

Protecting Land from the Known Unknowns

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There are few sights more unpleasant when walking in our green and pleasant land than fly-tipping waste. Equally the fly-tipping on industrial sites or as has recently been experienced on car parks of major supermarkets is a sad and poignant reflection on 21st century attitudes to Society.

The most recent statistics from the Department of Environment Food and Rural Affairs of just last month (15 November 2018) state that local authorities in England alone have dealt with just under 1 million fly-tipping incidents in the last year, with estimated clear-up costs of in excess of £50 million.

Of course it is not just the abandonment of waste that causes problems, but the arrival of at times huge numbers of people, sometimes as many as 50-60 men, women and children and not forgetting horses and dogs camping illegally in local parks and green spaces. The sight of mobile homes and caravans can be intimidating to local people, particularly as land meant for football, picnics and other recreational pursuits are threatened by the arrival of unknown persons.

The attitude of the police differs from Borough to Borough. The police have extensive powers to move on camps in this way under Section 61 of the Criminal Justice and Public Order Act 1994, but rarely use it. Instead, it falls to the Borough to prepare possession proceedings, serve notices, obtain a possession order and then enforce the order. That process is not only costly, but it is extremely time-consuming and gives Travellers intent on using the land as an impromptu camp or land-fill, a number of days to dump waste or in some instances invite others to dump their commercial waste as they are in "control" of the land.

The consequential negative effect on relations between councils, their tax payers, the police and the whole community is impossible to quantify, but it is recognised by DEFRA as an unfortunate consequence of these activities.

However, there is a mechanism to fight back that is being adopted by the Councils and commercial operators and in more recent times private landowners intent on protecting their development land - the preventative injunction. The High Court has recognised the extent of the problem and accepted that going through the County Courts simply permits the occupants to stay on the land while the legal process runs its course. The obtaining of a preventative injunction, forbidding "persons unknown" from accessing any green spaces, most commonly parks and sports fields to make an encampment, supermarket car parks and development land is proving successful, although inevitably the push / pull effect does leave other land vulnerable to incursion.

Proceedings against Persons Unknown is an acceptable way forward as held by Morritt VC in *Bloomsbury Publishing Group Ltd v News Group Ltd* [2003] EWHC 1205 and *Hampshire Waste Services Ltd v Persons Unknown* [2003] EWHC 1738. The three types of Defendants in Person Unknown cases being identified in the recent decision of Mr. Justice Marcus Smith in *Vastint VC -v- Persons Unknown Entering or Remaining Without the Consent of the Claimant on Land and Buildings Comprising Part of a Development Site Known as the Former Tetley Brewery Site, Leeds* [2018] EWHC 2456 as:

1. Where there is a specific defendant but the name of that defendant is not known;
2. Where there is a specific group or class of defendants, some of whom are known but some of whom are not known; and
3. Where the identity of the defendant is defined by reference to that defendant's future act of infringement.

It is the third of these that most closely applies to the potential defendant in the protective injunction cases.

The advantages of this pro-active legal approach are that those seeking to occupy land illegally; cannot simply move to the next available site, as that site is also protected. The injunction acts as a substantial deterrent in the form of fines, seizure of assets and imprisonment. As a consequence of this process the protracted and expensive injunction procedure for each incursion is replaced with a swifter and more draconian contempt procedure.

It is the deterrent element of such action that is the most effective weapon in the fight against this form of trespass.

The test to be applied when the Courts are considering this type of application was also addressed by Mr. Justice Marcus Smith in *Vastint VC*. He applied the following two tests:

- (a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights?
- (b) 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?

The Court will also have regard to the Article 8 rights of persons in need of a place to dwell. The test was considered by Lord Brightman in *South Bucks District Council v Porter (No. 1)* [2003] 2 AC 558 as one of balancing whether it is just to grant the relief sought and whether it is proportionate to do so, having regard, amongst other factors, to the Convention rights of those who are either are encamped on the site or wish to do so.

Time will tell how successful this type of injunction will be, but the hope is that by obtaining more protection for our green spaces against unknown occupiers, the huge negative factors associated with unlawful occupation and waste deposits will be addressed leading to more funds for our local councils, more development of land for residential accommodation and a cleaner and more enjoyable environment for all.

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