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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT  
[2021] EWHC 698 (Admin)



No. CO/3111/2020

Royal Courts of Justice

Wednesday, 3 February 2021

Before:

SIR ROSS CRANSTON

(Sitting as a Judge of the High Court)

B E T W E E N :

THE QUEEN  
ON THE APPLICATION OF  
(1) BRUCE WALTER MCLAREN  
(2) JILL SANDFORD MCLAREN  
(3) WALTER FERGUSON MCLAREN

Claimants

- and -

WOKING BOROUGH COUNCIL

Defendant

\_\_\_\_\_

MR H. MOHAMED appeared on behalf of the Claimants.

MR T. STRAKER QC appeared on behalf of the Defendant.

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J U D G M E N T

SIR ROSS CRANSTON:

- 1 This is an application for judicial review in which the claimants challenge the decision of Woking Borough Council (“the Council”) to grant planning permission to New Central Developments Limited (“New Central”) for the demolition of existing buildings and the erection of a building with self-contained flats in York Road, Woking. The planning permission granted was across the land of both the claimants and New Central. The land owned by the claimants is approximately 50 per cent of the application site.
- 2 The focus of the claimants case is that the s.106 agreement is defective because it fails to bind either the current owner, New Central, or future freehold interests in the land which they currently own.
- 3 In the course of the hearing Mr Mohamed, for the claimants, helpfully explained that the site address, 7 York Road, covers both the land of the claimants and of New Central. In other words, New Central’s land - the corner plot of land serving York Road and Bradfield Close - does not have a separate address, a point of some importance in understanding some of the documents.
- 4 The background is, in brief, this. The claimants are a partnership and from their part of 7 York Road they conduct a business consisting of a clothing store, a carpet store and part-serviced offices.
- 5 In August 2016, New Central applied for planning permission for a 6-storey building comprising 46 self-contained flats (26 1-bedroom flats and 20 2-bedroom flats), including 30 off-street parking spaces at basement level. The certificate of ownership submitted with the application was incorrect, covering the whole of the land at 7 York Road.
- 6 This was a major development and fell outside the scope of the planning officer’s delegated powers. There was an Officer’s Report dated 26 September 2017 prepared for the Council’s Planning Committee. The applicant is named as Simon Connelly, who is the principal of New Central. At the outset, the report recommended that planning permission be granted subject to conditions and a s.106 agreement. The s.106 agreement was to secure the SAMM (Strategic Access Management and Monitoring Project) contribution = in other words, the contribution to mitigate any effect on the Thames Basin Heaths Special Protection Area (SPA) - and in relation to affordable accommodation.
- 7 The report goes on to describe the site and its planning history. It then summarises the proposal, deals with the consultation representations and sets out planning issues. As to the impact on the Thames Basin Heaths SPA, the report states:

“The applicant has agreed to make a SAMM contribution of £25,862 in line with the Thames Basin Heaths Special Protection Area Avoidance Strategy 2010 to 2015.”

The report adds:

“And in view of this, the Council is able to determine that the development would have no significant effect upon the SPA and, therefore, accords with Core Strategy 2012 Policy CS8 and the Thames Basin Heaths Special Protection Area Avoidance Strategy 2010 to 2015.”

As to affordable housing, the report explains that a contribution would make the proposal economically unviable. However, it added, it was considered appropriate to ensure that an overage agreement applied as part of the s.106 agreement should the scheme become viable. The conclusion to the report was that the proposal was an appropriate form of development with an acceptable impact, subject to conditions, and an agreement securing a financial contribution as regards the Thames Basin Heaths SPA, explained earlier in the report. The report then says this under the heading “Planning Obligation”:

“The following obligation has been agreed by the applicant and will form the basis of the legal agreement to be entered into.”

And it then specifies the SAMM contribution and the overage agreement. There then follows the conditions, including a number requiring prior Council approval before building occurs or proceeds. Attached is a site plan which shows the proposed development covering the whole site, numbered 02/200.

- 8 Following the decision of the Planning Committee, there were discussions between the parties. In the course of them, the Chief Executive of the Council wrote to the third claimant on 18 March 2018 that the principal of New Central had told him that the claimants had refused to sell their part of the site, which was their right, adding that because of the importance of the Council securing the delivery of homes it was willing to consider compulsory purchase orders to ensure that developments were undertaken, particularly in central Woking. The Council had been discussing that possibility with New Central for land to the west. The Chief Executive added that it seemed that the Council had thought erroneously that the claimants were the sellers.
- 9 On 3 June 2019, the Council wrote to New Central that since no progress had been made it would treat the application as finally disposed of under Article 40 of the Town and Country Planning (Development Management Procedure)(England) Order 2015.
- 10 There were then a number of emails exchanged between New Central and the claimants. In one, New Central set out what the claimants might gain financially from selling their property, should they wish to do so. New Central added that to sign a s.106 agreement put them under no obligation unless they decided to go ahead with the development by way of joint venture; if they sold the land, they would no longer be bound by its terms, and if they did not sell the land the development would not go ahead. In another email on 7 June 2019, the claimants asked New Central about the best price it would pay for the land and New Central responded that it would pay £2 million. Since the third claimant had mentioned that the address of the two other claimants was incorrect on the draft s.106 produced by the Council, New Central asked for the correct address and any other changes, adding that it would try to buy some time before the Council voided the application. The third claimant replied with the correct address for the other two claimants, commenting that there was no second owner mortgage since the bank had been paid and had released its charge earlier that year.
- 11 New Central informed the Council that the terms of the s.106 agreement had been agreed, but that these changes relating to addresses and bank mortgage needed to be made. In an email to New Central on 13 June 2019, the third claimant stated that the claimants were minded to sign the s.106 deed but needed a week’s grace to take legal advice.
- 12 On 20 June 2019, the Council emailed New Central, copying in the third claimant, recalling that it had received the agreements New Central had signed as first owner, but could it be

confirmed that it should send the agreements to 7 York Road for signing by the claimants as second owner. The response from New Central was in the affirmative. However, the claimants did not sign: they were not satisfied as to the offer, and the property comprised the base for their business.

- 13 In July 2019, the Council submitted a draft site allocations development plan document dated November 2018 for examination by an inspector. It included Policy UA36, which stated that the claimants' land, along with the land owned by New Central, was considered as available for re-development given the 2017 Planning Committee decision, subject to legal agreement. The claimants wrote and contested the allocation of their land in this way and explained the background. The inspector consequently excluded it from consideration.
- 14 In correspondence on 3 January 2020, the third claimant informed the Council about what the claimants considered to be fundamental errors in relation to the status, availability, vacancy and ownership of 7 York Road during the hearings before the inspector. The letter stated that at the time of the application the claimants had not had any negotiations with New Central and had made clear their unwillingness to sell for a variety of reasons. " 'No need, no wish, no desire' is our position still", they said.
- 15 The Council's Deputy Chief Executive replied on 10 February 2020 that each planning application was taken in good faith to be accurately submitted by the applicant. It did not undertake Land Register searches while processing an application but if comments were received disputing land ownership enquiries would be made to clarify the position. The letter explained that notwithstanding this, planning permission ran with the land and not to the applicant, so land ownership had no bearing on the outcome of a planning application. Whether or not a planning permission could be lawfully implemented if there was a dispute of land ownership was a separate matter.
- 16 Four months later, on 12 June 2020, the Council and New Central, described as "the owner", executed as a deed a s.106 agreement. Recitals 2, 4 and 5 are as follows:

- "2) The owner is registered as the freehold owner of that part of the land with title absolute at HM Land Registry under title number SY852649 and shown hatched blue on the plan for identification purposes only...
- 4) The owner has made the application in order to develop the land by carrying out development.
- 5) The Council has resolved to grant planning permission subject to the owner entering into this deed."

The land is defined as follows in the definition clause:

"Means all that land together with buildings erected thereon situate and known as 7 York Road, Woking shown red on the plan."

Clauses 2 and 3 of the deed provide as follows:

- "2) This deed is given by the owner with intent of binding the freehold interest in the land from the date of this deed.
- 3) This deed is binding on the parties and the successor is entitled to the land stated be bound."

- 17 Two days later, on 14 July 2020, the Council granted planning permission for the development. The provisions of the permission track those of the Planning Committee's

resolution in 2017. Compliance with the conditions is underlined in the document, in particular that prior to commencement of certain aspects and continuation of the building work Council approval must be obtained.

- 18 In a witness statement the third claimant explains that he only learnt about both the s.106 agreement and the grant of planning permission by accident. He then enquired about the matter, to be confronted by these unpalatable facts. He wrote to the Council and on 20 August they replied, amongst other things stating:

“Further to my email last week I have looked at the matter. You asked on what legal basis has the s.106 agreement been signed, therefore, allowing planning to be issued and why. The case officer liaised with the Director of Legal and Democratic Services prior to issuing the decision and received the advice that the developer, who is prepared to sign the agreement, has sufficient control over the application site and offsite access to ensure the planning obligations, amounting to the SAMM and affordable housing overage payments are complied with. Upon receipt of this advice a new s.106 agreement was drafted and signed by the developer and subsequently a planning permission issued.”

There was a delay in the s.106 agreement being uploaded to the Council’s website but it seems to have occurred at some point after 25 August 2020.

### **Ground 1**

- 19 Ground 1 of the claimants’ grounds is that the s.106 agreement signed by the Council and New Central is legally deficient in that it does not bind the site. Alternatively, that there has been no explanation as to why or how the Council had reasoned the exclusion of the claimants’ land from the agreement.
- 20 In advancing this ground, Mr Mohamed contended that for the s.106 agreement to meet the requirements of the Planning Committee Resolution of 2017 the claimants were required to be a party to that agreement. There was an obligation, he continued, to bind all the material interests in the application site. By failing to bind an area of land which benefits from the planning permission, the agreement failed to ensure that the scheme was being brought forward in accordance with the proposed obligations in that 2017 decision. He highlighted the words of the deed, which I have quoted. Therefore the s.106 agreement, he continued, could not properly be enforced. Consequently, the mitigation which the agreement was intended to secure to make the development acceptable in planning terms have not come forward. In his submission, it was always intended that the claimants would be party to the s.106 agreement and no explanation had been given for the Council’s volte face.
- 21 In my view, this ground does not raise an arguable legal or public law error. The s.106 agreement follows the requirements of s.106 of the Town and Country Planning Act 1990. It is in the form of a deed. It identifies, by the definitions referred to, the land in which the person entering the obligation, i.e. New Central, is interested, and the interest which the person entering into the obligation has. It will be recalled that recital 2 of the agreement stated that New Central was the owner of the land with title absolute at HM Land Registry under the number I have referred to and shown hatched blue on the plan. Despite infelicities in the drafting of cl.2, which I have quoted, interpreted in context it expresses the intention of the owner, New Central, to bind its freehold interest in the land, in other words, approximately one-half of the area of the site, the part which it owns.

- 22 Further, I cannot see any legal requirement that a s.106 obligation ought to bind all material interests in a planning application site. Those with no interest in land can apply for planning permission in respect of it, as Mr Mohamed conceded, and a local planning authority can grant planning permission on taking material considerations into account. On my reading it was not a pre-condition of the Planning Committee's decision in 2017 for the claimants to be a party to the s.106 agreement. That is not what the report says in its conclusion, and the passage immediately following, under the heading "Planning Obligation", which I quoted earlier. The fact is that the obligation binds a sufficient part of the site, namely, that belonging to New Central, to preclude development unless its purposes are met. I would add that the claimants have not been excluded from the agreement; they may unilaterally bind themselves at any time to its obligations if they choose to do so.
- 23 In the course of his submissions, Mr Mohamed contended that the claimants would not be able to prevent development proceeding on the part of the site owned at present by New Central since there could be a phased development with that part only. In as much as this point is relevant, the permitted development involves the whole of the site, the demolition of buildings and the erection of the new building in accordance with the approved plans, including 02/200, which, as I have described earlier, shows a building covering the whole of the site. A phased development is not contemplated.
- 24 In summary, the s.106 agreement in my view secured the SAMM contribution and an obligation to pay the overage, which were the rationale set out in the Officer's Report of 2017. The agreement is enforceable in relation to New Central's land only, but secures the necessary mitigation for the whole site.

## **Ground 2**

- 25 This ground contends that in granting planning permission in 2020, the Council failed to take into account as a relevant and important factor the material change of circumstances since the Planning Committee's resolution in 2017. In particular, the claimants assert: 1) that Council officers mistakenly believed that there was a willing seller of a freehold interest to be included in a s.106 agreement, having since learnt that the claimants were not willing sellers; 2) negotiations pursuant to the s.106 agreement had faltered and the agreement had not been signed by the claimants who own approximately one-half of the site; 3) the ownership certificate relevant to the proposal turned out to have been incorrectly served, a point subsequently drawn to the Council's attention; and 4) the site had become subject to a proposal for allocation, but the draft allocation contained many errors which were highlighted by the claimants ahead of planning permission being granted.
- 26 Mr Mohamed fairly conceded that these changes would not necessarily have been material planning conditions on their own but submitted that in combination, and in the context of the planning application, they amounted to material considerations. In his submission, the application before the Planning Committee in 2017 was represented as one where the application related to "the Land" which was wholly within the control of, or soon to be purchased completely, by New Central. That reasoning underpinned the Planning Committee's report, which was premised on this material consideration, but which was no longer the case in 2020. Mr Mohamed also submitted that given these changes the proposal should have been returned to the Planning Committee and - a new point - enquiry made as to whether the officers still had delegated authority to execute the deed and grant planning permission.
- 27 In my view, none of these factors constitute a material change of circumstances between the date of the resolution and the date of the grant, either alone or cumulatively. The readiness or otherwise of the claimants to sell to New Central or to enter into a s.106 agreement is not

material to the grant of planning permission. Nor is the fact that the ownership certificate before the Planning Committee was incorrect. That was a procedural point prior to the determination of planning permission. Indeed, points 1 and 3 relate to the situation at the time of the 2017 decision and I find persuasive Mr Straker QC's point that they could not change.

28 In any event, I accept Mr Straker's submission that none of these points have relevance to planning issues material to the decision to grant planning permission. There was no need, in my view, for the matter to be returned to the Planning Committee since, as I have stated earlier in the judgment, permission, when granted in 2020, was in line with the 2017 resolution. Thus the delegation point falls away.

29 Under this head, Mr Mohammed also contended that the Council had not explained why the claimants' land was not required to be part of the s.106 agreement. In my view, there was an explanation in the emails of 10 February and of 20 August 2020, to which I have referred, in as much as there was any obligation on the Council to provide one.

### **Ground 3**

30 Here, Mr Mohamed's argument was that there was a breach of the claimants' legitimate expectation that they would be party to the 106 agreement. Mr Mohamed relied in particular on the email from the Chief Executive of 18 March 2018, which I quoted earlier. It stated, amongst other things, that compulsory purchase powers might be exercised. That gave rise to the legitimate expectation for the claimants to believe that no permission would be granted without them being a party. The Council had sent them the agreement for signature, and it was entirely reasonable that they took that to mean that permission would not be granted with their first being a party to it. There was no explanation, Mr Mohamed submitted, as to the change in the Council's approach.

31 In my view, there was no clear, unambiguous and unqualified assurance understood by those to whom it was given that the Council would not proceed with a s.106 agreement without the claimants being a party. The email of 18 March contained no such assurance. Nor can I discern any course of conduct to this effect. The fact is, as I explained earlier, the agreement was sent to the claimants at a time when the third claimant had indicated that they were minded to sign the agreement. As I have explained already, the fact that the claimants have significant ownership rights over the land referred to in the agreement is neither here nor there. There was nothing giving rise to a legitimate expectation that they would be a party to agreement.

32 In his written submissions, Mr Mohamed also advanced this ground on the basis of irrationality given that the claimants had a reasonable expectation of being notified of a fundamental change in the Council's position. In my view, the claimants' case cannot surmount the high threshold required for a rationality challenge in light of the circumstances which I have explained.

### **Ground 4**

33 Ground 4 is that the Council failed to comply with the requirements of s.65(5) of the Town and Country Planning Act 1990 and Articles 13 and 14 of the Town and Country Planning (Development Management Procedure)(England) Order of 2015. Section 65(5) provides that planning permission cannot be granted unless any requirements imposed by the section have been satisfied, and pursuant to that Articles 13 and 14 contain requirements regarding notice of applications for planning permission.

- 34 Regarding this ground Mr Mohamed contended that, despite the claimants being known to the Council and New Central as the freehold owner of part of the land in question, the Council failed to fulfil its statutory functions of giving them notice. They had first become aware of the change in circumstances in the email of 20 August, well after the agreement was signed and the planning permission issued. The Council, Mr Mohamed contended, had breached the strict requirements of notice.
- 35 The notice requirements contained in section 65(5) of the 1990 Act and Articles 13 and 14 are preliminary to the determination of an application. However, assuming these provisions were breached in this case what the claimants must also demonstrate is that this caused them prejudice. Mr Mohamed has not persuaded me that the claimants have suffered prejudice. As Mr Straker pointed out, the only prejudice asserted is a want of knowledge. The claimants' challenge in these proceedings is to the grant of planning permission and, as Mr Straker pointed out, if the claimants do not wish to see the planning permission implemented they simply do nothing until it lapses.
- 36 Mr Mohamed also submitted that, as a result of the grant of planning permission, a compulsory purchase order has come closer. However, as a matter of law the Council has always had the power of compulsory purchase under s.226 of the Town and Country Planning Act 1990. I would simply add that if the claimants wish to be party to the s.106 agreement they can do that at any time. They need not do so, nor need they sell their land. As Mr Straker submitted they can also prevent the development going ahead, given the nature of the permission granted. The bottom line is that there is no legally relevant prejudice in this case.

**Conclusion**

- 37 It follows that permission to seek judicial review is refused.
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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.