Neutral Citation Number: [2019] EWHC 1619 (QB)

Case No: F90BM116

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2019

Before :

MR JUSTICE WARBY

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Between :

Birmingham City Council	**Claimant**
- and -	
(1) Mr Shakeel Afsar	
(2) Ms Rosina Afsar	
(3) Mr Amir Ahmed	
(4) Persons Unknown	**Defendants**

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Jonathan Manning (instructed by **Birmingham City Council**) for the **Claimant**
John Randall QC and James Dixon (instructed by **Safaaz Solicitors**) for the **First to Third Defendants**

Hearing date: 10 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WARBY:

1. On Monday 17 June 2019, I handed down my reserved judgment giving reasons for the decisions announced at the hearing on 10 June 2019: [2019] EWHC 1560 (QB). Draft orders have since been drawn up, and largely agreed, leaving only one matter for decision: whether the claimant Council should be required to give undertakings in damages. This is an issue that was raised by me. By agreement, I have resolved that issue on the basis of written submissions, for which I thank Counsel.

2. My conclusion is that, in the particular circumstances of this case, the Council should provide undertakings in the usual form: to comply with any order the Court may make if the Court later finds that the injunctions I have granted have caused loss to any defendant or third party for which that defendant or third party should be compensated. The Council has made clear that if this was my conclusion the undertakings would be forthcoming, so I accept them.

3. The relevant principles appear to be these:

    (1) The long-standing norm in civil litigation is to require the applicant for an injunction to provide these undertakings; the rules now provide that this should be done "unless the Court orders otherwise": see PD 25A para 5.1(1). The onus is therefore on an applicant which wishes to be exempted from this requirement to show why that should be done. The presumption in favour of such undertakings is reflected in the Model Order.

    (2) There is no such presumption when it comes to third parties. When they are concerned, the Court must consider whether to require an undertaking to compensate them: PD25A para 5.3. But the norm, in litigation affecting Article 10 rights, is to require such an undertaking: see, again, the Model Order.

    (3) The old rule that the Crown should never be required to give such an undertaking is a thing of the past. Such an undertaking *may* be required of central or local government bodies, or other public bodies. But this should not be done as a matter of course. This is nowadays a matter of discretion; the propriety of requiring such an undertaking should be considered in the light of the particular circumstances of the case, and what the Court considers fair in those circumstances. See *Hoffman-La-Roche v Secretary of State for Trade and Industry* [1975] AC 295, 364 (Lord Diplock); *Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227, 274 (Lord Goff of Chieveley); *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11 [33] (Lord Neuberger).

    (4) A factor of general importance that needs to be borne in mind, when exercising the discretion, is the fact that in general – with few exceptions – English law does not confer a remedy for loss caused by administrative law action: *FSA v Sinaloa* [31]. The exceptions identified by the Supreme Court were misfeasance in public office and cases of breach of the Convention rights, within s 6(1) of the HRA.

(5) Other relevant considerations identified in the cases cited above include whether the authority is acting pursuant to a statutory duty in seeking relief; the fact that the authority is only accorded limited resources to fulfil its functions; whether some other person or body would be able to, and would, act if the authority did not; and the undesirability of dissuading or deterring a public authority from acting in the public interest.

4. Another factor which seems to me to be relevant is the nature of the undertaking itself. Two features may be important. First, it is for the respondent to show that loss has been suffered, and that this has resulted from the grant of the injunction. Secondly, the Court retains the power, and duty, to decide whether, in all the circumstances, the respondent should be compensated for that loss. This must of course be done in a principled way. But by the same token, it must mean that in reaching a decision the Court should take into account the general rule against awarding compensation for loss caused by administrative action undertaken on behalf of the public, and in the name of the public interest.

5. Here, I take account of the following: (1) The Council has a duty to protect public rights to use the highway, but that is not at the centre of its claim. The provisions that are principally relied on (s 222 of the Local Government Act and, in particular, the 2014 Act) are permissive. (2) The main target of the action is anti-social behaviour in the form of speech. The nature of the behaviour is harassment, causing alarm or distress, to individuals. The action is not being taken on behalf of the public at large but rather a section, or some sections, of the public. The main beneficiaries are teachers, other staff, and pupils at the school. (3) The individuals concerned could, in principle, bring their own private law actions to prevent harassment, if it attained the level of criminal behaviour required by the Protection from Harassment Act 1997. If they did so, they would undoubtedly be required to give undertakings as to damages. (4) There is nothing wrong with the Council pursuing this action in their stead, but there is no particular magic in the fact that a public authority is taking on that burden. It seems to me to be reasonable to provide the respondent/defendants with a corresponding level of protection. (5) The fact that the action is brought by a public authority, and (by concession) interferes with the Convention rights of the respondent/defendants is a factor in favour of exercising my discretion to require the undertakings. Breaches of the Convention by public authorities can sound in damages, where that is necessary. This is one of the recognised exceptions to the general rule. The provision of an undertaking sets up a relatively simple mechanism for the resolution of any such claim. Finally, (6) there is little prospect that the provision of these undertakings will in practice impose a great burden on the Council. It is improbable that the injunctions will cause any material loss; the damage which could realistically be suffered is injury to rights and freedoms. Those are not to be treated lightly, but the scale of any compensation required, even if unlawful conduct were established, would probably be relatively modest. Again, the provision of undertakings is a proportionate means of dealing with the assessment of any such compensation.

6. It will be noted by the defendants that I have not accepted their submission that the Council is "acting in its own interest" in this matter. That seems an artificial way to describe the nature of the claim. Nor have I accepted the defendants' submission that factors in favour of requiring undertakings include what they call the "vindictive conduct of the School", and the (alleged) fact that the School undertook no

consultation as regards the delivery of the teaching which is the subject of the protest. I could not make factual findings about those matters at this stage, nor do I see clearly their legal relevance, or a route by which they would feed into the exercise of my discretion if I upheld what the defendants allege.