Neutral Citation Number: [2025] EWHC 607 (KB)

Case No: QB-2021-002314

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2025

**Before**:

**ANDREW KINNIER K.C.**
**(Sitting as a Deputy Judge of the High Court)**

**Between:**

**ASHFORD BOROUGH COUNCIL**

**Claimant**

**- and –**

**(1) MARK HOMEWOOD**
**(2) TERESA REIDY-WILDE**

**Defendants**

**Emmaline Lambert** (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
**Alexander Macpherson** (instructed under **the Bar's Direct Access Scheme**) for the **Defendants**

Hearing date: 10 February 2025

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# Approved Judgment

This judgment was handed down remotely on 17 March 2025 at 10:30am by circulation to the parties or their representatives by email and released to the National Archives

**ANDREW KINNIER K.C. sitting as a Deputy Judge of the High Court**

**Introduction**

1. By an application (dated 24 September 2024 but issued on 9 October 2024) the Defendants ask to be released from the undertakings they gave in response to an application by Ashford Borough Council ("**the Council**") for an injunction, under s. 187B of the Town and Country Planning Act 1990 ("**the Act**"), to restrain various alleged breaches of planning control at land known as "land at Bonnington Court, Bonnington" ("**the land**").

2. Although it is jointly made, the Second Defendant has taken no active role in the application and, in the words of the skeleton argument served on his behalf, Mr Homewood is the main applicant. The hearing therefore proceeded on the basis that Mr Mark Homewood, the First Defendant, has authority to act on behalf of both Defendants.

3. The application has been vigorously pursued and equally vigorously contested. It was originally listed to be heard on Monday 16 December 2024 but the Council applied to adjourn on the basis that the Defendants' time estimate of one hour was insufficient and it wished to lodge evidence in response for which more time was needed. Mr Homewood resisted the Council's application but it was allowed on 13 December 2024 by Mr Marcus Pilgerstorfer K.C. sitting as a Deputy Judge of the High Court who set down the Defendants' application for a half-day hearing and made directions for the Council to serve its evidence by 10 January 2025 and for the Defendants to provide any evidence in response by 24 January 2025. Although the parties served evidence by those deadlines, additional statements and disclosure were exchanged up to and including the Friday before the hearing on Monday 10 February 2025. By the time of the hearing, Mr Homewood had served four statements and the Council had provided two, all of which were supplemented by exhibits. Both parties lodged a skeleton argument, supported by an authorities bundle, and the hearing lasted a full day.

4. In light of the issues raised by the parties and the relatively long history of the parties' dealings, it is first necessary to set out the factual background in some detail.

## PART 1 – the factual background

*The parties and the land*

5. The Council is the planning authority for the area in which the land is situated. At the time the undertakings were given, the Council understood that the Defendants were the owners of the land which is registered at H.M. Land Registry under Title Number K707048. Although part of the land appears to have been sold to an entity called "@SIPP" in which Mr Homewood has some form of interest, it is uncontroversial that the Defendants still own a substantial part.

6. The land itself extends to about 25 acres of open countryside and it is outside the confines of any village or settlement. Agriculture is its lawful planning use. It is on the western side of New Road Hill, a single carriageway, and it lies about 0.2 miles to the south-west of Aldington and some three miles to the north-east of Orlestone. I am told that the land is within the Bonnington Wooded Farmlands Landscape Character Area which is typified by certain features including undulating land which forms part of the immediate foreground to the Kent Downs Area of Outstanding Natural Beauty. I am also told that the overall planning aim for the area is to conserve and reinforce the landscape.

*The Council's claim against the Defendants*

7. On 15 June 2021, the Council issued a Part 8 claim which sought an injunction, under s. 187B of the Act, to prevent alleged breaches of planning control on the land. The details of claim endorsed on the claim form alleged that the Defendants had carried out development in breach of planning control and that works had been carried out to prepare the land for residential occupation, namely placing a mobile home on it. The details also said that the change of use for stationing of mobile homes/caravans for residential use was a development for the purposes of s. 55 of the Act which required permission; the land was in open countryside and outside any settlement boundaries so a change of use would require full consideration by the Council. Finally, it was said that the Council thought it likely that the Defendants intended to carry out further work "to facilitate the residential use of the land and to bring mobile homes and residential paraphernalia on to the land without the benefit of planning permission."

8. The claim was supported by a statement of Claire Cutts (dated 15 June 2021), then the Deputy Team Leader of the Council's Planning Enforcement Team. Mrs Cutts' statement described the location, size and use of the land and confirmed, at para. 5, the Council's understanding that its lawful planning use was agriculture. The statement said that on 4 June 2021, the Council had received a report that a mobile home had been brought on to the land. On the same day, officers carried out a site visit, made contemporaneous notes and took photographs, all of which were exhibited. The statement recorded, at para. 9, that officers had found a mobile home in the northern corner of the land and that a substantial area of hard-surfacing, with black chipping on the top layer, had been laid at the vehicle entrance. It was some nine metres in depth from the edge of the carriageway and eight metres wide. Officers also found that a large black drainage pipe had been installed below the hard surfacing.

9. Mr Homewood had been present on the site when the officers visited on 4 June 2021 and he was questioned by them. Mrs Cutts' statement reported that Mr Homewood said that the mobile home was to be used an office serving the land but that he was unable to confirm his 'agricultural' plans for the land other than indicating that he and the Second Defendant may get a few animals in the future. Mr Homewood said that no-one was living in the mobile home and Mrs Cutts' statement recorded the officers' assessment that while it was not yet in residential use, the mobile home was not obviously in use as an office. Mr Homewood confirmed that the mobile home had been connected to the water and electricity mains supplies and there was a green metal electricity cabinet nearby. A large black plastic rectangle was also on the land which Mr Homewood said was a septic tank that had not yet been connected to the mobile home.

10. Mrs Cutts' statement exhibited an email sent by Mr Marc Willis, the Defendants' planning consultant, to the Council's planning enforcement team on 7 June 2021, three days after the officers' initial site visit ("**the Willis email**"). It said that Mr Willis had been instructed by the Defendants to prepare and submit a planning application "to establish a new agricultural enterprise on the land, including the siting of a temporary rural workers dwelling and ancillary development, in accordance with Policy HOU55 of the Ashford Local Plan." The email also said that the planning application and the supporting agricultural appraisal report was in the process of being finalised and should

be with the Council "within a few days" and the Defendants' plan was to establish a viable livestock breeding enterprise on the land. The email concluded thus:

> " … it is considered that the temporary siting of the single unit mobile home for use as a welfare unit and secure store in connection with the capital works taking place on the land is 'permitted development' by virtue of Schedule 2, Part 4, Class A of the General Permitted Development (England) Order 2015 and is therefore not a breach of planning control."

11. Mrs Cutts' statement exhibited the text of Sch. 2, Part 4, Class A of the General Permitted Development (England) Order 2015 presumably because it had been cited in the Willis email.

12. Mrs Cutts' statement explained that officers had carried out a second site visit on 14 June 2021 and the site visit note was exhibited. The latter recorded that no-one was on site; metal entrance gates were shut and secured with a D-lock and the black plastic septic tank remained in place. No continuing works were noted by the officers.

*The hearing of the Council's application for an interim injunction*

13. On 16 June 2021, the Council's without notice application for an interim injunction was heard by Lane J. The Council was represented (as now) by Ms Lambert and the notes of the hearing record that the judge was taken to the relevant parts of Mrs Cutts' statement and exhibits (including the notes of the first site visit on 4 June 2021 and the photographs taken by officers on the second site visit on 14 June 2021). The judge confirmed that he had all the exhibits.

14. The hearing note records Ms Lambert's summary of the Council's concerns thus:

> " … Other thing, which is odd is that a planning application will be forthcoming in matter of days. This is 4th June and Mrs Cutts has checked and there is no application on the system. When taking all of this together there is a strong suspicion why caravan is on the land. Not unusual while offices are closed. Because of pandemic, the council offices are closed. Makes it an ideal time to breach planning control. Addressing the without notice application – the council fears the intention to change the use, if notice was given, development would be undertaken and then it is difficult for council to enforce planning control once occupation is taken up."

The notes also say that Ms Lambert submitted that:

> "Because of size of land it may be other mobile homes brought on with several other agricultural workers. Mrs Cutts sets out in paragraph 23 why change of use will result in harm – because site is in open countryside and in Kent Downs, which is protected and will cause significant visual hardship, urbanising elements are at odds with landscape."

15. Having considered Mrs Cutts' statement and the exhibits (to which he made careful reference) and having heard from Ms Lambert, the judge made the interim injunction. In light of the argument advanced by Mr Fry, counsel for the Defendants, that the Council did not make full and frank disclosure at the hearing, I should highlight five points that were expressly considered by Lane J in his judgment: first, he was satisfied that the Council's serious concerns about the Defendants' intentions were justified; secondly, he concluded that there was no obvious reason why anyone needed to be present to deal with the agricultural aspects of management of the land absent any evidence of agricultural use of it; thirdly, that absence exacerbated concerns that the Defendants' intended to use the mobile home for residential purposes which, in turn, raised concerns about access to the highway; fourthly, the judge considered the Willis email and rejected the contention that placing the mobile home on the land was permitted development; fifthly, the Defendants' explanations did not allay, but only aggravated, the Council's concerns about their intentions.

16. The interim injunction prohibited the Defendants from using, or carrying out works to, the land in breach of planning control. That general prohibition was supplemented by seven specific prohibitions including one which forbade the Defendants from undertaking residential occupation of the mobile home on the land or bringing more caravans or mobile homes on to the land. The return date was fixed for 24 June 2021 and, pertinently, para. 3 of the interim injunction provided that the Defendants, if so advised, could make representations on the continuation, variation or discharge of the order. To that end, para. 4 provided that the Defendants could apply to the court on 48 hours' notice to the Council's solicitors to vary or discharge the interim injunction.

*The undertakings*

17. After service of the interim injunction, the parties reached a compromise under which the Defendants gave undertakings through their counsel (who then, as now, was Mr Fry) on which basis the Council's claim would be dismissed and there would be no order as to costs. The compromise is contained in a consent order, approved by H.H.J. Bowers Q.C. on 30 June 2021, which is subject to a penal notice ("**the final order**").

18. Subject to three limited (and, for present purposes, irrelevant) reservations, the Defendants' undertakings were as follows:

> "In this Order the Land means the land known as "Land at Bonnington Court, Bonnington" (also known as Land at Park Field, New Road Hill, Bonnington, Kent, TN25 7BA") registered at HM Land Registry under Title Number K707048, as more particularly shown on the plan attached to this Order, edged black.
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> Until planning permission is granted for development prohibited in this order, or further order, the First and Second Defendants (and each of them) UNDERTAKE (and each promise below is a separate enforceable undertaking) with immediate effect, not to do the following without planning permission (whether express or by development order) or to permit, instruct or encourage others to do the same:
>
> 1. Undertake residential occupation of the caravan/mobile home currently situated on the Land.
> 2. Change the use of the Land or any part of the Land from agricultural to residential use (including by stationing of further caravans and/or mobile homes on the Land).
> 3. Bring any further caravans and/or mobile homes for the purposes of human habitation or residential occupation on to the Land.
> 4. Erect on the Land any building capable of or intended to be put to residential use.
> 5. Take any other steps intended to prepare the Land for residential use (including by the stationing of caravans and/or mobile homes on the Land, spreading hardcore on the Land, and installing septic tanks)."

19. Para. 5 allows the Defendants or any other person affected by the order to apply to the court at any time to vary or discharge it subject to giving the Council notice. Mr Homewood relies upon this provision to make the application.

*The Defendants' application for planning permission*

20. On 2 July 2021, two days after they gave the undertakings, the Defendants applied for planning permission to change the use of part of the land to allow (a) the siting of a mobile home for use as an agricultural worker's dwelling, (b) the creation of vehicular access and (c) the erection of an agricultural building and ancillary development. The Council refused permission on 11 November 2021 and Mr Homewood appealed. On 30 September 2022, the Inspector allowed the appeal and granted conditional planning permission. Condition 9 is relevant and provided that:

> "The mobile home hereby permitted shall be for a limited period being the period of 3 years from the date of this decision. On or before the expiry of this period, the use of the mobile home hereby permitted as a dwelling shall cease, and all buildings, structures, materials and equipment brought onto, or erected on the land, or works undertaken to it in connection with the use of the mobile home shall be removed, and the land restored to its former condition."

*Relevant events since the Inspector's decision*

21. Since the grant of planning permission, Mr Homewood has built an agricultural building (also described as a barn in submissions and in this judgment) on the land. His evidence is that the land is being managed for agricultural purposes; his agricultural business is growing sufficiently well to allow him to employ two part-time employees; there are 43 alpacas, 45 sheep, ten chickens and seven beehives on the land. The access arrangements to the land have been approved by Kent County Council, the highways authority and Mr Homewood says that there have been no accidents or near-misses.

22. Following the grant of planning permission, on 3 October 2022, Mr Homewood contacted Sharpe Pritchard LLP (the Council's solicitors) to ask whether the Council would support an application by him to discharge the undertakings. There was no response and so on 2 March 2023, Mr Homewood sent an email directly to the Council to which there was no reply. On 20 February 2024, Mr Fry, on behalf of Mr Homewood, sent another email to Sharpe Pritchard asking for a without prejudice discussion about the undertakings with the Council. Various exchanges between Mr Fry and Sharpe Pritchard during the second quarter of 2024 failed to elicit any substantive response

from the Council. By the beginning of October 2024, two years after he first sent an email to the Council's solicitors, Mr Homewood had received no response to the question whether, given the grant of planning permission, the Council would agree to release him and the Second Defendant from their undertakings.

23. Notwithstanding the absence of any response to Mr Homewood, on 22 October 2024 (i.e. 13 days after the present application was made), Ms Joanne Alexander, the Council's Team Leader Planning Enforcement, visited the land and her findings are set out in her second witness statement (dated 7 February 2025). She concluded that the barn had not been constructed in accordance with the dimensions specified in the Inspector's permission. Ms Alexander's conclusion was robustly rejected by Mr Homewood who submitted an alternative set of measurements (summarised in his fourth witness statement (dated 9 February 2025)) to show that the barn was built in compliance with the permission.

24. Ms Alexander also considered that there were other potential breaches of planning conditions including (but not confined to) failing to gain approval for access arrangements before the works started; failing to install an electric vehicle ("**EV**") charging point; failing to gain approval for the proposed external lighting arrangements and failing to submit a landscaping scheme for approval. The substance of her assessment of the nature and extent of the alleged breaches are set out in "JA/22", the exhibit to her second statement. Apart from the question of the EV charging point, Mr Homewood denies that he has failed to comply with the relevant conditions and the detailed reasoning in support of his position is summarised in his fourth statement.

**PART 2 – the law**

25. Counsel confirmed that the law on the grant of injunctive relief, as set out at paras. 21-25 of Mr Fry's skeleton argument, was not contentious and applied equally to undertakings. For the purposes of this application, the relevant agreed principles can be summarised thus:

(a) The recent statements of the law governing injunctions against persons unknown and/or relating to protests generally apply to injunctive relief: see, for example, Ritchie J's approach in *HS2 v. Persons Unknown* [2024] EWHC 1277 (KB).

(b) On an application to review injunctive relief, the court should consider the continuing need for such relief. A claimant had to prove a real and imminent risk of serious harm. If nothing material had changed, if the risk still existed as before and the claimants remained rightly and justifiably fearful of unlawful conduct, an extension may be granted so long as procedural and legal rigour has been observed and fulfilled. However, if there had been material changes, the court is required to consider those changes, based on the evidence before it and in full light of the past decisions, to determine anew whether the scope, details and need for a full interim injunction should be altered. To do so, the original thresholds for granting the interim injunction still apply: see *HS2 v. Persons Unknown* [2024] EWHC 1277 (KB), paras. 31-33.

(c) Injunctive relief is discretionary. It reflects the power of the court to intervene where justice requires: *Wolverhampton City Council v. London Gypsies* [2023] UKSC 47, para. 150. That principle echoes the "just and proportionate" test under s. 187B of the Act. A litigant in possession of an injunction is under a continuing duty to keep the basis for maintaining it under review. This is a responsibility owed to the court and it is relevant to the court's grant of a discretionary and equitable remedy.

(d) An injunction, once granted, is not intended to be some form of proprietary benefit to the claimant. Instead, it is something that should be carefully controlled: *Wolverhampton City Council* [2023] UKSC 47, para. 167(iv). Injunctions should neither outflank nor outlast the compelling circumstances relied upon.

(e) The claimant's overall conduct is relevant as is the existence of other means by which the relevant problem could be addressed: *Wolverhampton City Council* [2023] UKSC 47.

## PART 3 – the application

*Generally*

26. The Defendants' application is prompted by three concerns: first, although they have been advised that following the grant of planning permission it is likely that the undertakings no longer apply, the Defendants remain concerned that any development of the land under permitted development rights might be misinterpreted by the Council as a breach of the undertakings and so the prospect of committal proceedings and the risk of custody and significant expense arise. Secondly, the Council's existing enforcement powers under the Act are sufficient to address any or any perceived breach of planning control whereas an application for committal would be a disproportionate and less effective means of achieving the same end. Thirdly, the Council's failure to provide any substantive response to the Defendants' request to be released from the undertakings only serves to exacerbate their nervousness about the Council's likely approach to their use of the land and the prospect of committal proceedings.

27. At the start of the hearing, Mr Fry said that although his skeleton argument identified three grounds on which he relied, he wished to added another ground based on the Council's alleged failure to give full and frank disclosure at the hearing before Lane J on 16 October 2021, a point which was said to have been prompted by the contents of late disclosure provided by the Council. The Defendants' application therefore rested on four grounds: first, because the Council failed to give full and frank disclosure to the judge at the hearing of its interim injunction application, it is doubtful (at the very least) whether the undertakings should have been given at all; secondly, the Inspector's grant of planning permission automatically discharged the undertakings; thirdly, the Council is under a duty to review the need for the undertakings but has failed to do so; fourthly, the undertakings are no longer necessary and/or their continuation is unfair.

*Preliminary matters*

28. Before turning to the grounds of the application, there are four preliminary points that I should address. The Defendants' overarching argument is that the basis on which the interim injunction was sought and granted was flawed. This original error has unfairly influenced subsequent events, including their decision to offer undertakings, to their

detriment. Reading the evidence as a whole, I am not persuaded that this argument, however strongly advanced, is right. It is tolerably clear that sometime before 4 June 2021 the Defendants bought a mobile home and placed it on the land, created a level base for it and made a driveway measuring approximately nine metres by eight metres. When the Council's officers visited on 4 June 2021, the Defendants had connected the mobile home to the water and electricity mains supply and arranged for the delivery of a septic tank to the land. The Defendants had neither sought nor received planning permission to do this work. For these reasons, I accept the Council's submission that the Defendants had carried out significant operational development without planning permission. There is also some considerable force in the Council's argument that the evidence suggests that the mobile home was intended to be a residential dwelling. Set against that background, Mr Homewood's answers to the Council officers' questions on 4 June 2021 were unsatisfactory. In my judgment, these matters provide some context for the Defendants' decision not to lodge evidence in response to the Council's case and not to apply to vary or discharge the interim injunction but instead to offer undertakings. As Ms Lambert submitted, they are also relevant to the present application.

29. Secondly, a consistent theme of Mr Fry's submission was that the undertakings were provided in response to the threat of costs should the matter proceed to a final hearing. Although there was no suggestion that the Defendants had acted under duress or that the Council's solicitors had acted improperly in any way, Mr Fry argued that the threat of continuing proceedings and the associated costs had effectively "coerced" the Defendants into providing the undertakings. I reject that submission. Once proceedings are issued, costs are always a relevant and legitimate factor in the parties' decision-making. I am told that in deciding what to do the Defendants had the benefit of legal advice from Mr Fry and they chose to offer undertakings and so avoid the risk of a substantial adverse costs order. In my judgment, neither the Council nor its solicitors can be criticised for saying that the Defendants would not incur significant costs if they offered undertakings on which basis the Council's claim would be withdrawn. On the facts of this case, it was a pragmatic solution to the situation and certainly not coercive.

30. Thirdly, a deeply unfortunate feature of this case is the Council's admitted failure timeously to answer Mr Homewood's request, first made on 3 October 2022, that he and the Second Defendant be released from their undertakings. Notwithstanding

various attempts between 3 October 2022 and 16 October 2024 to obtain a response, it was not until 13 December 2024 (the Friday before the original hearing on Monday 16 December 2024) that the Council said it opposed Mr Homewood's request. The Council's reasoned position was only articulated in Ms Alexander's first statement (served on 10 January 2025), some 27 months after Mr Homewood's original request. Although I have considerable sympathy for the significant pressures on the Council's planning team and the scarcity of sufficient resources to deal with their substantial volume of work, the failure to provide any, let alone any reasoned, response to Mr Homewood's request for more than two years is obviously unsatisfactory and, in my judgment, unreasonable. The relevance of the Council's failure to deal with Mr Homewood's request timeously and the weight to be attached to it for the purposes of this application are considered below.

31. Finally, Mr Homewood was concerned that there was some suggestion at the hearing on 16 June 2021 that he was a member of the travelling community and that point was relevant to the prospect of the land being occupied by more than one mobile home. It is, however, clear from Mrs Cutts' statement, Ms Lambert's skeleton argument lodged for, and the note of, the hearing that no such suggestion was made by anyone. It is equally clear that the judge's decision was not informed by any misapprehension or error on the point.

*Ground 1 – the alleged failure to provide full and frank disclosure and its consequences*

32. The Defendants contend that the Council failed to discharge its duty of full and frank disclosure at the hearing on 16 June 2021 because it should have placed four documents before the court but did not do so. As a result, Mr Fry submitted that the judge was not told everything that he should have been told and, for that reason alone, the making of the interim injunction and the offer of undertakings were "contaminated" and so the latter should be discharged. Ms Lambert accepted that the four documents were not before the judge but, essentially, she submitted they were of minor, if any, relevance and that the primarily relevant material (including the Willis email) was before the court. Accordingly, there was full and frank disclosure and the Defendants should not be released from their undertakings on this (or any other) basis.

33. I was not addressed in detail on the relevant principles but given the seriousness of the allegation, I should set out the law governing the duty of full and frank disclosure which was summarised by Carr J (as she then was) in *Tugushev v. Orlov* [2019] EWHC 2031 (Comm) at para. 7. She said:

> "The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:
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> i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
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> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;
>
> iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;
>
> iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;
>
> v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;
>
> vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

34. I have also directed myself to the additional considerations recently set out by the Court of Appeal in *Derma Med Ltd v. Ally* [2024] EWCA Civ 175:

> "30. Although this was said in the context of an application for a freezing order, the principles are of general application. I would draw particular attention, as relevant in the present case, to the fact that the overriding consideration when deciding whether to continue an injunction or grant a fresh injunction despite a failure of disclosure is the interests of justice; and to the need to maintain a due sense of proportion in complex

> cases. This latter point was made by Mr Justice Toulson in *Crown Resources AG v Vinogradsky* (15 June 2001) and was adopted by the Court of Appeal in *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381, [2014] 1 CLC 451 at [36]:
>
> > '… where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion. …
> >
> > I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees. …
> >
> > In applying the broad test of materiality, sensible limits have to be drawn. Otherwise, there would be no limit to the points of prejudice which could be advanced under the guise of discretion.'
>
> 31. A further point which merits emphasis is that even when there has been a failure of full and frank disclosure, the interests of justice may sometimes require that a without notice order be continued and that a failure of disclosure be marked in some other way, for example by a suitable costs order. A court needs to consider the range of options available to it in such an event."

35. The substance of the four documents that Mr Fry submits should have been disclosed can be summarised thus:

(a) An internal file note (dated 4 June 2021) which recorded the content of a report from Councillor Linda Harmon about the delivery of a mobile home on the land earlier that day and a summary of the information that the councillor had extracted from the Companies House website about Mr Homewood including his involvement in a company called Wilde Developments Ltd among whose objects was the buying and selling of land: exhibit 11 to Mr Homewood's fourth witness statement.

(b) A note of a telephone call (dated 7 June 2021) made by a complainant to the Council in which the former said that s/he had "heard they will keep alpacas on the field. Heard they will build a large number of houses on the field." The note also recorded advice given by the relevant Council officer to the complainant about what was permitted and that the matter was being investigated: exhibit 12 to Mr Homewood's fourth witness statement.

(c) A chain of internal email correspondence (dated 7 June 2021) which included an email sent at 4.35 p.m. from Mrs Cutts to Mr Roland Mills (whose role was not explained at the hearing). The former expressed concerns that a judge "may get wary" of making an interim injunction if there were concerns that placing the mobile home on the land was permitted development and she sought Mr Mills' advice. Although it was not submitted that the reply should have been before the judge, for the sake of completeness, I note Mr Mills' response, sent at 4.48 p.m., to the effect that he too was sceptical whether placing the mobile home on the land was permitted development and that the Council should apply for an interim injunction: exhibit 13 to Mr Homewood's fourth witness statement.

(d) A "service request" form (dated 15 June 2021, timed 5.13 p.m.) in which Mr Homewood made a street name and numbering application in relation to the land and said that he was seeking the registration of one new house which was a commercial property: exhibit 15 to Mr Homewood's fourth witness statement.

36. In short, the relevance of each of the four documents was, at best, peripheral. The Cutts statement said, at para. 7, that the Council had received a report that a mobile home had been brought on to the land. Neither the internal note nor the record of the complaint adds anything substantively relevant to the evidence that was already before the judge.

37. Mrs Cutts' email, sent at 4.35 p.m. on 7 June 2021, is a request for advice about whether placing the mobile home on the land was within the scope of permitted development. Essentially, Mrs Cutts was seeking assurance that proceeding with the application for an interim injunction was the right course based on the evidence that had been gathered. It adds little to the material before the court and it is no more than Mrs Cutts asking a colleague for a "sense check" of the merits of her intended course.

38. Similarly, Mr Homewood's street-naming/house-numbering application also has limited relevance. Although Mr Homewood said that there would be one house on the land, the nature and extent of the development found by the Council's officers on 4 and 14 June 2021 and Mr Homewood's unsatisfactory answers to their questions were far weightier evidence for the purposes of the hearing on 16 June 2021 and, critically, the Willis email set out the Defendants' position.

39. The answer to the primary question identified by Carr J in *Tugushev* is that, in all the circumstances, the effect of the absence of any or all of the four documents was not to mislead the court in any material respect. That is because they were, at best, peripherally relevant but, importantly, the Council had exhibited the Willis email which summarised the Defendants' position in response to the Council's concerns about development of the land. Lane J read and considered the Willis email when deciding whether to grant the interim injunction and he specifically referred to it according to the note of the hearing. In short, the judge had been given the relevant evidence upon which he could fairly decide the Council's application for an interim injunction. For these reasons, in my judgment, the Council discharged its duty of full and frank disclosure.

*Ground 2 – the undertakings have been automatically discharged by the grant of planning permission*

40. The Defendants' argument under this ground is two-fold: first, their undertakings subsisted until planning permission was granted for the development prohibited in the order, that is to say, residential occupation of the mobile home. The Inspector granted the Defendants planning permission which allowed, among other activity, residential occupation of a mobile home on the land albeit for a period of three years. For these purposes, temporary planning permission is a form of planning permission and the order of 30 June 2021 made no distinction between permanent and temporary planning permission. Accordingly, the undertakings were discharged by the Inspector's grant. Secondly, if and insofar as there is doubt whether the planning permission referred to in the undertakings should be permanent or temporary, by analogy with the approach taken in committal applications, any ambiguity should be construed in the Defendants' favour: *Redwing Ltd v. Redwing Forest Products Ltd* [1947] 64 RPC 67, para. 71.

41. The Council's position was pithily summarised by Ms Lambert, Counsel for the Council, in her skeleton argument: the suggestion that a time-limited permission for a temporary dwelling meets the definition of "planning permission" in the undertakings is a "stretch". If that contention is rejected, it still does not lead to the automatic discharge of the undertakings because only the first undertaking is covered by the planning permission whereas the others relate to the land and not just to a small parcel

within it. There is, therefore, no planning permission in place to discharge the rest of the undertakings.

42. The starting point is whether, as a matter of construction, the Inspector's grant of planning permission automatically discharged any of the undertakings. For those purposes, the "land" is as defined in para. 1 above and which was shown to be edged black on the attachment to the final order. The preamble provides that "until planning permission is granted for development prohibited in this order …" the Defendants each provided the five undertakings set out above. The first undertaking was solely concerned with the mobile home that the Defendants had brought on to the land. The scope of the remaining four was broader and concerned the land in its entirety.

43. As he explained at para. 7 of his decision, the appeal concerned "part of a large field with access from New Road Hill". For these purposes, the "land" was the "large field" and so the Inspector was concerned solely with that part of the land that was the subject of the proposed development and the appeal before him. The substance of the grant of permission is set out in paras. 89-95 of his decision and in the schedule of conditions. It is clear from those provisions that the grant of planning permission was confined to the mobile home, the proposed barn and related ancillary purposes. For the reasons given by the Inspector at para. 7 of his decision, the grant did not affect the rest of the land.

44. At the hearing there was little argument about the interpretation of the term "planning permission" and whether there were any specific reasons, by reference to the Act or any other planning legislation, why it should be read one way or the other. In my judgment, absent any qualifying words in the final order or any contrary submission relying on the Act or any other relevant enactment, the term was apt to include both time-limited and permanent grants of permission.

45. In relation to the first undertaking, the Inspector granted planning permission for the placing of the mobile home on the relevant part of the land. That, in my judgment, was sufficient to discharge the first undertaking which subsisted only until planning permission was granted or further order of the court. As the Inspector's decision made clear, as a matter of construction he was not granting permission in relation to the land

in its entirety to which the other four undertakings applied. The Inspector's grant was therefore not sufficient to discharge those undertakings.

*Ground 3 – the Council is under a duty to review the undertakings on which basis it should release the Defendants*

and

*Ground 4 – the undertakings are unnecessary and/or it would be unfair for them to continue*

46. Although grounds 3 and 4 focus on conceptually different points, they are both essentially concerned with whether there has been a material change in circumstances and whether it is just and convenient to discharge the undertakings. I shall therefore consider these grounds together.

47. In addition to the overarching points summarised above, the Defendants rely upon the Inspector's grant of permission, their compliance with the undertakings and the Council's delay in providing a response to their request to be released. In short, the Council submits that the Defendants' conduct in June 2021, their flagrant subsequent disregard of planning controls and the lack of transparency in relation to ownership of land separately and cumulatively demonstrate the continuing need for the undertakings.

48. First and foremost, irrespective of whether the first undertaking was discharged by it, the Inspector's grant (albeit time-limited and confined to a part of the land) is a material change in circumstances since the undertakings were given. Although the Council was concerned about the Defendants' plans for the land as a whole, the immediate prompt for issuing proceedings and making the interim order was the Defendants' actions in bringing the mobile home onto part of the land, connecting it to the water and electricity mains supply and building the access way all of which was done in the absence of planning permission. The Inspector carefully considered the evidence and concluded that, in relation to the mobile home, a time-limited grant of permission was justified. In particular, the Inspector concluded, at para. 91 of his decision, that the temporary three-year period was necessary to allow the alleged need for the mobile home to be reassessed at the end of what he described as "a trial period". In short, the Inspector conditionally granted permission in relation to the acts which had prompted the Council to seek injunctive relief and to accept the undertakings in the first place. He also granted

permission for the construction of the barn which, as far as I can tell, was not time limited in any way. These are also significant factors to be weighed against the Defendants' conduct, summarised in para. 28 above, which triggered the issue of proceedings in June 2021.

49. In considering the overall justice of the matter, it is relevant that there is no submission that the Defendants have breached their undertakings and there has been no application to commit the Defendants for any alleged breach of the undertakings. This is a substantial consideration which points towards allowing the application.

50. It is also relevant that, should the undertakings be discharged, the Council has alternative and effective means of dealing with any breach of planning control by the Defendants namely, its enforcement powers under the Act. This too is an important and weighty factor that inclines in favour of discharging the undertakings.

51. The question that caused me greatest concern is the Defendants' compliance with the conditions of the Inspector's grant of permission. As set out above, Ms Alexander concluded that the barn was not built in accordance with the relevant condition. Paras. 16-21 of her second statement and a supporting schedule also summarised other alleged breaches of conditions. Except in one respect, Mr Homewood disputes Ms Alexander's conclusions. The one admitted breach is a failure to install an EV charging point until 2025 which was a breach of the Inspector's condition number 5.

52. One further point that emerged during the hearing concerns the barn which had a dozen more roof-lights than was permitted. Mr Homewood explained that responsibility for the breach lay with the builders, not with him. He also pointed out that, had he tried to do so, given the absence of any response from the Council to his request to be released, there was little prospect of any timeous or useful engagement from the Council in response to any attempt to regularise the planning treatment of the additional roof-lights. That said, there is no evidence that Mr Homewood made any attempt to regularise the position.

53. The reality is that, apart from the EV charging point and the barn's additional roof-lights, the court is not in a position to resolve the competing allegations about the

Defendants' compliance or otherwise with the rest of the Inspector's conditions. The delay installing the EV charger is a minor breach. In contrast, the question of the barn's additional roof-lights is a relatively more significant infringement and one which is aggravated by Mr Homewood's apparent failure to do anything to rectify it. These matters should also be read with the Council's justified criticism of Mr Homewood's less than clear explanations of the precise ownership of the land. However, viewed in the overall evidential context, these matters are not so significant as to outweigh the substantial factors in favour of allowing the application. In any event, should the Defendants not adhere to any planning conditions, the Council has its enforcement powers under the Act to ensure compliance.

54. Finally, the Council's unsatisfactory and unreasonable delay in responding to the Defendants' requests highlights the potential unfairness in maintaining the undertakings for longer than is justified by events. The delay not only illustrates the Council's failure to keep the need for the undertakings under review, but it also leaves the Defendants exposed to the risk of committal proceedings in circumstances where the justification for the undertakings is no longer present and there are alternative adequate and effective means of dealing with any failure to comply with the Inspector's grant or planning requirements generally. As the Supreme Court identified in the *Wolverhampton* case, there is no proprietary right in an injunction (or, as here, an undertaking) and they should neither outlast nor outflank the facts that originally justified them. As matters stand, in my judgment, the real and imminent harm flowing from unpermitted development on the land no longer exists and, in all the circumstances of the case, it is just and convenient to discharge the undertakings.

## Conclusion

55. For the reasons set out above, the application is allowed. I will consider any consequential applications in writing or, if necessary, at a short hearing. Finally, I would like to express my thanks to Mr Fry and Ms Lambert for their assistance and to those who prepared the application bundle.