PLANNING AND HUMAN RIGHTS

DYER V WEBB ET AL

1. RICHARD BARRACLOUGH KC and MARK DAVIES acted for the applicants in their application for an interim injunction. MEGAN THOMAS KC advised on the planning aspects of the case in the context of the Harassment Act 1977. The judgement is reported at 2023 EWHC 1917 (KB)
2. This was another step in the dispute between neighbours in the idyllic setting of Surrey, an area of outstanding natural beauty. As the judge commented:

*“Village life in England is one of the glories of this country. But here a different side to its underbelly has been on view. While it is said that an English person’s home is their castle, here it has become, in a most unedifying way, a battlefield”*

THE CLAIM

1. The case said the judge raised *“important questions about the nature, extent and limitations of certain of our fundamental freedoms under the law”.*
2. The applicants had made some 50 applications for planning permission. The respondents had objected to some but not all of them.
3. The claim made by the applicants in addition to general allegations of harassment was that:

*“..the planning process was being used by the Defendants for an ulterior and illegitimate purpose, namely to target and to oppress the Claimants and cause them distress… the Defendants and each of them have engaged in a deliberate campaign of obstruction to the Claimants’ planning applications whatever their merits.”*

1. Thus, the claim was based on harassment in that the respondents pursued a course of conduct amounting to:

*“…harassment of the Claimants and which the Defendants knew or ought to have known amounted to harassment of the Claimants contrary to sections 1 and 3 of the Protection from Harassment Act 1997 that was calculated to cause and is causing the Claimants alarm and distress.”*

1. The claimants alleged that the value of their property had been diminished by some £1.3M by reason of the alleged harassment.
2. The judge analysed the 1800 odd pages of material including a number of witness statements made by and exhibits produced by the parties.
3. The applicants failed and the application judged to be totally without merit. Indemnity costs were ordered to be paid.

THE PRINCIPLE

1. The applicants’ arguments on harassment were defeated although the point of principle namely whether it is possible to injunct malicious objections within the planning process was confirmed.
2. That principle must remain an issue for debate in that whatever the reason for objecting to planning applications, once Convention Rights are engaged there is a mechanism for considering even malicious objections within the planning system. Can it ever be right to injunct objectors?
3. As it became clear that Convention rights were engaged such had a knock on effect in relation to the claim for an interim injunction. Once Convention rights were engaged the burden of establishing likelihood of success at trial shifted to the applicants.
4. In fact, the judge ruled that there was no urgency in the application for an interim injunction. No application for planning permission was imminent (there had been some 50 previous applications) and there were no interests of justice argument to be made.
5. The judge did not consider the applicants evidence on analysis to be anywhere near sufficient to support the application in any event.

HARASSMENT ACT 1997

1. The judge developed the argument by first considering the terms of the claim under the Harassment Act 1997:

*“Statutory intervention come in the form of the Protection from Harassment Act 1997. It provides:*

*“1 Prohibition of harassment.*

*(1) A person must not pursue a course of conduct—*

*(a) which amounts to harassment of another, and*

*(b) which he knows or ought to know amounts to harassment of the other.*

*(2) For the purposes of this section … the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*

*(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows —*

*(a) …*

*(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or*

*(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.”*

THE CONVENTION RIGHTS

1. The applicants argued that they did not seek to prevent the respondents from objecting to any planning application. Rather they sought to prevent what was said by them to be a conspiracy to defeat applications by objections which were aimed at harassing the claimants. The point made against that as a concept is that the claim engaged Articles 10 and 11 rights which must then be balanced against the applicants Article 8 rights.
2. The Court ruled and the applicants (reluctantly) conceded during argument that the claim engaged the Respondents Convention rights under the ECHR.
3. The reasoning of the court developed as follows:

*“….the powers under the 1997 Act and the rules of court in the Civil Procedure Rules (“CPR”) must be interpreted compatibly with Convention rights.*

*But what are the relevant rights?*

*Article 10 of the Convention – Freedom of expression*

*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority.*

*Article 11 of the Convention*

*Everyone has the right to freedom of peaceful assembly and to freedom of association with others …*

*Here the public authority would be the court imposing the restraint through injunction.*

*Were the making of the objections by the respondents unreasonable? Such a voicing of objection inescapably is an exercise of the freedom of expression under Art. 10. In its interpretation of Art. 10 of the Convention, the European Court of Human Rights has held that:*

*“freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every [person]” (Handyside v. the United Kingdom, Application no.5493/72, 7*

*December 1976, § 49).*

*The court has emphasised on several occasions the importance of this Article, which is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or are a matter of indifference, but also to those that offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society” (Handyside, ibid.; see also Observer and Guardian v. the United Kingdom)*

*The right to freedom of peaceful assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively (Djavit An v. Turkey, 2003, § 56;Kudrevičius and Others v. Lithuania [GC], 2015, § 91).*

*The applicants’ case is that it is unreasonable for the respondents to object to their planning applications and to discuss together what to do about the applicants planning applications because this amounts to “acting in concert” with a view to devising “tactical” or “spurious” objections.*

*The respondents submit that the 1997 Act was not intended to be used as a means to, as Ms Proferes put it, “repress freedom of expression or association”. To support that proposition, the respondents rely on the judgment of Eady J in Huntingdon Life Sciences v Curtin (quoted in DPP v Dzuirzynski [2002] EWHC 1380 (Admin), at [33]:*

*“The legislators who passed that Act [he is there referring to the 1997 Act] would no doubt be surprised to see how widely its terms are perceived to extend by some people. It was clearly not intended by Parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of political protest and public demonstration which are so much part of our democratic tradition. I have little doubt that the courts will resist any such wide interpretation as and when the occasion arises, but it is unfortunate that the terms in which the provisions are couched should be thought to sanction any such restrictions.”*

*However, in the intervening 20 years since Dzuirzynski, there is no doubt that injunctions have been granted under the Act to prevent certain protests. I therefore review the proper approach to this issue by asking a series of structured questions.*

*First, are the respondents seeking to exercise their rights under Art. 10 and/or Art. 11 for the purposes of Art. 10? I have no doubt that “expression” includes the right to hold and express opinions. Expressing an objection to a planning application prima facie must fall squarely within the Convention right. Meeting or communicating to express those rights whether informally or through a residents’ association plainly comes within Art. 11.*

*Second, will the relief sought involve the public authority, here the court, interfering with the rights? Clearly, yes, if the court grants the injunctive relief.*

*Third, is the restriction prescribed by law? Yes, as it is in accordance with legal principle and authority.*

*Fourth, is the restriction in pursuit of a legitimate aim? Here it is said to protect the applicants from maliciously created distress and also to safeguard their rights under Art. 8 (right to respect for private and family life).*

*Fifth, is the restriction necessary in a democratic society? Here the court can use the four-part test enunciated by Lord Reid in Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39. Lord Reid stated at [74]:*

*“It is necessary to determine, (1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right. (2) Whether the measure is rationally connected to the objective. (3) Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. (4) Whether balancing severity of a measure’s effects on the rights of the person to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter”.*

*Sixth, is there a rational connection between the means chosen (i.e. the proposed order) and the aim in view? Another way to look at this question is to ask whether the injunction furthers the protection of the applicants from distress. I find that it is certainly capable of doing so.*

*Seventh, are there less restrictive alternative means available to achieve that aim? Undertakings from the respondents might suffice, but despite correspondence between solicitors, the respondents are not prepared to agree to undertakings. They say they have done nothing wrong. We now come to the crux of the argument.*

*Eighth, is the aim of the proposed order sufficiently important to justify interference with a fundamental right? Does the order strike a fair balance between the rights of the individual and the general interest of the community, including the rights of others – here the rights of the applicants? These questions, it seems to me, involve a careful and nuanced examination of the competing factors. I must do so in the correct evidential and persuasive burden context.*

IMPACT OF THE CONVENTION ON AMERICAN CYANIMID

1. The impact of the Convention rights on the American Cyanimid test is significant. The judge discussed it in the following terms:

*“….. there are three propositions:*

*(1) At trial, it will be for the respondents (as defendants) to prove on a balance of probabilities that their conduct in making planning objections was reasonable (if it is found to amount to harassment et cetera);*

*(2) For interim relief, the applicants must satisfy the court that it is likely that they*

*(as claimants) will establish at trial that "publication will not be allowed" (planning objections being "publications" for the purposes of s.12 HRA 1998);*

*(3) Therefore, at this stage, the applicants must satisfy the court that it is likely*

*that respondents/defendants will not prove reasonableness at trial.*

WHAT WILL AMOUNT TO INJUNCTIBLE CONDUCT

1. The judge teased out how malicious objections may fall to be injuncted:

“*….Where the question of the “tactical” or spurious nature of the conduct comes in is at Limb 4, where the conduct is oppressive and unacceptable, and then again at Limb 6, where the conduct becomes a “torment”, something akin to conduct that would sustain criminal liability. Is objecting to a planning application conduct of that ilk? I find it difficult in the circumstances of this case to so conclude. Mrs Dyer may well be upset, frustrated and even angry at an objection to her planning application. Many people are. But can this really be elevated into the kind of mental “torment” that would justify criminal proceedings and sanction?*

*I cannot see how on any sensible or credible basis it can be maintained that these objections were devised to cause distress or were vindictive. Feelings have been running high in the area. Mrs Dyer wants to develop her land. The respondents broadly object to her plans as not in harmony with the nature of the village and the AONB. Mrs Dyer is perfectly entitled to try to develop her property. But in a democratic society, the respondents must be able to exercise their freedom of expression to object and to gather (“assemble”) and message or talk (“associate”) to discuss their objections.*

1. The judge here provides for the limitation to the Convention rights:

*“…But with an important limitation. If they are simply, spuriously, spitefully and maliciously doing so to cause distress to the applicants, and especially Mrs Dyer, then that would be a potential basis for the law to step in….*

*One gains support for this approach from the decision of this court in Dowson v Chief Constable of Northumbria [2010] EWHC 2612 (QB). There Simon J at [142] set out the elements of a successful claim in harassment:*

*(1) There must be conduct which occurs on at least two occasions;*

*(2) which is targeted at the claimant;*

*(3) which is calculated in an objective sense to cause alarm or distress;*

*(4) which is objectively judged to be oppressive and unacceptable;*

*(5) What is oppressive and unacceptable may depend on the social or working*

*context in which the conduct occurs.*

*(6) A line is to be drawn between conduct which is unattractive and unreasonable,*

*and conduct which has been described in various ways: ‘torment’ of the victim, ‘of*

*an order which would sustain criminal liability.”*

*I turn to the question of oppressive and unacceptable conduct. I can conceive that should the evidence indicate that the objections were in fact made maliciously that this could amount to oppressive and unacceptable behaviour.*

1. However, in this case the applicants failed on an interim application to cross the evidential threshold:

“ *I remind myself that this is an interim application. I do not at this stage determine the matter finally. I apply the interim test: given this is a very significant interference with Convention rights, have the applicants established in this hearing that it is likely at a future trial that the respondents will not prove reasonableness of conduct in making objections? I find that the applicants have not so established. In fact, they have not come close to doing so…..The respondents are entitled in a democratic society to differ from Mr and Mrs Dyer. This is the purpose of the planning process. It exists in part to provide a regulated method of dispute adjudication. There is no credible or reliable evidence before the court that the respondents have been abusing the system or covertly using it as a device to inflict harm on the applicants as opposed to simply holding strong contrary view about what they want for development in their village resting as it does in an Area of Outstanding Natural Beauty. Indeed, there is supporting evidence that identical points of objection were raised by the parish council and other individuals. Moreover, there were other applications by Mrs Dyer that these respondents did not object to that were nonetheless refused.*

*Stepping back, I remind myself of the words of Sedley LJ in Redmond-Bate v DPP*

*[2000] HRLR 249 at [20]:*

*“Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.”*

*To fetter the autonomy of individuals in their exercise of free speech rights will require good cause. I judge that this court must be slow indeed to restrain protected and precious Convention rights and freedoms by injuncting genuine and meritorious*

*objections to planning applications, even if they might upset the person applying to*

*develop their property.1991, §59)”.*

CONCLUSIONS

1. It will be rare to injunct those who seek to use the planning process to target those who wish to develop land. It remains however a possible remedy. The planning process itself is designed to counter unmeritorious objections.
2. If it is decided to seek judicial intervention on an interim application it will be necessary to make it clear in the application that it engages Convention rights and that the evidence is such as to make it likely that at trial the applicants are likely to succeed.
3. Evidentially large volumes of material are unlikely to impress a court and agreements or requests to adjourn will undermine any suggestion of urgency as will the fact that by the date of the hearing there is no imminent application for planning permission.
4. The applicants had instructed a planning consultant to provide an opinion on the alleged misuse of the planning process. Because they had previously advised the applicants in other property developments (albeit declared in the body of the report) the court decided to attach little weight to the report on the application. Thus, it will be necessary to obtain a report which is wholly independent of the developer.
5. Finally in this case the order as drafted was too wide. It is difficult to envisage any order designed to injunct the misuse of the planning process (where Convention rights are engaged) being sufficient to prevent misuse whilst allowing the injuncted otherwise to exercise their Convention rights.