IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

No. F90MA2989

[2023] EWHC 3599 (KB)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Tuesday, 8 August 2023

Before:

HIS HONOUR JUDGE BIRD
(Sitting as a Judge of the High Court)

B E T W E E N :

STOCKPORT METROPOLITAN BOROUGH COUNCIL — Claimant

- and –

(1) JASON LEE ALEXANDER
(2) CHADRAVADAN RAICHAND MEHTA
(3) SUNIL GUNNAR MEHTA
(4) H & H HOMES LTD — Defendants

MR J SMYTH (instructed by Legal Services, Stockport Metropolitan Borough Council) appeared on behalf of the Claimant.

MR G LEWIS (instructed by Janes Solicitors) appeared on behalf of the First Defendant.

THE SECOND, THIRD and FOURTH DEFENDANTS did not appear and/or were not represented.

J U D G M E N T

JUDGE BIRD:

1 This is a contempt application. The claimant is a local authority. It makes the application in its position as a local planning authority. There are two defendants: Mr Alexander and H1 Cheshire Limited. H1 Cheshire Limited, as I understand it, has been dissolved following its entry into administration. The application therefore proceeds simply against Mr Alexander.

2 The basis of the application is that Mr Alexander is in breach and wilfully so of a consent order made in December 2019. The circumstances that led to the court approving that order are recorded in other judgments. Broadly speaking, for the purposes of this application, the defendants were responsible for an unlawful development of contaminated land in Cheadle. That development comprised the construction of a number of dwellings. Some of those completed dwellings are now occupied, and those who occupy them find themselves in a difficult position.

3 The 2019 order was made in order to compromise enforcement proceedings brought by the claimant. So obvious was the seriousness of the matter, and so plain were the difficulties that those who live on the land find themselves in, that unusually after the consent order had been agreed, counsel for the defendants was given permission to make in effect a statement in court designed to give assurances to those who occupy the relevant properties. The terms of the order, in so far as relevant, are set out at para.4. They provide as follows:

> "By 4 p.m. on 1 July 2020 the Defendant shall submit to the Claimant a planning application and pay the application fee in cleared funds to regularise the residential use of the land. Application must be accompanied by all the plans, reports and documentation required to be submitted by the validation checklist found at exhibit 15 of the first statement of Mr Westhead and attached to this order. The application must be valid on receipt."

4 The parties agreed two extensions to the deadline set out in the order so that compliance was to be achieved by 4 p.m. on Monday 16 November 2020. Since the consent order was made, no planning application has been submitted.

5 On 20 January 2021 the claimant issued these contempt proceedings. It did so because nothing had been done which in the claimant's eyes was sufficient to regularise the position in respect of the land, and as far as the claimant was concerned Mr Alexander had not done enough to comply with the order, and indeed as far as the claimant was concerned had done what he could to avoid it. It is this contempt application that I have heard.

6 Mr Alexander has the benefit of criminal legal aid because his liberty is at stake and he has instructed Mr Lewis of counsel. The claimant appears by Mr Smyth of counsel. There were some initial applications made in respect of the format of the application, and an application made that I recuse myself. I dealt with those applications in a separate judgment.

7 I should say that although I felt able, in the circumstances of this case, to excuse a number of obvious failures, it is important that CPR Part 81 in its constituent parts are properly and fully complied with.

8 As to this application, Mr Alexander has submitted written evidence. He did so at a time that he was represented by solicitors experienced in these matters, and in doing so effectively waived the right that he would otherwise have to silence. That waiver was not

complete because Mr Alexander elected at trial not himself to be cross-examined by the claimant; rather, as is his right, he has chosen simply to rely on submissions made by his counsel.

9 I heard evidence from Mr John Westhead. Mr Westhead is essentially the claimant's compliance officer. During the course of his submissions Mr Lewis made a number of criticisms of Mr Westhead's evidence. I find nothing in those criticism. Mr Westhead, in my judgment, gave his evidence carefully and, as I would expect a professional planning officer to do. He was vigorously but fairly cross-examined. There were points at which his answers might not have been perfect, but I draw no adverse inference from that at all.

10 I then turn to consider the correct approach to this application. I accept that it is summarised in the reported case of *CPL v CHW* [2010] EWCA Civ 1253 [34]. My first task in dealing with this application is to identify by reference to the express language of the order, precisely what it is the order required the defendant to do. That, as the Court of Appeal have said, is a question of law. The second task for me is to determine whether the defendant has in fact done what he was required to do, and if he has not, was it within his power to do it? In other words, is the failure to comply with the order if established, something that is beyond the defendant's control or is it something over which he did have control.

11 Having set out those principal points, the Court of Appeal went on to clearly set out where the burden of proof lies and what it is. I therefore have at the forefront of my mind that it is for the claimant to establish that it was, at the relevant time, within the power of the defendant to do what the order required. I also bear in mind, and have at the forefront of my mind, that the standard of proof is the criminal standard so that before finding Mr Alexander guilty of contempt, I must be sure that he has not only not done what he was required to do, but that at the time it was required to be done it was within his power to do it.

12 The Court of Appeal also made plain that where the defendant is found guilty, or perhaps more accurately the particulars of contempt are made out, I would need to set out plainly my finding of what it is the defendant has failed to do and my finding that he had the ability to do it.

13 I then turn to the first question. The wording of the order in my judgment is plain. What Mr Alexander was required to do was to submit a compliant planning application by Monday, 16 November 2020. I was referred to a number of authorities that make that point, in particular I was referred to *Kea Investments Ltd v Eric John Watson* & Ors [2020] EWHC 2599 Ch. At para.71 reference is made to a further decision, that of *Re Jones* [2013[EWHC 2579. At para.21 of that judgment the point is made that a mandatory order is not enforceable by committal unless it specifies time for compliance. At para.23 the point is made that someone may be found to be in breach of a mandatory order by failing to do the prescribed act by the specified time. In those circumstances, Munby LJ in the case referred to, felt that it was perfectly appropriate to talk of the contemnor remaining in breach thereafter until such time as the breach had been remedied. However, he went on to say that when a mandatory order is not complied with, there is but a single breach. Authority for that proposition is *Kumari v Jalal* [1997] 1 WLR 97. At para.72 within the main judgment, the Court of Appeal says this:

> "... At first blush it comes as something of a surprise because it is an everyday experience to regard, and refer to, a person who does not comply with an order as being in continuing breach (...), and it is

> therefore easy to slip into the assumption that a person who is in continuing breach is also committing a continuing contempt. [Counsel] said, and I agree, that it is common for lawyers and judges to refer to continuing contempts... But the logic of Sir James Munby's decision is impeccable and I have no hesitation in accepting it, and in accepting that it is in fact heretical to think that a person who has continued not to comply with a mandatory order after the deadline imposed by the order is committing a continuing contempt. A contempt in failing to do an act by a particular deadline is committed, if at all, when the deadline is not met, and failing to do the act thereafter is not strictly a further or continuing contempt."

14 I regard those decisions as clear authority for the proposition that when considering breach I ought to look at matters as they stood on the date by which the act was to be done. I am satisfied so that I am sure, and indeed it is not contended to the contrary, that Mr Alexander is in breach of the order. That is because no planning permission was sought, no planning application was submitted by 4 p.m. on Monday 16 November 2020. But the question for me is the second question posed in *CPL*. That is: was it within Mr Alexander's power to do it on or before the required time? With hindsight, para.4 of the consent order contains a number of hostages to fortune. It requires strict compliance. It requires the application to be made in strict compliance with the validation checklist. That is clear because the order provides that the application "must be accompanied by all plans, reports and documentations required to be submitted by [that] checklist". The order does not refer to material compliance, perhaps unsurprisingly.

15 The checklist is a detailed document. It comprises 42 requirements and indeed the 42nd requirement itself contains a further seven detailed requirement. Paragraph 22 requires the planning application to be supported by and include a heritage assessment which includes a completed archaeological investigation in accordance with the written scheme of investigation and proposal for display/recording of findings produced by Oxford Archaeology North in September 2010. Whilst that requirement is for a heritage assessment, it is plain that the heritage assessment must be completed so that it includes an archaeological investigation, which itself is completed in accordance with the September 2010 report.

16 The evidence before me is clear and it seems to me accepted by the claimant that there is no September 2010 report and therefore no possibility of ensuring that the archaeological investigation which was to form part of the heritage assessment could be in accordance with the written scheme set out in that report.

17 It seems to me that that matter is plain because after the expiry of the deadline Mr Westhead agreed, on behalf of the Council although without any variation to the order, that the Council would be prepared not to insist on formal compliance with para.22, but would accept something lesser. The Council was forced into that position because there was no 2010 report. There are various emails, documents and pieces of evidence within the bundle that deal with the point, but they all make the same point. Absent a 2010 report which Mr Alexander and his planning consultant sought a copy of, para.22 of the validation checklist could not, in my judgment, fully be complied with.

18 During the course of his submissions Mr Smyth suggested that whilst that approach would be right on a strict reading of para.22, that it would be unrealistic to proceed on the basis that if something approaching para.22 had been attempted by Mr Alexander, it would be

nonsensical to suggest that the Council would reject it. Whilst there is a great deal of common sense in Mr Smyth's proposition and submission, I am satisfied it is not the test that I should apply. The test for me to apply is: am I sure that at the deadline of 4 p.m. on Monday 16 November 2020 Mr Alexander could have produced a planning application that complied with each and every aspect of the list, including para.22? I have come to the conclusion that I cannot be satisfied that that is the case for the reasons that I have given.

19 I am not entitled to read the relevant paragraph of the consent order as referring to substantial or 90 per cent compliance with the list. That is why, regrettably, it is a hostage to fortune because the slightest true inability to comply with the list is sufficient to mean that the order could not be complied with.

20 Mr Smyth made a number of other points during the course of his helpful submissions. He pointed out that viewed as a whole the evidence suggests that Mr Alexander might be said not to take his obligation seriously. He suggested that there were other parts of the checklist that were not complied with by the relevant date which could have been complied with. I do not propose to say anything about those points for the simple reason that in my judgment they are not material to the outcome of this application.

21 The Council has fallen into the understandable trap in many ways, highlighted in the authorities to which I have referred. It has considered Mr Alexander to be in continuing breach of the order and therefore in contempt of court. But I am satisfied, following the Court of Appeal guidance to which I have made reference, that that was an error. Therefore on a strict interpretation, and there is, I am afraid, room for nothing else, the application for committal must be dismissed. For those reasons, compelled as I am, I dismiss it.

LATER

22 I deal now with the question of costs. The general rule is that a successful party will have its cost paid by the unsuccessful party. The successful party here is Mr Alexander. Although Mr Alexander is in breach of a consent order, that breach has been found not to amount to a contempt. The point raised by Mr Alexander was a point that struck to the heart of the application. Had it been made earlier, this matter would have progressed towards a globally satisfactory conclusion no doubt far quicker than it has. Amongst other things a two day hearing perhaps would not have been needed. It seems at least arguable that there would not have been need for any cross-examination. Nonetheless, those points which have been raised by Mr Alexander have been found to be correct. These proceedings do involve liberty of the individual, and it is right that I bear that in mind.

23 I am not satisfied that there is any good reason here to depart from the usual order for costs. It would not be appropriate for me to use a costs order in these circumstances to punish Mr Alexander for the fact that he was in breach of the order. It would not be right for me to use the order to punish Mr Alexander for the fact that there is still no planning application. It seems to me for all those reasons that the order that I should make is that the claimant should pay Mr Alexander's costs. It is not an order that I make with any great relish, but I am satisfied nonetheless that it is the right order to make.

24 I am not satisfied that I should make any separate order in relation to the March hearing. The order that I made on that occasion was that the costs should be in the case. I did not order that the costs were reserved, so it seems to me they should simply follow the event in the circumstances that I have set out.

25 Mr Lewis asks for those costs to be assessed on the indemnity basis. He draws my attention to CPR 44.3.10. He points out that it is a standard and general rule that costs will be assessed on the indemnity basis where there are unmeritorious allegations of fraud. Part of the rationale for that is that fraud is a serious allegation. There is no similar rule that Mr Lewis has drawn to my attention that committal costs will generally or always be assessed on an indemnity basis. In that regard, I have a wide discretion.

26 The rules of course are silent as to the circumstances in which an assessment on the indemnity basis is appropriate, and the general guidance is that such an order should only be made where the conduct of the case by the paying party falls short and easily short of what the court expects. It is not every case, for example, where mistakes are made, that would attract indemnity costs.

27 In my judgment, this case does not fall into the "out of the norm" category. Mr Lewis draws my attention to the point that if a case which is speculative, weak or thin is pursued to trial, the risk of doing so may result in an indemnity costs order. I do not think it would be appropriate to classify this case as speculative, weak or thin. It is simply a claim that has been brought and lost. The proper order is that the usual basis of assessment should apply. I am not satisfied there is any reason to make any other order, and therefore I direct that the costs to be paid to the defendant, subject to the appropriate assessment in respect of Legal Aid, will be assessed on the standard basis.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.