Neutral Citation Number: [2019] EWHC 3222 (Ch)

Case No: PT-2019-000045

IN THE HIGH COURT OF JUSTICE
PROPERTY AND BUSINESS COURTS
Property Trusts and Probate (ChD)

Rolls Building,
Fetter Lane, London. EC4A 1NL

Date: 26/11/2019

Before :

MASTER SHUMAN

- -

Between :

LIONEL JEFFREY COZENS-SMITH	**Claimant**
- and -	
BELLWAY HOMES LIMITED	**Defendant**

- -
- -

Tom Carpenter-Leitch (instructed on a direct access basis) for the **Claimant**
John Randall QC (instructed by **Gateley plc**) for the **Defendant**

Hearing dates: 5 July 2019

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

MASTER SHUMAN :

1. In July 2016 the four freehold owners of land at Little Meadow, Alford Road, Cranleigh, Surrey GU6 8NE obtained outline planning permission for the erection of 75 dwellings on that land. The claimant was one of those owners. In December 2016 the owners sold the land less a small strip to the defendant for the price of £9.65 million ("the site"). The reserved land formed a strip of land 0.25 metres in width running along the northern and eastern boundary of the site ("the strip"). The claimant is now the sole owner of the strip.

2. The claim concerns a footpath ("the footpath") constructed by the defendant on the site but continuing across the strip to the northern boundary. There is a factual issue between the parties as to whether the footpath crosses the entire strip but that does not matter for the purposes of the hearing before me. By a Part 8 claim form the claimant seeks declaratory relief that he is not obliged to permit the construction of the footpath (although it has already been constructed) and in the alternative that he is not obliged to grant a right of way along it.

3. The defendant has made an application by notice dated 18 February 2019 to strike out the claim pursuant to CPR 3.4(2)(a) and/or (b) for an order for summary judgment pursuant to CPR 24.2(a). The defendant relies on a witness statement of Geoff Blake, a land director at the defendant, dated 15 February 2019 filed in opposition to the claim. In addition Andrew Johnson, solicitor and partner, has filed three witness statements dated 18 February 2019, 24 June 2019 and 4 July 2019.

4. The application is opposed by the claimant. He has also made a cross-application by notice dated 12 March 2019 for permission to amend his Part 8 claim form to include a claim for injunctive relief and/or damages. That application is supported by a short witness statement from the claimant dated 11 March 2019. He also filed a witness statement dated 10 January 2019 in support of his claim. On 3 July 2019 the claimant filed and served a further witness statement dated 2 July 2019. Whilst late, I permitted him to rely on that statement and the defendant to rely on Andrew Johnson's statement served in response the day before the hearing.

5. The key issue before me concerns the meaning of "planning permission" in the transfer dated 21 December 2016 ("the transfer"). It is a short question of construction as to whether planning permission included only the outline planning permission dated 1 July 2016 or the approval of reserved matters ("the disputed ARM") dated 28 July 2017 as well. It is the defendant's contention that if I accept the construction contended for by the defendant all other issues fall away, including its own application seeking in the alternative permission to counterclaim against the claimant and the co-owners for an indemnity in relation to the legal and other costs incurred in dealing with the claimant's claim.

6. The claimant takes issues with the defendant's characterisation of the disputed ARM as an ARM, suggesting that it is in fact a new grant of planning permission, raises a factual issue as to the extent of and date when the footpath was constructed and seeks to bring into issue the meaning and effect of condition 8 in the disputed ARM. In order to make good that argument the claimant must also categorise the ARM application as an application for planning permission, although this is not accepted by the claimant. At paragraph 29 of Mr Carpenter-Leitch's skeleton argument he submits, "there remains a real and important issue to be resolved and the declaration sought (or perhaps a minor variation of it) indeed has utility for C." It is therefore also necessary for me to determine what the disputed ARM is: an ARM in respect of the OPP or a stand-alone new grant of planning permission.

THE LAW

7. The defendant seeks to strike out the claim pursuant to CPR 3.4(2)(a) or (b) which provides that,

> "3.4(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; …"

8. The notes to the White Book 2019, at 3.4.2 reiterate that a claim should not be struck out unless the court is certain that it is bound to fail.

9. In the alternative the defendant seeks summary judgment pursuant to CPR 24.2, which provide that the court may grant summary judgment on the whole of a claim or on a particular issue if:

> "(a) it considers that—
>
> (i) the claimant has no real prospect of succeeding on the claim or issue; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

10. In ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 the claimant sought to recover a sum of money said to be a debt due under an agreement made in March 1990. The defendant had been incorporated to provide vocational training to the employees of its members, which included the claimant. In 2002 the claimant sold its assets to another company, Ineos. The transfer of assets effectively put Ineos in the place of the claimant in the 1990 agreement. The defendant relied on the 2002 agreement as constituting a novation in favour of Ineos of the claimant's rights under the 1990 agreement and any other rights it might have or acquire against the defendant. The defendant's application for summary judgment was dismissed. The Court of Appeal considered that the application should have been granted, this was a short point of construction that was eminently suitable for summary determination. At paragraphs 13 to 14 Moore-Bick LJ said,

> "13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the

> circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.
>
> 14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

11. As to construction, Mr Randall QC referred me to Lord Neuberger's summary of the relevant principles in Arnold v Britton [2015] UKSC 36. This was a case in which the Supreme Court considered the meaning of a service charge clause in the leases of chalets in a caravan park. At paragraph 15 he said,

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

12. Lord Neuberger went on to emphasise a number of factors and the following are particularly relevant to the issues raised by the parties in the case before me.

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be

construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. …

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

> 21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.
>
> 22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. …"

THE FACTUAL BACKGROUND AND KEY DOCUMENTS

13. In or around 2014 Berkeley Strategic Land Limited applied for planning permission to develop land to the north and northwest of the site ("the Berkeley land") The application was refused but allowed on appeal on 31 March 2016. The Berkeley land is to the north of the strip and so far as I am aware abuts the strip.

14. On 1 July 2016 Waverley Borough Council ("WBC") granted outline planning permission in respect of the land to the claimant and the other co-owners ("the seller"), reference WA/2015/0478 ("the OPP"). The First Schedule to the OPP records,

> "Outline application, with access to be determined, for the erection of 75 dwellings to include 27 affordable dwellings with associated private amenity space and parking. This application is accompanied by an Environmental Statement (as amended by additional EIA information received 12/06/2015)."

15. The second schedule to the OPP sets out 39 conditions.

16. The first condition reserves 4 matters: layout, scale, landscaping and appearance. It states that, "The reserved matters shall be carried out as approved. Approval of all reserved matters shall be obtained from the Local Planning Authority in writing before any development is commenced."

17. The third condition states,

> "The plan numbers to which this permission relates are. 14009-01; Location Plan – 1431 PL01 Rev. C; Block Plan (Indicative) – 1431/PL.02. The development shall be carried out in accordance with the approved plans. No material variation from

> these plans shall take place unless otherwise first agreed in writing with the Local Planning Authority.
>
> Reason
>
> In order that the development hereby permitted shall be fully implemented in complete accordance with the approved plans and to accord with Policies D1 and D4 of the Waverley Borough Local Plan 2002."

18. Vehicular access was dealt with in the OPP, condition 26.

19. On 21 December 2016 the seller sold the site to the defendant specifically as a development site with the benefit of the OPP ("the contract").

20. Clause 1 of the contract sets out the definitions and rules of interpretation that apply to the contract. The relevant definitions are as follows:

> "Plan means the plan annexed at Schedule 1
>
> Planning Permission: planning permission reference WA/2015/0478 (as the same may be amended or varied from time to time and including any reserved matters thereto)
>
> Property: the freehold property at Little Meadow Alford Road Cranleigh GU6 8NE shown more particularly delineated in red on the Plan and being part of the land registered at HM Land Registry with title absolute under title number SY512898 being the whole of the registered title but excluding the Ransom Strip
>
> Ransom Strip means a strip of land 0.25 metres wide along the northern and eastern boundary of the Property between points marked A, B and C on the Plan which shall be retained by the Seller
>
> Transfer: the form of transfer annexed at Schedule 4".

21. The transfer in form TP1 is dated 21 December 2016. It records that the site is transferred out of the land with the title number SY512898. The site is identified by reference to an attached plan with the strip clearly marked as running along the northern and eastern boundary of the site marked between points A, B and C. The site is registered under title number SY842751.

22. The consideration paid was £9.65million which Mr Blake says represented a full price for the site with the benefit of the OPP. There is no evidence before me to counter this and I accept his evidence.

23. Clause 12 of the transfer sets out the following relevant additional provisions:

> "12.1 Definitions
>
> "Development" means the residential development to be constructed on the Property and on the Retained Land in accordance with Planning Permission
>
> "Planning Permission" means planning permission reference WA/2015/0478 as may be amended or varied from time to time
>
> "Section 106 Agreement" means an agreement dated 1 July 2016 made between (1) Waverley Borough Council (2) Surrey County Council (3) Crownhall Estates Limited and (4) the Seller as the same may be amended or varied from time to time
>
> "Retained Land" means the strip of land measuring 0.25 metres in width along the northern and eastern boundary between points A, B and C on the attached plan"

24. The rights granted for the benefit of the site are set out in clause 12.3:

> "12.3.1 A right of entry on to so much of the Retained Land as is unbuilt on with tools, equipment, machinery and workmen for the purposes of:
>
> (a) carrying out any works to the [site] and/or the Retained Land which are required to comply with any condition of the Planning Permission and/or S106 Agreement and/or any Infrastructure Agreement;
>
> (b) constructing the Development …"

25. There are a series of further rights, paragraphs 12.3.1 (c) to (d), 12.3.2(a) to (c) and 12.3.3 to 12.3.6, for the benefit of the defendant and its successors in title providing express authority to go on to the strip and build on it.

26. The rights reserved for the benefit of other land are set out in clause 12.4 as follows:

> "The Transferor hereby covenants with the Transferee so as to bind the Retained Land into whosoever hands it may come and for the benefit and protection of the Property covenants for itself and its successors in title to observe and perform at all times after the date of this Deed in relation to the Retained Land the following stipulations and restrictions;
>
> 12.4.1 to comply with the conditions referred to in the Planning Permission insofar as they relate to the Retained Land … and to fully and effectually indemnify the Transferee against all actions costs claims demands expenses or proceedings arising from any non-compliance with this covenant

> …
>
> 12.4.5 To pay to the Transferee on demand all costs and expenses incurred by the Transferee in the event of the Transferor failing to comply with the positive obligations contained in the immediately preceding clauses 12.3.1 to 12.3.4"

27. The defendant made a pre-application submission before making an application for approval of reserved matters. Mr Randall QC submits that this is usual practice, which I accept. Following a meeting on 2 December 2016 Waverley BC set out its informal written comments on that submission in a letter dated 24 February 2017. I note that the letter records that "The pre-application submission seeks officers views and opinions on the reserved matters."

28. Mr Randall QC submits that it is clear from this letter that Waverley BC are referring to the general layout of the site rather than access. The letter rightly identifies that the layout submitted differs from the indicative plan submitted at the outline stage as it introduces a circular route around the site rather than a central spine road. It is commented that this proposal represents an improved layout as it is less rigid and creates a more fluid use of space. There is reference to connectivity and that the layout needs to address connectivity between the site and surrounding land. By this stage the Berkeley land had outline planning permission and the boundaries of the site, save to the west, were open fields. References to access in the documents must therefore be to the connection between the site and the public highway, Alford Road, running along the western boundary of the site, not to the layout of the site. There is much force in this submission, the significance of which becomes more apparent when one goes through the application for approved reserved matters and the disputed ARM.

29. On 31 March 2017 the defendant made an application for approval of reserved matters in respect of the site ("the ARM application"). The heading in the form is "Application for approval of reserved matters following outline approval. Town and Country Planning (Development Management Procedure)(England) Order 2015."

30. Box 4 specifically refers to the pre-application submission that I have referred to at paragraphs 27 to 28 above. Box 5 sets out the development description and the reserved matters for which the defendant was seeking consent. It states,

> "Reserved matters application for the erection of 75 dwellings to include 27 affordable dwellings, and associated, parking, landscaping and open space, following the grant of outline planning permission (LPA Ref: WA/2015/0478). This application is accompanied by details of the layout, scale, landscaping and appearance."

31. The ARM application clearly refers to the 4 reserved matters set out in the OPP. I note that the date of the application decision is given as 27 April 2017 and must have been inserted at a later date. The declaration at box 9 is dated 31 March 2017 and declares that the application is for planning permission or consent as described in the form and accompanying plans or drawings and additional information.

32. On 28 July 2017 Waverley BC sent the disputed ARM to the defendant's agents. From the documents that I have been taken to this document must have been triggered by the ARM application; the claimant has not taken me to any new application for planning permission.

33. The disputed ARM has a new number, WA/2017/0738; this matches up with the number inserted on the ARM application. It records that Waverley BC grant planning permission for the development specified in the application deposited on 13 April 2017 and described in the first schedule but subject to the provisions of section 91 of the Town and Country Planning Act ("the 1990 Act"). There is a note referring to section 91 of the 1990 Act and that the development should be begun not later than the expiration of 3 years beginning with the date of this permission.

34. The first schedule refers to the development and specifically "details pursuant to outline permission granted under WA/2015/0478, together with the discharge of certain conditions imposed on this consent". This is an unambiguous reference to the OPP.

35. The second schedule lists 10 conditions. Condition 1 refers to a list of plans. Condition 8 provides,

> "Condition
>
> the development hereby approved shall not be first occupied until the pedestrian and cycle links within the site and between the site and the surrounding area have been laid out in accordance with the approved plans thereafter and they should be retained and maintained for their designated purpose.
>
> Reason
>
> the above conditions are required in order that the development shall not prejudice highway safety nor cause inconvenience to other highway users."

36. By email dated 21 December 2017 DMH Stallard LLP ("DMH"), the claimant's then solicitors, notified the defendant's conveyancing solicitors that any use of the strip to link the land to the north with the site would be a trespass for which the seller did not give permission and referred to "condition eight of the reserved matters consent". The reply on 11 January 2018 from the defendant's conveyancing solicitors referred to an application to remove condition 8 and an application for new planning permission.

37. On 28 August 2018 DMH wrote to the defendant's solicitors stating that the claimants have been advised that they are entitled to seek an injunction against the defendant should it seek to construct the footpath and that they were entitled to commence

proceedings to seek declaratory relief. By letter dated 24 September 2018 the defendant's solicitors stated that the defendant was in the process of constructing the footpath and went on to provide a detailed analysis of the construction of "planning permission" in the transfer. No application for an injunction was made by the claimant.

THE APPLICATIONS

38. Mr Carpenter-Leitch sought to argue that this was not an appropriate case for summary disposal submitting that the claimant had a real as opposed to a fanciful prospect of obtaining injunctive relief at a final hearing. Although that ignores the fact that no such claim has yet been made, he did realistically acknowledge that "whilst it may be that the grant of equitable relief in the form of an injunction will be refused e.g. on the grounds of delay such a relief is discretionary.[1]" This was alluding to the fact that DMH had raised at a very early stage that the construction of the footpath in accordance with condition 8 of the disputed ARM on any part of the strip would be a trespass. The defendant's position was set out clearly in its conveyancing solicitor's letter dated 4 June 2018. Despite that, the claimant stood by knowing that the defendant was developing the site in accordance with the OPP and disputed ARM. By at the latest 24 September 2018 the claimant knew from solicitor correspondence that the defendant was constructing the footpath. However the claimant's Part 8 claim form which was only issued on 14 January 2019 only sought declaratory relief. It was not until the defendant had issued its application for summary disposal that DMH wrote to the defendant's solicitors seeking permission to amend to seek injunctive relief and damages and inviting them to withdraw the application. In a letter dated 11 March 2019 the defendant's solicitors refused consent to the proposed amendment explaining that there was no evidence proffered by the claimant on the merits of his proposed amendment and indeed it was predicated on the basis that his construction of the transfer must be correct.

39. On 12 March 2019 the claimant issued an application for permission to amend his claim form to include a claim for injunctive relief and/or damages either in lieu of the grant of an injunction pursuant to section 50 of the Senior Courts Act 1981 or "the common law". His evidence in support simply asserts that he had not made such a claim earlier because of his apparent misunderstanding that to seek injunctive relief might expose him to a financial claim by the defendant: the claimant's witness statement dated 11 March 2019. That evidence does not address whether the application for permission has any prospects of success. It was incumbent on the claimant to do more than make a bare assertion through counsel that his prospect of success was more than fanciful: he failed to do so.

40. The issues in this claim plainly turn on issues of construction, the meaning of "planning permission" in the transfer and whether the disputed ARM is an ARM or a new grant of planning permission. They are entirely suitable for summary disposal. I have had the benefit of both counsel making extensive submissions, both in writing and orally, on these issues of construction.

Does "planning permission" include the OPP and the disputed ARM or just the OPP?

[1] Claimant's skeleton argument, paragraph 36,

41. The definition of planning permission in the transfer specifically refers to planning permission reference WA/2015/0478, as may be amended or varied from time to time. It is unquestionably a reference to the OPP and gives its correct reference number.

42. Outline planning permission provides a decision on the general principles of how a site can be developed. There is no evidence before me to suggest that the seller intended to develop the site themselves. I assume by applying for OPP rather than full planning permission the seller was simply enhancing the price at which they could sell the site.

43. I was referred to the Town and Country Planning (Development Management Procedure)(England) Order 2015 No 595 ("the 2015 order"). Article 2(1) defines "outline planning permission" as "a planning permission for the erection of the building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters". It goes on to define "reserved matters" as "any of the following matters in respect of which details have not been given in the application – (a) access; (b) appearance; (c) landscaping; (d) layout; and (e) scale". Article 5(1) provides that where an application is made for outline planning permission the local planning authority may grant permission subject to a condition specifying reserved matters for the authority's subsequent approval.

44. Condition 1 of the Second Schedule to the OPP specifically provides that it is a condition of the grant that the four specified reserved matters (layout, scale, landscaping and appearance) will be subject to the prior approval of the local planning authority being obtained in writing before any development is commenced. An application for approval must be made within three years from the date of the OPP. This is entirely consistent with the 2015 order.

45. The purpose of the transfer was for the seller to sell the site to the defendant with the benefit of OPP. In order for the OPP to be lawfully implemented the defendant had to obtain approval of reserved matters. The claimant's position is that the definition of planning permission in the transfer was confined to the OPP alone, notwithstanding the words used in the definition and indeed the definition of "planning permission" in the contract. On the claimant's construction I am asked to accept that the defendant purchased the site with the benefit of OPP for the price of £9.65million with the intention of building the development but could not lawfully implement the OPP because the ARM did not form part of the definition of planning permission in the transfer. This analysis reveals the absurdity of the claimant's contention.

46. I am satisfied that the definition of planning permission clearly included not only the OPP but also the disputed ARM, and indeed any ARM. For completeness I am also satisfied that it included any subsequent amendment or variation of the OPP, which necessarily included any subsequent amendment or variation of the ARM.

Is the disputed ARM an ARM or a new grant of planning permission?

47. Article 6(1) of the 2015 order sets out various requirements for an application for ARM,

> " (a) must be made in writing to the local planning authority and give sufficient information to enable the authority to identify the outline planning permission in respect of which it is made;
>
> (b) must include such particulars, and be accompanied by such plans and drawings, as are necessary to deal with the matters reserved in the outline planning permission; and
>
> (c) except where the authority indicate that a lesser number is required, or where the application is made using electronic communications, must be accompanied by 3 copies of the application and of the plans and drawings submitted with it."

48. The claimant contends that the disputed ARM is a new grant of planning permission and therefore cannot be included within the definition of "planning permission" in the transfer. I suggested during the hearing that it follows that the claimant must be suggesting that the ARM application was an application for planning permission or that it was treated as such by Waverley BC. Mr Carpenter-Leitch disagreed saying all he had to do was 'make good' his argument that the disputed ARM was a grant of planning permission.

49. A grant of planning permission may be granted by development order, on application to the planning authority, on adoption or approval of a simplified planning zone scheme or alterations to such a scheme or on the designation of an enterprise zone or the approval of a modified scheme: section 58(1) of the 1990 Act. It may also be deemed to be granted under section 90 of the 1990 Act; development with government authorisation. What Mr Carpenter-Leitch did not do was refer me to any primary or secondary legislation that regularises the factual scenario that he advances; that Waverley BC may simply grant new planning permission to the defendant without any application or other statutory basis for doing so. Without that, the purported grant of new planning permission by Waverley BC is ultra vires but it was not suggested by any party that the decision of Waverley BC as set out in the disputed ARM was not lawful. I therefore do not accept Mr Carpenter-Leitch's contention that I can look at the disputed ARM in isolation.

50. The claimant relies on three submissions in respect of the disputed ARM: (1) it looks like and describes itself as planning permission; (2) It contains a time limit and statutory reference which can only be relevant to planning permission; and (3) condition 8 could not have been included in the ARM under the OPP.

51. (1) Mr Carpenter-Leitch submits that there is a distinct reference number for the disputed ARM, as there is with the OPP, and it is laid out in a similar format. In several places there is reference to "permission" and indeed the first paragraph states that Waverley BC "DO HEREBY GRANT planning permission".

(i) The number, lay out and references to "permission" must be viewed in their documentary, factual and commercial context. I note that the disputed ARM specifically refers in the first paragraph to "the development specified in the form of

application described in the first schedule". That schedule effectively mirrors the description of the development in the OPP and moreover specifically refers to "details pursuant to outline planning permission granted under WA/2015/0478". References to "permission" cannot be read in isolation and the application which was the basis for the disputed ARM is an application for an ARM, clearly described as such on the face of that document and encompassing the more limited matters that an ARM application rather than an application for OPP or full planning permission would include.

52. (2) Mr Carpenter-Leitch submits that the reference to section 91 of the 1990 Act and the time limit of 3 years can only be consistent with the disputed ARM being a grant of planning permission.

(i) Placing this in its commercial context, on the claimant's case the defendant purchased the site with OPP at a full market price but cannot lawfully develop it because the OPP required approval of specified reserved matters. The ARM application was plainly an application for approval of reserved matters. Indeed as the Encyclopaedia of Planning Law & Practice, vol 6, notes in its commentary on article 6 of the 2015 Order an application for approval of reserved matters is not an application for planning permission so the provisions as to ownership certificates, publicity and consultation do not apply. The perversity of the construction contended for by the claimant is further re-inforced when one considers the consequence of his argument: notwithstanding the ARM application triggering the disputed ARM Waverley BC decided to simply grant new planning permission for the site, without any legal foundation for doing so and without the requisite information, publicity and consultation that an application for planning permission would require.

(ii) Plainly the disputed ARM does refer to section 91 of the 1990 Act when the relevant section for conditions attached to outline planning permission is section 92. However isolated references to an incorrect section of the 1990 Act cannot convert the disputed ARM into planning permission. It is necessary to construe the disputed ARM as a whole rather than cherry pick parts of it and further to place it in its correct documentary, factual and commercial context.

(iii) The time period of 3 years does not take matters any further forward. It is consistent with the erroneous reference to section 91 of the 1990 and furthermore is only found in the informative note in the disputed ARM.

53. (3) Mr Carpenter-Leitch spent some time developing his argument that condition 8 in the disputed ARM is inconsistent with this being an approval for reserved matters. He suggests that "access" was dealt with in the OPP and did not form part of the reserved matters[2], although he acknowledges that the laying out of the footpath may arguably be a matter of "layout" not access. However he goes on to submit that anything which deals with provisions of a point of entry to and exit from the site must be "access". This is supported he says by article 2 of the 2015 order which defines "access, in relation to reserved matters, means the accessibility to and within the site, for vehicles, cycles and pedestrians in terms of the positioning and treatment of access and circulation routes and how these fit into the surrounding access network". He also said that it was significant that the defendant applied to remove condition 8 and then withdrew its application, although it is not clear why this is significant.

[2] The first condition in the OPP.

(i) Mr Randall QC submits that an approval of reserved matters cannot materially derogate from the OPP although the approval can make alterations so long as they are within the scope of the OPP. On his analysis condition 8 is just that, within the scope of the OPP. I was referred to the judgment of Widgery J in R v Bradford on Avon UDC ex p Boulton [1964] 1 WLR 1136 at 1147-8 where he accepted that an application for planning approval, now an application for approval of reserved matters, was not an application for planning permission. In Heron Ltd v Manchester Council [1978] 1 WLR 937 Lord Denning referred to the difference between an approval of reserved matters and an application for planning permission. At page 943B-C he said,

> "I said earlier that the developers wished to retain their original grant of outline planning permission: and did not wish to have to apply for a new outline planning permission. So they deliberately confined their application to "approval of reserved matters." There were good reasons for this: an application for outline planning permission is in law an "application for planning permission." It has to comply with all the requirements of the Town and Country Planning General Development Order 1973 (S.I. 1973 No.3): and in particular article 5 which requires it to be on a special form and accompanied by all the plans and drawings: and in accordance with the notices under the Act, and the various consultations. Whereas an application for "approval of reserved matters" need only be in writing under article 6 and without all the various notices and consultations. "

There is a very clear distinction between the requirements for applications for planning permission including outline planning permission and an application for approval of reserved matters. In R v Newbury DC ex p Stevens (1992) 65 P&CR 438 Roch J had to consider the meaning of "planning permission" in section 29(1) of the Town and Country Planning Act 1971, now section 71 of the 1990 Act. He went on to accept that conditions may be imposed although such conditions cannot materially derogate from the outline planning permission already granted.

(ii) So is condition 8 only consistent with the disputed ARM being a grant of new planning permission or is it part of the approval of reserved matters and therefore becomes part of the OPP? Again it is flawed to consider this condition in isolation without putting it in the correct factual and temporal framework. Waverly BC's response to the defendant's pre-application submission was to comment that the proposal represented an improved layout and more fluidity within the site. I accept the submission that references to access were to the connection between the site and Alford Road; the Berkeley land having only recently been granted planning permission on appeal and was still open fields. I therefore conclude that condition 8 formed part of the OPP and was not part of a new grant of planning permission.

54. I make the following findings in respect of the disputed ARM:

i) The reference to the application in the first paragraph is a reference to the ARM application made by the defendant on or about 31 March 2017. That was indeed an application for approval of reserved matters made in accordance

with the 2015 order and pursuant to condition 1 in the second schedule to the OPP. This is also consistent with the description set out in the first paragraph to the disputed ARM which makes specific reference to the OPP, uses the correct reference number and follows the description of the development in the OPP itself.

ii) The references to section 91 of the 1990 Act both in the first paragraph and in the informative note are errors. The former should have been a reference to section 92 of the 1990 Act: that is consistent with the disputed ARM plainly referring to the OPP. The latter is simply a note, it does not purport to be a planning condition or anything else of statutory effect. In so far as it is capable of fixing a time period, which I do not accept given that it was an informative note nothing more, pursuant to section 92(3) of the 1990 Act the period of 2 years would be deemed to be inserted in the disputed ARM.

iii) The first schedule refers to "the outline application was accompanied by an Environmental Statement" which is a reference to the application for OPP and is clearly parasitic to the OPP rather than a reference to a new planning permission.

iv) The disputed ARM when read as a whole is consistent with it being made in accordance with section 92 not section 91 of the 1990 Act. Specifically when one contrasts the 10 conditions set out in the disputed ARM with the 39 conditions set out in the OPP it is patent that the conditions in the second schedule of the disputed ARM are not consistent with a grant of full planning permission. For example, conditions 5 to 6, 8 to 22, 28 to 38 in the OPP are not found in the disputed ARM. I accept Mr Randall QC's submission that the overwhelming proportion of conditions in the OPP are not found in the disputed ARM.

55. In so far as the claimant sought to argue that the parties could not have intended that he be bound to conditions that he had no knowledge of at the date of the contract and transfer that is plainly wrong. This was a substantial development and the site was sold with the benefit of the OPP which inevitably required the defendant to obtain approval of reserved matters which also included conditions, so long as they did not materially derogate from the OPP. Viewed in that context the claimant's argument that the defendant's rights contained in clauses 12.3 and 12.4 of the transfer could only have applied to works required under the OPP and not the disputed ARM is bound to fail.

56. In conclusion, for the reasons that I have set out above I construe the definition of "planning permission" in the transfer to include the OPP and also the disputed ARM and I find that the disputed ARM is an approval of reserved matters in respect of the OPP and is not a grant of new planning permission. It therefore follows that the first declaration sought by the claimant is bound to fail. The obligation to permit the construction of the footpath is founded on the rights granted to the defendant for the benefit of the site, specifically clause 12.3.1(a) to (d). The claimant (and his 3 co-owners) expressly covenanted with the defendants for themselves and their successors in title in respect of the strip at clause 12.4.1 to comply with the conditions referred to in the planning permission in so far as they relate to the strip. The defendant has constructed the footpath, whether over the strip in part, total or not, in accordance

with the OPP and the disputed ARM. Waverley BC have confirmed that the pedestrian and cycle links comply with the approved plans[3] and in a letter dated 8 June 2019 the head of planning services wrote to the defendant confirming that conditions 3, 8 and 10 in the disputed ARM have been complied with.

57. As to the second declaration sought by the claimant that is also bound to fail. At no stage has the defendant asserted that it had the right to compel the claimant to grant a right of way over the footpath. Indeed this is not a condition in either the OPP or the disputed ARM. The defendant's position was made clear in its solicitor's correspondence since 27 September 2018. There is no legitimate basis for the claimant seeking such a declaration and further to seek a functionless declaration is to fly in the face of the overriding objective.

58. For completeness I have already referred to the paucity of evidence to support the claimant's application for permission to amend his claim to seek injunctive relief and/or in the alternative damages. I note the failure by the claimant to address the issue of delay in seeking an injunctive remedy, which is discretionary in nature. Whilst the failure to seek interim relief does not preclude a final injunction being granted it is a factor that will be weighed in the balance on whether it should be granted. I also note that the consequence of the mandatory order being granted would be to place the defendant in breach of its planning obligations under the OPP. I do consider it telling that the claimant did not apply for interim relief but instead stood by whilst the defendant developed the site and that even when his claim was issued did not seek injunctive relief and damages against the defendant. It is incumbent on the claimant to satisfy the court that permission to amend should be granted, both in respect of the claim for an injunction and his damages claim. The claimant's amended claim could only be maintained if his construction of the transfer was correct and I have concluded it is not. In the circumstances the claimant has no real prospect of succeeding on the proposed amended claim.

59. I allow the defendant's application and order that the claim be struck our pursuant to CPR 3.4(2)(a). I also consider that the claimant satisfies the test for summary judgment and in the alternative I grant reverse summary judgement.

[3] Email dated 20.5.19 from the senior planning officer at Waverley BC to Mr Jasper of the defendant.