Neutral Citation Number: [2023] EWHC 353 (Admin)

Case No: CO/3206/2022

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

IN THE MATTER OF A CLAIM UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2023

Before

MR JUSTICE LANE

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Between :

LAZARI PROPERTIES 2 LTD	**Claimant**
- and –	
THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
and	
THE LONDON BOROUGH OF CAMDEN	
	Interested party

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Mr R Taylor KC (instructed by **Herbert Smith Freehills**) for the **claimant**
Ms E Dring (instructed by **the Government Legal Department**) for the **defendant**
Ms S Blackmore instructed by **LB Camden)** for the **interested party**

Hearing date: 14 February 2023

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JUDGMENT

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 February 2023 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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Mr Justice Lane :

1. This is a renewed application brought by the claimant under section 288 of the Town and Country Planning Act 1990. Permission was refused on the papers by Sir Ross Cranston on 11 October 2022. The claimant's challenge is to decisions of an inspector (a) to dismiss an appeal made under section 195 of the Town and Country Planning Act 1990, following the failure of the interested party (the Council) to make a decision on an application made to it under section 191 of the 1990 Act for a certificate of lawful use and development; and (b) to make an order that the claimant should pay part of the costs of the interested party. The claimant also challenges the decision of the inspector not to award the claimant its costs of the appeal, although Mr Taylor KC did not pursue this challenge before me at the renewal hearing on 14 February 2023.

2. The claimant is the owner of the Brunswick Centre in Bloomsbury, London. The Brunswick Centre is a Grade 2 listed "megastructure". It contains 2 linked blocks of 560 flats above a shopping centre with rows of shops at raised ground level. The shops (which include a supermarket) are situated over a basement, which contains car parking, a service area and a cinema. Ramps and steps provide access to the central boulevard from several surrounding streets.

3. On 1 September 2003, planning permission was granted for the refurbishment of the Brunswick Centre. Condition 3, which was attached to the planning permission, provided as follows: "Up to a maximum of 40 percent of the retail floorspace, equating to 3386m2 (excluding the supermarket and eye-catcher), is permitted to be used within Use Classes A2 and A3 of the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order."

4. As the inspector's appeal decision makes plain, the application for a certificate of lawful use and development was submitted in respect of "The Brunswick Centre" as a whole and the entirety of the Centre was identified on the redline plan. The claimant could have sought a certificate to cover specific units within the Centre but (at least up to the date of the hearing) chose not to take that approach. Instead, the claimant sought a certificate as follows: "Application to certify that the existing use of the Brunswick Shopping Centre within Class E and without compliance with Condition 3 of Planning Permission: PSX0104561 is lawful".

5. The reference to Class E was brought about by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020, which amended the 1987 Order. Class E subsumes previous use classes, which were specified in the Schedule to the 1987 Order as Class A1 (shops), Class A2 (financial and professional services), Class A3 (restaurants and cafes), and Class B1 (business).

6. The claimant's application was accompanied by a redline site location plan, which indicated the entire Brunswick Centre as the subject of the application. However, certain units in the Brunswick Centre had been identified as sui generis. These included the cinema and a beauty parlour in unit 36, both of which had been identified as sui generis by the claimant, notwithstanding additional units which the interested party said may not be within Class E.

7. The inspector found that condition 3 did not fall to be interpreted in the way contended for by the claimant. The claimant said that the references in condition 3 to Classes A2 and A3 now fell to be interpreted as references to any land use within Class E of the amended Use Classes Order. The inspector rejected that interpretation, essentially on the basis that he considered to do so would effectively render condition 3 meaningless.

8. The inspector also rejected an argument raised by the claimant in the course of the hearing that condition 3 was in the nature of a flexible permission, which ceased to have effect after a period of 10 years had elapsed. The inspector concluded that condition 3 continued to restrict how the Brunswick Centre may be used.

9. The inspector dismissed the claimant's appeal for these reasons. But he also dismissed the appeal because he found, discretely, that the application failed to describe precisely what was being applied for. The inspector stated that the PPG said an application needed to describe precisely the subject matter of the application and not simply the use class. It also needed to describe the land to which the application related. The inspector held that a use class is not a land use.

10. The inspector said, at paragraph 26 of his decision, that he raised this concern with the claimant on both days of the hearing. The claimant argued that the PPG was not formulated in 2014 with Class E in mind and that its application was the only way to establish that a site is in a use falling within Class E. The inspector said that, be that as it may, the PPG merely reflected what is required pursuant to section 191 of the 1990 Act.

11. At paragraph 27, the inspector said he had considered whether his concerns could be addressed by a modified or substituted description pursuant to section 191(4) of the 1990 Act. But the inspector held that this would require him to identify and describe the land use for every relevant part of the land in the Brunswick Centre. The inspector noted that, at the hearing, the claimant said that it was "not right" for the inspector to use the "description of operation" data taken from Appendix 10 of the claimant's grounds of appeal, in order to assist him with such a modification of the claimant's description. Accordingly, the inspector said he had not done so.

12. Although the inspector noted, at paragraph 28, that the claimant said there were examples of existing use Class E certificates granted by other councils, the inspector had not been provided with full details of how those councils had reached their decisions. The inspector had reached a different conclusion in the light of the PPG and section 191 of the Act. In addition, unlike the present case, the inspector noted that the examples provided by the claimant did not seek to incorporate non-compliance with a condition.

13. At paragraph 29, the inspector said he appreciated what the claimant was trying to achieve. This was to provide certainty for future tenants that the floorspace could be occupied and used flexibly within Class E. That would in turn help to facilitate the re-occupation of vacant floor space in the Brunswick Centre. However, it struck the inspector that this was a role for a certificate for a specific use made under section 192, rather than section 191. The inspector considered it was a long-established principle that certificates enabled owners and others to ascertain whether specific

uses, operations or other activities are or would be lawful. They did not enable anyone to ask the general question: "what is or would be lawful?"

14. At paragraph 31, therefore, the inspector concluded that the description of existing use in the present case was ambiguous and imprecise.

15. At paragraph 32, the inspector turned to the issue of the specification of the land. As I have already said, this was described as "the Brunswick Shopping Centre". The inspector found that a key complicating factor in the present case was that some 40 or more units were included, each of which had their own planning history. At the site visit, it was obvious to the inspector that the land, which was not excluded from the application, included ground floor residential accommodation, pedestrian accesses to residential accommodation above the shopping centre, external public spaces and the servicing/access roads to the basement car parking areas. These were uses that the inspector found on the balance of probability would not fall within Class E. As such, the exclusions plan before the inspector was found by him to be imprecise and ambiguous.

16. At paragraph 35, the inspector considered whether the above difficulties could be resolved by modifying the description so as to refer, for example, only to commercial floor space. This had been suggested by the claimant on the site visit. However, it was clear that at least some of the commercial units traded from part of the external public space. The inspector was not satisfied that this was "floorspace". He therefore considered that an accurate plan was essential to specify the land. However, it was not clear to him precisely where the lines should be drawn.

17. In addition to these concerns, and notwithstanding the effect of condition 3, the Council had identified specific units which it disputed could be considered to be in Class E, drawing attention to certain other conditions of the 2002 permission. At paragraph 37, the inspector addressed this issue. He found that he did not need to deal with any condition other than Condition 3.

18. At paragraph 39, the inspector noted that under the 2020 Regulations, a hot food takeaway, where consumption of that food is mostly undertaken off the premises, is a sui generis use that is not within Class E. Equally, any mixed-use which included a primary component of hot food takeaway was not within Class E. That mattered, the inspector said, because if, without planning permission, by the date of the application for these certificates, any unit which had become a hot food takeaway or a mixed-use, including a hot food takeaway primary component, the lawful use of the unit may have been lost due to the lack of any right of reversion to the lawful use, pursuant to section 57 of the 1990 Act.

19. At the appeal hearing, the inspector noted that the Council said its evidence of the hot food takeaway component of the relevant units included officers' observations and a knowledge of the business models of operators (paragraph 40). At paragraph 41, the inspector found that the Council's concern that the hot food takeaway component in those units may be a primary component of the use therein was "entirely reasonable". Furthermore, it was consistent with the inspector's own observations when he undertook a visit to the site. He saw there several hot food delivery drivers waiting outside the disputed units, and many of those units clearly advertising that hot food was available for takeaway and delivery. At paragraph 43, the inspector noted the

Council's concerns that the hot food takeaways contradicted or otherwise made the claimant's version of events less than probable in respect of the disputed units. Overall, given that the burden of proof was on the claimant on the balance of probabilities. the inspector was not satisfied that the disputed units did not include a primary hot food takeaway use (paragraph 43).

20. At paragraph 48, the inspector considered whether the disputed units could be excluded from the certificates, in order to overcome these difficulties. During the hearing, the inspector canvassed the views of the parties on that matter. Having done so, he concluded that by modifying the description of the certificates with reference to the disputed units, as shown on the exclusions plan, those units could be excluded from the certificate. However, doing that would not overcome the imprecision and ambiguity the inspector had found with the exclusions plan in respect of other parts of the site. It would also not address the issue of condition 3.

21. The challenge to the inspector's decision on the appeal under section 195 is brought on several grounds. First the claimant challenges the inspector's interpretation of condition 3. Having heard counsel for the parties, I have concluded that this ground (ground 1) and the closely related ground 2 are arguable. In short, there is arguable merit in the submissions of Mr Taylor KC that condition 3 does not bear the interpretation placed on it by the inspector.

22. Grounds 3 and 4 concern the inspector's conclusions regarding the nature of the claimant's application for a certificate. I am wholly in agreement with Ms Dring and Ms Blackmore that these grounds are unarguable.

23. Mr Taylor's primary position, on behalf of the claimant, was that a description of a use class could be deployed in an application under section 191 of the 1990 Act. Section 191(1) provides that a person who wishes to ascertain whether any existing use of buildings or other land is lawful may make an application to the local planning authority "specifying the land and describing the use, operations or other matter". Section 191(5)(b) states that a certificate under section 191 shall "describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class)".

24. Mr Taylor contends that section 191(5)(b) means that it is permissible to apply for a certificate by reference solely to Class E. That is, however, wrong. It is plain from the language of subsection (5)(b) that the words in parentheses are not an alternative to the primary obligation in the preceding words to describe the use, operations or other matter. Rather, the words in parentheses are an additional requirement, where a described use happens to fall within a use class. That is precisely what the PPG says, as the inspector correctly noted at paragraph 24 of his decision.

25. I have mentioned that, at paragraph 27 of his decision, the inspector recorded the claimant as saying that it was "not right" for the inspector to use the "description of operation" data from Appendix 10 of the claimant's grounds of appeal, in order to assist him with a modification of the description of the existing use. Before me, Mr Taylor said that, in fact, the claimant had proposed using Appendix 10 to describe the use of a particular unit, and then refer to that use as falling within the relevant part of class E.

26. I am not satisfied that there is anything in the materials before me that shows the inspector was arguably wrong in his understanding of what was being communicated to him on behalf of the claimant at the hearing. Indeed, read as a whole, it is manifest from the decision that the inspector was generally concerned about the way in which this application had come before him. Overall, I agree with the defendant and the interested party that the inspector was entitled as a matter of his planning judgment to decide that the application fell to be dismissed because of the problems he identified concerning the description of the existing use and the specification of the land (irrespective of his conclusion on the interpretation of condition 3). As held by HHJ Jarman QC, sitting as a judge of the High Court, at paragraphs 29 and 30 of R (Flint) v South Gloucestershire Council [2016] EWHC 2180 (Admin), "The importance of precision in defining in the certificate the use found to be lawful has been emphasised by the courts on a number of occasions... 30. It is not a requirement of law, however, that in all cases a certain degree of particularisation is required. What is an appropriate level of detail will vary from case to case and is a matter of judgement for the decision maker based on the evidence…".

27. The same point arises in respect of the issue of the plans. I do not accept that the inspector arguably erred in law in finding that at no point was he put in possession of plans which met the task he had been asked to undertake. On the contrary. his decision clearly shows the opposite. Overall, I agree with. Ms Blackmore that it cannot be right to expect the inspector, dealing with a complex megastructure with interlinked uses including residential and public areas, all of which is a Grade 2 listed heritage asset of both national and local significance, to grapple with complex but inadequate plans, together with a list of tenants and their alleged use class, and then to have to create of his own motion revised descriptions and plans.

28. Even though the inspector was engaged in an informal hearing, rather than a public inquiry, I agree with the defendant and the interested party that he was not arguably obliged to "root out" the claimant's case for it. It is also relevant in this regard that the inspector had a duty to maintain fairness to all parties which were appearing before him. The inspector did not have a primary or overriding duty to respond positively to each last-minute suggestion raised by the claimant in order to deal with the serious procedural problems identified by the inspector. Were the position otherwise, it is clear that other parties could be seriously disadvantaged in having to respond to what could be a very different case from that presented in the pre-hearing materials.

29. Grounds 3 and 4 are therefore unarguable.

30. I turn to ground 5 and the issue of the units offering hot food takeaways. I find the inspector was unarguably entitled to conclude on the evidence and in the exercise of his planning judgment that the concern of the Council about hot food takeaways contradicted or otherwise made the claimant's version of events less than probable for the disputed units: paragraphs 21 and 43 of the decision. The inspector was entitled to address the issue on the basis of how the parties had put their respective cases. He was also entitled to rely on his own observations at the site visit. The inspector clearly preferred the Council's evidence. Bearing in mind that the burden of proof was on the claimant, the simple fact is that the claimant failed to make good its case.

31. 31. Ground 5 is therefore unarguable.

32. I turn to ground 6, which concerns costs. I have noted earlier that Mr Taylor did not pursue before me the challenge to the inspector's decision not to award costs to the claimant. In my view, Mr Taylor was entirely right not to do so. It cannot possibly be contended that, in the circumstances of this case, the claimant ought to have been awarded its costs. There was no unreasonable delay or other unreasonable behaviour on the part of the Council, as the inspector noted at paragraphs 16 to 26 of the relevant costs decision.

33. I therefore turn to the remaining costs challenge mounted by the claimant. This concerns the decision of the inspector that the claimant should pay a proportion of the costs of the Council/interested party. This decision concerned the introduction by the claimant during the first day of the hearing of an argument concerning the interpretation of condition 3; namely, that condition 3 was flexible and accordingly lapsed after 10 years. The claimant points to the fact that the inspector considered that, if this submission had succeeded before him, that could have changed the inspector's conclusions on condition 3. The claimant therefore submits that since the matter was one which the claimant was entitled to raise, it did not matter whether the Council had to deal with it at the point it arose as opposed to earlier. Accordingly. The inspector's costs decision is arguably unlawful.

34. I do not accept that this remaining aspect of ground 6 is arguable. It is plain that, although the inspector found the hearing would have had to go into a second day in any event, the late raising of this issue nevertheless contributed to the need for the second day. It is also manifest, as was pointed out by Ms Blackmore, that, in the real world, it is one thing to have to deal with an issue raised properly in advance and quite another for the issue to have to be taken on board in the heat of the hearing process. Accordingly, the inspector was unarguably entitled to reach the conclusion he did at paragraph 8 of the relevant costs decision, that work was needed which would not otherwise have arisen but for the unreasonable conduct of the claimant in raising the issue of flexibility so late in the day, Again, I remind myself that inspectors are expert in these fields and that their decisions on costs should not be disturbed without a good legal reason. There is nothing before me, either by way of written materials or oral submissions, to show that in this case the inspector arguably acted irrationally in concluding as he did.

35. Ground 6 is therefore unarguable.

36. I need now to address the submission put forward by both the defendant and the interested party that permission should be refused even if (as I have found) grounds 1 and 2 are arguable. The submission relies on the principle identified in Simplex GE Holdings Ltd v Secretary of State for the Environment (1989) 57 P & CR 306. In short, the principle indicates that permission should be refused if the outcome of the appeal before the inspector would necessarily have been the same. As is clear from the inspector's decision and as I have held, the conclusion on condition 3 was not the sole reason why he dismissed the claimant's appeal. He did so for other discrete reasons, which I have found to be unarguably sound.

37. I must accordingly explain why I have concluded that, on the facts of the present case, permission should be granted for grounds 1 and 2 to be determined at a substantive hearing. I accept Mr Taylor's submission that grounds 1 and 2 are, in effect, severable and that there is a real purpose in permitting the claimant to argue them substantively,

so that the High Court can reach a decision on the correct interpretation of condition 3. Given that a fresh application by the claimant under section 191 is highly likely, if not inevitable, and that condition 3 is likely to be relevant to the determination of any such application, it plainly makes sense that the issue of interpretation is settled before such a fresh application is made.

38. I accept that, as matters stand, the claimant has not sought a declaration, which will be needed on the above basis, given that the inspector's decision should not be quashed. The claimant will need to do so. I do not, however, consider that the claimant's failure, so far, to seek a declaration should be destructive of its case in respect of grounds 1 and 2.

39. I therefore grant permission on grounds 1 and 2 and refuse permission on all of the other grounds.