Case No: H00CL002

IN THE COUNTY COURT AT CENTRAL LONDON

Date: 13th May 2022

Before :

HHJ Baucher

- -

Between :

The Lord Mayor and Citizens of the City of Westminster	**Claimant**
- and -	
Persons unknown who congregate or gather in Maida Hill Square London W9 (" Maida Hill Market" and cause anti- social behaviour	**Defendant**
Ernest Theophile	
Michael Gill	

- -

- -

Mr Asghar (instructed by Bi-Borough Shared Legal Services) for the Claimant
Mr James- Matthews (instructed by Birnberg Peirce) for the Second Defendant

Hearing dates: 27th April 2022

- -

HHJ BAUCHER:

1. On 29th March 2022 I directed there should be a trial of a preliminary issue namely whether or not the public sector equality duty (PSED) applies to the claimant's application for an injunction.

2. The claimant issued proceedings for an injunction pursuant to s222 of the Local Government Act 1972 (LGA) and under s1 of the Anti-Social Behaviour, Crime and Policing Act 2014 (2014 Act) on 20th January 2021.

3. On 29th January 2021 the court granted an interim injunction against the defendants. The date for the final injunction hearing is August 2022. On 23rd July 2021 the third defendant advised he would not be defending the claim and intended to take no part in these proceedings. As the second defendant is the only active defendant in the proceedings I shall refer simply to Mr Theophile as the defendant in the judgment.

4. Mr Asghar represented the claimant and Mr James-Matthews represented the defendant. I am grateful for the diligent manner in which they presented their respective arguments and following the hearing provided further legal material.

The Factual background and the Parties' positions

5. The proceedings relate to use of Maida Hill Square, London. The claimant's pleaded case is that for several years the defendants have been congregating in the Square and have caused anti-social behaviour by playing music, drinking alcohol, shouting, swearing, obstructing the highway and by urinating and defecating. The claimant says that such behaviour has caused alarm,

harassment, distress, nuisance, the risk of damage to property and negatively impacted on businesses in the area.

6. The defendant is 74 years of age and has visited the area most of his life. He is Afro-Caribbean. He says that access to the Square is part of his community ties, where backgammon and dominoes are played, and where informal support is given for those experiencing social isolation and issues with their mental health.

7. The defendant says that the proposed injunction is likely to be indirectly discriminatory because the majority of those whose behaviour is constrained share the protected characteristic of race and that the claimant's PSED under the Equality Act 2010 (2010 Act) was thereby engaged.

8. The claimant's case is set out at paragraph 18 of the Amended Reply:

> "It is denied that the Claimant was subject to the duty imposed by s.149 of the Equality Act 2010 - the Public Sector Equality Duty ("PSED"). The PSED only applies in circumstances where a public authority exercises a public function. The seeking of an injunction by the Claimant was in pursuit of the legitimate aims of preventing disorder and protecting the reputations and rights of others and is not the exercise of a public function. (Birmingham City Council v Afsar [2019] EWHC 3217 QB)."

Submissions

9. Mr Asghar's submissions were succinct. He referred me to s29(6) and s31(4) of the 2010 Act and the exercise of a public function. He argued that the seeking of an anti-social behaviour injunction is not a public function and accordingly the PSED does not apply.

10. In amplification of those submissions Mr Asghar submitted that as the application for an injunction did not involve the claimant making a policy decision, or a decision in an individual case, but the claimant seeking to uphold

the rights of others then the claimant was not exercising a public function. He accepted the claimant is a core authority for the purpose of s150 but argued that the words in the statute "all its functions" had to be construed to mean public functions. He said the application for an injunction was not a public function and so the PSED was not engaged. He submitted that s150 should be construed by reference to Parts 3-7 of the 2010 Act. He said he was not seeking to make a distinction between a public function and function but between function and something that is not a function but a private act. He contended that there was no individual decision as against the defendant as contended by Mr James-Matthews but an application to protect the rights of others.

11. Mr Asghar submitted that the Home Office "Anti-social behaviour, Crime and Policing Act 2014: Anti-social behaviour powers. Statutory guidance for frontline professionals" revised in January 2021 was "seriously wrong." He argued that in any event s19 of the 2014 Act stated only that the Secretary of State may issue guidance and not that any party shall be bound by it.

12. In support of his submissions Mr Asghar relied on the decision of Birmingham City Council v Afsar [2019] EWHC 3217 (QB) and the reasoning of Mr Justice Warby (as he then was) at paragraph 44 of the decision. Mr Asghar said that on the literal reading of that paragraph it was clear that the judge was making a distinction between a function and a public function and that Mr Justice Warby was saying that where a local authority upholds the rights of others that conduct does not fall within the ambit of the 2010 Act.

13. I do not consider it is necessary to set out Mr James-Matthews' submissions separately as they are substantially woven into the discussion section of this judgment.

General principles

14. Before turning to my consideration of the issue I shall set out some general observations which govern my determination.

15. Counsel agreed that I should have regard to Section 11.9 of Bennion, Bailey and Norbury on Statutory Interpretation, Arbuthnot v Fagan [1996] L.R.L.R, AG v Prince Ernest Augustus [1957] AC 436, Pinner v Everett [1969] 1WLR 1266 and Williams V Central Bank of Nigeria [2014] UKSC10.

16. The objective of any statutory interpretation is to determine the intention of the legislature.

17. In Arbuthnot v Fagan [1996] L.R.L.R. 135 Steyn LJ (as he then was) stated at page 140:

> "I readily accept Mr Eder's submission that the starting point of the process of interpretation must be the language of the contract. But Mr Eder went further and said that, if the meaning of the words is clear, as he submitted it is, the purpose of the contractual provisions cannot be allowed to influence the court's interpretation. That involves approaching the process of interpretation in the fashion of a black-letter man. The argument assumes that interpretation is a purely linguistic or semantic process until an ambiguity is revealed. That is wrong. Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision. In the field of statutory interpretation the speeches of the House of Lords in Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436 showed that the purpose of a statute, or part of a statute, is something to be taken into account in ascertaining the ordinary meaning of words in the statute: see Viscount Simonds' speech, at p. 461, and Lord Somervill of Harrow's speech, at p. 473. It is true that such a purpose may also be called in aid at a later stage in the process of interpretation if the

language of the statute is ambiguous but it is important to bear in mind that the purpose of the statute is a permissible aid at all stages in the process of interpretation."

18. In the case of Attorney- General v Prince Ernest Augustus of Hanover [1957] AC 436 (referred to by Steyn J above in Arbuthnot v Fagan), Viscount Simonds stated at page 460-461:

"My Lords, the contention of the Attorney-General was, in the first place, met by the bald general proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

19. Whilst Lord Somervell stated at pages 473-474:

"A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicholl left it in 1826. "The key to the opening of every law is the reason and spirit of the law - it is the 'animus imponentis,' the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context - meaning by this as well the title and preamble as the purview or enacting part of the statute."

20. In Pinner v Everett [1969] 1WLR 1266 at P1273 Lord Reid said:

> "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word of phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."

21. Finally, in Williams Lord Neuberger said at paragraph 72:

> "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaenburg AG [1975] AC 591, 613.We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words."

22. In summary the starting point is the statute and its purpose. Then the words must be given their plain and natural reading. It follows that where the meaning is clear there is no need to resort to other canons of statutory construction unless the result is so startling that the words could not have been so intended.

Discussion

23. The logical starting point is the statutory scheme but before turning to it I need to consider the high point of Mr Asghar's argument, namely the decision in Birmingham City Council v Afsar (No 3) [2019] EWHC 3217 (QB). In that case the central issue was the school's teaching of LGBT issues and whether that represented unlawful discrimination against British Pakistani Muslim children at the school, and for those with parental responsibility for them, on the grounds of race and religion. The argument advanced was that the court could not lawfully grant an injunction to curtail protests against the teaching policy and

related conduct of the school and to do so would be an act of discrimination that could not be justified. At paragraphs 44-45 Mr Justice Warby said:

> "44. The EA does not outlaw all discrimination based on any protected characteristic. It covers specific territory, carefully mapped out in the Act. Conduct is only unlawful discrimination if it relates to an activity falling within one or more of Parts 3 to 7 of the Act, which cover, respectively, Services and Public Functions, Premises, Work, Education, and Associations. Aster Communities was a case about premises, and the defendant relied on Part 4, s 35(1)(b) of the EA, which provides that "a person (A) who manages premises must not discriminate against a person (B) who occupied the premises ... by evicting B": see [16] (Baroness Hale). In the present case, the Court is not being asked to give effect to an eviction, or any other act of the Council falling within EA Parts 3 to 7. The application is for an order curtailing what is said to be anti-social behaviour, public nuisance, and obstruction of the highway. The application pursues inherently legitimate aims, concerned with upholding the rights of others. The Council's conduct in seeking such injunctions does not fall within the ambit of the EA.
>
> 45. Even if that is wrong, the acts complained of appear to me to fall outside the scope of the EA."

24. I am not persuaded that the final three sentences in paragraph 44 should be taken "literally" as Mr Asghar submitted or that I should construe Warby J to be making a distinction between public and non public functions. First, previous decisions of the courts are not statutes and therefore the principles enunciated in cases and the language used are not to be read and interpreted as if they were a statute. On a logical extension of Mr Asghar's construction this court would be bound by any words expressed by a higher court. What matters is the ratio decidendi of the decision. Secondly the factual circumstances are very different from the facts in this case. Thirdly there was no issue before Warby J that the very injunction sought was likely to be discriminatory in itself. Therefore, no legal argument or jurisprudence was considered by Warby J on that issue. I am therefore far from persuaded that this court is bound by his decision in the manner suggested by Mr Asghar. I concur with Mr James-Matthews that if

Warby J had been issuing general guidance to local authorities he would have been obliged to consider s149(2) and s150 and the words used in the statute. In my view that Warby J did not so when he had the principles of statutory construction well in mind in respect to another argument (see paragraph 30) belies the central difficulty with Mr Asghar's submissions. I do not consider that Warby J was enunciating some principle of general application so that any application by a local authority for an injunction under the 2014 Act in whatever circumstances would not attract the PSED. The matrix for paragraph 41 of the decision being a binding ratio decidendi for inferior courts is simply not made out.

25. My view is fortified by the statutory scheme. s150 provides so far as applicable:

> (1) A public authority is a person who is specified in Schedule 19.
> […]
> (3) A public authority specified in Schedule 19 is subject to the duty imposed by section 149(1) in relation to the exercise of all of its functions unless subsection (4) applies.
> (4) A public authority specified in that Schedule in respect of certain specified functions is subject to that duty only in respect of the exercise of those functions.
> (5) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998.

s149 provides:

> (1) A public authority must, in the exercise of its functions, have due regard to the need to –
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act:
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) …

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are –

age;

disability;

gender assignment;

pregnancy and maternity;

race;

religion or belief;

sex

sexual orientation.

26. The effect of the statute is to create three categories for the application of the PSED in relation to public and non public authorities. Those categories are :1)public authorities to which the PSED applies in relation to the exercise of "all its functions"; 2)public authorities to which the PSED applies in relation to the exercise of certain functions in Schedule 19; and 3)non public authorities, who exercise public functions, and to which the PSED applies in relation to the exercise of those public functions. I do not need to consider the other categories because Mr Asghar accepted that by virtue of Schedule 19 the claimant is a core authority and therefore bound by s150 (3).Thus, the PSED applies in relation to the exercise of "all of its functions." The dispute between the parties is what that means. In the circumstances I do not consider I need to consider to any great extent the legal authorities I was referred to by the parties in the context of core and hybrid authorities.

27. Mr James-Matthews' primary submission is that as the claimant is a core authority then given the word "all" any of its actions require it to be bound by the PSED. His secondary submission was that this was an individual decision in any event and therefore even on the claimant's submissions the PSED applies. In contrast Mr Asghar considered the wording should be considered in the context of the exercise of a public function only. He refuted the contention that the application for an injunction was an individual decision but rather argued that it was an application to protect the rights of others.

28. Mr Asghar sought to persuade me that the courts in the cases such as Pieretti v Enfield London Borough Council [2010] EWCA Civ 1104 and Barnsley Metropolitan Borough Council v Norton and others [2011] EWCA Civ 834 had

decided that there was a public function in the context of a policy decision or a decision in an individual case which were therefore far removed from the instant case.

29. In my view Mr Asghar's submissions ignore the starting point of statutory construction as set out at section 11.9 of Bennion. The "golden rule" or the "plain meaning rule" requires the court to follow the ordinary grammatical meaning of the legislative provision. The logical extension of Mr Asghar's submission is that the word "all" would serve little or no purpose. That is not a promising starting point for an argument on statutory interpretation. Thus, Mr Asghar was forced to argue, not that the word should be ignored, but that it should be restricted by reference to public function or by reference to Parts 3-7 of the 2010 Act. I am not persuaded that the wording should be read in such a way.

30. Whilst the 2010 Act provides no definition of the word "function" in my view the meaning of the words "all of its functions" in s150(3) is clear. The natural and plain reading is that the PSED is to apply to everything the claimant does. Indeed, I find myself echoing the words of Viscount Simmonds in Prince of Hanover "nor can I ignore that the omission of any restricting words is of great significance." There are no words of restriction. The reference is to "all" and there are no words to suggest that "all" does not apply in a given set of circumstances. I consider the plain meaning rule should be applied. I am not persuaded there is anything to "modify, alter or qualify it." The wording is clear that the application is to all the claimant's functions. I also consider that interpretation is consistent with the overall construction of the 2010 Act which

deploys the use of the words "public function" and "function", the latter when considering a broader category.

31. I derive support from my construction of the statute from the leading textbook on this area Monaghan on Equality Law where at chapter 16 at paragraphs 16.49- 16.50 the learned authors state: (The Italics and underlining being my emphasis)

> "The Public Sector Equality Duty applies to a 'public authority. A 'public authority' for these purposes is a person who is specified in Schedule 19. Such a public authority may include both core and "hybrid" authorities. By section 150(3) of the EA 2010, 'a public authority specified in Schedule 19 is subject to the duty imposed by section 149(1) in relation to the exercise of all its functions unless subsection (4) applies. Section 150(4) provides that: 'a public authority specified in that Schedule in respect of certain specified functions is subject to that duty only in respect of the exercise of those functions.'
>
> Further, section 149(2) provides that the Public Sector Equality Duty applies to a 'person who is not a public authority but who exercises public functions…. In the exercise of those functions.' A 'public function' for these purposes is 'a function that is a function of a public nature for the purpose of the Human Rights Act 1998. In this way the Public Sector Equality Duty applies to all bodies- 'core' public authorities and 'hybrid' authorities-when exercising public functions (*in the former case, that being all their functions*), whether listed or not."

32. Further, Mr James-Matthews referred me to the Equality and Human Rights Commission "Technical guidance on the public sector equality duty: England." Under the heading "Which functions are covered?" at A.12 the guide states:

> "Most public authorities specified in Schedule 19 are subject to the general equality duty in relation to the exercise of all of their functions- that is everything they are required and permitted to do."

33. Whilst I accept this is only guidance the definition from a distinguished body is supportive of the application of the 2010 Act to all the claimant's actions.

34. I am not persuaded that some tortuous and constricted construction of the statute is required to give effect to Parliament's intention. In my view the very fact that

Parliament created 3 separate categories in relation to public functions belies the central difficulty in the claimant's argument. Further on the construction placed on the 2010 Act by Mr Asghar there would be no need for the legislators to have added the definition clause in s150 (5) in relation to public function.

35. I am also not persuaded that the clear words of the statute are somehow to be constricted by reference to s 29(6) which provides that:

> "A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

36. Whilst the section does make reference to public function the section quite clearly applies to "any person" as distinct from a public authority. The section is limited to public function, but it is not addressing local authorities as Mrs Justice Laing made clear at paragraph 13 in Turani v Secretary of State for the Home Department [2019] EWHC 1586 (Admin).

37. I do not consider the Act should be construed to incorporate additional words such that s150(3) is to be read as if the words "Parts 3- 7" were added. The logical extension of that argument results in the words being read into s149 (1) but not the following subsections of that section. With all due deference to Mr Asghar's submissions such an approach would be to place a construction on the Act which would restrict the operation of s149(1) b) c) and s149(3) which I do not consider could have been Parliament's intention and, indeed to the contrary, would fly in the face of the intention of the 2010 Act.

38. Thus, the defendant succeeds on its primary argument. However, I also consider that the claimant's resistance of the application of PSED is flawed on its own attempt to persuade the court it was not exercising a public function.

39. An application for an injunction under the 2014 Act may only be made by certain defined public bodies. The first eligible body under s5(1)(a) is "a local authority". In my judgment when a local authority makes such an application it is therefore making that application as part of its public duties. I concur with Mr James-Matthews that to suggest otherwise is untenable. During legal submissions I asked Mr Asghar how the application could be anything other than an application for an injunction which affected an individual, in this instance the defendant, and therefore on his own argument the engagement of a public function. At first Mr Asghar had no answer. After reflection he submitted that as it was an application to protect the rights of others then it did not engage the public function in relation to the individual defendant. In my view the very argument advanced by Mr Asghar highlights the claimant's attendant difficulty. Its own Amended Reply pleaded the application "was in pursuit of the legitimate aim of preventing disorder and protecting the reputations and rights of others." Quite clearly in acting to protect the rights of others the council is exercising a public function. It is not exercising any private right. The reality is that even on its own case the claimant was exercising a public function.

40. That this must be so is in my view clear from the Statutory Guidance on the 2014 Act. This provides under the heading "Vulnerability:"

> "Particular consideration should be given to the needs and circumstances of the most vulnerable when applying the powers to ensure that they are not disproportionately and unreasonably impacted upon, and local agencies must be satisfied that the behaviour meets the legal tests. Any use of these powers must be compliant with the Human Rights Act 1998, the Equality Act 2010 (in particular the public sector equality duty pursuant to section 149) along with all other relevant legislation."

41. In the face of that guidance Mr Asghar was forced to argue that the guidance was "seriously wrong" and that an authority was not bound to follow it. I consider that to be a bold, if not remarkable, submission. Mr Asghar essentially submitted that the guidance is wrong about the application of the PSED. If the 2014 Act had just become law perhaps his argument may have required consideration if I had just been considering the guidance in a vacuum without consideration of the other matters discussed above. However, the 2014 Act has been in force for over 8 years and the Guidance has been subject to amendment as recently as January 2021. If the Guidance had been fundamentally flawed, I consider it would have been amended over the passage of time as its intent and purpose is to assist the police, local authorities and other agencies who exercise functions under the 2014 Act. Clearly that would be the case if it were "seriously wrong." For the reasons I have already expressed I find the Guidance is not wrong but consistent with the proper interpretation of the 2014 Act.

42. Further whilst I accept that any Guidance is not mandatory for a local authority to follow even Mr Asghar did not go so far as to assert that an authority should exercise its powers in blatant breach of its statutory obligations. In fact, Mr Asghar conceded that if I found that the application for an injunction was a public function then the claimant is bound by the PSED. On my construction of the statutory provisions the claimant should have followed the Guidance.

Conclusion

43. I find that the terms of the 2010 Act are clear and the PSED applies to the exercise of " all" of the claimant's functions. Further that an application for an injunction under the 2014 Act is any event a public function.

44. In making an application for an injunction pursuant to s1 of the 2014 Act the claimant was required to have regard to the PSED. It follows the preliminary issue is therefore determined in the defendant's favour.