of nuisance which cannot be effectively controlled. They also consider that it will usually be legitimate for a local authority to exercise these powers wherever Gypsies who are camped unlawfully refuse to move onto an authorised local authority site. Where there are no such sites and the authority reaches the view that an unauthorised Gypsy encampment is not causing a level of nuisance which cannot be effectively controlled, it should consider providing basic services such as toilets, a refuse skip and a supply of drinking water at the site."

Paragraph 9 states:

> "The Secretary of State continues to consider that local authorities should not use their powers to evict Gypsies needlessly. He considers that local authorities should use their powers in a humane and compassionate way, taking account of the rights and needs of the Gypsies concerned, the owners of the land in question and the wider community whose lives may be affected by the situation."

15. There is also 2006 guidance on managing unauthorised camping. Again it deals with circumstances in which it is appropriate to move Gypsies and Travellers on and in which it is not, and provides for the need for welfare assessments to be carried out before so doing.

16. It is important to recognise that the injunction that is being sought, and the injunctions that have been sought and granted in other cases, are not limited to preventing fly tipping, and no one, including the intervenor, is suggesting that this kind of behaviour should not be prevented by legal means if necessary. The injunctions are not

specifically addressed to antisocial behaviour or criminal acts. They are focused on prohibiting (with, of course, the penal sanction of potential committal to prison if breached) anyone from setting up an encampment without permission of the local authority and the landowner and entering and/or occupying land for residential purposes, and bringing onto the land any caravans or mobile homes and bringing vehicles onto the land in question for the purpose of disposal of waste or materials.

17. Mr Smyth accepted during the course of argument that the order that he was seeking amounted, on at least a **de facto** basis, to a boroughwide exclusion save that Gypsies and Travellers could still go onto private land, cemeteries and highways which were not subject to the order. There is clearly a potential issue when one takes the cumulative effect of all the injunctions granted and potentially to be granted in future into account, as to whether Gypsies and Travellers will be prevented from exercising what is recognised in both UK equalities law and human rights law to be their right to pursue their traditional nomadic lifestyle. I am told that three-quarters of the 30,000 or so Gypsies or Travellers in London are in permanent accommodation, and on the evidence there is some provision in that regard in Bromley, albeit with a shortfall based on need, but one-quarter of that number are nomadic and travel rather than remaining in one place. Whilst there is no general entitlement to encamp or reside on public or recreational spaces and it is a matter for the planning system to ensure suitable provision is made for Gypsies and Travellers, I am told that there are no authorised transit sites available for nomadic Gypsies and Travellers anywhere in London, including Bromley, which then raises the question of where they are to go.

18. The intervenor has also raised the fact that the General Permitted Development Order 2015 permits unauthorised encampments by caravans in certain circumstances and such "permitted developments" does not amount to a breach of planning control. Yet injunctions have been granted pursuant to section 187B of the Town and Country Planning Act 1990, which do apparently seek to prohibit such lawful activity.

19. It has been contended by the local authority in this case that this does not affect a claim to an injunction based on trespass, but whether or not that is right, here the local authority is not the owner of all the sites and does have to rely on section 187B in relation to the sites where it is not the landowner. Mr Smyth stated that his clients

would regard an injunction drafted so as to carve out from the prohibition permitted development rights as one that was, in his words, "second rate" and not something the local authority would wish to have. He invited me instead to limit the injunction to the sites where the local authority is the landowner rather than to alter the injunction in that regard.

20. These three issues (firstly, the cumulative effect of the injunctions granted, which raises the question of whether Jay J's approach that the difficulties created by an injunction elsewhere should not preclude the grant of an injunction to the local authority making the claim for it is still the correct approach; secondly, the interrelationship between judicially created relief in the form of injunctions and the statutory scheme of enforcement laid down by Parliament under the 1994 Act; and thirdly, the impact of permitted development rights on the proper scope of any injunction) have not to date been the subject of appellate review. As I indicated, this case has come before me with the first formal intervention on behalf of Gypsies and Travellers and is apparently being treated as a test case. All the claims (and, for that matter, this one so far as the defendants are concerned) have been undefended, which is perhaps not surprising when they are sought against persons unknown. It seems to me that an authoritative appellate review of the jurisdiction and the principles on which such injunction should be granted, taking into account in particular these three issues I have identified, is now needed.

21. Having made those observations about the wider implications of claims of the type before me, I am cognisant that, as a first instance judge, it is my role to apply existing law to the claim and to the evidence before me in relation to this claim and to arrive at a decision regarding whether or not to grant the claim for a final injunction on that basis, and that is what I will now do.

22. The factual background to the claim is as follows. It is advanced in the evidence of the intervenor that Romany Gypsies have been in Britain since at least the 16th Century and Irish Travellers since at least the 19th and that that long history is reflected in Bromley's own relationship with Romany Gypsies and Irish Travellers. The Bromley Traveller Accommodation Assessment (November 2016) describes Romany Gypsies

and Irish Travellers as having been stopping in Bromley for a considerable period of time. They have traditionally done so:

> "… whilst working in and travelling through the Borough. Historically, Gypsies moved between farms in Bromley and Kent picking fruit and vegetables in the summer, hops and potatoes in early autumn. [However] as traditional forms of work diminished, travelling patterns changed both nationally and locally. More recently Irish Travellers have also visited the Borough."

That is at paragraph 1.3 of that Assessment.

23. Bromley has also had a history of unauthorised encampments by Gypsies and Travellers. On the evidence before me, in 2016 there were 11 such unauthorised encampments, at an average annual cost of £13,046. In 2017 there were 12, at an average annual cost of £14,232. In 2018, prior to the application for the injunction being made in the middle of August, there were again 12, at an average annual cost of £14,232. The average length of stay was between five days and two weeks. (There were two further encampments in 2018 after the interim injunction was granted, but these were on highways so they are not relevant to the injunction, which does not extend to highways. These highway incursions were dealt with by the local authority.)

24. Although it is said in evidence that there was a "sharp increase" in incursions, this was not in number because the same number of incursions occurred as in the previous year. It was not in evidence but I was told by Mr Smyth on instructions that all of the incursions occurred in a six-to-seven-week period between June and the middle of August 2018, so the increase was in the frequency with which the incursions occurred. The evidence is that it is likely that this acceleration occurred because of injunctions having been granted to other London boroughs (Croydon and Greenwich were mentioned in this regard) which have had the effect of displacing activity into Bromley. The evidence is that by the end of July 2018, the council was receiving complaints on a virtually daily basis and the situation was causing considerable community concern and unease. According to the evidence again, some £200,000 has been spent on infrastructure over the last eight years to prevent illegal vehicle access onto public spaces. Previous incursions have been dealt with by eviction, using powers under the Criminal Justice and Public Order Act 1994, but the evidence of the local authority is

that this is slow, expensive and cumbersome and that the increase in the rate of frequency of incursions was difficult to manage, particularly within a stretched local authority budget.

25. The harm which it is said has been caused is threefold: (a) loss of public areas which cannot be used by members of the public (for example, a local football club which could not hold training sessions); (b) environmental harm caused by human and dog faeces being left on the site, litter being discarded, the playing of loud music, the use of electrical generators and damage being caused to landscaped parts of land in order to gain entry or to electrical and other fittings in car parks; and (c) the cost to the taxpayers of the clean-up operation.

26. The injunction sought relates to 171 sites within the Borough of Bromley. These comprise 139 sites that constitute parks, recreation grounds or open spaces and are shown on Map 1 and 32 public car parks which are shown on Map 2. There is a history of a small number of these sites having been entered on previous occasions, and others have been included that are of a similar nature but are not sufficiently protected by the infrastructure that has already been put in place. Highway sites have not been included as these, I am told, have not been a particular problem in the past, and cemeteries have not been included for the same reason. I was told by Mr Smyth at the hearing that three-quarters of the sites are owned by the local authority and the remaining quarter represents common land.

27. The effect of the interim judgment (which has been in place for some nine months now) is that it has been successful so far as Bromley London Borough Council is concerned. It is relevant that the travelling season is considered to be between March and October each year, and that is when one would expect there to be more encampments or incursions that are unauthorised. There were two incursions on highways in the autumn of 2018 but those are irrelevant to the injunction, which did not prohibit encampments on highways. I am told that there was a breach some ten days ago at Leaves Green where eight caravans moved onto common land. They were notified of the injunction and they moved on later that day. The reality seems to be that those causing the problems previously experienced have probably moved elsewhere outside the Borough.

The order that is sought is as follows. I am referring to the order I received yesterday, which had been amended since the hearing. The order that is sought is that until 4.00 pm on 15 May 2022, the defendant, as persons unknown, occupying land and/or depositing waste are forbidden from: (1) setting up an encampment on any land identified on the attached map (Map 1) on sites numbered 1 to 139 and on any land identified on the second attached map (Map 2) on sites numbered 1 to 32 without the grant of planning permission and the written permission of the claimant; (2) entering or occupying any part of the land identified on Map 1 on sites numbered 1 to 139 and any part of the land identified on Map 2 on sites numbered 1 to 32 for residential purposes (temporary or otherwise) including caravans, mobile homes, vehicles and residential paraphernalia without the grant of planning permission and the written permission of the claimant; (3) bringing onto the land identified on Map 1 on sites numbered 1 to 139 and the land identified on Map 2 on sites numbered 1 to 32 any caravans/mobile homes other than if driving through the London Borough of Bromley or in compliance with the parking orders regulating use of the car parks/highways and with express permission from the owners of the land; (4) bringing onto the land identified in Map 1 on sites numbered 1 to 139 and the land identified on Map 2 on sites numbered 1 to 32 any vehicle for the purposes of disposal of waste and materials or fly tipping other than when driving through the London Borough of Bromley or in compliance with the parking orders regulating the use of car parks/highways or with express permission from the owners of the land; (5) depositing waste or fly tipping on the land identified on the attached map (Map 1) on sites numbered 1 to 139 and on any land identified on the second attached map on sites numbered 1 to 32 without the written consent of the claimant. For the avoidance of doubt, this restraint includes but is not limited to rubbish, green waste, discarded furniture, household waste, faeces (both animal and human) and building materials. As is clear, the order sought is for a five-year period.

28. The change in the policy of the local authority has apparently been driven by the impact of other London Boroughs obtaining injunctions. I quote from the statement of Mr Toby Smith dated 19 November 2018 at paragraph 8, which is at page 372 of the hearing bundle:

> "Advice was taken and careful consideration given by senior management in the council as to the consequences of trying to

> manage the ongoing situation using the same method as in previous years as opposed to the consequences of seeking an alternative approach. Whilst initially reluctant to take the step of seeking an injunction against persons unknown, the continued sharp rise in incursions described above, which were increasing in the size of groups involved as well as the general frequency, led to the decision being taken that such an application was, in balancing all relevant interests, one which was appropriate and proportionate. It was considered that this proportionate response did not offend against the equality duty as the council was not seeking to prevent any legitimate use of the areas by the defendants."

29. It is apparent that the local authority did not carry out any formal equalities impact assessment or assessment under article 8 of the European Convention on Human Rights (which the claimant, as a public authority, is under a duty pursuant to section 6 of the Human Rights Act 1998 as a matter of UK law not to act incompatibly with). Further, it appears the local authority has not formally considered the best interests of any children who will be affected prior to applying for the injunction or indeed at any time since.

30. In terms of alternative sites for Gypsies and Travellers, there are no transit sites in London, including Bromley. In terms of permanent pitches, as of 2016 there was a shortage of 10 to 14 pitches with a recognised need for some six more by 2021 and still further pitches being needed thereafter.

31. Evidence was given by Ms Gill Slater on behalf of the London Borough of Bromley at an examination in public relating to the draft London plan on 15 February 2019. In relation to the issue of temporary stopping places for Travellers, she gave the following evidence, which is at page 637 of the hearing bundle and set out at paragraph 6 of Ms Diaconescu's statement. It states:

> "After hearing from other persons present, including the representatives for the Greater London authority and myself on behalf of LGT [the intervenor], the representative for the London Borough of Bromley, Gill Slater, then said as follows:
>
> 'From Bromley's perspective, we don't have that many incursions. We have some but not many. But other boroughs certainly have more significant numbers by nature of the way travelling through boroughs incurs, occurs -- sometimes you're one side of a

> boundary, sometimes you're on another side of the boundary. So we just agree with the London Gypsy and Traveller unit that this is a strategic issue, and if some wording were to appear we'd have concerns similarly with the concern we've had for travelling showpeople that this is, this is a strategic London-wide issue and, sub-regional is about as low a level as the need and resolution of the need needs to be addressed at that level, not falling on the individual boroughs, because you may find you're below a critical mass to provide a transit site in one borough.'"

It is not clear if her evidence was directed to the pre- or post-injunction period or both, but Ms Slater did appear to be suggesting that there was insufficient need for there to be a transit site located in Bromley.

32. I turn now to the legal principles that are applicable to this claim. Section 222(1) of the Local Government Act 1972 empowers the local authority to institute civil proceedings in its own name where it considers it expedient for the promotion of the interests of inhabitants in its area.

33. There are two limbs to the claimant's case. The first is the common law of trespass in relation to sites where it is a landowner. The second is section 187B of the Town and Country Planning Act 1990 to restrain breaches of planning control. Although the claim was originally also advanced pursuant to section 130 of the Highways Act 1980, there is no highway land in relation to which the injunction is sought, and it is agreed that this legal basis for the claim is not relevant.

34. In relation to the claim for an injunction based on trespass, I was taken to the authority of *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 at [79], where Lord Neuberger stated that where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed and has been committed in the past by the defendant, an injunction to restrain or threaten trespass would in the absence of good reasons to the contrary appear to be appropriate.

35. In relation to an injunction pursuant to section 187B of the Town and Country Planning Act 1990, that section provides as follows:

> "(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
>
> (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach."

36. The test to be applied on application under this section was considered by Lord Bingham in *South Buckinghamshire District Council v Porter (No 1)* [2003] 2 AC 558 [27] to [37]. I gratefully adopt the summary of Warby J in the case of *London Borough of Sutton v Persons Unknown* dated 7 November 2018 of the principles that were laid down in the *South Buckinghamshire* case. These are as follows: (1) the court exercises in this respect an original jurisdiction and not merely a supervisory one; (2) it must exercise its discretion based upon the particular evidence in the case; (3) that if it appears that a breach will continue or occur unless restrained by an injunction, that will be a strong pointer towards the grant of an injunction; and (4) finally, that the court must decide whether in all the circumstances it is just to grant the relief sought and whether it is proportionate to do so.

37. In the course of arriving at those conclusions and elaborating on them, Lord Bingham addressed the question of human rights. At paragraph 37 of the decision, after reviewing the relevant authorities (including *Chapman v United Kingdom* 33 EHRR 399, as well as *Buckley v United Kingdom*), he stated:

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

> essentials the task which the court is in any event required by domestic law to carry out."

38. I have also been directed by the intervenor to the Court of Appeal judgment in the *South Buckinghamshire* case given by Simon Brown LJ, which is quoted at paragraph 20 of the House of Lords judgment. I will quote the part on which reliance is placed. Paragraph 38 states:

> "But it seems to me no less plain that 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 questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites. … Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers. Conversely, however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken."

Then at paragraph 39:

> "Relevant too will be the local authority's decision under section 187B(1) to seek injunctive relief. They, after all, are the democratically elected and accountable body principally responsible for planning control in their area. Again, however, the relevance and weight of their decision will depend above all on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) questions as to necessity and proportionality."

39. What is being sought in this claim is a **quia timet** injunction against persons unknown. Literally translated from the Latin, "**quia timet**" means "because he fears". This is an injunction granted to prevent apprehended or threatened wrongful acts which have not yet occurred or the repetition of wrongful acts which have previously occurred.

40. In *Vastint Leeds BV v Persons Unknown* [2018] EWCH 2456 (Ch), Marcus Smith J identified three types of defendant falling into the category of "unknown person" at paragraph 21. It is the third that applies in this case:

> "Where the identity of the defendant is defined by reference to that defendant's future act of infringement. In such a case, the identity of the defendant cannot be immediately established: the defendant is established by his/her/its (future) act of infringement."

41. At paragraph 31(3) he went on to set out a test for granting a **quia timet** injunction:

> "When considering whether to grant a **quia timet** injunction, the court follows a two-stage test:
>
> (a) First, is there a strong probability that, unless restrained by a judgment, the defendant will act in breach of the claimant's rights?
>
> (b) Secondly, if the defendant did act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"

42. Injunctions against persons unknown has been an established feature of the law since *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633, and the principles have been applied in a variety of different contexts, including unwanted incursions on land. The most recent authority on cases of this nature was a judgment of the Court of Appeal in a case called *Boyd & Corrfe v INEOS Upstream Ltd & 9 Ors* [2019] EWCA Civ 515. At paragraph 34, the Court of Appeal tentatively framed six principles applicable when seeking an injunction against persons unknown, on that case in an interlocutory basis (but it would appear these principles are also applicable when seeking a final injunction): (1) there must be a sufficiently real and imminent risk of a tort being committed to justify **quia timet** relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of injunction and the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise to enable persons potentially affected to know

what they must not do; (6) the injunction should have clear geographical and temporal limits.

43. The issue of permitted development rights has also been raised before me, given that the claim rests on section 187B of the Town and Country Planning Act 1990 (and only that section) for the common land sites, and on both that provision and trespass in relation to the sites that are owned by the local authority. The intervenor has drawn attention to the fact that there are lawful uses of land as a caravan site, i.e. uses which do not involve a breach of planning control but which appear to be prohibited under the injunction orders already made in other cases and sought and made in this case on an interim basis.

44. The relevant provisions are article 3 of the Town and County Planning (General Permitted Development) (England) Order 2015/596 ("the GPDO 2015") which states this at article 3(1):

> "Subject to the provisions of this Order and regulations 75 to 78 of the Conservation of Habitats and Species Regulations 2017 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2."

Then Part 5 of Schedule 2 of the GPDO 2015 is entitled "Cavan sites and recreational campsites, class A (use of land as caravan site)":

> "Permitted development
>
> A. The use of land, other than a building, as a caravan site in the circumstances referred to in paragraph A.2.
>
> Condition
>
> A.1 Development is permitted by Class A subject to the condition that the use is discontinued when the circumstances specified in paragraph A.2 cease to exist, and all caravans on the site are removed as soon as reasonably practicable.
>
> Interpretation of Class A

A.2 The circumstances mentioned in Class A are those specified in paragraphs 2 to 10 of Schedule 1 to the 1960 Act (cases where a caravan site licence is not required), but in relation to those mentioned in paragraph 10 do not include use for winter quarters."

45. Then paragraphs 2, 3 and 10 of Schedule 1 to the Caravan Sites and Control of Development Act 1960 provide as follows at paragraph 2:

"Use by a person travelling with a caravan for one or two nights

Subject to the provisions of paragraph 13 of this Schedule, a site licence shall not be required for the use of land as a caravan site by a person travelling with a caravan who brings the caravan on to the land for a period which includes not more than two nights—

(a) if during that period no other caravan is stationed for the purposes of human habitation on that land or any adjoining land in the same occupation, and

(b) if, in the period of 12 months ending with the day on which the caravan is brought on to the land, the number of days on which a caravan was stationed anywhere on that land or the said adjoining land for the purposes of human habitation did not exceed 28."

Paragraph 3:

"Use of holdings of 5 acres or more in certain circumstances

3(1) Subject to the provisions of paragraph 13 of this Schedule, a site licence shall not be required for the use as a caravan site of land which comprises, together with any adjoining land which is in the same occupation and has not been built on, not less than 5 acres—

(a) if in the period of 12 months ending with the day on which the land is used as a caravan site the number of days on which a caravan was stationed anywhere on that land or on the said adjoining land for the purposes of human habitation did not exceed 28, and

(b) if in the said period of 12 months not more than three caravans were so stationed at any one time.

(2) The Minister may by order contained in a statutory instrument provide that in any such area as may be specified in the order this paragraph shall have effect subject to the modification—

(a) that for the reference in the foregoing subparagraph to 5 acres there shall be substituted a reference to such smaller acreage as may be specified in the order, or

(b) that for the condition specified in head (a) of that subparagraph there shall be substituted a condition that the use in question falls between such dates in any year as may be specified in the order, or subject to modification in both such respects.

(3) The Minister may make different orders under this paragraph as respects different areas, and an order under this paragraph may be varied by a subsequent order made thereunder.

(4) An order under this paragraph shall come into force on such date as may be specified in the order, being a date not less than three months after the order is made; and the Minister shall publish notice of the order in a local newspaper circulating in the locality affected by the order and in such other ways as appear to him to be expedient for the purpose of drawing the attention of the public to the order.

Travelling showmen

10(1) Subject to the provisions of paragraph 13 of this Schedule, a site licence shall not be required for the use of land as a caravan site by a travelling showman who is a member of an organisation of travelling showmen which holds for the time being a certificate granted under this paragraph and who is, at the time, travelling for the purposes of his business or who has taken up winter quarters on the land with his equipment for some period falling between the beginning of October in any year and the end of March in the following year.

(2) For the purposes of this paragraph the Minister may grant a certificate to any organisation recognised by him as confining its membership to bona fide travelling showmen; and a certificate so granted may be withdrawn by the Minister at any time."

46. The local authority is also subject to a public sector equality duty at section 149 of the Equality Act 2010 which requires it to have due regard to the need to eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, to advance the quality of opportunity between people who share a protected

characteristic and those who do not, and to foster good relations between people who share a protected characteristic and those who do not. The Act explains that having due regard for advancing equality involves removing or minimising the disadvantages suffered by people due to their protected characteristics and taking steps to meet the needs of people from protected groups where these are different from the needs of other people. The Gypsies and Travellers are a minority protected by the equalities legislation.

47. Article 8 of the European Convention on Human Rights (which, as a result of section 6(1) of the Human Rights Act 1998, the local authority is prohibited from acting incompatibly with and, by section 6(1) and (3)(a) of the Human Rights Act 1998, the court is prohibited from acting incompatibly with) confers the right to respect for a person's private and family life, home and correspondence. Article 8(2) of the European Convention makes it clear that it is permissible to interfere with a person's article 8 rights if that is done in accordance with the law, is in pursuit of a legitimate aim or aims and is necessary in a democratic society, ie it answers a pressing social need and is proportionate to the legitimate aim to be pursued.

48. I now turn to the application of these principles to the facts, starting with the issue of an injunction against persons unknown. Although it would appear in this case that there have been some Gypsy and Traveller families who do return to the area and are known by a family name, the local authority's evidence to me is that it is not known what their full names are and whether or not those names are genuine. In any event, it seems to me, given the displacement effect, there would appear to be new groups who have come from other boroughs which has given rise to the issues last summer that prompted this claim, and that the names of the individuals within those new groups are not known to the local authority. I am therefore satisfied that it is impossible to name the persons who are likely to commit the conduct which it is sought to restrain.

49. The notice requirements have been complied with for the interim injunction and no concern has been expressed or objection taken by the intervenor in relation to the notice and service requirements. In those circumstances, I am satisfied it is possible to give effective notice of the injunction and the method of such notice to be set out in the draft order.

50. An amendment was made to the original orders sought which was simply for persons unknown to make it clear that the title should be "persons unknown occupying land and/or depositing waste". In other cases that has been split into two categories, being (1) persons unknown occupying land, and (2) persons unknown depositing waste. In one case (2) was separated into "depositing waste or fly tipping". It seems to me it is appropriate to keep those categories separate and to consider them separately, ie persons unknown occupying land and persons unknown depositing waste and/or fly tipping.

51. Turning to the substantive merits, given the history of unauthorised encampments and the impact of other injunctions that have been sought and granted, I accept that there is a strong probability that, unless restrained by a judgment, the defendant persons unknown will act in breach of the claimant's rights in accordance with the first stage of Marcus Smith J's test in *Vastint Leeds* or, to put it in terms of the *Boyd v INEOS* requirement, that there is a sufficiently real and imminent risk of a tort of unlawful conduct being committed in order to justify **quia timet** relief. Although the total number did not increase in 2018 over 2017, the frequency of the unauthorised encampments did increase with all the unauthorised encampments taken place in a relatively short period.

52. Further, the effect of the injunction has been to almost eliminate them. It clearly works. It has reduced the impact on the resources of the local authority and no doubt improved community relations. I recognise that if the injunction is not made final it may start again, although this may depend to some extent on whether those responsible for the issues last summer (who appear to have moved elsewhere in the period since) stay elsewhere or return to Bromley.

53. The fact that it creates a difficulty for other local authorities was not regarded by Jay J in the *McGinley* case as overriding the need for an injunction to be granted, but it was nevertheless an argument he regarded as having some force. It seems to me that the cumulative effect of the injunctions being granted does give rise to a need to revisit the relevance of the fact that difficulties are going to be caused for other local authorities as a factor in relation to whether to grant an injunction.

54. The key question is the second part of the test which has been expressed slightly differently in different cases. In *Vastint Leeds* it was expressed as follows:

> "Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of actual infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"

55. There was some disagreement between counsel as to whether irreparable harm was actually required as a matter of law by the authorities. Clearly, substantial harm has been caused which is sufficient, in my view, to amount to grave harm to local residents as a result of their inability to access and use public and recreational areas they are entitled to access and use news and the environmental impact in the respects I have already outlined, together with the clean-up costs which are borne by the Bromley taxpayer.

56. It is a more difficult question whether the harm can be said to be "irreparable", if that is a requirement, since the damage, for example, to points of entry and so on can be repaired, albeit at a cost in terms of time and money. It could be said that the damage to community relations and the distress to residents is irreparable.

57. Turning to the *South Buckinghamshire* test as to whether in all the circumstances it is just to grant the relief sought and whether it is proportionate to do so. "All the circumstances" include the article 8 rights of the Gypsies and Travellers to exercise their traditional way of life. Those rights do not extend to entitlement to fly tip or deposit substantial quantities of waste on sites or otherwise engage in criminal acts. As was recognised in the *Sutton* case by Warby J (at paragraphs 41 to 43) and the same points have been made in this case in evidence and in submissions, there is concern which has been raised by the intervenor that a persons unknown injunction, which although directed to persons unknown is implicitly directed at the Gypsy and Traveller community, with the scope that is being sought and is being granted in other cases, blurs the distinction between different categories of Gypsies and Travellers. The intervenor points to the fact that it is only a small minority of the Gypsy and Traveller community that are engaged in criminal activity and fly tipping. The concern that is

being advanced by the intervenor is for the Gypsy and Traveller community who are not engaged in criminal activity but are nonetheless impacted by these orders. It is clear that the injunction which is proposed will represent an interference with the freedom of movement and other private law rights of Gypsies and Travellers. However, the injunction does seek to pursue a legitimate aim, namely the protection of the rights of others, being the residents of Bromley London Borough Council who have been adversely affected by the harm identified in relation to previous unauthorised encampments in Bromley.

58. Thus, the real issue for me to determine is whether the order sought is proportionate to the legitimate aim sought to be achieved. According to the *Boyd* principles, I must also consider whether the terms of the injunction correspond to the threatened unlawful conduct and are not so wide that they prohibit lawful conduct, whether they are sufficiently clearly and precise to enable persons potentially affected to know what they must not do, and whether the injunction has clear geographical and temporal limits. These factors overlap to a significant extent with considerations of proportionality.

59. The extent of the relief sought and its geographical compass is very broad. When one looks at paragraphs 1, 2 and 3 of the order I am asked to make, as Mr Smyth accepted in argument, it amounts to a **de facto** boroughwide prohibition of encampment and upon entry/occupation for residential purposes and bringing vehicles onto the land (apart from in relation to the exceptions that are specified in the order) in relation to all accessible public spaces in Bromley except cemeteries and highways. Only paragraphs 4 and 5 are directed at fly tipping and deposition of waste. I will come back to those in a moment.

60. None of the paragraphs of the order are directed specifically at prohibiting antisocial behaviour or criminal behaviour whilst on the land, as opposed to entry to and occupation of the land. That may be because this would require the defendants to be identified or because such matters can in any event be dealt with by enforcement through the criminal justice system or pursuant to the Criminal Justice and Public Order Act 1994.

61. However, one factor that is clearly relevant to my consideration, as was made clear in the *South Buckinghamshire* case by Simon Brown LJ, is the availability of suitable alternative sites. I note this was an important factor that influenced the decision of Jefford J in the *Wolverhampton City Council v Persons Unknown* [2018] EWHC 3777 QB case when granting an injunction similar to the one sought here. At paragraph 10 she makes clear that she was concerned but was reassured that the result of the injunction would not be a boroughwide prohibition on Traveller sites in Wolverhampton because there were other sites that could be occupied, not all sites were subject to the injunction, and the local authority had taken steps to consider and was seeking to put in place the provision of a transit site. She granted the injunction for a period of three years but with an annual review at which the council would be required to provide evidence of the steps it had actually taken to provide the said transit site.

62. That is not the case here. Here there is no transit site and there is no proposal for a transit site. Further, it would seem that Bromley is not supporting the provision of a transit site in Bromley, at least based on Ms Slater's evidence at the examination in public.

63. Mr Smyth's answer to this was that the Gypsy and Traveller community can occupy private land or they can go elsewhere outside the Borough. I do not regard transferring the undoubted problems the local authority has experienced to private landowners, who would themselves be entitled to seek possession orders evicting such occupants from their land, as a solution. The ‘going elsewhere’ option (which is apparently what has happened following the grant of an interim injunction) transfers the difficulties to another borough, who will then in turn invoke and seek to rely on the grant of the pervious injunction to seek theirs on a "me too" approach. The problem, as I indicated before, is now the cumulative effect of all these injunctions which are reaching significant numbers and continue to be applied for by new local authorities as the problem gets transferred into their area, which means there is now more force in the argument that this is a relevant factor to be considered in deciding whether to grant the relief sought.

64. In the *Sutton London Borough Council* case, there was apparently evidence of a careful assessment having been done of the council's duties under the Human Rights Act. At paragraph 40 the judge noted that the council had given evidence of engagement with families and had conducted equality impact assessments before making an application for an interim injunction. It is clear from the same paragraph that it was trying to assist with identifying a Traveller site. It is clear from paragraph 44 that consideration had been given to less intrusive alternatives such as a negotiated stopping policy.

65. By contrast, in the claim before me there is no evidence that any proper equality impact assessment(s) were carried out, whether in form or indeed in substance. There appears to have been no engagement with Gypsy and Traveller families. I have already addressed the fact that there is no evidence of any intention to provide a transit site. I am simply told that consideration was given to the fact that the Gypsy and Traveller community would be unable to live temporarily in Bromley and that it was recognised that this would cause inconvenience and difficulty, but that the stronger argument was in favour of protecting public space.

66. The evidence is conflicting about the extent of the problems in Bromley. Further, the basis for this claim appears to conflict somewhat with what Ms Slater said at the examination in public, although it is not clear how far the interim injunction was a relevant factor in the latter evidence, bearing in mind her evidence post-dated the grant of the interim injunction last August. It is not clear whether and to what extent a negotiated stopping policy has been considered as a possible alternative and a less intrusive solution protecting the rights of those Gypsies and Travellers wishing to exercise their traditional way of life without engaging in the sort of criminal and unacceptable conduct which raises undoubted concern.

67. It is also not clear on the evidence how any infringements of the injunction would be dealt with in future in relation to the conduct of welfare assessments as occurs at present in relation to the existing statutory scheme of enforcement pursuant to Government guidance. From the one recent incident, it does not appear (at least on the basis of what I was told) that any welfare assessment was carried out. It may be that none was needed, but this is again a factor that required and requires proper consideration bearing in mind the injunction is effectively replacing the existing system

of statutory enforcement powers and the government guidance relating to them with a court-imposed prohibitory injunction, which is subject to the sanction of committal for breach or contempt.

68. In my view, the decision to apply for an injunction was not made having had regard to all the material considerations and did not properly pose and approach the article 8(2) questions as to necessity and proportionality or indeed the need to have regard to the best interests of children (and there are clearly children who are going to be affected by the policy that is being adopted).

69. A final injunction is also sought for a five-year period. That is very lengthy. It is beyond the three years that has been granted in other cases with, in some cases, a provision for annual review in the interim. That is an unduly wide and disproportionate temporal limit, although I recognise that the court, if minded to grant an injunction, could limit it to a shorter period.

70. The issue of permitted development rights was raised, as I understand it, with the local authority as at last November, but, based on the submissions to me, has not been satisfactorily addressed by the local authority. It clearly affects the common land, which represents a quarter of the sites in relation to which an order is applied for and which are not owned by the local authority and are not subject to a claim based on trespass but rather amount to a claim for an injunction based on breaches of planning control under section 187B of the 1990 Act. The local authority has told me that it does not want an injunction which excludes lawfully exercised permitted development rights. Its argument is that an injunction should instead be granted in relation to its own land, which would remove a quarter of the sites being sought (although those sites have not been specifically identified to me) on the basis that the claim in this regard is pursued in trespass and permitted development rights do not apply to the land in its ownership and/or that it does not consent to their exercise.

71. The difficulty with this contention is that the permitted development rights are expressed to apply to "land" generally. Whilst they cannot be exercised if the landowner does not permit their exercise, the issue arises as to when a trespass is committed. Is it at the point when a person enters the land for the purpose of

exercising those rights or when that person is told that the landowner does not permit that exercise and they then fail to leave? This point was raised by the intervenor but, in my view, was not satisfactorily answered by the claimant. The draft order as it stands includes a prohibition on entering onto land for residential purposes, and so it would preclude the former situation if it is not a trespass (as to which I make no determination). It is another point it seems to me the claimant needed to consider in order to ensure that the order sought was limited to unlawful conduct and was not proscribing lawful conduct.

72. Taking account of all the circumstances, including the duties of the local authority that have not been discharged, I am not satisfied that the relief sought in paragraphs 1 to 3 of the draft order strikes a fair balance or is proportionate, and I do not consider that it is just and convenient in this case to make a final injunction in those terms. I therefore decline to do so. However, I am satisfied that it is proportionate to grant an injunction prohibiting fly tipping and disposal of waste going beyond a low-level misdemeanour (such as depositing or leaving a bin bag of rubbish when there is no bin) there being no protected rights to engage in such activities and evidence that this has been a real problem that the local authority has had to deal with. I am therefore prepared to grant an injunction in terms of paragraphs 4 and 5 but with the additional words in paragraph 5 proposed by the intervenor that it should be "depositing substantial amounts of waste or fly-tipping on the land identified without the written consent of the claimant". In that way it is targeted at the type of conduct raised in this case, which the local authority is, quite understandably, seeking to prohibit. I appreciate that the local authority is concerned that that wording is not sufficiently precise, but it seems to me that, unless it wishes to specify a minimum volume of rubbish which has not been suggested, it is better to include those words so as to avoid applying a serious sanction to minor misdemeanours. It seems to me that that is the lesser of two evils, and it will be clear that conduct of that low-level nature is not the target of the proposed order.

An application was originally made for there to be a power of arrest included in the injunction order, and an application had been issued on 17 April 2009 seeking to attach a power of arrest to the injunction. That application is no longer pursued, and accordingly I do not need to deal with it. It is proposed that the application be adjourned generally and that if the claimant does not apply to the court by 17 April

2020 to have it heard, that it stand dismissed, and in the event the claimant seeks to pursue it, notice must be given to the intervenor so that it has the opportunity to attend to make representations.Accordingly, I am not attaching a power of arrest. The relevant provision seeking adjournment of the application is simply avoiding the need for the claimant to have to re-issue an application seeking a power of arrest to be attached to the order. It seems to me, in the absence of objection to it, it is appropriate that the application be adjourned generally.

73. That is the order that I make. I do not order paragraphs 1 through to 3 but I am prepared to order 4 and 5 incorporating the amendment that has been proposed by the intervenor.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge.