Neutral Citation Number: [2023] EWCA Civ 428

Case No: CA-2022-001618

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**MR JUSTICE MEADE**
**[2022] EWHC 2025**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2023

**Before :**

**LADY JUSTICE KING**
**LORD JUSTICE DINGEMANS**
and
**LORD JUSTICE SNOWDEN**

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**Between :**

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| **AHGR LIMITED** | **Appellant/ Claimant** |
| **- and -** | |
| **(1) DR LUKE KANE-LAVERACK**<br>**(2) MR PETER KANE-LAVERACK** | **Respondents/ Defendants** |

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**Nathaniel Duckworth** (instructed by **Colman Coyle Solicitors**) for the **Appellant**
**Myriam Stacey KC and Nick Grant** (instructed by **Payne Hicks Beach LLP**) for the **Respondents**

Hearing date : 14 March 2023

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# Approved Judgment

This judgment was handed down remotely at 12 noon on 21.4.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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**Lord Justice Dingemans :**

## Introduction and issues

1. This appeal raises the issue of the proper construction of the phrase "live/work" in a clause in a 999 year lease dated 20 August 2002 of a leasehold flat of Unit 8, Bickels Yard, 151-153 Bermondsey Street, London SE1 3HA ("the premises"). The Bickels Yard development was a mixed development of flats, offices, and one "live/work" unit. As is apparent below, there were a number of particular features of the grant of planning permission for these premises, which might not be replicated in other "live/work" units.

2. The relevant clause in the lease contained a covenant against use of the premises other than as a "live/work" unit in accordance with the terms and conditions of the relevant grant of planning permission, which itself referred to "live/work". The leaseholders of the premises when proceedings were commenced were the respondents, Luke and Peter Kane-Laverack.

3. By a judgment dated 29 September 2021 following a trial brought by the appellant, AHGR Limited ("AHGR"), the freehold owner of Bickels Yard, against Luke and Peter Kane-Laverack for breach of covenant, His Honour Judge Johns KC, sitting in the Central London County Court, held that the phrase "live/work" in the lease meant "live and/or work" and made a declaration to that effect. The claim for breach of covenant was dismissed.

4. AHGR appealed to the High Court of Justice, Chancery Division contending that the phrase "live/work" in the lease required the leaseholders to "live and work" at the premises. By a judgment dated 6 July 2022 Meade J agreed with the interpretation of live/work given by HHJ Johns KC, and dismissed the appeal.

5. AHGR now appeals to this Court. Mr Duckworth, on behalf of AHGR, submitted that this Court should place very considerable reliance on what HHJ Johns KC found to be Supplementary Planning Guidance ("the SPG") issued by the London Borough of Southwark ("Southwark"). It was contended on behalf of AHGR that the words "live/work" in the lease and grant of planning permission were ambiguous and had to be interpreted in the light of the SPG, and once that process was undertaken it was obvious that "live/work" meant "live and work".

6. Ms Stacey KC submitted on behalf of Luke and Peter Kane-Laverack that the judges below were right not to interpret the grant of planning permission in the light of the SPG. If, however, the SPG was to be taken into account, it was clear that the planning permission permitted the occupiers to "live and/or work" at the premises. Luke and Peter Kane-Laverack have served a respondent's notice relating to the location of the kitchen in the premises.

7. The second issue raised by the appeal is the meaning of "work" if the lease is to be construed as requiring the leaseholders to "live and work" at the premises. The judge found that activities carried out at the premises by Luke and Peter Kane-Laverack from 2014 to 2019 satisfied the requirement of "work". AHGR contends that "work" was to be equated with "business" activities, and that many of the activities accepted by the judge to amount to "work" were not sufficient to meet that definition.

8. I am very grateful to Mr Duckworth and Ms Stacey, and their respective legal teams, for their helpful written and oral submissions.

**Relevant factual background**

9. It seems, from a report dated April 2005 prepared for the London Borough of Hammersmith & Fulham entitled "Does Live/work?", that the "live/work" concept was copied from the United States. It had developed in the US as a consequence of zoning codes. It had been used in London, where the London Boroughs are separate planning authorities, since the late 1990s. It appears to have been seen by planning authorities as a way to encourage mixed use developments and to encourage the development of unused buildings which were in areas designated as employment areas. There was reported to be disillusionment in the UK with the concept because of the number of units which had reverted to residential only use, whereas some units had reverted to employment only use where there was a strong market for small offices. It was apparent that different planning authorities had taken different approaches to the concept. It was common ground between the parties on the appeal that "live/work" was a concept of its own kind (or sui generis) which could not be classified under a single class within the Town and Country Planning (Use Classes) Order 1987.

10. Southwark was the relevant planning authority for Bickels Yard on Bermondsey Street, which was within a defined "employment area" in the Southwark planning area. Southwark approved a planning guidance document on 9 February 1999 entitled "Live/work development in Bermondsey Street". The guidance document identified a range of requirements that would need to be met by live/work developments. It was this document which HHJ Johns KC found to be the SPG in paragraph 33 of his judgment. There was no appeal against that finding, which is consistent with the description given in paragraph 15.49 of the April 2005 report to Hammersmith and Fulham and the fact that the SPG is aimed, as appears from paragraph 1.1, at providing developers with clear and concise advice when submitting planning applications for live/work developments in the Bermondsey Street area.

**Material terms of the SPG**

11. Given the dispute over the effect of the SPG it is necessary to set out some of its material terms.

12. Paragraph 1.2 of the SPG stated:

> "Live/work development is the provision of associated living and working accommodation within a single self-contained unit. This type of accommodation is attractive to people either setting up their first business or seeking to expand a business which they are operating from their current dwelling. Associated living and working is particularly attractive to a disabled person, as travelling to work is one of the main barriers to employment that disabled people face."

13. Paragraph 1.4 of the SPG stated:

> "This guidance sets out the background to the development of live/work interest in Bermondsey Street. It identifies a range of requirements that will need to be met by live/work developments as well as specific planning conditions that are likely to be attached to any approval of such developments. In assessing proposals for live/work development in Bermondsey Street, the first consideration will be their acceptability against the relevant planning policies."

14. At paragraph 3.3.2 of the SPG it was recorded that:

> "the majority of live/work units surveyed are being used for a single-person operation, such as writing … which do not create employment and are uses which can often take place within a dwelling house without the need for planning permission. This type of domestic scale activity is not in the spirit of live/work use and should not be encouraged" (emphasis added).

15. At paragraph 3.3.4 of the SPG it was stated that:

> "conditions which do not refer to a defined area of working floor space appear to allow single-person operations to operate legitimately, as it is difficult to demonstrate on site the balance between working and living space within a unit" (underlining added).

16. It was also recorded at paragraph 3.3.5 of the SPG that small live/work units were generally defined as domestic premises for council tax purposes and were not subjected to the burden of business rates. Consistently with paragraph 3.3.4, paragraph 4.2.1 provided "each live/work unit should have a minimum of 40 square metres of definable, functional workspace in addition to the residential element" and paragraph 4.2.2 provided that "the workspace should be identified on submitted drawings and physically delineated from the residential element".

17. The SPG continued at paragraphs 4.2.3 – 4.2.5:

> "4.2.3 In order to protect the commercial vitality of the Employment Area, live/work units should not occupy units at ground floor level. In smaller units it may be permissible to provide the work element of a live/work unit at ground floor level with the residential above (this will be controlled with a planning condition)
>
> 4.2.4 No more than two bedrooms shall be included in each unit as live/work uses are not considered suitable for family accommodation, particularly within a defined employment area.

> 4.2.5 The workspace needs to be capable of accommodating the whole range of B1 uses, including light industry. Easy access for bulky goods and materials should be provided with double doors, 2 metre width, high ceilings and goods lifts."

18. Paragraph 5.1 of the SPG stated:

> "In addition to any other conditions that may be required, the following conditions should be attached to any planning permission for a live/work development:
>
> (1) The work part of the live/work units hereby approved and shown on the approved drawing number shall only be used for purposes falling within Class B1 of the Town and Country Planning (Use Classes) Order 1987 in association with the residential parts of the units as shown on the submitted plans hereby approved and shall not be used for any other purpose.
>
> (2) The residential parts of the live/work units hereby approved and shown on the approved drawing number shall only be used for residential purposes, in association with the work part of the said live/work units and shall not be used for any other purpose."

**The planning permission for Bickels Yard**

19. Planning permission for the development of Bickels Yard was sought from Southwark. The proposed development was for: 13 business units (which are now used as offices); 14 residential units; and one live/work unit, which became the premises. HHJ Johns KC found that the reason for the "live/work" unit was to avoid having a development of 15 or more residential units which would have triggered a requirement for the developer to sell 25 per cent of the scheme as affordable housing.

20. There were two plan drawings of the premises which had been submitted with the application at different times. The first drawing, plan 304D, showed a separate, clearly demarcated, working space in the premises. The working space was shaded as "B1 use". That plan was superseded by a later drawing, plan 404A, which showed the whole premises as shaded, and the shading was shown in the key as "work/live" space.

21. In a delegated decision report printed on 13 February 2001 ("the deferral report"), the planning officer stated that the application was for "15 flats" of which the premises

> "has been called a `work/live' unit but as it is on the first floor, is a flat layout and bears no similarity to a genuine work/live business unit, it is a clear and blatant attempt to bypass the Affordable Housing requirement".

In the light of that observation the planning officer suggested in the report that that "requires an explanation of how the Affordable Housing policy is addressed". It seems that the decision on planning permission was deferred.

22. It is not apparent from the planning documents located by the parties what, if anything, occurred between the production of the deferral report and the grant of planning permission.

23. Planning permission was granted by decision dated 23 February 2001. It was for the "erection of part 4 and part 5 storey building comprising 13 business units, 14 residential units and 1 live/work unit". It was described to be in accordance with the application received on 1 August 2000 and amended by revisions/additional plans received on 13 February 2001 and "applicant's drawing no.'s". These drawings included drawing number P404A which did not sub-divide the flat into separate "work" and "live" areas and which shaded the whole area as "work/live" space. The drawings did not include the earlier plan 304D.

**The lease of the premises**

24. The premises were leased on a 999 year lease on 20 August 2002. Clause 2.4 of the lease is a covenant by the leaseholder:

> "not to use or permit the use of the demised premises or any part thereof otherwise than as a live/work unit in accordance with the terms and conditions set forth in the planning permission dated 23 February 2001 … nor to do or permit to be done anything which may cause the landlord to be in breach of its obligations under any statutory enactment or regulation."

25. There is also a covenant at clause 3.5 of the lease not to contravene planning legislation.

26. Clause 2.4 expressly refers to the grant of the planning permission, and it is common ground that the meaning of the clause has to be interpreted in the light of the planning permission which was granted by Southwark.

27. The premises were at one time occupied by Regus Mutual Managers Limited, suggesting some business use of the premises after the development had been completed. The lease of the premises was purchased by Luke Kane-Laverack on 23 October 2009 and the premises were used exclusively as a single dwelling house from at least 26 October 2009 until October 2013. The premises were a two bedroom, two bathroom premises with the second bedroom functioning as a study.

28. Luke and Peter Kane-Laverack applied in October 2013 to Southwark for a certificate of lawful use of the premises as a single dwellinghouse residential flat.

29. HHJ Johns QC found that from 2014 Peter Kane-Laverack, who is a barrister, had worked at the premises as a free-lance writer and a legal consultant, preparing notes, lectures, speeches, written submissions and advice. Luke Kane-Laverack, who is a doctor, had also provided triaging and phone consultations for his GP patients, provided consultancy services to a charity and had written articles, speeches and given advice from the premises.

30. AHGR brought proceedings in 2019 against Luke and Peter Kane-Laverack for breach of covenant.

## The proceedings and judgments

31. There was a trial of the proceedings before HHJ Johns KC. In his judgment the judge set out the findings of fact summarised above. He set out the relevant principles relating to the interpretation of grants of planning permission, and interpreted clause 2.4 of the lease as meaning that the leaseholder was permitted to "live and/or work" at the premises, so that it could be used for residential purposes only, the leaseholder was not required to "live and work" at the premises. HHJ Johns KC also found that even if there had been a requirement to work at the premises it would not have required a business to be operated from the premises, and that there was no waiver of the covenant. In case he was wrong on his main conclusion, HHJ Johns KC assessed negotiation damages for breach of the covenant at £5,000 (having heard competing expert assessments of £60,000 and £0.)

32. AHGR sought and was granted permission to appeal to the High Court. Meade J heard the appeal on 6 July 2022 and gave an extempore judgment. Meade J summarised the reasoning of HHJ Johns KC and then rejected a number of points advanced on behalf of Luke and Peter Kane-Laverack which had not been relied on by the judge. Meade J turned to assess the correctness of the judgment by HHJ Johns KC and rejected points made under 11 separate headings on behalf of AHGR. Meade J also stated that he would have found that there was significant work carried on in the premises after 2014 on the basis of the findings made by HHJ Johns KC.

33. In their judgments, both HHJ Johns KC and Meade J considered that the Court should be slow to interpret the planning permission in the light of the SPG which was not incorporated into or referred to in the relevant grant of planning permission. HHJ Johns KC and Meade J also found that if reliance was placed on the SPG it showed that this grant of planning permission meant that "live/work" meant "live and/or work".

## Relevant legal principles

34. There was no material dispute between the parties about the relevant principles applicable to the interpretations of covenants in leases or grants of planning permission. In *Cherry Tree Investments v Landmain* [2012] EWCA Civ 736; [2013] Ch 305 at paragraphs 129 and 130 the principles applicable to the construction of a facility agreement and registered charge were considered. The majority of the Court held the parties to the bargain of the charge made public in the register, while recording that that bargain might be rectified if there was evidence that the register did not reflect the agreement made by the parties. It was held that the reasonable reader could take into account by way of the admissible background of a publicly accessible register the physical features of the land, but not collateral documents which were not available to those inspecting the register.

35. In *Trump International Golf v The Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85 the Supreme Court considered the legality of the grant of planning permission to operate an offshore wind farm within sight of a golf club and resort. It was held, in paragraph 33 of the judgment, that there was limited scope for the use of extrinsic material in the interpretation of a public document such as a planning permission. It was relevant to the process of interpretation to note that failure to comply with a planning condition might lead to criminal sanctions. The court should

ask itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole.

36. Lord Carnwath stated at paragraph 66 of his concurring judgment that the process of interpreting planning permissions did not differ materially from the approach taken to other documents. The particular legal and factual context of a planning permission is that it is a public document which may be relied on by parties unrelated to those originally involved and that planning conditions may be used to support criminal proceedings. This justifies a relatively cautious approach so as to limit the categories of documents which may be used in interpreting a planning permission. Lord Carnwath referred with approval to earlier cases in which a strict approach had been taken, for example refusing to look at the application unless it had been expressly incorporated into the grant of planning permission by the use of words such as "in accordance with the application".

37. The reasonable reader can be taken to understand the role of permission, conditions and any incorporated documents. It is permissible to have regard to documents incorporated into the permission, although as a matter of reality there may be some inconsistencies between all of the documents incorporated into the grant of permission. Courts should be extremely slow to consider the intention behind conditions from documents which are not incorporated, particularly if they are not in the public domain, see *UBB Waste Essex v Essex County Council* [2019] EWHC 1924 (Admin).

38. In *Hillside Parks Ltd v Snowdonia National Parks Authority* [2022] UKSC 30; [2022] 1 WLR 5077 the Supreme Court considered whether it was possible to carry out a development pursuant to planning permission where a later planning permission, which had been acted on, made it impossible to carry out the original scheme. At paragraphs 26 and 27 the Court emphasised that grants of planning permission are to be interpreted according to the same general principles that apply in English law to the interpretation of documents with legal effect. The exercise is objective, and based upon what a reasonable reader would understand the words to mean. The relevant context includes the fact that a planning permission is not personal to the applicant, and is a public document on which third parties are entitled to rely, which means that correspondence passing between the parties will not be considered.

**The interpretation of "live/work unit in accordance with the terms and conditions set forth in the planning permission"**

39. I agree with both HHJ Johns KC and Meade J that, in the very particular circumstances of this grant of planning permission for this "live/work" unit, the phrase "live/work" meant "live and/or work".

40. This is for a number of reasons. First, as was common ground, the phrase "live/work" in this particular lease was, as a matter of language, ambiguous and could mean "live and work", "live or work" or "live and/or work". Secondly the relevant plan which formed part of the planning permission showed the whole of the premises shaded as "live/work" which meant that there was no sub-division imposed by the planning permission into separate "live" or "work" areas. This meant that it would be for the leaseholder to determine where to live and where to work. Leaving such matters to the discretion of the leaseholder suggests a permissive approach to the phrase

"live/work" meaning that the leaseholder might decide only to live at the premises, or only to work at the premises, or to do both in parts of the premises at their choosing. Thirdly because a leaseholder might be served with enforcement notices and might ultimately be the subject of criminal proceedings for breach of planning permission, then if it was intended that lawful use of the premises required both living and working, that would be spelled out using language that was clear and unambiguous.

41. That is a conclusion which has been reached without the use of any extrinsic materials, and I do not consider that the reasonable reader of the grant of planning permission would have regard to the SPG, the earlier plan (plan 304D), or the planning officer's deferral report. This is because those documents were neither referred to nor incorporated into the grant of planning permission. If, however, regard is to be had to any of those documents then in my judgment each of the documents supports the interpretation that the phrase "live/work" meant "live and/or work" for this grant of planning permission for this "live/work" unit.

42. As to the SPG, I agree with Mr Duckworth that the thrust of the SPG is that the general intention behind the concept of a live/work unit is to create a situation where the occupier will both live and work at the relevant planning unit. This is particularly apparent from paragraph 3.3.2 of the SPG which refers to the "spirt of live/work use". However the SPG also specifically recognises that if this general intention is to be achieved in relation to a particular planning unit, the areas of the unit which are for living and those that are for working should be delineated, and that the work area should be designated for B1 use. This is because conditions which do not refer to a defined area of working floor space "appear to allow" single-person operations of the type which can be carried out from a dwelling house without planning permission to operate legitimately. The need for planning conditions to give effect to the general intention also appears from paragraph 5.1 of the SPG which provided that "the following conditions should" be attached to a live/work unit. These conditions included showing the work part approved for purposes falling within class B1 and requiring the residential parts to be used in association with the work part of the live/work unit. In this case if a reasonable reader was to have regard to the SPG, that reasonable reader would be struck by the absence on plan 404A of any sub-division of the premises into separate areas for live and work and the absence of conditions in the grant of planning permission relating to the premises, and would infer that, although the general spirit of live/work units was to deliver units where the occupier both lived and worked, that had not been required in relation to the premises.

43. If the reasonable reader were to have regard to plan 304D, that would also support the interpretation that "live/work" meant "live and/or work". This is because the reasonable reader would note that the premises had been divided into separate live and work areas, and that the work area had previously been specified as class B1 use. The contrast with the plan 404A (which did not sub-divide the premises) would have been obvious, and the reasonable reader would consider that this change was so that the premises might be used at the occupier's option as a residential flat, or offices, or both.

44. Finally if the reasonable reader were to read the planning officer's deferral report and comments to the effect that "the flat layout" (which I assume to be a reference to the absence of any sub-division between "work" and "live" parts of the premises) "bears no similarity to a genuine work/live business unit", then the reasonable reader would

take further comfort that their interpretation of the planning permission as permitting living and/or working was both reasonable and right. This is because the grant of planning permission followed without any apparent change to the proposal.

45. I have not taken account of the use of the premises after the grant of planning permission, which means that it is not necessary to consider the very narrow circumstances in which use might be made of subsequent events to interpret the grant of planning permission. As reported cases establish, persons do not always take advantage of the range of uses permitted by the grant of planning permission, and persons act in breach of planning permission. This makes evidence of subsequent use a very uncertain guide to the proper interpretation of the grant of planning permission. Further I have not taken account of the location of the kitchen, meaning that there is no need to consider the Respondent's Notice.

**The definition of "work"**

46. This conclusion about the interpretation of the grant of planning permission means that it is not necessary to define what "work" in the "live/work" phrase meant. In the course of submissions there were interesting discussions about: whether work was to be equated with "business activities" pursued for profit; whether a lawyer's work from home would not qualify as "work" if they had an existing separate professional address; and if the lawyer did not have an alternative professional address, whether pro bono work carried out from home would not count, unless perhaps it was done with the intention of developing the paying part of a practice.

47. Although there was force in Mr Duckworth's complaint that he had attempted to provide a full and usable definition of "work" and that none had been suggested on behalf of Luke and Peter Kane-Laverack, in my judgment it would be appropriate to leave the question of what "work", in a "live/work" development, might mean for an appropriate case in which it matters. This is because there might be different answers to the question depending on whether B1 use has been specified for any part of the premises.

**Conclusion**

48. For the detailed reasons given above I would dismiss this appeal.

**Lord Justice Snowden**

49. I agree.

**Lady Justice King**

50. I also agree.