



Neutral Citation Number: [2020] EWHC 504 (QB)

Case No: QB – 2019 - 004500

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 05/03/2020

**Before :**

**THE HON. MRS JUSTICE THORNTON**

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**Between :**

**Norfolk Homes Limited**  
**- and -**  
**North Norfolk District Council**  
**- and -**  
**Norfolk County Council**

**Claimant**

**First Defendant**

**Second Defendant**

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**Mr Lockhard-Mummery QC (instructed by DLA Piper UK LLP) for the Claimant**  
**Ms Dehon (instructed by Eastlaw) for the First Defendant**

Hearing dates: 26/02/2020  
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**APPROVED JUDGMENT**

**The Hon. Mrs Justice Thornton :**

**Introduction**

1. The Claimant, Norfolk Homes, applies for summary judgment of its claim for a declaration that residential development of land in Holt, Norfolk is not bound by obligations contained in an agreement made pursuant to section 106 Town and Country Planning Act 1990 (TCPA). The First Defendant, Norfolk Council (“the Council”) is the local planning authority and resists the claim. The Second Defendant (Norfolk County Council) does not contest the claim.
2. The parties were agreed as to the legal test and principles applicable to an application for summary judgment. The Court may give summary judgment if it considers that the Council has no real prospect of successfully defending the claim (CPR 24.2). To defeat the application, it is sufficient for the Council to show a prospect of success which is real in the sense of not being false, fanciful or imaginary. Where a summary judgment application gives rise to a short point of law or construction, the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an adequate opportunity to address the point in argument (Global Asset Capital Inc v Aabar Block S.A.R.L. [2017] EWCA Civ 37, Three Rivers DC v Bank of England (No.3) [2001] 2 All ER 513).

**Factual Background**

3. On 26 June 2012, the Council granted outline planning permission for 85 dwellings on land off Cley Road and Woodfield Road, Holt (application no PO/11/0978) (“Outline Planning Permission”). A few days earlier on 22 June 2012, the then owner of the development site and the Council entered into a section 106 Agreement providing for an affordable housing scheme and financial contributions to a local recreation ground; car parking; community centre and nature conservation. It is not disputed that affordable housing is a key planning priority for the Council.
4. In 2013, by a decision notice dated 19/9/13, conditions 3 and 7 of the Outline Planning Permission were varied to allow 15 dwellings to be served from vehicular access off Cley Road instead of the 12 previously allowed. The reference number for this permission was PF/13/0854. The permission was granted pursuant to section 73 TCPA.
5. In 2015, by a decision notice issued on 2/9/15, conditions 19 (rating for sustainable homes) and 20 (green energy) of the Outline Planning Permission were replaced to reflect policy developments. The reference number is PF/15/0074. The permission was granted pursuant to section 73 TCPA.

6. By a decision notice dated 19/8/16 the Council approved the reserved matters. Reference is made in the notes to applicants to the Outline Planning Permission. The application site is said to be subject to a section 106 agreement.
7. Planning consultants for Norfolk Homes made payments under the section 106 Agreement on the 15/12/16; 24/1/17 and 17/2/17 although the parties dispute the significance of the payments. On behalf of Norfolk Homes it is contended that the payments were made without prejudice and are legally irrelevant to the claim. On behalf of the Council they are said to be consistent with the Council's understanding that the section 106 agreement continued to apply to the varied permissions.
8. By a decision notice dated 30/5/18 the Council gave notice that the information supplied on behalf of Norfolk Homes had satisfactorily discharged various pre commencement conditions.
9. It is common ground that Norfolk Homes commenced development under the second section 73 planning permission (PF/15/0074) and the development began within the statutory time limit through the excavation and laying of foundations to one of the dwellings.
10. On 15/8/19, representatives of Norfolk Homes wrote to the Council seeking confirmation that the development was not bound by the terms of any planning obligation and requiring the Council remove reference to the s106 agreement from the Land Charges Register.
11. By a decision dated 23/8/19 the Council refused a certificate of lawfulness for implementation of planning application ref PF/15/0774 without triggering the requirements of the s106 agreement dated 22 June 2012 stating:

*“The Council is satisfied on the balance of probabilities the planning permission which Norfolk Homes has implemented (ref PF/15/0774) a variation granted under s73 TCPA on 2 Sep 2015 cannot lawfully be implemented without triggering the obligations imposed by a section 106 agreement made in connection with the original planning permission (PO/11/0978) granted on 26 June 2012.”*

12. On 3/10/19 the Claimant issued a Part 8 claim form seeking a declaration that the development is not bound by any of the obligations contained in the section 106 agreement and an order requiring the Council to remove reference to the section 106 agreement from the Land Charges register.

### **Submissions of the parties**

13. On behalf of Norfolk Homes, Mr Lockhart-Mummery submitted that the claim raises a short point of law about the construction of the section 106 agreement which, in his words, is as 'plain as a pikestaff'. The obligations in the section 106 agreement are expressly tied to the implementation of the Outline Planning Permission, as is readily apparent from the definitions of Application, Development and Planning Permission. The development is being implemented under the separate and independent planning permission (PF/15/0774), as to which the parties chose not to include the increasingly standard clause to the effect that the s106 obligations were to remain binding.
14. On behalf of the Council, Ms Dehon submitted that the claim raises a cogent and novel point of law which is not apt for summary judgment. The Supreme Court decision in Lambeth makes clear that a planning document, which includes a section 106 agreement, must be interpreted according to the natural and ordinary meaning of the words in their surrounding context, which includes the planning context. Accordingly, the section 106 agreement is to be construed as applying to the outline planning permission as varied. Failing that, these words are to be implied. The available evidence, namely the Council's approval of reserved matters and the payments made under the section 106 agreement, is consistent with the Council's understanding that the s106 agreement continued to apply to the varied planning permissions.

### **Legal framework**

15. Section 106 of the Act provides (as material):

*“(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section ....as “a planning obligation” ...*

- (a) restricting the development or use of the land in any specified way;*
- (b) requiring specified operations or activities to be carried out in, on, under or over the land;*
- (c) requiring the land to be used in any specified way; or*
- (d) requiring a sum or sums to be paid to the authority*

...

(9) *A planning obligation may not be entered into except by an instrument executed as a deed ...*

....

(11) *A planning obligation shall be a local land charge ....”*

16. Section 73 of the Town and Country Planning Act 1990 is headed ‘Determination of applications to develop land without compliance with conditions previously attached’. It provides:

*“(1) This section applies... to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.*

*(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and – (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.”*

17. It is common ground that a planning permission granted pursuant to section 73 takes effect as a separate independent permission to carry out the same development as previously permitted but subject to new or amended conditions (Lambeth v Secretary of State for Housing Community and Local Government [2019] 1 WLR 4317 at [19]).
18. The relevant principles of contractual interpretation were not in dispute. The court must identify the intention of the parties by focusing on the meaning of the relevant word(s) in their documentary, factual and commercial context. That meaning has to be assessed in light of i) the natural and ordinary meaning of the words ii) any other relevant provisions of the contract iii) the overall purpose of the contract iv) the facts and circumstances known or assumed by the parties at the time the document was executed and v) commercial common sense but vi) disregarding subjective evidence of any parties intentions (see Arnold v Brittan [2015] UKSC 36 at [15]-[21].)

19. The legal principles for implication of term(s) into a contract were not in dispute:

*“For a term to be implied the following conditions (which may overlap) must be satisfied: 1) it must be reasonable and equitable 2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it 3) it must be so obvious that ‘it goes without saying’ 4) it must be capable of clear expression 5) it must not contradict any express term of the contract.”* (Marks and Spencer Plc v BNP Paribas Securities Services [2015] 3 WLR 1843 where Lord Neuberger approved the summary of principles set out in BP Refinery (Western Port) Pty Ltd v. Shire of Hastings [1977] 180 CLR 266)

### Decision

20. I am not persuaded that the claim gives rise to a short point of law. Some, but not all, of the issues that arise from the claim seem to me to be as follows:

- a. To what extent are the legal principles for interpreting a section 106 agreement the same as those for interpreting any other planning document?
- b. Should the section 106 agreement be construed in accordance with its ordinary and natural meaning; the statutory and planning context (including the subsequent section 73 permissions) (Lambeth paragraph 19) or should it be construed according to the principles of contractual interpretation set out in Arnold v Brittan (in particular principle iv) that the contract should be construed according to the facts and circumstances at the time of the contract)?
- c. To what extent is the case of Lambeth v Secretary of State relevant to the present case?
- d. Can the Council be said to have fallen into a ‘technical trap’ of the sort envisaged by Court in Lambeth v Secretary of State? To what extent, if at all, should the Courts intervene to protect the Council from any ‘technical trap’?
- e. Can the case of Lambeth be said to establish the principle that developers should not be able to evade obligations by relying on technical traps.

- f. The legal relevance, if any, of the payments made under the section 106 agreement in 2016/2017.
  
  - g. The legal relevance, if any, of the implications of the developer's case being inconsistent with a key planning priority for the Council (the provision of affordable housing).
21. I am not persuaded that the Council has no real prospect of successfully defending the claim given the wording of the relevant s73 permission and wider planning context and given the absence of authority directly on point in relation to some of the issues raised.
22. Mr Lockhart-Mummery urged me to grasp the nettle and determine the claim given there is no evidential complexity and the parties have had an adequate opportunity to address the legal points raised. I decline the request. The nature of the application meant there was insufficient opportunity to consider the above mentioned issues.
23. Accordingly, I refuse the application for summary judgment. I direct the parties to seek to agree consequential matters.