Neutral Citation Number: [2020] EWHC 879 (Ch)

Case No: PT-2019-000766

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (CH D)

Royal Courts of Justice
Rolls Building, Fetter Lane
London EC4A 1NL

Date: 21/04/2020

Before :

DEPUTY MASTER BOWLES

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Between :

T & P Real Estate Limited	**Claimant**
- and -	
The Mayor and Burgesses of the London Borough of Sutton	**Defendant**

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Paul G Tucker QC and **Sarah Reid** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**
Saira Kabir Sheikh QC (instructed by **SLLP**) for the **Defendant**

Hearing date: 9th March 2020

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Judgment Approved

Deputy Master Bowles :

1. By a Claim Form, issued under Part 8 CPR, on 19th September 2019, the Claimant, T & P Real Estate Limited (T&P), seek a declaration that its proposed development, at Sutton Park House, 15 Carshalton Road, Sutton SM1 4LD (the Property), namely the change of use of the property from an office use to a residential use, fell within the ambit of an exception to an Article 4 Direction made by the Defendant, the London Borough of Sutton (Sutton), in November 2013, as modified by the Secretary of State, on 30th July 2014, and that, in consequence, the proposed development constitutes permitted development, by reason of and pursuant to Class O of the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2015 (the 2015 Order).

2. By an application, dated 22nd October 2019, Sutton applies to strike out this Claim as an abuse of process. This judgment relates to that application.

3. The background to this Claim and to this application is, for a non-planner, not wholly straightforward.

4. In the barest of outlines, the broad effect of the 2015 Order and of its relevant predecessor, the Town and Country Planning (General Permitted Development) Order

1995 (the 1995 Order), was and is to grant, without need of specific application, planning permission for those classes of development identified in the relevant Order. Change of use from office use to residential use (B1 to C3) is one of the classes of development so permitted.

5. Development, pursuant to the permission granted by both the 1995 and 2015 Orders, was and is, however, conditional.

6. Firstly, permitted development is conditional upon application being first made as to whether prior approval is required in respect of a variety of environmental matters associated with the proposed development. That application being made, development can only commence, following upon one of three matters; receipt of a written approval; receipt of a written notice that prior approval is not required; or the passage of 56 days from the date that the application for prior approval is received, without any determination of the application being made.

7. Secondly, under the 1995 Order, a limitation was placed upon the permission granted by that Order, namely that the permitted use had to be in place by 30th May 2016. That limitation was, however, removed by the 2015 Order, as currently amended and replaced with a requirement that the permitted development must be completed within three years of the prior approval date.

8. Both the 1995 and 2015 Orders contain, or contained, provisions enabling a planning authority to make a direction (known as an Article 4 direction) having the effect of removing, in appropriate circumstances, the entitlement of a developer to rely upon the permissions otherwise arising from the orders in question. The issue of construction raised in this case is as to the true construction of an exception, or limitation, to the removal of permitted development rights contained in an Article 4 Direction made by Sutton.

9. The issue arises in the following way.

10. In December 2014, prior approval was granted to a company called G4S Cash Solutions (UK) Limited (G4S), the then beneficial and legal owner of the Property, in respect of a scheme for the change of the use of the Property from office to residential. That scheme has never been implemented and, in consequence, the permission for that development, pursuant to that prior approval lapsed in December 2017.

11. In November 2013 and, therefore, well in advance of the grant of the December 2014 prior approval, Sutton had taken steps to issue an Article 4 Direction, in relation to an area of land forming part, or all, of Sutton Town Centre and including the Property. That Direction was expressed to come into effect upon 29th January 2015 and, in its original form, would have removed the permission existing in favour of the putative developer unless the proposed development had been completed by that date.

12. However, by December 2014, the Article 4 Direction had been modified by the Secretary of State, so as to include the exception, or limitation, the construction of which is the subject of the current Claim. The effect of the exception was to exclude from the area in respect of which general development rights had been, or would have been, removed, by reason of the Article 4 Direction, ‘any building or land in relation

to which prior approval …has been granted, or … is treated as granted before 29th January 2015'.

13. The clear and undisputed consequence of the exception was to retain, in favour of the then putative developer, or any successor, even after the Article 4 Direction had come into force, the extant permission to develop the Property, in accordance with the scheme for which prior approval had been granted and to exclude, as regards that scheme, the Property from the area of land in respect of which general development rights would, by reason of the Article 4 Direction have, otherwise, been withdrawn.

14. The question which is raised in these proceedings, however, and which has already been raised in other proceedings (see: **R (on the application of Berkshire Assets (West London) Ltd) v London Borough of Hounslow [2018] EWHC 2896 (Admin) (Berkshire**)) is the extent to which, on its true construction, the exception has the further effect of retaining general development rights in respect of buildings and land where prior approval has been granted, in this case, prior to 29th January 2015, but in respect of schemes other than those where that prior approval has been granted..

15. In this regard, in **Berkshire**, the Planning Court, in Judicial Review proceedings, in respect of the refusal of prior approval applications, by the London Borough of Hounslow, in a case where an Article 4 Direction contained an exception in near identical terms to that with which this case is concerned, determined that, on the true construction of that exception, the effect of the exception, at least in circumstances where, at the point when new applications for prior approval were made, previous prior approvals remained extant, was to exclude the effect of the Article 4 Direction, in removing general development rights, from buildings and land in respect of which such extant prior approvals remained in being. The consequence of that construction and determination was that, in respect of such land and buildings, general development rights were retained, with the result that it was open to a developer to put forward for prior approval, in reliance upon those rights, schemes of development, falling within those rights, other than the scheme, or schemes, for which extant prior approvals had been granted.

16. In this case, as is set out above, the prior approval granted by Sutton in December 2014 expired, or lapsed, in December 2017. Notwithstanding that lapse, in March 2019, Lawlor (Holdings) Limited (Lawlor), a company related to T&P, applied for prior approval, in respect of a new development scheme, in respect of the Property. The new scheme, as with the old lapsed scheme, contemplated change of use from office use to residential use and would, accordingly and subject to the requisite prior approval, constitute permitted development, if and provided that the lapsed prior approval had the effect, on the true construction of the exception, of continuing general development rights in respect of the Property, notwithstanding the terms of the Article 4 Direction.

17. In May 2019, Sutton issued a refusal notice in respect of that application. The essential ground of that refusal, other than in respect of certain concerns as to parking, was its contention that, in circumstances where the prior approval in respect of the Property had lapsed, any general development rights protected by the exception had, on the true construction of the exception, fallen away and, therefore, that no such rights existed in respect of which prior approval could be granted.

18. That refusal and that construction of the exception has been appealed to the Planning Inspectorate by Lawlor, pursuant to section 78 of the Town and Country Planning Act 1990 (the 1990 Act) and the appeal was heard on 19th November 2019. The decision of the Planning Inspectorate is awaited.

19. The issue raised in that appeal is, as is common ground, identical to the issue raised in these proceedings. T&P contend that the lapse of the 2014 prior approval does not have the effect, on the true construction of the exception, of removing general development rights and precluding, therefore, the permitted development for which it has sought prior approval. Conversely, Sutton contend that, at least where prior approvals have lapsed at the date of any new application for prior approval, the effect of the exception, properly construed, is to bring to an end any permitted development rights which, but for the lapse of the relevant prior approval, might, by reason of the exception, continue to exist in respect of land falling within the Article 4 Direction and including, therefore, the Property.

20. T&P contend that this result is reached by the application of the literal construction of the words of the exception and that because a prior approval had been granted in respect of the building and land making up the Property, prior to 29th January 2015, the effect of the exception is to retain permitted development rights in respect of the Property, indefinitely and irrespective of the lapse of the prior approval which gives rise to this consequence. Sutton, in contrast, contends that that approach requires the words 'has been granted' to be read as 'was once granted' and that, having regard to the context and purpose underlying the Article 4 Direction and the exception, the exception should not be given the wider meaning and effect for which T & P contend.

21. Lawlor's appeal was lodged in June 2019. By that date, however, T & P had become interested in the Property, by reason of the beneficial interest in the Property that it has obtained, pursuant to a contract of sale, dated 24th May 2019, between itself and G4S. It is that interest in the Property that gives T&P its potential standing to pursue the current proceedings.

22. As already stated, it is not in dispute but that the point of construction, as to the effect of the exception, which is raised in Lawlor's appeal, is the self-same point of construction as is raised in these Part 8 proceedings. Nor, given that Lawlor and T&P are related companies and that Lawlor is pursuing the same argument in both the Part 8 proceedings and the appeal and by the same legal advisers, has any point been taken that the parties to the litigation are different to the parties to the appeal.

23. In these circumstances, Sutton grounds its application to strike out on two bases. Firstly, it is submitted that the issue in question is exclusively one of public law and that, for that reason, it is a misuse of the Part 8 procedure, for it to be used to procure a declaration of such, exclusively, public law rights. Secondly, it is submitted that, irrespective of the public law point, it is a misuse, or abuse, of the Part 8 process, or of process generally, to bring the current proceedings, when the self-same point is already in process of determination by the Planning Inspectorate and where, as here, the unsuccessful party would be in a position to seek to challenge the decision of the Planning Inspectorate in the Planning Court, pursuant to section 288 of the 1990 Act.

24. In regard to the first and, perhaps, principal basis upon which Sutton seeks to strike out, I have deliberately set out in some detail the facts, circumstances and legislative

and administrative provisions which underlie the current proceedings and which demonstrate, as I see it, that the issue raised, namely the construction of a local authority planning Direction is quintessentially one of public, rather than private, law. It is not a matter that applies, or operates, exclusively, as between T&P and Sutton, but, rather, as acknowledged by T&P, is one that affects, potentially and equally, a number of property owners, or putative developers in the area falling within the Article 4 Direction and who have the benefit of lapsed prior approvals. Nor, is there any suggestion, in this case, that the public law question raised, in respect of the construction of the Article 4 Direction, is, in any sense, interlinked with, or related to, or, as it is put in one case, homogenised with any separate private law right, or rights, obtaining as between T&P and Sutton, upon which T&P relies in support of its claim for declaratory relief.

25. The relevance of that conclusion, for purposes of the present case, stems from the seminal speech of Lord Diplock, in **O'Reilly v Mackman [1983] 2 AC 237**, and from the so-called 'exclusivity principle' arising from that case. That principle, at page 285 D to E, establishes that 'as a general rule' it is 'contrary to public policy, and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by that means to evade the provisions of Order 53' (now CPR 54) 'for the protection of such authorities'.

26. There seems to me to be no doubt that the purpose of the declaratory relief sought by T&P, as to the construction of the Article 4 Direction and the exception, is, precisely, to establish that the decision of Sutton to refuse prior approval in respect of the development of the Property, on the basis of Sutton's construction of the exception, infringes T&P's right, on its construction of the exception, to exercise its public law right to carry out permitted development of and at the Property and that, as such, this case falls, squarely, within the scope of the general rule, identified by Lord Diplock, in **O'Reilly v Mackman**, such that the attempted litigation of the matter, other than by the processes which have been put in place for the determination of public law rights and challenges, constitutes an abuse, or misuse, of process.

27. In this case, as was, carefully, explained to me, by counsel, the relevant process for a public law challenge to Sutton's decision would, ordinarily, be by way of the process Lawlor has adopted; that is to say by way of appeal to the Planning Inspectorate, pursuant to section 78 of the 1990 Act and, if needs be, appeal to the Planning Court, pursuant to section 288 of the 1990 Act. In that event, procedures similar to those applicable to judicial review would apply. Application for leave to appeal would have to be lodged within 6 weeks of the decision of the Planning Inspectorate of which complaint is made and permission of the Planning Court would have to be granted before the appeal could proceed.

28. Given these routes of appeal, it is common ground that judicial review of Sutton's decision would be unavailable, even if the time limits, under CPR 54, had not expired. Even in the absence of Lawlor's appeal, the fact of the section 78 avenue of appeal would, ordinarily, rule out judicial review, by reason of Lawlor's failure to exhaust its remedies. It is, apparently, possible that in some cases, where the public law point at issue is a point of pure law and where the process of appeal to the Planning Inspectorate has not been commenced, that the Administrative, or Planning, Court,

will entertain judicial review, notwithstanding the availability of the section 78 route of appeal. That, however, is not this case.

29. In this case, T&P seek to justify its decision to bring these Part 8 proceedings, alongside Lawlor's section 78 appeal and without conforming to the usual procedures for challenging a public law decision, on two principal grounds; firstly, that developments in case law, since **O'Reilly v Mackman**, have had the effect of diluting the exclusivity principle, such that there is no longer to be found any bright line between private law and public law rights and such that, in this case, there is a sufficient private law interest to warrant the approach that T&P has taken; secondly, that, in the circumstances of this case, the public importance, in the determination of the issue of construction of the Article 4 Direction and the exception, warrant that approach.

30. In regard to the latter, Mr Tucker QC, for T&P, explained that his concern, or one of them, was that Lawlor's success, on appeal to the Planning Inspectorate would not provide a definitive and binding ruling, whether in respect of T&P, or in respect of other persons having an interest in the determination of the question of construction. He postulated, in particular, the situation where Lawlor won its appeal, but where Sutton elected not to appeal. He submitted that, in that situation, there being no binding legal ruling from the court, it would be open to Sutton to maintain its current position, on construction, in respect both of what he termed a re-planning by T&P (meaning a new application for prior approval in relation to a different development scheme for the Property than the one which, if the current appeal is allowed, would have prior approval) and any applications for prior approval by other developers, seeking to develop properties in the area embraced by the Article 4 Direction and relying upon the existence of lapsed prior approvals as perpetuating their right to permitted development, under the 2015 Order.

31. In both instances, Mr Tucker acknowledged that the declaration sought in the current proceedings would not, of itself, provide that binding authority (the declaration being limited to the existence of permitted development rights in relation to the particular development in respect of which Sutton has refused prior approval). He submitted, however, I think correctly, that the reasoning, or ratio decidendi, leading to the declaration he sought, would bind the Planning Inspectorate, as an inferior tribunal, and, thus, preclude Sutton from any attempted re-argument of the point of construction.

32. Mr Tucker accepted that, in certain circumstances, it would be necessary, or appropriate, to stay the current proceedings. Those circumstances would arise if T&P lost its planning appeal but, then, appealed to the Planning Court, under section 288 of the 1990 Act, or if, T&P, having succeeded in the planning appeal, Sutton then actively pursued an appeal under that section of the 1990 Act.

33. I am not persuaded that there is any sufficient private law interest raised in this case to justify the use of these Part 8 proceedings.

34. Lord Diplock, in **O'Reilly v Mackman**, contemplated, at page 285E to G, that exceptions to the exclusivity principle would, or might, arise, particularly where the challenged public law decision arose collaterally to an alleged infringement of private law rights, and that further exceptions might arise as case law developed.

35. There have, undoubtedly, been such developments and, as foreshadowed by Lord Diplock and, as explained by Carnwath LJ, as he then was, in **Trim v North Dorset CC [2010] EWCA Civ. 1446**, at paragraphs 21 to 23, it is primarily in the area where private and public law rights overlap and where private law disputes involve public bodies that exceptions to the exclusivity principle have been created and where (quoting **Wade & Forsyth, Administrative Law 10th Edition,** pages 570 to 581, and **De Smith's Judicial Review, 6th Edition**, paragraph 3-097) there have been 'signs of liberality' and of an abatement in the 'rigours of exclusivity' and a perception of the need for a 'new approach'.

36. However, as set out, in **Trim**, at paragraph 23, there is nothing in these developments to undermine, or challenge, the core principle that purely public acts should be challenged, only, in public law proceedings.

37. In my view, this is just such a case. As already stated, this is not a case where T&P relies upon any private law rights, in its challenge to the construction that Sutton has placed upon the Article 4 Direction and the exception contained within that Direction. The issue raised is purely as to the true construction, meaning and effect of the Article 4 Direction and that Direction, having the effect, as it does, of reducing, or removing, to an extent dependent upon its true construction and effect, general permitted development rights available to any landowner, or developer, interested in the land the subject of the Direction, is, as again already stated, quintessentially a matter of public law. T&P can point to no factor special to it, as opposed to any other putative developer, having the benefit of a lapsed prior approval, such as to render Sutton's construction of the Direction and its, consequent, refusal of prior approval for T&P's proposed development any different in the case of T&P than it would have been for any other developer in the same position.

38. The fact, that Sutton's construction of the Direction and its consequent refusal of prior approval for T&P's development has the effect of preventing that development and, thereby, impairing T&P's use of the Property, does not, for that reason, provide T&P with a private law interest in that construction and refusal, or preclude the question of the meaning and effect of the Direction from retaining its public law status. As set out, in paragraph 27 of **Trim**, '[p]ublic action does not lose its "public" character merely because it involves, as most public action does, interference with private rights and freedoms. It is only where there is an overlap with private law *principles* ... that procedural exclusivity may become difficult to maintain'.

39. In this case, no such principles are in play, no relevant private interest is engaged, the issue as to the true construction and effect of the Direction remains a purely public law question and, for that reason, the exclusivity principle applies.

40. That view and the corresponding conclusion that this Part 8 Claim is a misuse of the process and that the proper approach has been that taken by Lawlor, by way of its section 78 appeal, is, only, confirmed by a consideration of T&P's submission based upon the alleged public importance of securing a determination of the proper meaning, effect and construction of the Article 4 Direction and the exception.

41. Mr Tucker, in emphasising the public significance of the issue for determination in this case, drew attention to the fact that both in **Trim** and in another case relied upon by Sutton, **Cash v Wokingham BC [2014] EWHC 2748 (Admin)** (both cases where

Part 8 Claims were struck out for abuse of process) the declaratory relief sought related in the one case to a local authority breach of condition notice relating to a retrospective planning permission and in the other case to enforcement notices served by the relevant local authority. The point he sought to make was that, in both instances, because the notices in question related to enforcement, they, in a sense, raised private issues, as between the relevant local authority and the particular claimants and did not, therefore, have the public significance of the declarations sought in this case.

42. With all respect to Mr Tucker, it seems to me that the point works against him. In **Richards v Worcestershire County Council [2017] EWCA Civ, 1998**, Rupert Jackson LJ, having reviewed the relevant case law, in a case where Part 7 proceedings had been brought against the defendant council and where that council had applied to strike out, pursuant to the exclusivity principle, concluded, at paragraph 65, that 'the exclusivity principle applies where the claimant is challenging a public law decision or action and … his claim affects the public generally'. That, as it seems to me, is, precisely, the case that T&P put forward and, precisely, the reason why this case falls, squarely, within the exclusivity principle and should not, therefore, proceed under Part 8.

43. In light of the foregoing, I can deal relatively shortly with Sutton's alternative argument that the doubling up of these proceedings with the section 78 appeal is, in itself, an abuse of process.

44. In my view, it is.

45. Mr Tucker has explained, as set out in paragraph 30 of this judgment that the fundamental reason for the doubling up of these proceedings with the section 78 planning appeal is, paradoxically, to protect T&P, or Lawlor, or other putative developers, from the situation which might arise if Lawlor were successful in the planning appeal, if Sutton, then, elected not to take the matter to the Planning Court, under section 288 of the 1990 Act, and if Sutton, whether as against T&P, in respect of a new prior approval application, or as against some other potential developer of land within the area included within the Article 4 Direction and, like T&P, having the benefit of a lapsed prior approval, elected to refuse prior approval on the same basis and on the application of the same construction of the Direction as, in this hypothesis, would have already been rejected by the planning inspectorate, in respect of Lawlor's current appeal. He argued, additionally, that, in the somewhat unlikely event that the court's determination, in these proceedings, was achieved before the planning Inspectorate issued its decision, then the court's decision would be determinative of the planning appeal.

46. In regard to the latter point. It cannot, in my judgment, be other than abusive, in circumstances where a properly constituted appeal tribunal is seised of an appeal, to bring parallel proceedings in respect of the very same point. The overriding objective, in the Civil Procedure Rules, applicable across both private and public law cases and to which reference was made by Lord Woolf, in the context of the exclusivity principle, in **Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988**, attaches considerable weight, as currently in force, to the proportionate use of the resources of the court. It cannot, in my view, be a proportionate use of those resources to bring parallel proceedings in the way that T&P has done in this case,

particularly where the tribunal proceedings are, as it seems to me that they are, the appropriate proceedings to deal with the public law issue raised in this case and where these current proceedings offend, as already explained, against the exclusivity principle.

47. In regard to the paradoxical contention that these parallel proceedings provide a protection for T&P and/or other developers, in the event that Lawlor's planning appeal succeeds and is not appealed further, I have no doubt but that the continuation of these proceedings for that purpose would be abusive.

48. Putting aside what, to a non-planner, seems the gross improbability that Sutton would behave as postulated by Mr Tucker, it is, in my view, plainly abusive for proceedings to continue, for the purpose of affording this supposed protection when, in the circumstances postulated by Mr Tucker, Lawlor would have, by its success on the section 78 appeal, procured prior approval for its proposed development, on the footing that that development constituted permitted development, under the 2015 Order, and when, therefore, the Part 8 proceedings, if continued, would continue for the purpose of seeking a declaration to exactly the same effect as the relief already obtained. Any continuation of the proceedings, in those circumstances and after the relevant relief had already been obtained would, as between the parties, be wholly academic, a waste of court resources and an abuse.

49. In the result I am satisfied that for all the reasons set out herein, this Part 8 Claim constitutes a misuse and abuse of the Part 8 process and that, for that reason, the Claim must be struck out.