Neutral Citation Number: [2022] EWHC 2868 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 11 November 2022

Before :

THE HON. MR JUSTICE HOLGATE

- -

Case No: KB-2022-003788

Between :

IPSWICH BOROUGH COUNCIL **Claimant**

- and –

(1) FAIRVIEW HOTELS (IPSWICH) LIMITED **Defendants**
(2) SERCO LIMITED

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- -

Gethin Thomas (instructed by **Ipswich Borough Council**) for the **Claimant**
Richard Kimblin KC (instructed by **Howard Kennedy** LLP) for the **First Defendant**
Paul Brown KC (instructed by **Clyde & Co LLP**) for the **Second Defendant**

Case No: KB-2022-003787

Between :

EAST RIDING OF YORKSHIRE COUNCIL **Claimant**

- and -

(1) LGH HOTELS MANAGEMENT LIMITED **Defendants**
(2) S HULL PROPCO LIMITED
(3) S HULL OPCO LIMITED
(4) MEARS GROUP PLC
(5) MACK RESIDENTIAL LIMITED

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Gethin Thomas (instructed by **East Riding of Yorkshire Council**) for the **Claimant**
Robin Green (instructed by **Ashton Bond Gigg Solicitors**) for the **First to Third Defendants**
William Upton KC (instructed by **Mears Group (In-House Legal)**) for the **Fourth Defendant**
The **Fifth Defendant** did not appear and was not represented

Hearing date: 8 November 2022
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Approved Judgment

This judgment was handed down remotely at 5.30pm on 11 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Introduction

1. The claimants in two separate claims apply to renew *ex parte* injunctions, obtained without notice, until trial. The claims arise out of proposals by the Home Office to use two hotels to accommodate asylum seekers.

2. The Secretary of State for the Home Department ("SSHD") did not take part in these proceedings. Section 95 of the Immigration and Asylum Act 1999, read together with regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005 No.7), imposes a duty on the SSHD to provide "support" for asylum seekers (and their dependants) who appear to the Secretary of State to be, or to be likely to become, "destitute" within 14 days (in the case of new applicants). By s.95(3) a person is destitute if *inter alia* he does not have adequate accommodation. "Support" includes accommodation. By section 94(1) (as currently in force) an asylum seeker for these purposes is someone who has made a claim that it would be contrary to the Refugee Convention or Article 3 of the ECHR to remove him from the UK. Under s.98 the SSHD is under a duty to provide temporary support in the form of accommodation to an asylum seeker who appears to be destitute until a decision under s.95 is taken.

3. The first claim concerns the Novotel Ipswich Centre Hotel, Grey Friars Road, Ipswich ("the Novotel"). Ipswich Borough Council ("IBC"), the claimant in KB-2022-003788, is the local planning authority ("LPA") for its administrative area under the Town and Country Planning Act 1990 ("TCPA 1990"). Fairview Hotels (Ipswich) Limited ("Fairview"), the first defendant, is the owner of the Novotel.

4. Serco Limited ("Serco"), the second defendant, is one of three service providers contracted by the Home Office to provide accommodation for asylum seekers whilst the initial processing of their claims takes place. This process has normally taken around 21 days, after which the asylum seeker is moved to "dispersed accommodation", where they remain until they receive a decision from the Home Office on their status. Mr. Paul Brown KC, who appeared on behalf of Serco, told the court that recent increases in new asylum claims have caused that 21 day period to increase, but he had no instructions on the current average period. Serco is responsible for some 35,645 asylum seekers of whom about 11,200 are being provided with initial accommodation ("IA") in 84 hotels in different parts of the country. Under the terms of its contract with the Home Office, Serco is required to provide accommodation for an asylum seeker on the same day as it receives instructions to do so from the Home Office. In the last two weeks Serco was required to provide initial accommodation for 850 and 950 people respectively.

5. It is common ground that the lawful planning use of the Novotel is a hotel, within Class C1 of the Town and Country Planning (Use Classes) Order 1987 (SI 1987 No. 764) ("the UCO"). IBC considers that the proposed accommodation of asylum seekers would involve the use of the building as a hostel and a breach of planning control, namely the carrying out of development by making a "material change of use" without planning permission. The defendants dispute that contention.

6. IBC has sought to take enforcement action by relying upon the power in s. 187B of the TCPA 1990 to apply for an injunction to restrain the apprehended breach of planning control.

7. The second claim concerns the Humber View Hotel, Ferriby High Road, North Ferriby, East Riding of Yorkshire. The East Riding of Yorkshire Council ("ERYC"), the claimant in KB-2022-003787, is the LPA for its administrative area. The first three defendants ("D1 to D3") are LGH Hotels Management Limited ("LGH"), S. Hull Propco Limited and S. Hull Opco Limited, respectively the management company for the LGH group, the freeholder and the leaseholder/operator of the hotel. The fifth defendant, Mack Residential Limited ("Mack"), is a sub-contractor engaged to block-book the hotel for an initial period of three months, with an option to extend, and to provide services. Mack has contacted the court to say that it supports the other defendants' cases, but does not wish to appear or be represented.

8. The LGH Group owns 52 hotels in the UK. Since June 2020 LGH says that it has been an active supporter of the Home Office's Refugee and Asylum Seeker programme. LGH currently provides 13 hotels under a "sole use" agreement for that purpose.

9. The fourth defendant, Mears Group PLC, ("Mears"), like Serco, has a contract with the Home Office to provide accommodation and support for asylum seekers pending the determination of their applications. Mears currently provides accommodation for about 5000 asylum seekers in about 80 hotels. Mears is attempting to accommodate a minimum of 500 asylum seekers this week and each week thereafter.

10. It is common ground that the lawful planning use of the Humber View Hotel is a hotel. ERYC considers that the proposed accommodation of asylum seekers would involve the use of the building as a hostel and a breach of planning control, namely the carrying out of development by way of a material change of use without planning permission. The defendants dispute that contention.

11. ERYC has sought to take enforcement action by relying upon the power in s. 187B to apply for an injunction to restrain the apprehended beach of planning control.

12. On 27 October 2022 Jacobs J granted IBC the following injunction: -

> "The Defendants be restrained until the return date being a half day hearing on Monday 7 November 2022) whether by themselves or by instructing or encouraging or permitting any other person from either further using or facilitating the further use of the Novotel Ipswich Centre Hotel, Grey Friars Rd, Ipswich IP1 1UP, or any other hotel within the borough of Ipswich, as a hostel whether by accommodating or facilitating the accommodation of asylum seekers or otherwise, save for the accommodation of the 72 people currently occupying the Novotel Ipswich Centre Hotel."

13. On 28 October 2022 Jacobs J granted ERYC the following injunction: -

> "The Defendants be restrained until the return date, being a half day hearing on Monday 7th November, 2022, whether by themselves or by instructing or encouraging or permitting any other person from either using or facilitating the use of the Humber View Hotel, Ferriby High Road, North Ferriby, East Riding of Yorkshire, HU14 3LG, or any other hotel within the council district East Riding of Yorkshire, as a

> hostel whether by accommodating or facilitating the accommodation of asylum seekers or otherwise."

He directed that the application to continue that injunction should be heard by the same judge as would hear the application to continue the injunction granted to IBC.

14. On 4 November I ordered that the hearing should be adjourned to 8 November and that the two applications would be heard together, for the more efficient use of the court's resources. But, of course, the claims remain separate and have received individual consideration. I also gave directions for any further evidence and for skeleton arguments.

15. I am very grateful to all counsel for their written and oral submissions.

16. Both injunctions prohibit the defendants in each claim from using not only the named hotel but also any other hotel in the respective claimant's district as a hostel, including a hostel to accommodate asylum seekers. Mr. Gethin Thomas, who appeared on behalf of both ICB and ERYC, rightly accepted that there was no evidence of any apprehended breach of planning control by any of the defendants in relation to any other hotel in the relevant district and that there was no justification for that part of each injunction to be continued in any event.

17. IBC's decision to bring its claim was taken by Clare Dawson-Dulieu, Operations Manager for Legal and Democratic Services. ERYC's decision to bring its claim was taken by Lisa Nicholson, Director of Legal Services, and by Alan Menzies, Director of Planning and Economic Regeneration. The officers acted under delegated powers.

18. IBC relied upon witness statements from Ms. Shirley Jarlett, Assistant Director for Governance and the Council's Monitoring Officer, and from Tim Peters, a Senior Planning and Enforcement Officer. Fairview relied upon a witness statement from Satish Chatwani, a Director, and Serco relied upon witness statements from Tasneem Said, an in-house lawyer, and from Thomas Roberts, a Legal Director of Clyde & Co LLP.

19. ERYC relied upon two witness statements from Hazel Walsh, Planning Enforcement Team Leader. D1 to D3 relied upon a witness statement from Gillian Jackson, Sales Director of LGH, and from Joseph Henry, General Manager at Humber View Hotel. Mears relied upon a witness statement from John Taylor, Managing Director of Mears Group PLC.

20. In addition, the court was provided with a statement "Background Information on the Asylum Support System" prepared for the purposes of this and other similar claims. It is undated and no author is identified in the document. Mr. Brown said that it had been prepared by Jonathan Kingham, a Litigation Lead for Asylum Support Contracts in the Home Office. Having taken instructions, Mr. Brown said that the document would be filed and served early next week as a formal witness statement. On this basis, Mr. Thomas fairly accepted that the unconventional presentation of the document at the hearing should not result in it receiving reduced weight. That seems to me to be correct, given the nature of its contents and the absence of any real dispute about them.

Accommodation under the Asylum Support System

21. Mr Kingham's document states that the number of destitute asylum seekers requiring accommodation has reached record levels in the UK, in part because of the requirements of cohorts under the Afghanistan and Ukraine relocation schemes. The number of asylum seekers needing accommodation and subsistence was 48,042 on 31 March 2020, 56,812 on 31 March 2021, and 80,399 on 31 March 2022, the last figure representing an increase of 67% over the previous 24 months.

22. The number of asylum seekers requiring accommodation has continued, and is continuing, to grow substantially. At the end of September 2022 provisional Home Office estimates were that about 99,000 asylum seekers were being accommodated, of whom 38,3000 were in short-term accommodation.

23. Part of this increase in destitute asylum seekers whom the SSHD is obliged to accommodate relates to the arrival in the UK of people in small boats. There were 299 such people in 2018, 1,843 in 2019, 8,466 in 2020, 28,526 in 2021 and over 40,000 so far in 2022.

24. Where an asylum seeker is at immediate risk of homelessness, the Home Office provides emergency accommodation under s. 98 of the 1999 Act. In what are described by Mr. Kingham as "normal" times, that is before the Covid pandemic, the increase in asylum seekers from the Afghanistan and Ukraine cohorts and arrivals by small boats, that accommodation would generally be provided in one of eight "initial accommodation" sites across the UK, in the form of a "full-board multi-person hotel or accommodation setting" ("Core IA"). Individuals would remain in IA for a few weeks whilst their needs for support were assessed and longer-term arrangements made. Thereafter, accommodation under s. 95 has generally been provided in "dispersal accommodation" across the country, often in the form of self-catered furnished flats and houses. Such accommodation is provided by third party suppliers under regional contracts, who are to consult with local authorities before a property is used. Requirements for support services and location may constrain the suitability of premises and the speed of deployment. Because many asylum seekers are vulnerable, the accommodation must be exclusive and not shared with other people.

25. Where the need for emergency accommodation temporarily exceeds capacity at IA sites, block-booked hotels are used as a short-term contingency, whilst longer-term dispersal accommodation is procured. Contingency IA is substantially more expensive to the taxpayer and its temporary nature does not allow for the same level of services to be provided. Suitable sole-use contingency IA is becoming more difficult for accommodation providers to source. It is only ever intended to serve as short-term mitigation.

26. The recent exceptional level of increase in the number of destitute asylum seekers entitled to accommodation under the 1999 Act has significantly exceeded the available and timely supply of long-term accommodation. Accordingly, the main way in which the Home Office has sought to meet the situation has been by expanding the use of short term emergency or contingency accommodation, such as block-booked hotels. However, the supply of that accommodation has not kept up with the increasing needs. This has resulted in over 4,000 migrants being held at the

processing centre in Manston, Kent "for considerably longer than the expected 24 hours".

27. Tasneem Said gave evidence on behalf of Serco to similar effect in the IBC claims. She adds that where hotel accommodation is used, Serco's Home Office engagement team first writes to the MP and local authority to advise of the proposed use of a hotel. Serco will hold a meeting with intended parties, including the local authority, police, fire and health services, to explain the proposal and answer questions. The process from identifying a hotel to moving the first asylum seekers into the accommodation generally takes about 6 weeks.

28. At paragraph 18 she says:-

> "Serco is in the process of working with a number of hotel providers to engage them to provide housing for the asylum seekers. However, pressure from local authorities is stifling progress in providing adequate housing and Serco is having to find temporary workarounds which is causing uncertainty for the asylum seekers, leading to the risk of them being kept for longer in sub-standard conditions in facilities such as the Manston centre or in the worst-case scenario being made homeless."

At paragraphs 23 and 24 she states:-

> "Serco has explored many options for alternative initial accommodation, including for example, ex-university campuses, disused military bases, modular builds and even cruise liners. For various reasons outside its control and because of the need for immediate accommodation, these have not been found to be viable options.
>
> As a best last resort, Serco has therefore entered into contracts with hotels to provide temporary initial accommodation. This has provided the best and quickest solution as hotels are generally of an adequate standard and are ready for immediate use."

29. Given Serco's obligation to house an asylum seeker on the same day as it is instructed to do so, where the need for accommodation exceeds the number of rooms available in contracted sole-use hotels, the company is forced to spot-book rooms in hotels open to the public on a rolling 48-hour basis.

Chronology

Novotel Ipswich

30. On 15 September a Deputy Director of the Home Office emailed the Chief Executives of IBC and Suffolk County Council referring to the problems caused by increasing numbers of asylum seekers and notifying them of the potential use of the Novotel as contingency IA so that the Home Office could address any concerns that either authority might have. It was hoped that the use would begin "within the coming weeks". The Home Office would contact officers at the two councils and also

stakeholders for discussion. Following those conversations the exact start date would be confirmed.

31. IBC's Chief Executive replied on 16 September 2022:-

> "1. It is the biggest hotel in the town centre and its loss to general customers would be hugely damaging to the hospitality and leisure economy of the town. This loss would be particularly keenly felt due to the location of the hotel within our town centre and its close proximity to many restaurants and bars. Other places will have a number of 100+ occupancy hotel options – whereas Ipswich doesn't;
>
> 2. For a scheme of this scale we'd want the time to be able to discuss it with our partners (including our BID, our local refugees support organisation, the local police, the local health services and various other support agencies) to gain their views – this should be done prior to any decision being made as to whether the hotel should be used for this use or any other new purpose;
>
> 3. In addition, having got recent experience running a hotel for other vulnerable groups (rough sleepers, sofa surfers and homeless) we remain concerned that the scale of support available to people in the hotel would be enough, unless the level of need for support (including translation) is very very low.
>
> 4. Ipswich already effectively has one hotel used for asylum seeker accommodation (at Copdock – which is just outside the boundary) where residents access the limited support services available in Ipswich on a daily/regular basis – this exacerbates point (3) – we are not convinced there is capacity in the local system for more people to be supported; …"

32. On 22 September 2022 the Chief Executive of the County Council raised concerns which may be summarised as follows:-

    i) The Novotel would be unavailable for 3 months for Registrar's services as a temporary location until relocated to the Town Hall. This would affect weddings which had been booked;

    ii) School places within a 2 mile radius are limited;

    iii) A lack of capacity in Health Outreach to deal with the needs of the occupants. The GPs in the area are already at capacity;

    iv) The police raised issues relating to community tension, exploitation of vulnerable people for alcohol, drugs and prostitution in the area, and a potential increase in retail crime.

33. On 26 September 2022 the Home Office responded to IBC referring to its statutory obligation to provide destitute asylum seekers with accommodation and then said:-

> "The use of hotels is a contingency measure, in order to meet our statutory obligation to house asylum seekers whilst we consider their claim for international protection. The Home Office has continued to see a higher demand than anticipated intake during recent months which has meant continued demand for asylum support and accommodation services, which has resulted in services users being accommodated in hotels for longer than we had envisioned. We are however taking steps to resolve this and bring an end to hotel use as contingency accommodation via widening dispersal, however procurement of dispersal accommodation has not been at the level needed to support new arrivals into the UK."

The author said that whilst the concerns raised were appreciated, he reminded the authority of the current problems faced by asylum seekers.

34. On 6 October 2022 the Home Office responded to the County Council, addressing each of the concerns raised in turn. The author explained how the Registrar's services could continue and the Novotel would not be used for families and would not place a burden on school resources. With regard to health services, the use of the hotel would only be an interim measure and funding was available to ease pressure on primary care services. The email also responded to issues raised by the police. The intention is to use the Novotel only on a temporary basis and ultimately to end the use of all hotels as IA, in accordance with the Ministerial policy announced in April 2022.

35. The email of 6 October 2022, which was copied to the Chief Executive of IBC, ended by stating that because of the urgent need, the Home Office was looking to use the Novotel from 23 October, over a fortnight later. The Home Office also said that they would like to meet with operational colleagues and relevant statutory bodies to discuss matters further and understand wider impacts. It is not clear whether any such meeting took place and, if not, why not.

36. It was not until 22 October 2022 that the Chief Executive of IBC contacted the Deputy Director at the Home Office. He understood that the use of the hotel would start within the next 48 hours. He then said that he had become aware of a "legal challenge" brought by Stoke-on-Trent Borough Council and that a further hearing would be taking place on 2 November 2022. IBC would be "doing more research on this early next week [that is the week commencing 24 October 2022] and keeping a close watch on that case and its applicability to Ipswich". The email asked whether it would be "prudent" of the Home Office to await the outcome of the "Stoke case" and said that IBC would take advice on 24 October as to whether it would be appropriate or sensible for the Council to take similar action.

37. Several things should be noted. Up until this point IBC had not even suggested that what the Home Office was preparing to do amounted to a breach of planning control, let alone one in respect of which enforcement action would be "expedient". Even then, it was not alleged that there would in fact be a breach of planning control and if so why. Nor was any undertaking requested from the Home Office not to use the Novotel. Lastly, the Chief Executive warned the Home Office that IBC might take legal action similar to Stoke-on-Trent City Council. Evidently, he did not think it

inappropriate to give that notice to the Home Office. In that last respect he was undoubtedly correct.

38. I interpose to say that in *The Council of the City of Stoke-on-Trent v Britannia Hotels Limited* (KB-2022-003540) Bourne J on 21 October 2022 J granted an ex parte injunction and Linden J on 2 November 2022 refused to continue that injunction until trial.

39. In the morning of 24 October 2022 the Chief Executive of IBC contacted Ms. Jarlett. She was provided with copies of communications with the Home Office. She asked Mr. Peters to draft a letter seeking an "urgent response" to questions relating to the proposed use of the hotel. The draft, which was sent on 25 October 2022, simply required Fairview to "provide information regarding your plans for the use of this (sic) premises" by 2 November. IBC reserved the right to take enforcement action if Fairview failed to respond within that timescale. IBC was prepared to allow just over a week for a response, although it knew that the Home Office intended that the Novotel be used to accommodate asylum seekers from 23 or 24 October 2022. But the draft letter was not sent because at 5.26 pm on 24 October the Chief Executive received an email from the Home Office stating that 75 beds would be in use that day, with a further 50 later that week and the remainder on 31 October.

40. When Mr Peters spoke to a Manager at Serco at 1.30pm on 25 October he discovered that the company had a 12 month contract with the Home Office and 70 people had moved into the Novotel.

41. On 25 October at some time between 1.30 pm and 3.55 pm the Chief Executive of IBC met with Ms. Jarlett and Mr. Peters. It was decided that a temporary stop notice be served under s. 171E of the TCPA 1990 requiring the change of use of the Novotel from hotel in the C1 Use Class to "hostel *sui generis*" to cease immediately. The notice was drafted so as to cover the existing occupants of the facility.

42. On 26 October Fairview's Solicitors, Howard Kennedy LLP, wrote to IBC maintaining that the use of the hotel was entirely lawful. They asked for the temporary stop notice to be withdrawn and for IBC to discuss the issues with their client.

43. On 27 October 2022 IBC issued its claim for an injunction and successfully applied *ex parte* without notice for the injunction. The claim form asserted that it had acted as expeditiously as possible after learning of "a serious breach of planning control" "to seek agreements that no such breach will occur but without success". The claim form focused on what had happened from 24 October 2022 (see e.g. para. 6). It was claimed that if the application were to be made on notice, "it would be too late to prevent the full number of people being moved into the Novotel and may even accelerate their arrival." I regret to have to say that those assertions did not fairly reflect the whole chronology summarised above.

Humber View Hotel

44. On Wednesday 28 September 2022 the Home Office contacted ERYC to say that because of the need to increase contingency accommodation for asylum seekers the Humber View Hotel had been identified as a potential site. They were hoping to start

up the site "in the coming week" but withheld to address any concerns the Council might have. That initial indication did not appear to allow adequate time for the authority to respond, but any initial concern about that was overtaken by subsequent events.

45. On 29 September 2022 ERYC replied stating:-

i) In relation to the Afghan scheme the location of the hotel had been unsuitable. The nearest services are a mile away along an unlit path adjacent to a busy road with limited public transport. ERYC appreciated that a use for asylum seekers would be different. Services could be on-site and they might not need access to off-site services in the same manner;

ii) Given proximity to the A63, road safety advice should be provided to all occupants.

Plainly, the local authority were not suggesting that a breach of planning control would be involved, nor did they raise any planning objections opposing the proposal as a matter of principle.

46. On 13 October the Home Office responded saying that the occupiers would be a different cohort to the Afghan cohort and the accommodation providers had a good deal of experience of managing such situations. They said that an operational meeting with local authority officials would be arranged shortly.

47. A meeting took place on 18 October 2022 between ERYC, the Home Office and Mears. On 20 October ERYC wrote to the Home Office to set out its concerns. These had developed. In summary, they were:-

i) The proposed change of use would appear to constitute a material change of use. The Home Office was asked (a) to explain whether, and if so how, the proposed use would fall within a hotel use and (b) not to implement the use without any necessary planning permission;

ii) There was a concern about the relationship between the site's location and the Humber Bridge in the context of suicide risk;

iii) There were safety concerns about the location of the site next to the A63 and within reach of a railway line;

iv) "The hotel is currently well used and offers a high-quality alternative to Hull City Centre accommodation, which is located in close proximity to a key employment site."

ERYC also wrote in similar terms to D1 to D3 and Mack. They were warned about the risk of enforcement action, but not the possibility of an application for an injunction under s. 187B of the TCPA 1990. Ms. Walsh also met with Mr. Henry, the Hotel's General Manager, on the same day.

48. ERYC expressed the same views in an email to the Home Office dated 21 October.

49. There was no response to those communications from ERYC. Consequently, on 24 October Ms. Walsh contacted two persons at LGH. But she was unable to obtain any firm information, because Ms. Jackson, who was primarily responsible, was absent. Nonetheless, Mr. Henry said that he had understood the Home Office's use to be starting on 31 October.

50. In these circumstances, Ms. Walsh wrote to LGH and to the hotel on 24 October stating that in the Council's view the proposed use would constitute a material change of use requiring planning permission. LGH was asked to confirm by 11 am on 25 October that the proposed use would not commence without the relevant planning permission being in place. Otherwise, the company was asked to state within the same timescale the date when the use would commence and who would be the operators. There was no response to those emails. The evidence now before the court shows that by 24 to 25 October Ms. Jackson knew that the Home Office would proceed. On 26 October she confirmed that LGH would be ready to proceed.

51. On 27 October 2022 ERYC issued its claim for an injunction. It applied *ex parte* without notice for the injunction, which was granted on 28 October. The Council asserted that it had applied as expeditiously as possible after learning of an imminent breach of planning control and repeated the language used in the IBC case to justify seeking an injunction *ex parte* without notice.

How each hotel would be used.

Novotel Ipswich

52. Mr Chatwani describes how the Novotel would be used. Fairview has entered into a booking agreement with an agent of Serco for a term of 12 months from 24 October for the use of the 101 bedrooms at the hotel for the accommodation of asylum or resettlement clients. From 24 October 37 rooms have been occupied by 72 persons, 35 rooms in twin occupancy. The remaining rooms are vacant.

53. There have been no physical alterations to the hotel. None are proposed. The layout remains the same. Each room has en suite facilities. Shared occupancy involves people acquainted with each other.

54. The hotel operates as normal in a number of respects. Fairview's staff operate reception 24 hours a day and check guests in and out. Hotel staff clean rooms and common parts in the usual way. Guests are not allowed to cook anywhere in the hotel. Guests are served 3 meals a day in the restaurant. The restaurant facilities have not changed. Each room has a TV, telephone, tea and coffee. But in addition Serco provides security at the premises for the protection of occupants in the event of protest.

55. Mr Peters began his investigation of the use of the hotel on behalf of IBC on 24 October 2022, the day the 72 asylum seekers arrived. He was told by reception that the Novotel was closed for 12 months and no bookings were being taken. He visited the property on 25 October. Some tables had been placed to the left of the main entrance, but the main reception desk was still being operated by hotel staff. Mr Peters

spoke to the hotel's General Manager who said it was being operated as a hotel. It does not appear that any further investigation was carried out, or if it was, the witness statement was silent about that. Instead, Mr. Peters gave the manager a copy of the temporary stop notice under s.171E of the TPCA 1990 which had already been authorised by IBC the previous day.

56. IBC did not serve a planning contravention notice on any party under s. 171C of the TCPA, or take any other steps, to require more information to be provided on how the land was being used. It is plain from the chronology that there was a sufficient timescale within which that could have happened. From the material currently before the court, IBC appears to have been relatively uninformed about what was or would be taking place in the hotel, or any effects of that activity.

Humber View Hotel

57. Mr. Taylor describes how the premises are proposed to be used. The hotel's own staff would be on site 24 hours a day, 7 days a week. They and the hotel's contractors would continue to run the facility in the same way as if there were no asylum seekers there. Mears' staff would make regular visits to provide assistance and provide 2 security staff on a continuous basis to help keep the premises and its occupants safe and secure. Mears would provide induction to new occupants on their arrival.

58. Rooms would be allocated one person to a room. It is intended that only single men would be accommodated. Each room has its own bathroom. There are no shared bathrooms. There are no cooking facilities for use by occupants. The guests would be served three meals a day prepared by the hotel's staff in the hotel kitchen. The hotel would deal with laundry. Guests are free to come and go as they wish.

59. Mack would block book the hotel initially for three months, with an option to extend. The agreed cost of the rooms is an average £85 a night. A backpackers' hostel in Hull charges between £20 and £44 a night. Guests will have to leave the premises once Mears is able to move them into dispersed accommodation. On 15 October 2022 LGH began to cancel any bookings at the hotel from 31 October onwards.

60. On 25 October 2022 Mears sent to ERYC a Brief for the use of the Humber View Hotel. This explains how occupants are able to contact Migrant Help at any time for advice and reporting issues. The brief describes what Mears will do in relation to age assessment issues for people said to be under the age of 18. Mears also makes arrangements for occupants to have a health check and to have access to local GP services and repeat prescriptions.

61. Although the hotel physically has 95 rooms, all those apart from the 77 rooms proposed to be used for asylum seekers are incapable of being occupied.

62. In this case also steps do not appear to have been taken to obtain a fuller picture of the proposed use.

***Ex parte* applications for injunctions without notice.**

63. CPR 25.3(1) enables the court to grant an interim injunction without notice if the court is satisfied that there are good reasons for notice not to be given. The evidence

in support of the application must identify those reasons (CPR 25.3(3)). Even so, "except in cases where secrecy is essential", the applicant should at least take steps to notify the respondent informally of the application (CPR PD 25A para. 4.3(3)). Modern methods of communication make it unlikely that there will ever be a practical justification for not giving informal notice of the application and documentation relied upon (Civil Procedure para. 25.3.2).

64. The general principle is that the court will not entertain an application of which no notice has been given, unless giving such notice would enable a defendant to take steps to defeat the purpose of the application (as, for example, in the case of a freezing order or a search and seizure order), or there has been no time *at all* to give notice before an injunction is required to prevent the threatened act (*National Commercial Bank Jamaica Limited v Olint Corp Limited* [2009] 1 WLR 1405). It is an exceptional remedy (*Moat Housing Group-South Limited v Harris* [2006] QB 606 at [63] and [71]).

65. Applicants for *ex parte* injunctions need also to be mindful of the practical implications of not giving notice to a respondent. In such circumstances, a claimant (including those representing him) is under a duty owed to the court to make a full and frank disclosure of all matters relevant to the application, including all matters of fact or law which are or may be adverse to the claimant (Civil Procedure at para 25.3.5). If that duty is not fulfilled, the court may discharge the injunction obtained *ex parte* (Civil Procedure at para. 25.3.6). There may also be other consequences.

66. The defendants in both claims made strong criticisms of the decisions by IBC and ERYC to seek interim injunctions without any notice at all. In the light of the material now before the court I see considerable force in those criticisms. The chronologies show that there was ample time to give notice to the defendants. Furthermore, it is difficult to see how secrecy was justified in either case. The two authorities told the other side about the possibility of enforcement action being taken without being concerned that that might result in an accelerated breach of planning control. IBC plainly alluded to the possibility of applying for an injunction. The court is normally able to hear urgent matters within a suitable timescale. Furthermore, the court is able to assess the implications of any defendant attempting to change the *status quo* after having received notice of an application.

67. However, in the present case it is unnecessary for me to reach any firm conclusions on what happened in these two cases. During the hearing the defendants said that they do not ask for the injunction to be set aside because of any improper procedure or because of any material non-disclosure. Nonetheless, in view of the manner in which this and other similar *ex parte* applications have been made, it is necessary to remind practitioners of key principles.

Legal Principles

Material change of use

68. Planning permission is required for the carrying out of development of land (s. 57(1) of TCPA 1990). "Development" includes the making of a material change in the use of any buildings or land (s. 55(1)).

69. The making of a change of use of itself does not amount to development. That depends upon whether the change is "material" in terms of planning considerations. Planning considerations are to do with the character of the use of land. The policies of the development plan may be relevant to that issue (*Wilson v West Sussex County Council* [1963] 2QB 764 at 785; *R (Wright) v Resilient Energy Severndale Limited* [2019] 1 WLR 6562 at [36]). The issue of whether a material change of use takes place is one of fact and degree. But what has to be considered is the character of the use of the land, not the particular purpose of a particular occupier (*Westminster City Council v Great Portland Estates plc* [1995] AC 661 at 669G). In this context, it is relevant to consider not only the on-site but also the off-site effects of the character of the use of the land (see e.g. *Hertfordshire County Council v Secretary of State for Communities and Local Government* [2013] JPL 560; *Westminster City Council v Secretary of State for Communities and Local Government* [2015] JPL 1256).

70. The UCO has been made pursuant to s. 55(2)(f) of the TCPA 1990 to exclude from the definition of development, and hence the requirement to obtain planning permission, changes between a use for one purpose and the use for any other purpose within the same Use Class (see also Article 3(1) of the UCO). Thus, Class C1 comprises "use as a hotel or as a boarding or guest house where, in each case, no significant element of care is provided". Until 1994 use as a hostel was also included in the same use class. A hostel is now a *sui generis* use outside any Use Class (Article 3(6)(i) of the UCO).

71. However, it is important to bear in mind that the UCO simply defines certain changes of use so that they are not to be treated as development. The Order does not operate so as to treat a change from a use within a Use Class to another use outside that Class as a material change of use (*Rann v Secretary of State for the Environment* (1979) 40 P&RC 113). So where the use of land changes from a hotel to a hostel, the only effect of the UCO is that that change is not excluded from development control. The UCO cannot be used to treat that change as representing in itself a *material* change in the use of the land. Whether that is so will depend on a case-specific assessment of the effect of the change on the character of the use of the land, in other words, the planning consequences of the change.

Hotels and Hostel Uses.

72. It is important to appreciate that the case law on what may be considered to be a hotel or a hostel as providing guidance on relevant considerations in determining what is ultimately a question of fact. The criteria set out in the cases are not to be treated as prescriptive or conclusive (see e.g. the *Westminster* case [2015] JPL 1276 at [30]). Neither word is to be regarded as a term of art. It should also be borne in mind that in the cases cited the court was carrying out a legal review of a decision made by a decision-maker responsible for finding the facts.

73. So, in *Mayflower Cambridge Limited v Secretary of State for the Environment* (1975) 30 P&CR 28 it was stated that, in contrast to bed-sitting rooms, the essence of a hotel is that it takes transient guests, or people for short stays. But in *Commercial and Residential Property Development Company Limited v Secretary of State for the Environment* (1981) 80 LGR 443 Glidewell J (as he then was) accepted that a hotel

may lawfully be occupied by permanent residents, that is people who do not have a home elsewhere (p. 447).

74. In *Commercial and Residential* the court also held that a hostel is a building where people either *live or stay* and which provides communal facilities. The word "hostel" is not a term of art in relation to duration of stay. It can include not only youth hostels for transient occupation but also long-term accommodation as in the case of a nurse's hostel. The sleeping accommodation is often, but by no means always, in the form of dormitories rather than single rooms and provides shared working, eating and recreational facilities. It is of the essence of a hostel that it provides relatively basic, inexpensive accommodation.

75. Plainly there is a spectrum of hostel uses. Glidewell J said that a nurses' hostel in which the occupants live, rather than stay, shares many of the characteristics of permanent housing. On the other hand, a hostel used as transient accommodation has many of the characteristics of a hotel: people coming and going, people booking in and checking out, people who stay in the hostel but live elsewhere.

76. In *Panayi v Secretary of State for the Environment* (1985) 50 P&CR 109 Kennedy J held that an Inspector had made no error of law in deciding that a change from four self-contained flats to a hostel used for homeless families involved a material change of use. The Inspector had been entitled to rely upon (i) the use of the premises to accommodate homeless families referred by a local authority, (ii) the premises were supervised and serviced, (iii) payment was made for the facility by the local authority on a nightly basis, and (iv) each family's stay was transient. Those factors had been judged by the tribunal of fact to be significant in the context of a change from self-contained flats. They were not characteristics of a use as a dwelling. As the Court of Appeal pointed out in the Westminster case, they are not a definitive checklist ([30]).

77. The *Westminster* case concerned a challenge to an Inspector's decision in an enforcement notice appeal, where the notice had alleged a change from a hotel to a mixed use as a hotel and hostel. The challenge succeeded in the Court of Appeal on two grounds. First, the Inspector failed to apply the correct legal approach for determining whether a planning unit has a mixed use. Second, she failed to have regard to the off-site effects of the actual use of the property, in particular the effects upon residential amenity.

78. The Court of Appeal stated that "the distinction between hotel use and hostel use is a fine one" ([5]). The Inspector had said the same, pointing out that many of the features of the operation could be found in a hotel as well as a hostel ([23]). Plainly the issue is fact-sensitive.

79. The Court of Appeal also stated that if the Inspector had not made an error with regard to the legal nature of a mixed use, it would have been difficult to see how she could reasonably have reached any conclusion other than that there was a mixed hotel and hostel use ([30]). That was on the basis of the Inspector's findings that:-

    i) a number of rooms were in use as dormitories (with bunk beds for 4, 6 or 8 people) with shared bathroom facilities and there were communal cooking and laundry facilities;

ii) the hotel was used by a specific category of people, young people travelling in groups;

iii) The occupants had to perform some tasks which would normally be carried out by hotel staff as part of the services provided. In addition, the premises had to be supervised to address noise and disturbance caused to neighbours by the occupants.

80. The claimants placed much reliance on the decision of Coulson J (as he then was) in *Carespec Limited v Wolverhampton City Council* [2016] EWHC 521 (Admin). That involved a challenge to a temporary stop notice prohibiting a change from a hotel to a hostel or mixed hotel/hostel use. The judge rejected an irrationality challenge to the local authority's judgment that a material change of use had taken place.

81. At [32] the judge said that from *Commercial and Residential* and *Panayi* the following factors provided reasonable grounds for the local authority to conclude that the premises were being used as a hostel:-

> "(a) There was going to be a significant and substantial usage by asylum seekers, who are conventionally housed in hostels;
>
> (b) They would be sleeping two to a room, despite the fact that they were strangers, something that would not be countenanced in a hotel;
>
> (c) They would reside there permanently, unlike people staying in a hotel;
>
> (d) The Quality Hotel would be their home, because they would have no other home to go to. That is entirely different to guests at hotels;
>
> (e) The charges were modest (£35 per day for bed, breakfast, lunch and an evening meal) which again was consistent with a hostel, not a hotel;
>
> (f) Payments were made by G4S as agents of a public body, an express indication of a hostel noted in ***Panayi***;
>
> (g) Those accommodated at the Quality Hotel were transient, in that they were placed there until other accommodation became available or their asylum application was resolved against them. Again that is not consistent with the use of the building as a hotel.
>
> (h) They had no connection or link with the area at all"

82. With great respect, I am doubtful about the way in which factor (a) was expressed. As we have seen, asylum seekers are accommodated in a range of properties with different planning uses, not just hostels. I consider that what factor (a) was focusing on was the use of the premises solely by a particular cohort with nowhere else to live. I also doubt whether factor (h) assists in distinguishing a hostel from a hotel. At all events it is common ground that the factors in [32] of *Carespec* are not prescriptive or exhaustive, any more than the matters referred to in *Panayi*.

83. More importantly, the judge in *Carespec* was not referred to the decision of the Court of Appeal in *Westminster*, which reiterated the need to assess not only whether a change of use has occurred, but also whether that change is material in planning terms. It appears from [14]-[15], [28] and [32] of *Carespec* that the judge was persuaded to accept that the use of a building as a hostel requires planning permission because of the effect of the UCO. That would not accord with the legal effect of the UCO (see *Rann*). Furthermore, it seems to me that [31] of *Carespec* cannot be reconciled with *Westminster* at [30].

Enforcement Action

84. The normal method of taking action against a breach of planning control, other than a breach of condition, is by an enforcement notice issued under s. 172 of the TCPA 1990, sometimes combined with a stop notice under s. 183. An LPA cannot serve an enforcement unless they consider it "expedient" to do so, having regard to the development plan and any other relevant planning considerations (s. 172(1)(b)). In *Ardagh Glass Limited v Chester City Council* [2009] Env LR 34 HHJ David Mole QC said that "expedience" indicates the balancing of the advantages and disadvantages of taking a particular course of action. So, even though the authority may be satisfied that a breach of planning control has occurred, they may consider it not expedient to issue an enforcement notice because on balance the use causes no planning harm at all, or is beneficial, or may cause insufficient harm to justify the taking of any enforcement action. Alternatively, the authority's conclusions on expediency may determine the nature and extent of any enforcement action they decide to take.

85. Where an enforcement notice is issued and served, parties interested in the land may bring an appeal under s.174, which will normally be determined by a Planning Inspector. The appeal can determine not only whether a breach of planning control has occurred but also, if it has, whether planning permissions should be granted for the development enforced against (s. 174(2) and s. 177). Where an appeal is brought under s. 174 the enforcement notice is of no effect until the final determination of withdrawal of the appeal (s. 175(4)), but that does not apply to a stop notice.

86. An enforcement notice, a stop notice or a temporary stop notice may only be issued and served where the relevant breach of planning control has begun. Section 187B enables an LPA to apply to the court for an injunction to restrain a breach of planning control in relation to an actual or apprehended breach, and whether or not the authority has exercised or proposes to exercise any other enforcement powers under Part VII of the TCPA 1990:-

> "(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
>
> (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.

> (3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown.
>
> (4) In this section "the court" means the High Court or the county court."

87. In addition, s. 37(1) of the Senior Courts Act 1981 provides:-

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

88. So an LPA cannot exercise the power to apply for an injunction under s. 187B unless they consider it "necessary or expedient" to restrain a breach of planning control by injunction. Based on the clear language of the statute, it was common ground that the claimants in this case had to be satisfied not only that it was necessary or expedient to take enforcement action against the proposed use of the hotels, but also that it was necessary or expedient to do so in this particular way, by seeking an injunction, rather than by other methods of enforcement. Although the decision on expediency is a matter for the LPA, it was also common ground that the matters which the LPA must have regard to are relevant to the exercise of the court's discretion on whether to grant an injunction.

89. In the case of an enforcement notice, regulation 4 of the Town and Country Planning (Enforcement Notice and Appeals) (England) Regulations 2002 (SI 2002 No. 2682) requires an LPA to specify in the enforcement notice *inter alia* the reasons why it considers it expedient to issue the notice and also the development plan policies relevant to that decision. Typically an LPA will explain briefly, for example, the harm that is thought to result from the development.

90. There is no provision parallel to regulation 4 where an LPA seeks to proceed under s. 187B. Here the decisions to authorise the bringing of the claims were taken by officers exercising delegated powers. I asked the parties to consider whether the obligation for an officer to produce a record of the decision taken, including the reasons for that decision, contained in Regulation 7 of the Openness of Local Government Bodies Regulations 2014 (SI 2014 No. 2045) applied to the decisions made in these cases. The answer appears to depend upon whether "the effect of the decision is to … (ii) affect the rights of an individual" (regulation 7(2)(b)). The defendants say that it does, the claimants say that it does not. Whether there was a breach of the regulation does not go to the issue of whether an injunction should be granted, but plainly, irrespective of whether the regulation applies, there would be a clear advantage in LPA officers formally recording the reasons for proceeding under s. 187B of the TPCA 1990. A serious step is being taken and this practice would assist the court. There has not been full argument on the regulation and I will not decide the point. But having regard to *R (Newey) v South Hams District Council* [2018] EWHC 1872 (Admin) at [37] *and R (Spedding) v Wiltshire Council* [2022] EWHC 347 (Admin) at [46] I see much force in the defendants' contention.

Principles for the grant of an injunction

91. The parties agree that the principles in *American Cyanamid Company v Ethicon (No.1)* [1975] AC 396 are applicable. In addition, they agree that the principles in *South Bucks District Council v Porter* [2003] 2 AC 558 on the use of s. 187B, albeit a decision dealing with the grant of permanent injunctions, are relevant also for decisions on whether to grant an interim injunction.

92. In *South Bucks* at [11]-[12] Lord Bingham analysed the statutory framework It is unnecessary to repeat that analysis here, which I gratefully adopt. At [13] he referred to concerns regarding the adequacy of enforcement powers and the delays sometimes involved which had led to the report by Robert Carnwath QC (as he then was) in February 1989. The relevant passages in the report are quoted at [15]. He recommended a new power to apply for an injunction as a back-up to the normal statutory remedies for enforcement. By way of example, the power could provide an urgent remedy in cases where there is a serious threat to amenity, to deal with a threatened breach. The enactment of s 187B by the Planning and Compensation Act 1991 gave effect to that recommendation.

93. At [20] Lord Bingham cited [38]-[42] of the judgement of Brown LJ (as he then was) in the Court of Appeal and approved those passages at [38]. I note the following principles and guidance from that judgment:-

    i) The need to enforce planning control in the general interest is a relevant consideration and in that context the planning history of the site may be important. The "degree and flagrancy" of the breach of planning may be critical. Where conventional enforcement measures have failed over a prolonged period the court may be more ready to grant an injunction. The court may be more reluctant where enforcement action has never been taken;

    ii) On the other hand, there might be urgency in the situation sufficient to justify the avoidance of an anticipated breach of planning control;

    iii) An anticipatory interim injunction may sometimes be preferable to a delayed permanent injunction, for example, where stopping a gypsy moving on to a site in the first place, may involve less hardship than moving him out after a long period of occupation;

    iv) While it is not for the court to question the correctness of planning decisions which have been taken (e.g. decisions to refuse a planning permission or to dismiss an appeal), the court should come to a broad view as to the degree of environmental damage resulting from the breach and the urgency or otherwise of bringing it to an end;

    v) The achievement of the legitimate aim of preserving the environment does not always outweigh countervailing rights (or factors). Injunctive relief is unlikely to be granted unless it is a "commensurate" remedy is the circumstances of the case;

    vi) It is the court's task to strike the balance between competing interests, weighing one against the other.

94. At [27] to [29] Lord Bingham stated:-

"27. The jurisdiction of the court under section 187B is an original, not a supervisory, jurisdiction. The supervisory jurisdiction of the court is invoked when a party asks it to review an exercise of public power. A local planning authority seeking an injunction to restrain an actual or apprehended breach of planning control does nothing of the kind. Like other applicants for injunctive relief it asks the court to exercise its power to grant such relief. It is of course open to the defendant, in resisting the grant of an injunction, to seek to impugn the local authority's decision to apply for an injunction on any of the conventional grounds which may be relied on to found an application for judicial review. As Carnwath J observed in *R v Basildon District Council, Ex p Clarke* [1996] JPL 866, 869:

> "If something had gone seriously wrong with the procedure, whether in the situation of the injunction proceedings or in any other way, it was difficult to see why the country court judge could not properly take it into account in the exercise of his discretion to grant or refuse the injunction"

But a defendant seeking to resist the grant of an injunction is not restricted to reliance on grounds which would found an application for judicial review.

28. The court's power to grant an injunction under section 187B is a discretionary power. The permissive "may" in subsection (2) applies not only to the terms of any injunction the court may grant but also to the decision whether it should grant any injunction. It is indeed inherent in the concept of an injunction in English law that it is a remedy that the court may but need not grant, depending on its judgment of all the circumstances. Underpinning the Court's jurisdiction to grant an injunction is section 37(1) of Supreme Court Act 1981, conferring power to do so "in all cases in which it appears to the Court to be just and convenient to do so". Thus the Court is not obliged to grant an injunction because a local authority considers it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction and so makes application to the court.

…

"29. The Court's discretion to grant or withhold relief is not however unfettered (and by quoting the word "absolute" from the 1991 Circular in paragraph 41 of his judgment Simon Brown LJ cannot have intended to suggest that it was). The discretion of the Court under section 187B, like every other judicial discretion, must be exercised judicially. That means, in this context, that the power must be exercised with due regard to the purpose for which the power was conferred: to restrain actual and threatened breaches of planning control. The power exists above all to permit abuses to be curbed and urgent solutions provided where these are called for. Since the facts of

> different cases are infinitely various, no single test can be prescribed to distinguish cases in which the court's discretion should be exercised in favour of granting an injunction from those in which it should not. Where it appears that a breach or apprehended breach will continue or occur unless and until effectively restrained by the law and that nothing short of an injunction will provide effective restraint (*City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, 714), that will point strongly towards the grant of an injunction. So will a history of unsuccessful enforcement and persistent non-compliance, as will evidence that the defendant has played the system by wilfully exploiting every opportunity for prevarication and delay, although section 187B(1) makes plain that a local planning authority, in applying for an injunction, need not have exercised nor propose to exercise any of its other enforcement powers under Part VII of the Act. In cases such as these the task of the court may be relatively straightforward. But in all cases the court must decide whether in all the circumstances it is just to grant the relief sought against the particular defendant."

95. At [31] Lord Bingham dealt with the weighing of hardship that may be caused by an injunction: -

> "When application is made to the court under section 187B , the evidence will usually make clear whether, and to what extent, the local planning authority has taken account of the personal circumstances of the defendant and any hardship an injunction may cause. If it appears that these aspects have been neglected and on examination they weigh against the grant of relief, the court will be readier to refuse it. If it appears that the local planning authority has fully considered them and none the less resolved that it is necessary or expedient to seek relief, this will ordinarily weigh heavily in favour of granting relief, since the court must accord respect to the balance which the local planning authority has struck between public and private interests. It is, however, ultimately for the court to decide whether the remedy sought is just and proportionate in all the circumstances."

96. Lord Scott agreed with Lord Bingham [104]. He also stated at [99]:-

> "The criteria that govern the grant by the court of the injunction make clear, in my opinion, that the court must take into account all or any circumstances of the case that bear upon the question whether the grant would be "just and convenient". Of particular importance, of course, will be whether or not the local planning authority can establish not only that there is a current or apprehended breach of planning control but also that the ordinary statutory means of enforcement are not likely to be effective in preventing the breach or bringing it to an end. In a case in which the statutory procedure of enforcement notice, prosecution for non-compliance and exercise by the authority of such statutory self-help remedies as are available had not been tried and where there was no sufficient reason to assume that, if tried, they

> would not succeed in dealing with the breach, the local planning authority would be unlikely to succeed in persuading the court that the grant of an injunction would be just and convenient."

and at [102]:-

> "The hardship likely to be caused to a defendant by the grant of an injunction to enforce the public law will always, in my opinion, be relevant to the court's decision whether or not to grant the injunction. In many, perhaps most, cases the hardship prayed in aid by the defendant will be of insufficient weight to counter balance a continued and persistent disobedience to the law. There is a strong general public interest that planning controls should be observed and, if not observed, enforced. But each case must depend upon its own circumstances."

97. Mr William Upton KC on behalf of Mears relied upon *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043 for the proposition that a claimant seeking a *quia timet* injunction must show that irreparable harm would result if the injunction were not to be granted. It is clear from the judgment of Coulson LJ at [35] that that is a principle of general application; it is not limited to cases brought against persons unknown. That is also clear from the discussion in Snell's Equity (34th edition) at para. 18-029 in relation to final injunctions. However, I am not persuaded that that principle should be applied to s. 187B as a threshold test. That would not accord with the breadth of the language used by Parliament. Instead, the issue of whether the apprehended breach of planning control would cause irreparable harm unless restrained is one of the factors to be considered by the court in the overall balance.

Whether the injunctions should be continued

Triable issue

98. Serco accept that IBC's claim raises a triable issue as to whether the proposed use of the Novotel would involve a material change of use and thus a breach of planning control. Mr. Kimblin KC on behalf of Fairview submits that the issue is not triable. Mr. Robin Green on behalf of D1 to D3 in ERYC's claim accepted that the same issue in that case is triable. I did not understand Mr. Upton to contend otherwise on behalf of Mears.

99. In summary, Mr. Kimblin submits that on the evidence, the proposed operation of the Novotel does not differ from the existing operation in any material way and IBC has failed to address whether any change of use would be material. He points out that paras. 12 to 20 of the Details of the Claim do not address that issue. They simply focus on the contention that the proposed use would be a hostel and wrongly assert that because *a* hostel use is *sui generis*, it follows that a breach of planning control will take place (see also Mr Peters' witness statement at paras. 8 and 11).

100. I agree with Mr. Kimblin (a) that the pleading is defective and (b) that IBC made no real attempt to investigate how the Novotel would be used. I also agree that evidence on the planning consequences of any change of use is very limited. But on the basis of

all the material now before the court, I am not persuaded that IBC has failed to show a triable issue.

101. The starting point is that the distinction between hotel and hostel use in a case of the present kind is fine. There are some factors pointing against a hostel use. The proposed use involves no alteration of the premises. In many ways the operation of the Novotel would be similar to that carried out ordinarily by the hotel operators. There would be no dormitories and the accommodation could not be described as basic or inexpensive. On the other hand there are factors pointing to a hostel use. The premises would be block-booked for a substantial period of time solely for occupation by people belonging to one cohort, asylum seekers, having nowhere else to live. The duration of their transient occupation would be determined by their move to the next stage of the asylum process. The accommodation would be paid for ultimately by the Home Office. It is arguable that the factors pointing towards a hostel use outweigh those pointing against.

102. The effect of the block-booking of the whole hotel is that no accommodation is available for any member of the public. It is said that the Novotel is the largest hotel in the centre of Ipswich and that the loss of the accommodation would be damaging to the hospitality and leisure economy of the town, given its close proximity to restaurants and bars. It is arguable that this alleged harm is a planning consideration which may render a change to a hostel a material change of use and so attract planning control.

103. In these circumstances IBC has raised a triable issue in relation to the apprehended breach of planning control.

104. Given the stance taken by the defendants in the ERYC case, I deal with this issue more briefly. Although there are some differences in the evidence compared to the IBC case, for similar reasons there is a triable issue as to whether the use of the hotel would change to a hostel. The planning harm relied upon by ERYC is different (impact of the loss of the hotel accommodation on a key employment site and for tourism purposes and highway safety concerns). In my judgment it is arguable that this alleged harm is a planning consideration which may render a change to a hostel use a material change of use.

Adequacy of damages

105. There is no dispute that because each of the claimants is seeking to enforce planning control, damages could not be an adequate remedy. Indeed, I do not see how damages would even be an available remedy.

106. Although both of the *ex parte* injunctions were granted on the basis of each of the claimants giving a cross-undertaking as to damages, they now contend that the injunctions should continue without any such undertaking, because they are performing a law enforcement role, applying *Kirklees Metropolitan Borough Council v Wickes Building Supplies Limited* [1993] AC 227. The defendants accept that position. Only D1-D3 have suggested that they would suffer any loss. However, the main focus of the submissions of all defendants is on the harm to asylum seekers who would otherwise be accommodated in each hotel if the relevant injunction were to continue.

107. All parties agree that in order to determine each application to continue the injunction until trial, the court needs to address the balance of convenience.

The balance of convenience

108. I begin with some considerations common to both cases, before dealing with case-specific factors to do with planning harm.

109. The claimants say that the proposed use of the hotels would represent in each case a serious and flagrant breach of planning control. There is a strong public interest in enforcement action being taken against breaches of planning control.

110. In my judgment a convenient starting point is the statement of the Court of Appeal in the *Westminster* case that the distinction between hotel and hostel use is fine. In each case before this court there are factors pointing for and against the proposed use being a hostel use. Even if a hostel use would be involved, the key question still remains whether it would represent a material change of use. That would depend upon the planning consequences of the change. In each case that turns upon the planning harm identified by the claimant.

111. The nature and extent of that harm also goes to the seriousness of the alleged breach and the urgency or otherwise of bringing it to an end. During the course of the hearing Mr. Thomas rightly accepted that the claimants' justification for continuing the injunctions depends upon the seriousness of that alleged planning harm. Put another way, would the immediate restraint of the proposed use by injunction, rather than the use of other enforcement action, be "commensurate" with that harm.

112. The claimants accept that in each case the proposed use would not cause any environmental damage, or any harm to the amenity of neighbouring uses, or any harm to the character and appearance of the area. The buildings would not be altered. There would be no issues relating to traffic generation.

113. If an injunction is not continued, because such relief is not commensurate with the harm alleged, and other enforcement action were to be successful subsequently, the alleged hostel use could be brought to an end and the property then made available for hotel use. Accordingly, there would not be any irreparable damage or harm. Mr. Thomas points out that the non-availability of the property for hotel use over that period could not be reversed. But by definition, that harm will have been judged to be insufficient to justify the continuation of the injunction until any trial.

114. Undoubtedly there is a public interest in enforcement action being taken against breaches of planning control. But, as Mr. Brown submitted, the integrity of the planning system is not undermined by the normal enforcement regime, which allows an alleged breach of planning control to continue while the merits of an appeal are under consideration, unless, of course, a stop notice is served. The real question, therefore is, what is the strength of the public interest in an immediate injunction being granted before an alleged breach of planning control even begins. That depends upon the nature and extent of the harm alleged.

115. Similarly, the strength or otherwise of Mr. Thomas's submission that the defendant's approach involves "leapfrogging", or avoiding, the normal process of applying for a

certificate of lawfulness under s.192 of the TCPA 1990 or alternatively for a planning permission before commencing a development, depends upon the harm alleged. It is simply one side of the coin, the reverse of which says that the LPA should not face the delay involved in pursuing normal enforcement methods to bring a breach of planning control to an end.

116. I will consider separately below the specific planning harm put forward by the claimant in each case.

117. I do not accept that the alleged breaches in those claims should be treated as flagrant. In each case the alleged breach is based upon a fine distinction between hotel and hostel uses. This is not a case where the breach of planning control is clear, such as, for example, the carrying out of significant operational development. Nor is any breach flagrant in the sense of being carried out in an area of environmental sensitivity or in an area subject to strong development control policies, such as the green belt.

118. On the evidence before the Court I do not accept that the defendants' conduct has been flagrant. I say this for a combination of reasons. First, the defendants advance respectable arguments that no breach of planning control is involved. They say that the contrary view of the claimants will be strongly contested. Second, evidence has been given by Serco, LGH and Mears of having made sole use arrangements with a significant number of hotels to accommodate asylum seekers without action being taken for an alleged breach of planning control, at least not until proceedings started to be brought recently. For example, LGH operates or has operated sole use arrangements at 18 hotels. Serco provides temporary initial accommodation in 84 hotels. Meers provides for 5,000 asylum seekers in 80hotels. Third, the Home Office notified IBC and ERYC of its proposals, invited discussions with the local authorities and other service providers and addressed concerns. Fourth, in the case of IBC, from the notification by the Home Office of its proposal, the authority took over a month to say that a breach of planning control was involved. Then a cursory investigation was carried out in the week in which proceedings in the High Court were launched. In the case of ERYC the authority first raised the possibility of enforcement action just over 3 weeks after the Home Office notified them of its proposal.

119. I turn to harm that would be caused by the grant of the injunction. For the purposes of this hearing Fairview, Serco and Mears do not rely upon any financial harm to themselves at this stage. But D1-D3 do.

120. The Covid pandemic has significantly affected bookings across the LGH Hotel Group and the Humber View Hotel. The sole use contracts have helped the Group stay in business. There has been an issue as to what is the level of occupancy of the hotel at North Ferriby. But whatever the answer to that question, I accept the evidence of Ms. Jackson that the hotel has been operating at a loss. The Group had been discussing mothballing the hotel, which could potentially result in up to 50 members of staff being made redundant. Ms. Jackson says, and I accept, that the sole use contract offers "a financial lifeline for this hotel potentially securing its future". I consider this to be a significant factor in the balance. It is relevant also to the concern of the ERYC that the premises should continue to operate as a hotel in the future.

121. The continuation of the injunction would also cause other important harm in each case. The asylum seekers who would be accommodated at these two hotels are entitled to have their claims for asylum dealt with. Some will be successful. Some will not. It is not disputed that the merits of those claims are of no relevance in these proceedings. What is relevant, however, is the statutory duty of the SSHD to provide accommodation for destitute asylum seekers who would otherwise be homeless.

122. I do not attach any weight to Mr. Thomas's submission that it would be more harmful to asylum seekers if they had to be relocated after a final trial, rather than prevented from arriving at the hotels in the first place. They are only expected to remain in the IA contingency hotels for a relatively short period, even if the normal occupation period of 21 days has increased. The occupants will move on in any event. The real issue is the consequential effect of either of the subject premises not being available to assist in meeting the urgent and substantial need for this type of accommodation.

123. It is plain from the evidence that the Home Office is facing an unprecedented increase in the number of asylum seekers, the vast majority of whom have to be accommodated under the 1999 Act. As matters stand, there is no sign of this abating. The Home Office has therefore had to commission, as a matter of urgency, sole use contracts for hotels in various parts of the country as contingency IA facilities. These contracts are also intended to alleviate conditions at the Manston processing centre. It can seen from the evidence that without such facilities there is a real risk of some asylum seekers becoming homeless.

124. In reality, if either or both of the injunctions were to be continued, the Home Office would have to look for accommodation elsewhere. It is clear from the evidence that it is difficult to secure hotels suitable for single-use contracts. The supply is limited. In addition, the process involved takes several weeks. The court is not in a position to draw conclusions on the scope for alternative accommodation to be provided. But bearing in mind the very large and rapid increase in the requirement for accommodation for asylum seekers, that does not detract from the substantial weight which I consider should be given to this harm.

125. Mr. Thomas makes a generalised assertion that these problems are of the Home Office's own making. There is no evidence to support that submission. The court is in no position to comment. In any event, even if evidence were to be produced to support specific criticisms, that would not alter the position of the asylum seekers. They will include people who, according to our law, are entitled to protection under the Refugee Convention and potentially Article 3 of the ECHR. In cases of destitution they are entitled to be accommodated, however the present situation came about.

126. The evidence also makes it clear that in ordinary circumstances the Home Office would not wish to use hotel accommodation as contingency IA, not least because of the cost to the public purse. This use has been presented to the court as a short-term solution to an acute problem. The contracts in these case would last for up to one year.

127. The urgent need for contingency IA in order to accommodate destitute asylum seekers under a statutory duty was an important and essential consideration for each of the claimants to take into account. It is a specific and highly unusual need. There is no real evidence of either claimant weighing up these matters when taking its decision to initiate proceedings under s. 187B.

Planning Harm in relation to the Novotel

128. As I have explained a number of concerns were initially raised by the Chief Executives of IBC and Suffolk County Council. They were addressed by a response from the Home Office. I have not seen evidence of those concerns being pursued further. Instead, the witness statement of Ms. Jarlett simply says this:-

> "The Council has not received a planning application for a change of use for the hotel to a hostel and consequentially the change of use has not been through due process and determination including being subject to the proper considerations of consultation, loss of the hotel to the Ipswich area, current planning policy and protections for such use. The Novotel hotel is the largest hotel in Ipswich town centre, and it can be argued that the loss of its use as a hotel will have a damaging impact on the economy of the town and in particular the local hospitality and leisure sector who benefit from hotel residents. There is also concern that the unauthorised use of the hotel has caused the redundancy of employees of the hotel."

Effectively, that is it. I have already dealt with the matters raised other than the effect of the "loss" of the hotel.

129. The temporary stop notice refers to some policies in the development plan relating to the loss of the hotel, but they have not been produced and their implications have not been further discussed. As Mr. Kimblin and Mr. Brown pointed out the language in the witness statement "it can be argued that" is tepid.

130. I bear in mind that the proposed use is temporary in nature and so the loss referred to would be temporary. If there is a concern that that may turn out not to be the case, there are plenty of other weapons in the LPA's enforcement armoury to tackle the issue. That in itself would not justify immediate restraint of the proposed use.

131. In the circumstances, IBC has not presented a case of substantial planning harm.

132. It was common ground at the hearing that the temporary stop notice does not affect the merits of whether the interim injunction should be continued. In a letter from IBC to Fairview's solicitors dated 2 November 2022 the authority explained why the purposes of the temporary stop notice and the injunction were thought to be compatible. The notice had been served to deal with the 72 persons already in occupation, whereas the injunction was sought to prevent any additional occupation of the premises. Furthermore, the notice will cease to have effect on 22 November, whereas the injunction would carry on until trial.

133. In the circumstances, I consider that the factors in favour of discharging the injunction clearly outweigh those in favour of continuing it. I do not consider that the preservation of the *status quo* materially alters the balance. As is clear from *American Cyanamid* at p. 408G, the *status quo* in this case is not simply concerned with the subject premises, the hotel. The use of the hotel forms only part of a much larger programme for accommodating at short notice a large number of asylum seekers. The injunction would interfere with the implementation of part of that programme already being undertaken.

134. I conclude that it would not be commensurate with the evidence on planning harm (including the urgency alleged) for the injunction to be continued until trial.

Planning harm in relation to the Humber View Hotel

135. Although not raised initially, the economic impact of the hotel not being available for use by the public is now the main point discussed in the witness statement of Ms. Walsh, along with relevant policies of the development plan. She says that the loss of the hotel would be detrimental to key employment sites in the area, one at Humber Bridgehead and the other at Melton, which benefit from the availability of accommodation at the hotel. In addition, the semi-rural location enables the hotel to operate as part of the local tourism economy. As against those concerns, the proposed use of the hotel is intended to be temporary; the same considerations apply as in the case of the Novotel. Additionally, there is the evidence of the precarious financial position of the Humber View Hotel and of the risk of it closing should the injunction be continued. In these circumstances, I do not attach any significant weight to this aspect of harm.

136. It is also now suggested in the witness statement that the use of the hotel as a hostel "could" have a negative impact on the marketing of the Humber Bridgehead site. The suggestion is tentative and has not been developed.

137. The Home Office addressed the other issues raised by ERYC, including the relationship to services, in correspondence and in a meeting. These concerns have not been presented as issues of principle. For example, on pedestrian safety in relation to the A63, ERYC said that road safety advice should be provided to all occupants.

138. In my judgment, ERYC has not presented a case of substantial planning harm.

139. In the circumstances, I consider that the factors in favour of discharging the injunction clearly outweigh those in favour of continuing it. It do not consider that the preservation of the *status quo* materially alters the balance. As is clear from *American Cyanimid* at p. 408G, the *status quo* in this case is not simply concerned with the subject premises, the hotel. The use of the hotel forms only part of a much larger programme for accommodating at short notice a large number of people. The injunction would interfere with the implementation of part of that programme already being undertaken.

140. I conclude that it would not be commensurate with the evidence on planning harm (including the urgency alleged) for the injunction to be continued until trial.

Conclusion

141. I refuse the applications to continue the injunction granted to IBC on 27 October 2022 and to ERYC on 28 October 2022.