

RTPI PLANNING ENFORCEMENT WEEK (19TH – 23RD OCTOBER 2020)

PROSECUTIONS AND INJUNCTIONS

(21st October 2020)

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Prosecutions

- Authorisation of prosecutions and confiscation under POCA
- Disclosure

Injunctions

- Injunctions post-*Bromley*

PROSECUTIONS

R. (on the application of Kombou) v. The Crown Court at Wood Green [2020] EWHC 1529
(Admin)

Authorisation of prosecution and POCA

1. There is a crucial distinction between investigators legitimately considering the possibility of confiscation proceedings, and the decision-maker being improperly motivated to decide in favour of prosecution by the prospect of financial gain to the authority.
2. When deciding whether it is in public interest to prosecute it may be legitimate to consider whether the breach of planning has resulted in financial benefit of which the offender may be stripped by the court but would otherwise be able to retain.
3. The CPS Code for Crown Prosecutors expressly identifies that premeditation and the extent of benefit from offending are specific matters relating to an assessment

of culpability in considering the public interest in prosecuting (note this is not referred to in *Kombou*).

4. There is a distinction between the CPS as a prosecutor and a local authority, where the direct receipt of incentivisation payments under the Home Office ARIS scheme has the potential to give rise to a serious conflict of interests (or the appearance of the same).
5. The yardstick (when considering the suggested appearance of improper motivation of the decision to prosecute) is the view of an observer who is both fair-minded and informed.
6. The Court recognised that it will often be necessary, before a decision to prosecute is taken, for someone within the authority to consider the possibility that confiscation proceedings might be brought: it may for example be necessary to consider an application for a restraint order pursuant to section 40(2) of POCA during the investigation, and it may be necessary to consider the allocation of limited resources as between a number of investigations.
7. There is a distinction between investigators considering confiscation/restraint proceedings (which is permissible) and a decision-maker being improperly influenced by the prospect of financial gain to the authority (which is prohibited).
8. The distinction may not always be immediately clear; authorities can expect to continue to be challenged regarding this and should ensure that decision-taking processes are clear as to the reason(s) why prosecution and POCA are being pursued and the role that any awareness of POCA has played in the authority's handling of an enforcement matter leading up to any decision to prosecute.

Disclosure

9. Disclosure is an obligation of the prosecutor, not of the court or the judge. This concerns materials which are not evidence in the case – for example, internal memos, emails, file notes etc.

10. It has a particular pertinence in relation to authorisation to prosecute and POCA considerations, where documents/emails discussing or mentioning the same are likely to fall to be disclosed.
11. A free-standing duty on the investigator to pursue all reasonable lines of enquiry whether they lead towards or away from any person (including current suspect(s)) and to record/retain information obtained.
12. All of that information should be reviewed and materials which might reasonably be expected to undermine the prosecution or assist the defence (including in abuse of process applications or mitigation) must be disclosed. An initial review of the unused material should be undertaken by the “disclosure officer” and a decision to disclose or not be taken by the lawyer who reviews the file. Ultimate decisions on disclosure rest in the hands of the prosecution advocate at court, in connection with their overriding duty to the court.
13. A failure in disclosure is sufficient reason in itself to stop a prosecution entirely.

INJUNCTIONS

London Borough of Bromley v. Persons Unknown and others [2020] EWCA Civ 12

14. *Bromley* does not represent a complete prohibition on ‘wide area’ injunctions however they are a last resort where no other solution exists to a problem. Realistically such injunctions will be difficult to justify as they are likely disproportionate.
15. An applicant authority will need to show (in evidence) that the order sought is compatible with the nomadic habit of gypsies and travellers. Blanket bans are likely not compatible; a more granular and focussed assessment of sites to be protected will be necessary and be shown in evidence. Sites more likely to justify an order (and be less likely to involve an unacceptable constraint on nomadic lifestyles) are:

- a. Environmentally sensitive sites
 - b. Locally valued sites
 - c. Sites with a history of incursions
 - d. Prominent sites where occupation can reasonably be said to be likely to result in considerable disruption
16. Evidence of credible alternative sites will be needed, including transit site availability (or evidence of why the lack of transit sites is acceptable and what policy/policies the authority has which appropriately address the situation of gypsies and travellers in transit through an area). Ultimately this arises as an issue because of the tension between the nomadic habits of gypsies & travellers and the failure to provide adequate transit sites (and the solution will ultimately be to provide more transit sites).
17. Evidence of engagement with those affected by any order and a substantive assessment of the impacts of an order on those persons will improve the likelihood of securing an order – account for the specific needs and vulnerabilities of those affected (especially children – particular requirement to have regard to the best interests of the child). Undertaken prior to pursuit of enforcement action, with special consideration of how and when such engagement is attempted.
18. Will mean there are circumstances where seeking an order will not be justified because the impacts of seeking an order are not proportionate to the harm(s) arising from the entry/encampment.



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