



Neutral Citation Number: [2023] EWHC 1522 (Admin)

Case No: CO/4860/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2023

Before:

SIR ROSS CRANSTON

Sitting as a High Court Judge

Between:

**TAYTIME LIMITED as the appointed Agent for
and on behalf of MONKS LAKES LIMITED**

Claimant

- and -

**(1) SECRETARY OF STATE FOR
LEVELLING UP HOUSING AND
COMMUNITIES**

Defendants

(2) MAIDSTONE BOROUGH COUNCIL

(3) DAVID PADDEN

Charles Streeten & Chantelle Staynings (instructed by Assersons) for the **Claimant**

Ashley Bowes (instructed by GLD) for the **First Defendant**

James Maurici KC & Simon Jones (instructed by Richard Max & Co) for the **Third Defendant**

Hearing date: 13 June 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ROSS CRANSTON:

Introduction

1. This is both a decision on the validity of these proceedings and one on the claimant's application for permission to apply for statutory review under Section 288 Town and Country Planning Act 1999. It was ordered in for an oral hearing by Lang J, who also granted Mr Padden's application to be joined as the third defendant.
2. The Secretary of State's Inspector decided in November 2022 to dismiss an appeal in relation to land at Monks Lake, Staplehurst Road, Marden, Kent, which I will call "the land" in this judgment.
3. The issues are whether Taytime Ltd ("Taytime") could advance the appeal before the Inspector – the Inspector said it could not since it was not acting as the appointed agent for Monk Lakes Ltd (MLL) – and whether in turn it can advance the current challenge before the Planning Court.

Background

4. The land is owned by Taytime. There is a long planning history associated with it. The original planning application in 2011 was made to Maidstone Borough Council ("the Council") by MLL and by Mr & Mrs Harrison, who are the principals behind both Taytime and MLL. An aspect of the application for planning permission was before the Administrative Court in early 2014: *R (Padden) v Maidstone BC* [2014] EWHC 51 (Admin).
5. On 12 March 2020 the Council refused an application by Mr & Mrs Harrison for part retrospective and part prospective planning permission for the land. For the purposes of the EIA and ES the consultants were commissioned by Taytime. Taytime was named as the project managers.
6. There was an appeal. The planning appeal form for the Planning Inspectorate ("PINS") dated 11 September 2020 named MLL as the appellant, with the agent named as the Pegasus Group. There was no reference to Taytime.
7. The following year, on 15 July 2021, MLL the members of MLL passed a resolution that it be wound up voluntarily. Duncan Beat and Andrew Watling of Quantuma Advisory Ltd were appointed liquidators.
8. On 22 September 2021 Mr Beat, wrote, as liquidator for MLL, to the Planning Inspectorate ("the September 2021 Letter"):

"I am writing to appoint Taytime Limited...to take over full responsibility for the above listed planning appeal. Taytime Limited owns the land to which the original planning application and subsequent appeal relates, and I am satisfied that it is best placed to manage that process from this point forward as Monk Lakes Ltd (In Liquidation) has no interest whatsoever in this land. The representatives of Taytime Limited believe that the application should have been placed in their name in the first place, they were the party that instructed Pegasus

Planning and James Pereira of Francis Taylor Building Chambers for the submission of the appeal and they have an Asset Purchase Agreement in place for the rights to any planning permission, application or appeal associated with their land.”

9. The following week, on 27 September 2021, the liquidators entered into an indemnity agreement by means of deed between themselves on the one part and Taytime and its sole director on the second part (the “Deed”).
10. The Recitals state that the planning application was submitted in the name of MLL rather than Taytime in error. Recital E reads as follows:

(E) On the basis the planning application should have been in the name of Taytime and that Monk Lakes Limited had (and has never had) any interest therein, the Liquidators have agreed to permit Taytime to adopt the planning appeal against the decision 11/1948 provided that they are indemnified as to any costs expenses damages and adverse costs arising therefrom.
11. The Deed defined appeal as “an appeal against decision 11/1948” of the Council.
12. The operative parts of the Deed provided that the liquidators consented to Taytime having conduct of the appeal at its expense, and in consideration of that Taytime and the sole director indemnified them against any costs, expenses, damages, and claims.
13. In November 2021 PINS wrote in relation to the appeal before the Inspector that it had considered the status of MLL but that unless the appeal was withdrawn, or MLL was dissolved, “the Inspector will continue to determine the appeal”.
14. The parties prepared for the appeal. The Statement of Common Ground (SoCG), dated December 2021, was signed by Taytime, not MLL.

The Inspector’s decision

15. Some twelve months later, in October 2022, the Inspector conducted a hearing and made a site visit. In his decision letter dated 21 November 2022 he determined that the planning appeal was not correctly made and thus not capable of being lawfully determined under section 78 of the Town and Country Planning Act (“the 1990 Act”). He reasoned:
 - a. Section 78 explicitly limits the right to appeal against planning decision to the ‘applicant’: DL [3];
 - b. The original planning application was made by MLL which had subsequently entered into liquidation proceedings. However MLL had not been dissolved and could, in principle pursue the appeal as the appellant: DL [4];
 - c. “It is now Taytime pursuing the appeal, as the appellant, and not as an agent” DL [5]. That paragraph reads in full:

“5. However, the liquidator, Quantuma, has submitted a letter, dated 22 September 2021, appointing a separate company, Taytime Ltd (Taytime), to take over full responsibility for the appeal. The letter also

confirms that Pegasus Planning (the agents) and James Pereira KC (the legal representative) are instructed by Taytime, not MLL. It was also verbally confirmed at the hearing by some of the consultant team that they had been instructed by Taytime and not MLL. In addition, the Statement of Common Ground (SoCG), dated December 2021, has been signed by Taytime, not MLL. The appellant has offered to re-sign the SoCG this time by MLL, but this would not change the existing document, which is what has been submitted in support of the appeal. I do not view Taytime as an agent for MLL. The appointed agent is the Pegasus Group, as set out in the appeal form, and supporting documents. The combination of the Quantuma letter and the instruction of consultants by Taytime demonstrate that it is now Taytime pursuing the appeal, as the appellant, and not as an agent. Taytime could not be viewed as an agent for MLL. The appointed agent was the Pegasus Group, as set out in the appeal form and supporting documents.

- d. MLL is listed as the appellant on the appeal form but this has now been overtaken by events. While the persons behind both MLL and Taytime (Mr and Mrs Harrison) were the same, the applicant was explicitly listed as MLL and Mr and Mrs Harrison were no longer empowered to act for MLL as a result of the insolvency proceedings DL [6];
- e. For all these reasons it was clear that the party now pursuing the appeal was Taytime, not MLL. The appellant was, therefore, not the applicant, despite the common thread of Mr and Mrs Harrison, who were not applicants in their individual capacity and were not listed at all on the appeal form DL [6];
- f. Consequently, there was no valid appeal capable of being determined. As the appeal had not been withdrawn it had to be dismissed. In the circumstances there was no merit in assessing the planning merits of the case regardless of what they related to DL [7].
- g. It was unnecessary to consider the additional documents received because the appeal was not valid DL [8].
- h. “[T]he planning appeal was not correctly made and thus is not capable of being lawfully determined under section 78 of the Act, irrespective of the planning merits” DL [9].

The Planning Court appeal

16. In December 2022 this application for statutory review was received in the Administrative Court and issued for service. It is brought by Taytime “as appointed agent for and on behalf of MLL.” It seeks to quash the Inspector’s decision dismissing the planning appeal.
17. Ground 1 of the grounds of appeal in jurisdiction has been abandoned. The remaining grounds are ground 2, (i) the Inspector made an error of law to conclude that the appeal was not correctly made, and (ii) he was in error to find Taytime was not acting as MLL’s agent; and ground 3, the Inspector acted in breach of a

legitimate expectation arising on 17 November 2021 that the appeal would be allowed to proceed.

18. That summary of grounds 2 and 3 is taken from the draft Consent Order where the Secretary of State and the Council have accepted that the claim should be allowed on Ground 2. The draft states that the Secretary of State accepts that the Inspector failed to supply adequate reasons for his conclusion that Taytime was not acting as the appointed agent for MLL, and that therefore the claim should be allowed on ground 2 alone.
19. During the hearing in the Planning Court the Notice of statement of affairs prepared by MLL's liquidators in July 2021 was produced showing that it owes Taytime some £2770. The liquidators have stated that no further realisations are expected.

Validity of these proceedings

20. In relation to these proceedings Mr Padden has now raised whether they are validly brought.
21. In response Mr Streeten's case for Taytime is essentially that these proceeding are valid since it has been appointed an agent of MLL in relation to the appeal. MLL is in creditors' voluntary liquidation and the liquidators appointed Taytime as its agent in the September 2021 letter. The application to this court was ancillary to the appeal before the Inspector. Mr Streeten also contended that since Taytime had an interest in the land as owner and is a person aggrieved it has standing to bring these proceedings.
22. In response Mr Maurici KC contended that Taytime did not have authority to bring the claim. There was no direct evidence that MLL's liquidators had authorised the proceedings despite the fact that Mr Padden had repeatedly requested the liquidators to confirm that they had. Moreover, as a matter of insolvency law neither MLL nor the liquidators could lawfully authorise Taytime to bring these proceedings.
23. In my view it was wrong for Mr Streeten to characterise the issue as placing a burden on Mr Padden to demonstrate that Taytime did not have the authority to conduct these proceedings. As a defendant in a statutory review Mr Padden is entitled to raise the issue of Taytime's authority to bring the proceedings.
24. The only evidence Taytime proffered of its authority to act was the September 2021 letter to PINS from the liquidators and, much latter, the Deed. Subsequently, nothing has been heard from the liquidators. The letter refers to taking over full responsibility for "the above listed planning appeal", in other words, the appeal before the Inspector. As to the Deed, which is a document between the parties, as Mr Maurici KC pointed out it defines the appeal as "an appeal against decision 11/1948" of the Council. That definition does not include a subsequent statutory review of the decision of a planning inspector, even if this is correctly characterised by Mr Streeten as ancillary to the appeal to the Inspector. Given that the source of Taytime's authority arises from a deed it is to be construed narrowly.
25. These points are apart from any issue whether as a matter of company or insolvency law MLL could lawfully authorise Taytime to act or has done so.

26. So these points militate against the validity of the proceedings. However, it seems to me that there is substance in Mr Streeten's submission that Taytime could have brought these proceedings in its own right. Mr Maurici made the point that no application has been made under CPR19.4 to substitute Taytime as the claimant. It seems to me that the best way forward is to make an order for substitution under CPR 3.3(4) so that the judicial review can be considered. That is without prejudice to any issue about the grounds advanced for judicial review.

Judicial review grounds

Ground 2: error of law

27. The first ground is that the Inspector was arguably wrong in law to hold that the appeal had not been correctly or validly made. In support of arguability Mr Streeten's main points were that (i) MLL launched the appeal in September 2020; (ii) MLL paid Pegasus' fees and those of counsel in relation to that appeal until July 2021, until such time MLL entered liquidation; (iii) there is nothing in section 78 to prevent appeals being assigned; (iv) PINS recognised that as a matter of law unless the appeal was withdrawn or MLL was dissolved the appeal would continue; (v) the September 2021 letter was clear that MLL was appointing Taytime as its agent for the appeal, the word 'appoint' being a reference to the power under Paragraph 12, Part III of Schedule 4 to the Insolvency Act 1986; and (vi) were MLL and its liquidators not assenting to Taytime acting on its behalf no indemnity would have been required; and (vii) any challenge to the liquidators' acts had to be brought in the Business and Property Courts.
28. Let me begin with what the Inspector said. There is no need to reiterate horn book law about how decision letters are to be read: see *Greenwood v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 2975 (Admin), [39], per Lang J. The Inspector said that MLL could "in principle" pursue the appeal as the appellant and that MLL was listed as the appellant on the appeal form DL [4], [6]. He said at DL [5] that the combination of the September 2022 letter and the instruction of consultants by Taytime demonstrated that it was now Taytime pursuing the appeal, as an appellant, not as an agent DL [6]. He said that "it is clear that the party now pursuing the appeal is Taytime and not MLL".
29. It will be recalled that the September 2021 letter stated that Taytime was appointed to "take over full responsibility" for the appeal and manage the process. Not only that but the letter stated that (a) Taytime owned the land so the benefit of any planning permission was to its benefit; (b) MLL had "no interest whatsoever" in the land; (c) the representatives of Taytime believed that the application should have been placed in their name in the first place; (d) they were the party that instructed Pegasus and counsel; and (e) they have an asset purchase agreement in place for the rights to any planning permission, application or appeal associated with their land. There was also the Inspector's finding that Taytime signed the SoCG as appellant, not as agent. If the Inspector had had the Deed, that would have added grist to the mill given Recital E. All of this suggests to me that Inspector gave adequate reasons for his conclusion.
30. The real issue is not the Inspector's reasons but whether as a matter of agency law Taytime was no longer MLL's agent. There are also the insolvency points alluded to previously, namely, that a liquidator's power to appoint agents does not extend to the

power to delegate matters which require the exercise of professional judgment, which a planning appeal clearly entails. If MLL has no interest in either the land or the appeal there seems to be no benefit for MLL's creditors to be involved in the appeal. The liquidators confirmed that no realisations were anticipated from the site, their report did not identify the appeal as an asset, and Taytime was a creditor to only a minor extent.

31. In other words there are difficult issues of both agency and insolvency law which bear on the substantive issue which were not fully explored at the hearing. One aspect is the correct forum for advancing the insolvency points. This is the permission stage and all Mr Streeten has to demonstrate is that his case is arguable. Ground 2 is arguable not for the reasons the Secretary of State has given but because it is arguable that the Inspector's determination about the invalidity of the appeal was wrong as a matter of agency and insolvency law.
32. Consequently, permission is granted on this ground. The argument must focus on the agency and insolvency aspects. Given the nature of the challenge it would be desirable, but not essential, if the judge hearing the matter had commercial or insolvency law experience.

Ground 3: legitimate expectation

33. Mr Streeten contends that there was a legitimate expectation in the letter from PINS which stated that the Inspector would "continue to determine the appeal". This ground is not arguable. There is no promise which is clear, unambiguous, and devoid of relevant qualification. All PINS was saying was that for the time being the appeal would continue. If there was no valid appellant, the Inspector would be empowered to terminate the appeal. In other words, any expectation could not be considered legitimate if the appeal was lawfully ended because it was invalid.

Conclusion

34. Permission is granted on ground 2 on the limited basis referred to earlier.