IN THE BRIGHTON COUNTY COURT **Claim Number: 0BN02918**

BETWEEN:

Before Mr Recorder Luba QC

BRIGHTON AND HOVE CITY COUNCIL

Claimant

- and -

(1) CHRISSY ALLEYN

(2) JACK SMOULKES

(3) JONATHAN HANSON

(4) PERSONS UNKNOWN

Defendants

JUDGMENT
5 April 2011

Date of Hearing: 29 March 2011

Mr Simon Sinnatt for the Claimant

Mr Stephen Cottle for the three named Defendants

This is a reserved judgment to which the provisions of, and embargo in, CPR PD 40E apply, save that paragraphs 3 and 4 of that Practice Direction shall not apply.

Introduction

1. This is a claim for possession of land at Coldean Wood, Stanmer, Brighton ('the land'). The claimant, the Brighton & Hove City Council ('the Council'), is the owner of the land. The defendants are in occupation of the land in an assortment of caravans, trailers and other vehicles in which they reside. The Council has granted no lease or licence for anyone to reside on the land and none of the defendants have any authority to be living on the land.

2. The land comprises a large open sloping field edged by trees. It is open land accessible by pedestrians and is normally available for the use of walkers, in particular dog-walkers, and others wishing to use an open space. A footpath or track runs from the village of Coldean across the field and gives access to an area of woodland (Great Wood) and other open land beyond. The land is situated adjacent to a campus of the Brighton University. The land can only be accessed by vehicles by their travelling over a private road belonging to the University and thereafter by directly driving on the surface of the grassland.

3. Prior to occupation by the defendants, the land had no toilet facilities, running water, or any paved access beyond the University's private road. It still has no such facilities.

4. In May 2010 it first came to the attention of Council that a small group of individuals had set-up an encampment on the land. An inspection in June 2010 revealed that there were 15 lived-in vehicles. The numbers later increased significantly into the summer of 2010.

5. In August 2010, following proceedings in this Court, a number of the occupiers were evicted from the land. By these further proceedings the Council seek possession against the remaining occupiers who are a combination of the three named defendants and a much larger number of 'persons unknown' (including members of the three named defendant's families). On 20 December 2010 District Judge Clark made an order for possession of the land in respect of all occupiers save the three named defendants and their households. Directions were given for a trial of the claim against

the three named defendants. That adjourned claim was tried before me on 29 March 2011.

6. The Council relies for possession on its undisputed title to the land. That legal right is not in issue. Rather the claim is defended on two alternative grounds:

   (1) the decision to evict the three named defendants - and to press that decision to trial - was unlawful in that it was made in breach of public law principles and, accordingly, the claim for possession must be dismissed; or

   (2) there would be an infringement of the Article 8 rights of the three named defendants if the court were to sanction an eviction by making a possession order and, consequently, such order should be refused or at least deferred.

The Three Named Defendants

7. The following brief account of the circumstances of each named defendant is taken largely from their witness statements and from the statements of the Council's officers, the relevant content of which was not substantially challenged.

8. The first defendant is **Ms Chrissy Allen**. She lives with her daughter (of school age), her brother and other family members in a collection of numerous caravans and other vehicles that she states would equate to "around 200 feet along the kerbside". After a peripatetic early adult life, from 2000-2009 she was a tenant of accommodation in Bognor Regis. Since she took up residence in a caravan again, she has travelled widely in the UK and Europe and more recently occupied a number of unauthorised sites on both public and private land in the Brighton area, being evicted in turn from each. She moved onto the land subject of this claim in June 2010 following her eviction from privately owned land which she had occupied for some four months. Her witness statements recount a complex personal and medical history but indicate that at present she is receiving no medical treatment save regular monitoring. In November 2009, the Council accepted that it owed a duty to assist her by provision of accommodation under the homelessness legislation and gave her a Band A priority in

its social housing allocation scheme enabling her to bid for properties of her choice. No bids were made. In August 2010, the Council wrote to inform her they would be making bids on her behalf and outlined the procedure to be followed if she refused an offer of housing without just cause.

9. The second defendant, **Mr Jack Smoulkes**, is the first defendant's adult brother. He was born in a vehicle on a traveller site to an itinerant mother and has never lived in conventional housing. His time has been spent on authorised Gypsy/Traveller sites and in unauthorised encampments. He has lived in and around Brighton since 2008. He suffers from a severely contracted and ulcerated bladder for which he receives medication and both GP and hospital treatment. It is a long term condition. At his request the Council provided a flushing toilet facility for him from July 2010 to January 2011 until the mud (caused by unauthorised vehicles entering on the land) became impassable. He was included on his sister's 2009 homelessness application and the Council's duty to accommodate her is acknowledged to extend to him. He has also been advised that he may make his own homelessness application. He was a named defendant to an earlier set of possession proceedings relating to this land and in the course of them his solicitors suggested to the Council that he would give up possession in October 2010 if the Council did not seek to enforce the possession order before that date.

10. **Mr Jonathan Hanson**, the third defendant, has been travelling for over 20 years. He has four daughters and a son living with him. They range in age from 5 to 16 and are at local schools and a college. The children have all been born while Mr Hanson has been travelling and, at least since the death of their mother in 2009, he has been their sole carer. With short interruptions, he has spent most of the period from 2003 to date on unauthorised sites in the Brighton area. He spent the period from October 2003 to April 2006 living on the Council's transit site until (on the Council's account) he was evicted pursuant to a possession order granted for non-payment of pitch fees or (on his account) it closed for refurbishment. He is a member of the Sussex Community Land Trust which is a group of travellers seeking to identify land which they can collectively own and on which they can lawfully reside.

11. Mr Hansen moved onto the land in July 2010. Shortly afterwards his then partner tragically died. He has applied to the Council for assistance under the homelessness legislation. A duty to accommodate him was accepted and in July 2010, in response to an indication that he did not want conventional housing, he was invited to identify potential sites for his caravans. He provided eight suggestions each of which the Council investigated and found unsuitable -- for reasons explained to him in writing. He too was given Band A priority to bid for Council housing. No bids have been made. He was also offered the option of a possible stay of up to three months on the Council's transit site. He set out his circumstances in a letter to the Council dated 9 November 2010. An offer of a three bedroom house was made in January 2011. The Council received no reply to the offer and wrote to him in February 2011 to indicate that its duty had been discharged. His solicitors responded that the accommodation offered was not 'suitable' due to a bricks-and-mortar aversion and asked the Council to review the discharge-of-duty decision. The review has yet to be completed.

The Council's Response to the Encampment

12. The defences raised by the defendants must be seen against the background of the Council's actions taken in response to the occupation of its land.

13. Within the Council responsibility for dealing with any unauthorised encampments falls to the Traveller team who are also responsible for giving effect to the Council's published Traveller Strategy (June 2008). The team was prior to November 2010 based in the Council's Environmental Health Department but is now within the Housing Department. The team's Head of Operations is Mr Jonathan Fortune who is not only an Environmental Health Officer but has also had three years experience as a housing services manager. It was he who had responsibility for making decisions on behalf of the Council about what action (if any) should be taken in respect of any unauthorised occupation of the Council's land. Day-to-day liaison with those in occupation fell to his subordinates Ms Peters and Mr Hall who are Traveller Liaison Officers. I had the benefit of written and oral evidence from both Mr Fortune and Mr Hall.

14. The history of the Council's dealings with this particular land from the date of occupation to the present date can be shortly stated.

15. As I have already noted, the land was first inspected post-occupation in June 2010 and 15 lived-in vehicles were found. During that visit, health and welfare letters were attached to all the vehicles, seeking information about the circumstances of the occupiers.

16. A further visit on 30 June 2010 found 20 lived-in vehicles. By that time the occupiers included the three named defendants. They had all been recently evicted from other sites in the Brighton area.

17. On 8 July 2010 a further visit to the land found 46 lived-in vehicles. The Council received complaints about the encampment shortly after this visit and a noise abatement notice was served on 23 July 2010. There was no appeal against it.

18. As already noted, the majority of the occupiers of the land were then removed in August 2010 by order of this court granted in earlier proceedings (Claim No.0BN01737). The Council had become aware that Mr Hanson's partner had died and therefore did not include him or his family in the recovery of possession at that time, notwithstanding that this Court had granted an unqualified order for immediate possession. Likewise, Mr Smoulkes was not evicted on account of his disability and his sister (Ms Alleyn) was also permitted to remain. As were all their family members. All three named defendants were very well known to the Council's staff responsible for liaison with travellers.

19. On a further visit on 3 November 2010 the Council found that there were some 21 lived-in vehicles on the site. Health and welfare letters were again affixed to the vehicles during the visit.

20. On 24 November 2010, the Council issued these possession proceedings. As against the named defendants, they were adjourned with directions in December 2010.

21. On 25 January 2011, there was a further visit by Council officers to investigate complaints made about stray dogs on the site. Council staff carried out a further visit to the land on 27 January 2011 as part of its bi-annual count of travellers in its area. It found 19 lived-in vehicles.

22. Since June 2010 there have never been less than 18 lived-in vehicles on the land and over much of the period that the encampment has been present, special provision has been made by the Council to temporarily provide bottled water, a toilet facility to meet the medical needs of the second defendant and waste/refuse collection. That has cost the Council in excess of £10,000.

23. Between 24 February 2011 and 1 March 2011, the Council received eleven letters of complaint about the encampment on the land from residents in the surrounding area. Further complaints have been made and received since.

24. As that account indicates, there has been frequent contact between Mr Fortune and his staff and the various occupiers. And other communications between the Council's Housing Department and the occupiers. The Council's relevant staff were, in my judgment, fully appraised of the circumstances of the occupation and of the occupiers and, to the extent that there was more relevant information to be gleaned, there had been repeated invitations and opportunities for it to be provided.

25. Mr Fortune explained that there had been an initial period of toleration of the encampment. Not least in the initial absence of complaints. But later, following receipt of such complaints, and in particular service of a noise abatement notice and nuisances from the noise of music and generators, a decision to clear the site was taken in July 2010.

26. Despite the order made on that initial possession claim, the decision taken by the Council was to leave the three named defendants *in situ* and permit a further period of toleration for the reasons already recounted. The period of further tolerance expired in the autumn of 2010.

27. Mr Fortune at that point decided that the land should be cleared of the unauthorised encampment. One of the factors he took into account, but not the predominant one, was that the University was about to begin planned reconstruction and development of its own site and in consequence of those works the named defendants and the other occupiers would be trapped on the land without vehicular access.

28. The present proceedings for possession were then issued but, in the event, the planned works relating to the access road have been deferred and will not now proceed until 2013. Until then, the work which is underway at the University can be conducted without impact on access to the land.

29. However, Mr Fortune resolved to press on with the possession claim. His evidence was that for him the question of whether to desist or proceed was a matter of balancing the interests of the occupiers and the interests of other members of the community. He decided that the balance had shifted, given the duration of the unauthorised encampment, its size and its location, in favour of a clearance of the land. He candidly stated that his general disposition was to support travellers where possible but that in this case he was satisfied from the representations of local residents, a councillor and the local resident's association committee (whom he had met) that the balance favoured removal of the encampment.

30. He took into account the Council's Traveller Strategy and its Homelessness Strategy and he knew that the Council's policy objective was to avoid or prevent homelessness where possible. But he resolved to press ahead. Although receipt by the Council of complaints of noise, roving dogs and other nuisances and unpleasantness were factors in the decision he made, what had primarily shifted the balance was the adverse effect on the residents of loss of their amenity use of the land for walking, dog-walking, and other general recreation.

31. I record immediately that my assessment of Mr Fortune's evidence and that of Mr Hall was that it was careful, measured and wholly truthful. There was no hint of any exaggeration or of a desire to strengthen or bolster the Council's position in the proceedings. Indeed, part of Mr Fortune's explanation for not giving greater weight to the residents' complaints about noise, unsightly refuse and public defecation and

urination on the land was that those living on unauthorised encampments are often subject to such complaints, of matters both imagined and real.

The Public Law Defences

32. Mr Cottle advanced in his written and oral submissions a conventional public law challenge to the Council's decision to maintain the possession proceedings. The nature of the challenge was not immediately apparent from the Defences of the three named defendants nor from the Skeleton Argument furnished on the eve of the trial. That should not have been the case. It is trite law that, given the 'presumption of regularity' in administrative law, a claim of illegality on the part of a public body should be expressly pleaded and properly particularised and thereafter supported by written evidence.

33. As distilled by Mr Cottle in submissions, his grounds for the public law defences were that:

    (1) in respect of the third defendant (Mr Hansen), the Council had misdirected itself as to his status. Had it properly directed itself, it should have decided that he was a 'Gypsy' or 'Traveller'. If it had so directed itself, it would have taken into account the fact that he was entitled to the indirect benefit of the duty imposed by section 225 Housing Act 2004 which requires the Council to carry out an assessment of the accommodation needs of the gypsies and travellers in its area. Had it properly considered the matter it would have found him to be within the definition of "gypsies and travellers" applied to that section by statutory instrument. Had it done that, it may well have decided not to evict Mr Hansen because it had made no sufficient site provision available for Gypsies or Travellers in its area; and/or

    (2) in respect of both the first and second defendants (Ms Alleyn and Mr Smoulkes) the Council had failed to have regard to the fact that it was a housing authority and had failed to take into account the relevant statutory housing provisions by providing them with sufficient accommodation.

Mr Sinnatt made clear that the Council would not be prejudiced if the grounds, so distilled, were immediately tried on the available evidence.

34. In my judgment there is no substance in either ground of challenge. Neither would have survived preliminary scrutiny had they been pursued by way of judicial review in the Administrative Court and been required to pass through a permission stage. I can express my reasons relatively briefly.

35. The cornerstone of the first ground was Mr Cottle's reliance on the Council's published Traveller Strategy. This document, he submitted, drew a distinction between on the one hand "van-dwellers" and on the other "gypsies and travellers". The latter it treated more favourably than the former in relation to toleration of unauthorised occupation and potential provision of alternative sites. Mr Cottle's case was that Mr Fortune had wrongly treated Mr Hansen as simply a member of the former class rather than the latter. In consequence he had ignored or overlooked duties or advantages that he might have been owed as a 'gypsy' or 'traveller'.

36. In my judgment, Mr Cottle's submission fails at first base. On a true construction, the part of the Travellers Strategy that deals with "van-dwellers" (page 17) does so only in the context of addressing a response to unauthorised encampment *on the highway*. On a fair reading it has nothing to do with unauthorised encampment on non-highway land such as the instant encampment.

37. Even if that be wrong, there is not shred of evidence to support the contention that the defendants were dealt with as mere "van-dwellers". The assertion was not even put to Mr Fortune when he gave his evidence. To the contrary, the evidence of Mr Fortune was clear, consistent and compelling. He dealt with all the occupiers under the general provisions of the Travellers Strategy applicable to gypsies and travellers without any discrimination according to the nature of their history as travellers or their ethnic or cultural designation. True it is that Mr Hall had expressed in his written evidence a personal opinion that neither Mr Hansen nor the other two named defendants were gypsies or travellers. But he did not discuss their status with other officers and took part in no decision-making by the Council about their status. His written evidence was that "the Council has always dealt with him as if he were a Gypsy or Traveller"

(Witness Statement para 13). The account of Mr Fortune, his superior who actually took the decisions, was "The Council has always treated [the three] as though they were Travellers" (Witness Statement para 31).

38. Contrary to Mr Cottle's submissions, nothing would in any event have been gained by an exercise in precisely categorising the status of Mr Hansen or the others. They were all treated by Mr Fortune as being persons entitled to the benefit of the full range of the Council's relevant responsibilities as captured in the Travellers Strategy. There was no suggestion by Mr Cottle that that document failed to accord with the relevant legislation or central government guidance. In oral submissions and in further written submissions post-hearing, Mr Cottle placed repeated reliance on the proposition that Mr Hansen ought properly to be have been considered a Gypsy and · it seemed – should be found to be such by this Court. I can identify nothing that would have been relevantly gained for Mr Hansen from the Council having expressly engaged in such an exercise or that would be gained by the Court undertaking it now.

39. The Council has treated Mr Hansen as a traveller for the purpose of making enquiries of both East and West Sussex County Councils as to places on traveller sites but they have had no available spaces on recognised traveller sites. It has treated him as a traveller by including him (and the others on the land) in its bi-annual count of travellers on unauthorised sites pursuant to its Traveller Strategy and its statutory duty to assess need.

40. Moreover, even if Mr Hansen had been wrongly treated as a mere "van-dweller" that had resulted in no loss of advantage to him. The Council's transit site pitches are available to him without regard to his status as the Council explained by letter dated 21 July 2010 to his solicitors. In that letter the Council also clarified that the permanent site it was developing for gypsies and travellers would, once completed, be available for use "also by those who describe themselves as van-dwellers". He is thus entitled to access the transit site and the more permanent site under development.

41. I am wholly unable to identify any adverse impact on him whatsoever - even assuming that in his favour there was some public law irregularity by the Council to

ascertain or identify what was referred to at trial as his precise 'status'. In the event, I have found that there was no irregularity.

42. In respect of the second dimension of the public law defence, advanced for the first and second defendants and described at paragraph 33(2) above, the evidence adduced before me ran flat contrary to Mr Cottle's submissions. The Council *had* received, entertained and determined an application for assistance under the statutory homelessness provisions from Ms Alleyn (which included provision for Mr Smoulkes). Mr Smoulkes had been advised that he could make his own application if he wished but he had not done so. There was no suggestion that they had not been dealt with correctly.

43. Ms Alleyn has received notification that the Council accepts that it owes her the main housing duty arising from her homelessness and would provide her and her brother with suitable accommodation. My description of her entitlement to accommodation has already been has already set out.

44. Mr Fortune's evidence was that he had been aware of the fact that the defendants' homelessness applications and their outcomes were being dealt with by the Council's officers when he took the decision to proceed with their eviction. Given his professional experience, he was aware of the Council's responsibilities. However, he had not personally enquired of his colleagues what precise provision was to be made in performance of the Council's duties towards the two particular defendants if an eviction were to proceed.

45. Mr Cottle submitted that, in effect, this had been a matter into which Mr Fortune should have delved and his failure to do so had disabled him from taking into account a relevant matter. That matter was that the Council was highly likely to offer only bricks-and-mortar accommodation and that Mr Smoulkes and Ms Alleyn were highly likely to refuse it. So that, if they were evicted, there would be nowhere, and in particular no lawful alternative site, for them to move to.

46. I cannot accept that submission. First, in my judgment, there is no public law duty upon the Council to stay its hand - in seeking possession of its own land against

unauthorised occupiers - until the final outcome of any homelessness application that they may have made is known. No authority in support of such a proposition was advanced to me. The Council is normally entitled to proceed on the basis that its relevant officers will properly meet any duties owed under homelessness legislation at the point of eviction. Certainly, the Council will normally need assurance that applications for homelessness assistance have been elicited and made and are being dealt with. But Mr Fortune had that assurance.

47. Second, even if I am wrong and the scope of the Council's public law duty is as broad as Mr Cottle would have it, I am not satisfied there was any further relevant information that could or would have obtained by any further enquiry made by Mr Fortune. He was very familiar with both of the relevant defendants given their extensive history of unauthorised occupation of land in the Council's area and his responsibilities as the Council's relevant officer dealing with such occupations. He knew that there were no permanent sites for those travellers, such as the defendants, who wished to remain in the Council's area. He knew that provision under the homelessness duties might be made available by way of conventional accommodation which, given their history, both defendants may find unacceptable. In short, I am satisfied from his evidence that he well appreciated that any eviction from this land may have the possible result of the two defendants moving onto some other unauthorised site in the Council's area. In short, no material consideration was overlooked or ignored in taking the decision to proceed with the possession claim.

48. It is for those reasons that I reject both the grounds on which the public law defences were advanced. On the evidence, neither of them was ever capable of being sustained.

The Article 8 defences

49. Each of the three named defendants asserted, through Mr Cottle, that an eviction from the land would be an unlawful interference with their rights protected by the Human Rights Act 1998 Schedule 1 Article 8. The Article provides:

Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

50. Mr Cottle submitted that, at the date of hearing, the land occupied represented each defendant's "home". Further, that the caravans on the land were their individual homes. On any view, the right to respect for a home as protected by Article 8 was engaged by a possible eviction. If that be wrong he submitted, in the alternative, that the disruption to private life and family life that an eviction would engender meant that Article 8 was applicable. On either view, an eviction would be unlawful unless the court was satisfied that the conditions, contained in Article 8(2) for such an interference with the rights protected by Article 8(1), were made out.

51. Mr Sinnatt submitted that this was not an Article 8 case at all. In short, in order to have the benefit of the right to respect for a home, the individual had to demonstrate that a particular place was their home by establishing sufficient and continuous links to it. At the date when the present proceedings were issued, the defendants had only been in occupation a matter of months. The links with the land had been tenuous from the outset and unlawful throughout. In so far as the relevant "home" was the caravan, the proposed eviction carried with it no threatened retention or disposal of the caravan. Mr Sinnatt did not develop submissions as to the "private life" or "family life" limbs of Article 8(1).

52. In my judgment this is a case in which Article 8 is applicable. The defendants have been residing on the land for over nine months. It is not suggested they have anything amounting to a "home" elsewhere. Although the fact that the home was unlawfully established may in some cases be relevant, it is not in my judgment determinative when one is dealing with travellers who have no authorised site on which to lawfully

establish a home. This is not a case like *Price*[1] in which the occupiers had only been on site for a matter of days but nor is it a *Connors*[2] case of occupation in excess of a decade. It lies between those extremes. I am satisfied that the links established with the land in this case are sufficient to bring Article 8 into play in the 'home' dimension. If I am wrong about that, I am in any event satisfied that the prospective impact on the private and family lives of these particular defendants is just about sufficient to bring it within the other relevant dimensions of Article 8(1).

53. I acknowledge the force of Mr Sinnatt's submission that such a finding by the Court inevitably means that the more tolerant a council is of an unauthorised encampment on its land, and the more generous it is in its interpretation of central government guidance, the more likely it is to find that the occupiers can – when eventually faced with eviction – establish that Article 8(1) is in play in one or more of its dimensions. The structure of Article 8 would, however, suggest that the Council might well find that the extent to which it has tolerantly and generously dealt with an unauthorised occupation tells in its favour when a court comes to make the assessment required by Article 8(2).

54. I turn then to Article 8(2). It was common ground, in the light of recent decisions of the Supreme Court, that in a case such as this - of a public authority seeking possession of land occupied by those with Article 8 rights - it falls to the county court to determine for itself whether the conditions in Article 8(2) are fulfilled.

55. Mr Sinnatt submitted that even if the facts of this case as advanced by the defendants, were taken at their highest, there was not a seriously arguable case that the conditions of Article 8(2) were other than amply satisfied. In those circumstances, he forcefully submitted, not least in reliance on the relevant passages from *Pinnock*[3] and *Powell,*[4] these defences should not be entertained substantively by the Court.

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[1] *Leeds CC v Price* [2006] UKHL 10, [2006] 2 AC 465

[2] *Connors v UK* (2004) 40 EHRR 189

[3] *Manchester CC v Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441

[4] *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 WLR 287

56. In my judgment, this case has proceeded beyond the stage at which it is appropriate to engage in a summary assessment of the arguability of the defences. The ordinary place for that is at the first hearing of the claim. This litigation is long past that stage. At the first hearing, last December, directions were given for a trial as against these defendants. The trial date was fixed and notified in January 2011. The matter stood before me fully prepared for trial on both sides and with a one-day time estimate. There was no application for a strike-out of all or any part of the defences. It seemed to me that so much time would be expended in reasonable argument about whether the defences were seriously arguable that, if I were to determine that issue adversely to the Council, the trial itself could not be accommodated in the remainder of the allocated court day. In the result, Mr Sinnatt sensibly acknowledged that an attempt to make a summary assessment was unlikely to be in anyone's interests and, accordingly, I proceeded to try the Article 8(2) defences of the three named defendants.

57. Mr Cottle could not suggest that the possession claim was brought otherwise than 'in accordance with the law'. If his public law defence failed, as it has, the claim in this court is properly constituted and maintained. The first condition in Article 8(2) is satisfied.

58. Nor did Mr Cottle suggest that there was any failure by the Council to identify a so-called 'legitimate aim' in the taking of the proceedings. As is clear from *Pinnock* and *Powell*, in the absence of evidence to the contrary, the court is entitled to assume that the Council is acting to give effect to the interests identified in Article 8(2) in that it is seeking to vindicate its own lawful title to the land and is acting in pursuit of its wider statutory functions for the greater good. This is, of course, not a 'housing' case in which the presumption applies that a council is acting in the interests of best management of its stock of social housing in order to meet the housing needs of others.

59. However, the direct evidence of Mr Fortune was that the Council was here primarily motivated by the need to protect the 'rights and freedoms' of others in the sense of their right to unfettered and unimpeded access to recreation on open council land

otherwise normally available to them for that purpose. In those circumstances it was not necessary to consider whether other matters, such as the alleged nuisances caused by generators, dogs, waste and public human toileting, relating to the encampment, which for Mr Fortune were subsidiary, may have justified the Council taking action "...for the protection of health or morals..." of the local community.

60. It is right to acknowledge Mr Cottle's sensible concession in argument that some members of the wider community might well have found it intimidating to use the field, or simply pass through it, given the presence of so many vehicles and caravans on the site, occupied by persons unknown to them, when the land should ordinarily be wholly open for unlimited public access. Indeed, Mr Fortune had told me in evidence that residents had reported to him just such concerns of feeling uncomfortable and intimidated in using the land with the encampment on it. Mr Hall's evidence was that reluctance on the part of the public to use the land given the presence of the encampment was "understandable". I find that the second condition in Article 8(2) is satisfied.

61. Both counsel were agreed that at this point in the application of Article 8(2) the question for the Court becomes one of whether an eviction was 'necessary', or in the light of the jurisprudential development of that concept, whether an eviction would be 'proportionate'. Both were further agreed that an element of balancing of respective rights was involved in reaching a decision on the issue.

62. For Mr Cottle it was, at simplest, a case of weighing the interests of local residents (in having a place to walk their dogs with minimum inconvenience) against the interests of the occupiers (travellers with no lawful alternative site who would lose their current home and be towed to the roadside with nowhere to go). On that balance, the travellers should be permitted to stay, at least until some more compelling reason for moving them emerged.

63. Mr Sinnatt, relying on several passages in *Pinnock* and *Powell*, submitted that the balance starts significantly in the Council's favour and that it would take exceptional, rare or unusual factors to produce any result other than the grant of a possession order.

64. In my judgment the right course for a judge of this court to follow, once this stage of the analysis is reached, is to find the relevant facts and then to determine whether there is something in or about the circumstances of the particular defendants sufficient to deny the ordinary result of a public authority properly seeking to uphold its entitlement to control and regulate the use of its own land for the common good i.e. the making of an order for possession. That assessment can conveniently include consideration of whether, if a forthwith possession order would not be proportionate, some form of delayed or deferred order would be proportionate.

65. I need not here recount again the Council's reasons for seeking possession which, in my judgment, are entirely legitimate even if confined to the primary matter which drove Mr Fortune to pursue these proceedings in the Council's name. That is to say, the wish to restore the land to its intended purpose of unimpeded open public access and recreation in circumstances where the local community have to a significant degree been impeded in their use of it for many months. The photographs I have seen of the damage to the land caused by vehicles being taken onto it beyond the paved private road and the photographs of the encampment itself amply sustain the proposition that amenity has been significantly impaired. Even if the defendants are right that walkers can still access much of the land from a variety of different points and that those in the encampment (and their dogs) cause no direct nuisance to those visitors to the land, the Council was amply justified in being satisfied that the time for tolerance had endured long enough and that the land should be restored to its ordinary untrammelled state.

66. This finding has made it unnecessary to resolve issues of fact that might otherwise have fallen for determination – such as whether there was in fact noise nuisance from generators, danger from roaming dogs, public human toileting, etc. In short, there are no facts to find on the issue of whether the Council was pursuing a legitimate aim. It plainly was. The legitimate protection of the 'rights and interests of others' coupled with the Council's absolute right to possession by dint of its title are compelling factors when approaching an assessment of the proportionality of any eviction in this case.

67. I turn then to the circumstances of the three occupiers. I have already offered a thumbnail sketch of their individual circumstances earlier in this judgment. Mr Sinnatt did not seek, for the Council's part, to put in issue any matter of fact contained in any of the various witness statements that each of the three defendants had made.[5]

68. I take fully into account that they are travellers and that the Council is a public authority charged with the statutory responsibility of assessing and seeking to meet the needs of travellers. It has, as yet, no authorised traveller sites within its boundaries. It has identified suitable land on which to develop a site and had recently secured public funding to undertake the necessary works. It was not suggested that it was in dereliction of its general statutory duties in regard to travellers. The Council has made unsuccessful enquiries of the two nearest county councils to see whether they have any authorised sites to which the defendants could move.

69. The Council does have an official transit site for travellers who wish to stay for the short periods consistent with a nomadic lifestyle. Ordinarily, stays there are expected to last about 4 weeks but on Mr Hall's unchallenged evidence those on the site tend to stay about three months before moving on. Should they wish to do so, any of the three defendants could seek a place on that site and Mr Hansen has already been offered one for a period of possibly as much as three months. Travellers may return to the site and take a further pitch after a six month interval.

70. I consider that the availability of this transit site, which could be occupied by any of the defendants entirely consistently with their adopted disposition to travelling, is a significant feature in assessing the impact of their being removed from the land that they presently occupy. I do not overlook that Mr Hansen has stayed on that transit site previously or that he has said that he would find it uncomfortable to take up a pitch now given his feelings about the others presently and temporarily on other pitches on the site.

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[5] Save that Mr Hansen was called for the purpose of enabling the Council to challenge his assertion that he had a 'cultural' aversion to bricks and mortar accommodation. That was expressly and openly done purely for the purpose of avoiding any suggestion that the Council accepted that he had such an aversion which may be or become a live issue in other proceedings.

71. In some circumstances it may also be appropriate to take into account in assessing proportionality the specific positive duty on state authorities, derived from the jurisprudence of the Strasbourg Court, to facilitate the cultural and nomadic way of life of traditional or ethnic Gypsies. However, that is not this case. These travellers are not ethnic Gypsies. In so stating I do not overlook the unsolicited written submission of Mr Cottle, lodged after the trial, in which he asserted that the Third Defendant was a Gypsy. Mr Hansen himself gave no evidence to that effect and indeed, in the limited oral evidence that it was necessary for him to give, he disclaimed any assertion that he was a gypsy and categorised himself as a traveller. Neither the Strasbourg Court nor the domestic courts have yet recognised any positive duty on the state to facilitate the way of life of those non-Gypsy adult members of the community who exercise a preference for the occupation of a caravan over ordinary or conventional housing.

72. Mr Cottle particularly urged upon me the importance of the potential impact of an eviction on the *health* of the Second Defendant (Mr Smoulkes) if he were required to move on without alternative site provision. But I had no up-to-date medical evidence as to his present condition. It is not without note that he has chosen to maintain a travelling lifestyle notwithstanding his medical needs and the absence of any long-term authorised site being available to him. The responsible authorities, in this case the Council, accommodate his medical needs as best they can wherever he goes. There is nothing that suggests his medical condition will be adversely affected if he is required to move on now rather than simply voluntarily taking to the road again later. It will be recalled that he had previously asked in July only for a deferral of eviction until October. Certainly, his medical circumstances might weigh heavily if he faced a peremptory eviction. But that is not this case. His needs have already been amply taken into account by the Council which expressly permitted him to remain when others were evicted last August. In short, there is nothing in any medical matter that amounts to a strong case for any of the defendants to remain on the land.

73. Mr Cottle also advances the adverse impact on the *education* of the children. I readily accept that a nomadic lifestyle such as that which Mr Hansen, a man with a number of children, has adopted is likely to be potentially disruptive to the education of children. But beyond that I have no evidence relating to the particular education of these

children and I have none from their schools. Mr Cottle suggested that it was axiomatic that a child's education would be least disrupted if they moved schools over a school vacation between two academic years. I accept that as far as it goes. But taken alone it would result in every traveller with a school-aged child being able to resist eviction from an unauthorised encampment for up to a whole academic year. In this particular case there is no evidence that the children would not be able to reach their current school from: (a) any conventional housing the Council may be willing to provide; (b) the transit site; or (c) any other site in the Council's area that the defendants may seek to occupy if they reject (a) and (b). It must be recorded that the first and third defendants brought their children onto this land before the last Summer school vacation well knowing they had no right to occupy it. I can legitimately infer that they also knew well that they would have to move-on again. By reason of the tragic bereavements the children in Mr Hansen's household have suffered, he has been given an extended period of indulgence by the Council. I cannot see in the issue of 'education' any material of weight telling against the recovery of possession in this case.

74. Mr Cottle also stresses that the necessary consequence of eviction is *homelessness*, with all that that entails. I accept that, as I additionally accept his proposition that eviction falls harder on travellers because they are less able than the settled community to find alternative accommodation (it being easier for the latter to rent another house or flat than for the former to find authorised sites). But again, every eviction of a traveller, against the background of a national shortage of authorised sites, carries this consequence. If this taken alone were considered a significant factor, it would become virtually impossible to displace any unauthorised encampment. Moreover, in the instant case any immediate homelessness would be at the election of the defendants. The council accepts that it has responsibilities to all of them under the homelessness legislation and all or any of them, if insistent upon declining conventional housing, could seek a place on the transit site already mentioned.

75. Mr Cottle fairly urged every possible factor and combination of factors that could be advanced on behalf of the defendants collectively and each of the three of them individually. I am prepared to take their own evidence at its highest. Indeed, it has not been challenged. I accept, therefore, that none of them has been personally responsible

for any noise nuisance, roaming dogs or any of the other nuisances said by the local residents to be emanating from the encampment. However, in my judgment, even on that basis, the evidence in this case comes nowhere near to establishing that the severity of the impact of an eviction upon these defendants is such that it would be disproportionate to order one in the face of the Council's legitimate claim. My own findings accord with Mr Fortune's earlier assessment that there are "no significant health or welfare issues" in the circumstances of these defendants (Witness statement para 34).

76. True it is that this is a case in which the primary disruption has 'only' been in relation to a village community's right to unfettered access to open public land. But that disruption has gone on not for a few days or weeks but for very many months.

77. The Council has acted responsibly and stayed its hand for an extended period. Had it moved for possession peremptorily or in the absence of any complaint from others, there might well have been something in Mr Cottle's submission that it would not be right to make a 'forthwith order' and that the court should exercise any available powers to defer or delay eviction. That case may have been the more compelling last December when this case last came on for hearing. But this judgment will not be handed down until early April. Assuming (without deciding) that the court does have power to do something other than grant a forthwith order, this is singularly not a case in which it would now be appropriate to exercise the power. By a combination of the Council's generous toleration and the need for a claim to work through the court's processes, the defendants have had more than sufficient opportunity to prepare for the eventuality that they may be required to move on. It is not without note that the whole thrust of the case for the defendants is that they are 'travellers' and that they have not travelled for the best part of a year.

78. In short, there is in my judgment no feature of this case (or combination of features) that warrants the making of any order other than the forthwith order for possession to which the Council would normally be entitled and that is the order I shall make.

Supplementary matters

79. At the close of argument I indicated that I would reserve judgment and that it would be helpful to receive anticipatory submissions from counsel on ancillary matters. I was grateful that counsel felt able to address ancillary matters in oral argument.

80. *Costs:* The Council seeks it costs having successfully defeated the defendant's defences. Mr Cottle tentatively urged that if the case turned on a fine balance of factors either way on 'proportionality' the proper order might be 'no order' as to costs. I strongly doubt the soundness of that submission but in any event this case has not failed by a slim margin on 'proportionality' but by a considerable distance. Additionally, an unarguable public law defence was pressed to trial. The Council shall have its costs on a detailed assessment if not agreed. The Council accepts that the second and third defendants are protected by the fact that they have legal aid and I shall accordingly make the usual orders in respect of that.

81. *Permission to appeal.* Mr Cottle indicated that if I found against his clients on any point of law (in particular relating to the application of Article 8 or the court's jurisdiction to postpone possession) he would wish to have permission to appeal. In the event, the case has turned entirely on my assessment of the factual material. In those circumstances, assuming it nevertheless to be sought, I refuse permission to appeal. Moreover, since I consider that there is no real prospect of success in any appeal, I decline to grant any stay of my order.

82. *Hand-down and Order.* For the reasons given in this judgment I make the order shown in the Appendix attached to it. This judgment will be formally handed down by another judge of the Brighton County Court on 5 April 2011. If necessary, I release the matter to a District Judge for the limited purpose of handing down this judgment. The precise listing will be notified to the parties. The date of the Order, when drawn and sealed, will be the date that the judgment is handed-down.

83. *Counsel:* the attendance of counsel at the hand-down of judgment is excused. I am grateful to them both for their written and oral submissions.

Recorder Luba QC

5 April 2011

ORDER

(1) The three named defendants do each have permission to rely upon the evidence contained in their witness statements filed at Court on date of trial and included in the trial bundle at pp278-284

(2) The claimant do have permission to adduce in evidence the additional documents added to the trial bundle as pp274-277

(3) The three named defendants do have permission to rely upon the further evidence contained in their witness statements made at Court and added to the trial bundle as pp278-end.

(4) All the defendants shall forthwith deliver-up to the claimant possession of the land at Coldean Wood, Stanmer, Brighton that is the subject of this claim more particularly being the land shown hatched on the document BHCC1[6] attached to this order.

(5) The defendants shall pay the claimant's costs, to be subject of detailed assessment unless agreed.

(6) The order for costs shall not be enforced against the second or third defendant without the further permission of this Court.

(7) There shall be a Community Legal Service Fund assessment of the costs of the second and third defendants.

(8) Permission to appeal is refused. The correct appeal court is the Court of Appeal.

(9) A stay of the above orders, pending an appeal, is refused.

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[6] Page 5 of the Trial Bundle.