Neutral Citation Number: [2019] EWHC 1274 (Ch)

Case No: PT-2018-000912

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

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

Date: 24/5/2019

Before:

MASTER CLARK

- -

Between:

LOXLEIGH INVESTMENTS LIMITED **Claimant**

- and -

DARTFORD BOROUGH COUNCIL **Defendant**

- -
- -

Damien Falkowski (instructed by **Edwin Coe LLP**) for the **Claimant**
Lina Mattsson (instructed by **Sharpe Pritchard** LLP) for the **Defendant**

Hearing date: 9 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Master Clark:

1. This is my judgment on the application dated 21 December 2018 of the defendant ("the Council") for summary judgment on its counterclaim.

Background and the Council's claim

2. On 7 September 2012 the Council obtained outline planning permission DA/11/01091/OUT ("the Outline Permission") for erection of 5 detached houses on land owned by it at 63 and 79 Birchwood Road ("the Land"). The Outline Permission was granted subject to a number of conditions, including "*approval of details of the layout, scale and appearance of the building(s), the means of access thereto and the landscaping of the site*" ("the Reserved Matters").

3. On 12 March 2013 the Council sold the Land to the claimant, Loxleigh Investments Limited ("Loxleigh") on the terms set out in a transfer of that date ("the Transfer"), including overage provisions. The relevant provisions are contained in Clause 4:-

> *"ADDITIONAL PAYMENT*
>
> *4.1 If a Planning Permission is granted at any time during the Overage Period, an Additional Payment shall immediately become due from the Transferee to the Transferor at the Relevant Planning Permission Date. The Transferee covenants that it shall pay such Additional Payment to the Transferor on the earlier of:*
>
> *4.1.1 the date that is 18 months after the Relevant Planning Permission Date; or*
>
> *4.1.2 on the completion of the disposal of the last Unit comprised within the Relevant Planning Permission.*
>
> *4.2 The Transferee further covenants with the Transferor that it shall pay interest at the Default Rate to the Transferor on any Additional Payment that is not paid on its due date. Such interest shall be payable for the period from the due date to the date of actual payment and shall not affect any other remedy the Transferor may have…*"

4. The Schedule to the Transfer defines:-
   (1) Additional Payment as: *"fifty thousand pounds (£50,000) x* $\frac{\textit{Relevant Year RPI}}{\textit{the Base RPI}}$ x the number of Large Units comprised within the Relevant Planning Permission
   (2) Large Unit as: *"a Unit with a total gross internal area exceeding 3,000 (three thousand) square feet (calculated in accordance with the RICS Code of Measuring practice, 6th edition)"*;
   (3) Planning Permission as: "*any detailed planning permission which grants planning permission for the construction of Units*";
   (4) Unit as: "*a residential dwelling or a commercial property or building constructed or to be constructed (as the context requires) on any part of the Property which is capable of separate occupation*";
   (5) Overage Period as: "*5 (five) years starting on the date of this transfer",* i.e. 12 March 2013-11 March 2018.

5. The Additional Payment was therefore payable if "*any detailed planning permission*" was granted for the construction of a residential dwelling or a commercial property over 3,000 ft^2 on the Land before 11 March 2018.

6. On 10 October 2013 Loxleigh applied for and was granted approval of details described in its application in respect of the Reserved Matters (DA/13/01005/REM) – "the 2013 permission". This approval was followed by further applications for various variations. On 1 September 2015, Loxleigh was granted permission to vary "*condition 4 of planning permission DA/13/01005/REM as amended by DA/15/00644/NONMAT to allow revisions to external design, layout and floor plans of 5 detached dwellings*" – "the 2015 permission".

7. Loxleigh thereby obtained permission to build 4 houses with gross internal areas ("GIA") greater than 3,000 ft^2 ("the Houses") on the following dates:

   (1) 10 October 2013 - houses 2 and 3;
   (2) 1 September 2015 – houses 1 and 4.

8. The Council's position is that the 2013 permission and the 2015 permission were each "detailed planning permission" within the meaning of clause 4.1, triggering liability to pay the Additional Payment in respect of the relevant Houses. It is common ground that house 5 does not trigger the overage provisions, as its GIA is less than 3,000 ft^2.

9. It is unnecessary for present purposes to consider the claim by Loxleigh. In its counterclaim, the Council seeks the sum of £235,977.52 as overage payments due under clause 4.1 in respect of the Houses. This is a question of pure construction of the terms of the Transfer.

Summary judgment – legal principles

10. CPR 24.2 provides, so far as relevant:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
> (a) it considers that –
> …
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

11. The principles to be applied on applications for summary judgment are well established. They were summarised by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch), in a formulation approved in a number of subsequent cases at appellate level, including *AC Ward & Sons v Catlin (Five) Limited* [2009] EWCA Civ 1098 and *Mellor v Partridge* [2013] EWCA Civ 477. It is unnecessary to set them out here. The burden of proof is on the Council to show that the conditions is CPR 24.2 are satisfied.

12. The short point of construction arising in the counterclaim is, as the Council's counsel submitted, suitable for summary determination: see *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

Construction of contracts -legal principles

13. The relevant principles as to construction are also well established, and were common ground. They are set out by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 at [15] – [23] and summarised at [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 para.14. And it does so by focussing on the meaning of the relevant words . . . 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…"

Council's submissions

14. The Council's counsel made the following submissions.

15. First, she submitted that, in construing the terms of the Transfer, the court would need to determine what a reasonable person having all the background knowledge which would have been available to the parties would have understood "*any detailed planning permission*" to mean. This, she said, would involve considering the terminology used in planning law and practice.

16. The expression "detailed planning permission" is not defined in the relevant legislation. It is, she submitted, used to describe either "full planning permission", or planning permission obtained following the approval of the reserved matters in an outline planning permission. She referred me to the commentary in two legal textbooks.

17. Emmet & Farrand on Title at para 33.032 states:

> "If it is not desired to make a detailed application until it is known that proposals for the erection of buildings are at least acceptable in principle, an "outline" application may be made.
>
> …
>
> Where a planning authority reserve matters when considering an outline application, they cannot refuse final permission on other grounds which they could have taken into account on the outline application. Consequently, if they purport to refuse permission **on the final detailed application**,

> notwithstanding that they approve it so far as it concerns the matters previously reserved, they will be considered to have granted approval (*Hamilton v West Sussex CC* [1958] 2 Q.B. 286).
> (emphasis added)

18. Arnold Baker, *Local Council Administration* at 24.21 states:

> "Applications may initially be for outline planning permission for the erection of a building, followed by a further application for **detailed planning permission** for such matters as have been reserved by the authority for further approval under the outline planning permission."
> (emphasis added)

19. She also relied upon the analysis by Chadwick LJ in *Titanic Investments Ltd v MacFarlanes (a firm)* [1988] All ER (D) 682 in which he repeatedly refers to "detailed planning consent" being obtained pursuant to an outline planning permission. "Detailed planning permission" was, she submitted, equivalent to detailed planning consent and referred to the subsequent permission granted pursuant to an outline permission.

20. She submitted therefore that the background knowledge of the parties included the way in which "*detailed planning permission*" is used in the standard legal textbooks and legal authorities such as *Titanic*; and that the court should infer that they were using it with the same meaning.

21. She also relied upon the use of "*any*" as indicating an intention to include both a full planning permission for a different development, or an approval of the Reserved Matters. It showed, she submitted, that the parties intended that the liability to pay overage was triggered whether Loxleigh obtained detailed planning permission for the 5 residential dwellings approved in principle by the Outline Permission, or some different development. There was, she said, no basis for construing "any detailed planning permission" as meaning only full planning permission from the outset, which is the consequence of Loxleigh's position. That position was, she submitted, contrary to the natural meaning of the words used. It also made no commercial sense. If the parties had intended that building pursuant to the Outline Permission would not have given rise to overage, the Transfer could have provided that by using the term "full planning permission".

22. In this case, she submitted the grant of the Outline Permission coupled with the 2013 permission and the 2015 permission amounted to detailed planning permission for the respectively, houses 2 and 3, and 1 and 4; and therefore, gave rise to the liability to make the Additional Payment in respect of each house.

Loxleigh's submissions

23. Loxleigh's position is that no Planning Permission as defined in the Transfer was granted during the Overage Period, only approval of the Reserved Matters and conditions.

24. Its counsel first referred me to the description of overage by Walker J (as he then was) in the first instance decision in *Titanic Investments v MacFarlane* [1997] Lexis Citation 3741:

> "Overage means simply a deferred payment agreed to be made, in addition to the basic purchase price, the amount of the additional payment (if any) being determined by a formula which depends on unpredictable future events."

25. In reliance on this passage, he effectively invited me to construe the Transfer so as to limit liability under clause 4 to unpredictable events. He submitted that in this case there was no "unpredictable future event" on which the overage provisions could bite: Loxleigh had simply obtained the obtained approval of reserved matters and conditions etc. He relied upon the fact that at the time of entering into the Transfer, the parties knew about the Outline Permission, and that the Land was sold with the benefit of it. The grant of approval pursuant to it was therefore entirely predictable, and could not therefore have been intended by the parties to fall within clause 4.

26. His second submission was that the approach of the courts to construction of overage payments was strict, referring me to *Ministry of Defence v Country and Metropolitan Homes (Rissington) Ltd* [2002] All ER (D) 317 (Oct) and *Akasuc Enterprise Ltd v Farmar & Shirreff* [2003] EWHC 1275 (Ch).

27. His skeleton argument was limited to the above two points. However, he made further oral submissions as to the interpretation of "Planning Permission". In these, he relied upon the distinction in the relevant legislative provisions between planning permission on the one hand, and approval of reserved matters or permission for non-material changes on the other hand, referring me to various provisions of the Town and Country Planning (Development Management Procedure) (England) Order 2015. These provisions showed, he said, that approval of reserved matters and permission for non-material changes were not subject to the formalities and requirements of planning permission.

28. In support of this distinction, he also relied upon two authorities. The first was *R v Bradford-on-Avon UDC ex p. Boulton* [1964] 1 WLR 1136. That case concerned the construction of s.37 of the Town and Country Planning Act 1959 which provided:

> "(1) Without prejudice to the last preceding section, a local planning authority shall not entertain any application for planning permission made after the commencement of this Act unless it is accompanied by one or other of the following certificates signed by or on behalf of the applicant, that is to say
>
> (a) a certificate stating that, in respect of every part of the land to which the application relates, the applicant is [the owner] of the fee simple …"

29. In *Bradford*, an application for outline planning permission had been made by a builder who owned the land, followed by an application for approval of reserved matters by a developer intending to acquire it. Both applications were accompanied by certificates that the applicant was the owner of the application land; but at the date

of the approval application the builder remained the owner, so the certificate accompanying it was incorrect. The court held that an application for approval of reserved matters was not "an application for planning permission" within the meaning of s.37; and accordingly, was not required to be accompanied by a certificate.

30. The second authority relied upon by Loxleigh's counsel was *Heron Corporation Ltd v Manchester City Council* [1978] 1 WLR 937. In *Heron* it was held that an applicant to whom outline planning permission had been granted was entitled to apply for more than one approval of reserved matters covering the same ground. He relied particularly upon the following passage at 943B-E:

> "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. But apart from these there are often important consequences following on a grant of outline planning permission. Once granted, an outline permission is a valuable commodity which is annexed to the land. It runs with the land from purchaser to purchaser and enhances its value considerably. Often enough contracts of sale are concluded only subject to planning permission being granted. Everyone realises that it is of great worth. The date of the grant is also very important: because less tax may be payable on a grant before 1974 than after it. So, it may be very important for a developer to keep his original grant rather than have to apply for a new one."

31. He submitted that this distinction found in the legislation and case law would have been known to the lawyers drafting the Transfer; so that "planning permission" should not be construed as including an approval or permission for non-material changes.

32. He also referred to the definition of Planning Permission in the Transfer, and its requirement that the permission be "for the construction of Units". He submitted that it was the Outline Permission which gave permission for construction, because the Council could not lawfully refuse approval of the Reserved Matters once that had been granted – though he did not refer me to any authority in support of this proposition.

33. As to the meaning of "detailed planning permission", he initially submitted that it was not clear what the draftsman intended. His position then shifted to submitting that it meant full as opposed to outline planning permission. He also submitted that if the effect of the 2013 permission was to convert the Outline Permission to a full planning permission, then the relevant date of permission being granted was

September 2012, before the commencement of the Overage Period – referring me to *Heron*.

34. As for the 2015 permission, he submitted that neither it (nor the other approvals of non-material amendments) granted permission for the construction of the Houses.

35. Referring again to *Heron*, he submitted that the Council's construction could give rise to multiple liabilities on Loxleigh's part arising in respect of each approval of Reserved Matters. This he said could not sensibly have been intended by the parties, particularly when applications for non-material amendments were not limited in time, whilst a planning permission must be implemented within the time stated in the permission.

Discussion

36. I accept the Council's counsel's submission that "detailed planning permission" is apt to describe, and is in fact used in legal textbooks and decisions of the court to refer to approvals and permissions granted pursuant to an outline planning permission. By way of further example, this is the use found in *Freemont (Denbigh) Ltd v Knight Frank LLP* [2014] EWHC 3347 (Ch), [2015] P.N.L.R. 4. In the absence of a definition of the term in the relevant legislation, this constitutes the ordinary and natural meaning of the term. Further support for this meaning is found in the 2015 permission itself, which refers to the 2013 permission as a "planning permission".

37. The Transfer itself distinguishes (in its definition of "Composite Permission") between an outline and a detailed planning permission. I accept that the word "any" in the definition of Planning Permission is apt to include more than one type of detailed planning permission: either the grant of full planning permission for another development, and an approval or consent pursuant to the Outline Permission.

38. I do not accept that I am required to construe the Transfer on the basis that the parties intended that overage should be payable only if an unpredictable event occurred, although there may be many instances where this is in fact the case. The parties in this case were free to contract in the terms alleged by the Council; and whether they did so is a matter of construing the Transfer in accordance with the principles set out above.

39. As to the decisions relied upon by Loxleigh's counsel in support of his submission that the court adopts a strict approach to construction of overage provisions, I do not accept that those cases are authority for that proposition. They are, as the Council's counsel submitted, cases in which the court considered the ordinary meaning of the relevant provisions and applied orthodox principles of construction.

40. As for the *Bradford* and *Heron* cases, these were both concerned with the meaning of "planning permission" in the legislation. As noted in *Heron* (at 943F), work may not begin until approval has been granted; and a time limit for applying for approval of 3 years from the grant of outline planning permission was set by the provisions then in force. *Heron* was concerned with determining the date from when that time limit runs. It is not in my judgment of assistance in construing "detailed planning permission", or determining the date when that permission is granted. That date is to

be determined in accordance with ordinary principles and is the date on which the approval or permission was granted.

41. I also reject Loxleigh's counsel's submission that only the Outline Permission granted permission for the construction of the Units. The permission granted by it was a conditional permission, subject to approval of the Reserved Matters, and did not therefore permit construction to begin until approval had been obtained. This analysis is unaffected by the position (as set out in Emmet) that the Council could not lawfully have refused approval on other grounds which they could have taken into account on the outline application. It is also clear from *Heron* that where outline planning permission has been granted, "work is not to be begun until approval has been granted".

42. Finally, as the Council's counsel pointed out, the parties have expressly provided in clause 4 that the liability to make a payment under it only arises once in respect of each Unit – so that that the uncommercial outcome of repeated payments under different approvals or permissions (as suggested by Loxleigh's counsel) cannot occur. The fact that such a provision was considered necessary by the parties provides further support for the construction contended for by the Council.

Conclusion

43. For these reasons, I conclude that Loxleigh has no real prospect of successfully defending the counterclaim and there is no other compelling reason why the counterclaim should be disposed of at a trial.