Neutral Citation Number: [2023] EWHC 1070 (KB)

Case No: QB-2022-000741

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th May 2023

Before :

MR JUSTICE KERR

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Between :

(1) UNIVERSITY COLLEGE LONDON HOSPITALS CHARITY	**Claimants**
(2) MIDDLESEX ANNEXE LLP	
- and –	
THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CAMDEN	**Defendant**

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Mr David Matthias KC and Ms Isabella Tafur (instructed by **Pinsent Masons LLP**) for the **Claimant**
Ms Morag Ellis KC and Mr Emyr Jones (instructed by **Legal Services Department Camden Council**) for the **Defendant**

Hearing date: 25 April 2023

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Approved Judgment

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MR JUSTICE KERR

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 10am on 5 May 2023.

Mr Justice Kerr :

Introduction and Summary

1. The preliminary issue I have to decide is whether a contractual right of the defendant (**Camden**) to acquire an interest in certain land earmarked for affordable housing to be provided by the claimants' predecessor in title, unless that affordable housing were provided by June 2010, has survived a renegotiation and variation of the claimants' affordable housing obligation pursuant to a fresh planning permission granted in January 2018.

2. The preliminary issue is formulated as follows, by agreement:

> "Whether, on the assumption that the 2004 Section 106 Agreement remains extant, clause 4.2.1 of that Agreement is enforceable by the Defendant in light of (a) clause 3.7 of that Agreement and (b) the 2018 Middlesex Planning Permission and (c) the Claimants' declared intention to include in any conveyance or lease of the relevant land to the Defendant under clause 4.2.1(a) a covenant restricting the use of the said land to use for Affordable Housing pursuant to the Claimants' entitlement under clause 4.2.1(b) of that Agreement."

3. The land in question is called the **Middlesex Annexe Site** (or **the Site**). It used to form part of the University College London Hospital (**UCLH**) estate. When the new UCLH was built and opened in the early 2000s, the University College London NHS Foundation Trust (**the Trust**) and subsequently the claimants (having acquired certain sites from the Trust) sought to sell off the old sites to help pay for the new hospital and provide funding for NHS projects.

4. Camden granted certain planning permissions at various stages, including one granted to the Trust in 2004. A *quid pro quo* was a section 106 agreement (**the 2004 agreement**) (made under section 106 of the Town and Country Planning Act 1990 (**TCPA**)) requiring a minimum level of affordable housing provision at one of two sites, of which the chosen one was the Middlesex Annexe Site. The affordable housing had to be delivered by 1 June 2010.

5. If it were not delivered – and it was not – Camden had the right under the 2004 agreement, clause 4.2.1, to require the Trust – and subsequently its successors in title, the claimants – to transfer to Camden for nominal consideration of £1 a freehold or leasehold interest in the chosen site (**the £1 clause**), with the claimants having an option to include in the transfer a covenant that the transferred land could only be used for affordable housing.

6. Camden did not serve a notice after June 2010 to require transfer of the Site to it. Instead, after years of negotiations, discussions and enquiries, a fresh planning permission (**the 2018 permission**) and section 106 agreement were made in January 2018, permitting mixed use (residential and commercial) development of the Site and a differently defined level of affordable housing.

7. It is agreed that the claimants would include a covenant to use the Site for affordable housing only and that Camden therefore could not, under the 2018 permission, build the affordable housing agreed upon in the 2004 agreement without first granting itself a fresh planning permission providing for use of the relevant building on the Site for affordable housing only and not (as under the 2018 planning permission) for mixed residential and commercial use.

8. The claimants say their obligation to provide the level of affordable housing agreed in 2004 has fallen away, superseded by the agreed 2018 level of affordable housing (subsequently reduced by a variation on appeal); and that under a term of the 2004 section 106 agreement, clause 3.7, Camden's right under the 2004 agreement to acquire the Site has become unenforceable.

9. Camden says that on a correct reading of the 2004 agreement as a whole, its right to require transfer of the Site to it survives intact, remains enforceable and is not affected by clause 3.7. That clause makes provision to the effect that "[n]othing in this Agreement" shall "prohibit or limit the right to develop" the Site "in accordance with" a future planning permission.

10. So the issue between the parties, which I have to decide, is whether Camden's right under the £1 clause to call for acquisition of the Site prohibits or limits the claimants' right to develop the Site in accordance with the 2018 permission. The claimants say it does and therefore can no longer be exercised. They seek a declaration to that effect.

11. Camden says it does not because the inhibition on development of the Site would result from the consequences of Camden's exercise of its right, not from the terms of the £1 clause: the claimants' inability to develop the Site for mixed use in accordance with the 2018 permission would be imposed by other and different legal instruments, not by anything in the 2004 agreement.

Facts

12. The first claimant charity (**the charity**) acquires redundant land from the UCLH estate with a view to developing and then selling it to raise funds for NHS projects. It is the freehold owner of the Middlesex Annexe Site, in Cleveland Street, Camden. The second claimant is a partnership of the first claimant and one of its subsidiaries. It has a long lease over the Site and is its developer, controlled by the first claimant. Camden is the local planning authority.

13. The Trust is the freehold owner of a site on Grafton Way, mainly derelict in recent years, called **the Odeon Site** because there was once an Odeon cinema there. The Odeon Site also forms part of the UCLH estate, as does another site on Huntley Street (**the Obstetrics Site**), which also features in the planning history.

14. In 1998, Camden granted planning permission to the Trust to build the new UCLH on Euston Road, with community health facilities on the adjoining Odeon Site (**the original permission**). That permission was granted subject to two section 106 agreements, one of which obliged the Trust to provide at least 30 units of affordable housing either on the Obstetrics Site or on the Middlesex Annexe Site, both then owned by the Trust.

15. The original permission was for the most part implemented, in that the new hospital was built and opened; but the Odeon Site was not developed. A further planning permission (**the Odeon Site permission**) was granted by Camden to the Trust in July 2004 to provide community health care and associated facilities at the Odeon Site.

16. The Odeon Site permission was granted subject to the 2004 agreement, which was dated 1 July 2004. It brought together and rationalised the Trust's obligations in respect of the Odeon Site and also consolidated and updated its obligations previously found in the two section 106 agreements entered into at the time of the original permission in 1998.

17. The Trust's affordable housing obligation under the 2004 agreement comprised the minimum of 30 units required under one of the two section 106 agreements concluded at the time of the original permission; and a further 1,425 square metres of floor space for affordable housing. I will refer to the sum of those requirements together as **the 2004 affordable housing obligation**.

18. The housing to be provided in fulfilment of the 2004 affordable housing obligation had to be provided, under the 2004 agreement, either at the Middlesex Annexe Site or at the Obstetrics Site. There were definitions of "Affordable Housing", "Affordable Housing Units" and "All Affordable Housing Land". The latter definition embraced all the land required to perform the 2004 affordable housing obligation.

19. Clause 3.5 of the 2004 agreement provides that Camden "hereby agrees" to grant planning permission in respect of the Odeon Site. Clause 3.7 provides:

> "Nothing in this Agreement shall prohibit or limit the right to develop any part of the Property the Middlesex Annexe Site or the Obstetrics Site in accordance with a planning permission other than the Original Planning Permission and the Odeon Site Planning Permission granted (whether or not on appeal) after the date of this Agreement."

20. By clause 4.1, the Trust entered into various covenants. First, it had to give notice by April 2006 informing Camden whether the "All Affordable Housing Land" was to be provided at the Middlesex Annexe Site or at the Obstetrics Site (clause 4.1.1). By April 2007 (clauses 4.1.4 and 4.1.5), the Trust had to submit and thereafter pursue the necessary planning applications and enter into a lease agreement with a housing association, to take effect not later than 1 June 2010.

21. Clause 4.2.1 then followed. It is the £1 clause, providing materially as follows:

> "(a) Without prejudice to the Council's ability to enforce Clause 4.1.4 and 4.1.5 above if the All Affordable Housing Units are not completed by 1st June 2010 or has not been transferred to a Housing Association in accordance with the requirements set out in Clause 4.1.4 and 4.1.5 the Council may serve written notice on the NHS Trust to offer the Council a conveyance transfer or lease (as the case may be) of the interest in the All Affordable Housing Land as a separate parcel, completely cleared of buildings and in a stable, developable and fully decontaminated state for provision of affordable housing, with vacant possession and free from encumbrances, on no unusually onerous terms and together with all relevant ancillary easements, rights and other matters so that the same may be developed for Affordable Housing for a nominal consideration of £1 and the Owner shall comply with such requirements.

> (b) the making of any conveyance transfer or lease of the All Affordable Housing Land to the Council pursuant to this Clause shall absolve the NHS Trust of any further obligation to the Council hereunder and the NHS shall be entitled to include in any such conveyance transfer or lease a covenant restricting the use of the All Affordable Housing Land to use for Affordable Housing."

22. Clause 4.2.1(d) then made provision for the conveyance transfer or lease document to be drawn up with reasonably required provisions and drafting included in it, if not by agreement then by referring the matter to experienced conveyancing counsel.

23. Clause 4.4 provided the formula for calculating, by 1 December 2008, the number of affordable housing units to be provided. I am told by the parties that this formula produces the total figure comprising the sum of the minimum of 30 units (required under one of the two 1998 section 106 agreements) and a further 1,425 square metres of affordable housing; together making up the totality of the 2004 affordable housing obligation.

24. On 4 May 2006 (slightly after the April 2006 deadline), the Trust served notice that the "All Affordable Housing Land" would be provided at the Middlesex Annexe Site. Negotiations then took place in pursuit of agreement to a financially viable residential development scheme at the Site. The deadline of 1 June 2010 for performing the 2004 affordable housing obligation passed, without the Trust having performed it.

25. That same year, a former workhouse forming part of the Middlesex Annexe Site was grade 2 listed by English Heritage. This meant the former workhouse could not be used as the new building for the affordable housing proposed for the Site. The negotiations were derailed. Camden became entitled from 2 June 2010 to serve notice under the £1 clause, calling for transfer to it of the Site, but it did not do so and has not at any time since done so.

26. For the ensuing five years or so, up to about 2015, no agreement on a scheme for the affordable housing was reached. The Trust made two applications under section 106A of the TCPA to modify the 2004 agreement. Camden refused both. The Trust then ceased negotiating with the Council and transferred ownership of the Site to the charity in March 2017, which applied for planning permission for mixed use development at the Site.

27. That application led to the 2018 permission, granted by Camden on 15 January 2018, subject to a further section 106 agreement (**the 2018 agreement**) of the same date. The charity's obligation under the 2018 agreement to provide affordable housing was established by clause 4.1, read with clause 2.3, which I need not set out.

28. The effect of those clauses is summarised by Mr Peter Burroughs, the charity's development director, in his undisputed account of the planned development authorised by the 2018 permission and the 2018 agreement:

> "That authorised development involved, amongst other things, the delivery of 50 residential units (C3), 40 of which would be affordable housing, and 4,535sqm of commercial floor space (flexible use of Class B1 / D1 healthcare). The permission authorised the refurbishment of the three existing buildings on the Site, namely the Strand Union Workhouse; the North House and the South House and the erection of a new building to be located behind those existing buildings ('the **New Building**'). All of

the affordable housing units were to be located within the New Building, which was to be a mixed use building, also comprising commercial space and MRI scanning facilities and other health diagnostic facilities (including incorporating a breast clinic)."

29. In the negotiations, the claimants asked Camden to agree to the deletion from the 2004 agreement of the £1 clause. Camden did not agree to this. Instead, the parties executed a deed of variation on 9 October 2018, under section 106A of the TCPA, amending the 2004 agreement by providing that the claimants would be absolved from the 2004 affordable housing obligation only once they had provided all the required units and transferred them to a housing association.

30. Mr Burroughs explains that the 2018 permission has been implemented; the claimants have started to construct the buildings and facilities at the Middlesex Annexe Site. However, the affordable housing obligation under the 2018 agreement was not performed. Among other reasons given for that is that over a thousand skeletons were found at the location of the proposed new building behind the former workhouse. These had to be exhumed by archaeologists.

31. The charity therefore sought a variation to the 2018 agreement in 2021 to reduce its affordable housing obligation, also instructing its lawyers to write a pre-action letter disputing the enforceability of the £1 clause. Camden has refused to agree to any dilution of the affordable housing obligation on the charity under the 2018 agreement, but on an appeal an inspector agreed in a decision dated 1 December 2022 to reduce it to 17 affordable housing units, yet to be constructed.

<u>Submissions</u>

32. There was no dispute about the applicable principles and correct approach to the interpretation of an instrument such as the 2004 agreement. I was referred to various authorities on the interpretation of contract terms generally, including obligations created under section 106 of the TCPA and other kinds of planning obligation. It is unnecessary to lengthen this judgment by repeating the principles as they are well known and were not in dispute.

33. The cases and texts cited were those set out in Holgate J's helpful review in *Norfolk Homes Ltd v. North Norfolk DC* [2021] PTSR 863, at [49]-[50] and [62]-[81]; Lord Hoffmann's speech in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896; Sir Kim Lewison, *The Interpretation of Contracts*, 7th edition (2021), chapter 7; *N.E Ry v. Hastings* [1900] AC 260, 267 per Lord Davey at 267; and *Chitty on Contracts* 34th edition (2021) at 15-049 t0 15-053, including the citation from the judgment of Popplewell J (as he then was) in *Lukoil Asia Pacific Pte Ltd v. Ocean Tankers Pte Ltd (The Ocean Neptune)* [2018] 1 Lloyd's Rep 654, at [8].

34. Each party submitted that, applying those principles to the present case, on a straightforward reading of the clauses, as a matter of ordinary language and in their statutory and commercial context, having regard to the purpose of the clauses and considering what the parties actually did agree rather than what the court thinks they should have agreed, the reasonable reader would conclude that its interpretation was correct and that of the opposing party wrong.

35. More specifically, the claimants submitted by reference to clause 3.7 of the 2004 agreement that enforcement of the £1 clause would "prohibit or limit" the claimants' right to develop the Middlesex Annexe Site in accordance with the 2018 permission. The £1 clause, the claimants argue, is "in this Agreement", i.e. in the 2004 agreement. To quote from the claimant's skeleton argument:

> "If the effect of operating the £1 Clause would be to prohibit or limit the right to develop the Site in accordance with the subsequent permissions, the £1 Clause is not enforceable against the Claimants in light of clause 3.7".

36. If the claimants were required to transfer or lease to Camden the land on which the "New Building" is to stand, they would include in that conveyance a covenant of the kind authorised in the £1 clause, restricting use of that land to use as affordable housing. The main reason is, as Mr Burroughs explains, that:

> "the Charity would still look to build out a development on the smaller footprint of the land it would retain (approximately 1/3 of the site) and commercially would wish to restrict the use of the land to be burdened by the covenant to ensure that only affordable housing could be built on that land."

37. If the £1 clause were enforced, therefore, Camden would have to grant to itself a fresh planning permission permitting development of the transferred part of the Site for affordable housing use only. This has been referred to as the "notional affordable housing permission". That, the claimants say, would be inconsistent with the mixed commercial and residential use permitted under the 2018 permission; it would "prohibit or limit" development of "part of" (in the words of clause 3.7 of the 2004 agreement) the Site.

38. Alternative interpretations suggested by Camden should be rejected, the claimants say. Clause 3.7 does not envisage that the landowner may implement alternative permissions "subject to complying with the terms of the 2004 Agreement", as Camden has suggested. Clause 3.7 means what it says and is not subordinated to clause 4.2.1, the claimants submit.

39. Their interpretation, they contend, makes commercial sense in the context of section 106 of the TCPA: a reasonable reader would understand that at the time of the 2004 agreement, it was envisaged that any future permission would make appropriate provision for affordable housing through a new section 106 agreement. The £1 clause could only remain enforceable if the subsequent permission were consistent with the 2004 affordable housing obligation.

40. The claimants go on to submit that the 2018 permission, as subsequently altered following fresh planning applications and an appeal, made provision for first 40 and then 17 units of affordable housing, in the light of revised assessments of financial viability and achievable planning gain. That does not mean that there was an inconsistency between clause 3.7 and the £1 clause. From June 2010 to January 2018, Camden could have served notice to enforce the £1 clause.

41. It chose instead to renegotiate the development in a manner inconsistent with enforcement of the £1 clause. It could have insisted that the 2018 permission should remain consistent with enforcement of the £1 clause. If the 2018 permission had provided for the affordable housing to be located in a single dedicated building, with

mixed use development on the rest of the Site, the £1 clause and restrictive covenant would not have been inconsistent with such a permission and the £1 clause would have remained enforceable.

42. Camden submits, by contrast, that the 2018 permission and the 2018 agreement are not inconsistent with clause 3.7 of the 2004 agreement. Camden draws a distinction between, on the one hand, the terms of the £1 clause which are "in this Agreement"; and, on the other, what the claimants call in their skeleton argument "the effect of operating the £1 Clause".

43. The effects of operating the clause are not in the 2004 agreement, Camden submits. They are to be found in separate and subsequent legal instruments made necessary by exercise of the option to require a transfer or lease of the relevant part of the Site to Camden. Clause 4.2 requires the claimants to execute a lease or transfer of the relevant land to Camden including, if the claimants so choose, a restrictive covenant.

44. That lease or transfer would not be "in this Agreement", i.e. it is not within the compass of the 2004 agreement, Camden contends. The creation of the lease or transfer would result from the exercise of rights under the 2004 agreement, but it is a separate legal instrument not forming part of that agreement. Provision is made in clause 4.2 for that separate legal instrument to be created, settled if necessary by conveyancing counsel in the absence of agreement on terms.

45. The resulting separate and subsequent lease or transfer of the relevant land to Camden is therefore not in conflict with clause 3.7. That clause only applies to limitations or prohibitions on the right to development in accordance with subsequent permissions where those limitations or prohibitions are in the 2004 agreement itself, not in subsequent legal instruments arising from exercise of Camden's right under the 2004 agreement.

46. Camden accepts that the claimants would be unable, if the £1 clause is invoked, to construct the "New Building" containing a mix of commercial and affordable housing use in accordance with the 2018 permission because the claimants would impose a restriction under clause 4.2.1(b) limiting the use of the land to affordable housing.

47. Camden also accepts that to develop the affordable housing land identified as such in the 2004 agreement, Camden would have to grant itself a fresh permission restricting development of the part of the Site transferred to affordable housing use only, i.e. the "notional affordable housing permission".

48. However, Camden rejects the contention of the claimants that enforcement of the £1 clause would mean that any provision in the 2004 agreement would prevent development of the Site in accordance with the 2018 permission. What would prevent that is not anything in the 2004 agreement, but the fact that the charity would no longer control the land transferred or leased to Camden.

49. That analysis is, Camden says, consistent with the underlying purpose of the 2004 agreement provisions. That purpose is, Camden argued, to provide a safeguard against the Trust defaulting on its affordable housing obligations under the 2004 agreement. The purpose would be frustrated if clause 3.7 were interpreted so as

inevitably to conflict with clause 4.2 (the £1 clause), should Camden assert its right to call for transfer of the relevant land under that clause.

50. The reasonable reader possessed of relevant publicly available information in 2004 would have known that the affordable housing land was to be built on either the Middlesex Annexe Site or the Obstetrics Site; that there were no permissions in place for that to happen; that further permissions would therefore be needed; and that they would most likely be mixed use permissions because that was (and is) the most common type of development permission in Camden.

Reasoning and Conclusion

51. I have reflected on these rival contentions. Both interpretations seem to me tenable as a matter of language. The source of the limitation or prohibition on future development must be something "in this Agreement". Clause 4.2.1, the £1 clause, is undoubtedly "in this Agreement".

52. Does the £1 clause itself "prohibit or limit the right to develop [etc]"; or does it, as Camden contends, set the scene for other legal instruments outside "this Agreement" to do so? The question of construction that divides the parties comes down to that narrow issue.

53. It is true that the £1 clause only brings with it the consequence that the charity is inhibited from developing the Site in accordance with the 2018 permission if and when Camden's option under the clause is exercised. It is also true that once the option is exercised, other documents have to be created which restrict the charity's rights to develop the Site.

54. On the other hand, it is also true that the £1 clause sits squarely "in this Agreement" and if it were not "in this Agreement" the charity's right to develop in accordance with the 2018 permission could not be restricted by assertion of Camden's rights under the clause (and subsequent insistence by the charity on a restrictive covenant).

55. I consider next the underlying purpose of the provisions in the 2004 agreement and what the reasonable reader possessed of the relevant information in 2004 would have regarded as the true bargain then struck. It is correct, as Camden submits, that the purpose of the £1 clause is to provide a safeguard against the Trust defaulting on its 2004 affordable housing obligation. If the Trust did not perform it, Camden could do so instead.

56. It is also correct, as Camden submits, that the terms of the 2004 agreement envisaged that future planning permissions would need to be granted to give effect to the consequences of invoking the £1 clause. It would be legally possible for Camden to grant itself the notional affordable housing permission if that were required due to imposition by the charity of the restrictive covenant.

57. On the other hand, from the Trust's standpoint in 2004, clause 3.7 was there to ensure that future development under modified or different planning permissions would not be stifled by operation of the £1 clause. Future planning permissions might well (as in fact happened) include modifications to the 2004 affordable housing obligation, making the £1 clause inappropriate, redundant and out of date.

58. Both sides' arguments make sense in the planning and commercial context. Camden had a legitimate interest in the Trust not being allowed to say that to provide affordable housing was unaffordable to the Trust, avoiding compliance by pleading absence of "viability". The claimants had a legitimate interest in ensuring their obligations could be modified and updated in the light of changing conditions through the proper operation of the planning system.

59. After reflection, I have come to the conclusion that the claimants' construction is to be preferred. It is artificial, in my judgment, to sever the terms of the £1 clause from the consequences of invoking it. Those consequences are "in this Agreement" in the sense that they flow directly from and indeed form the entire rationale for including the £1 clause in the 2004 agreement.

60. Furthermore, modification of affordable housing obligations before they are performed is a common feature of planning exercises such as this one. While a private contractor cannot (absent an express term) plead poverty as an excuse for non-performance of a contractual obligation, in the statutorily underpinned planning system it happens all the time.

61. Thus, Camden knew (and the reasonable reader would know) in 2004 that its power to enforce the 2004 affordable housing obligation was not unlimited. The 2004 agreement could be modified, either with Camden's consent or, on appeal, without it. The reasonable reader would know that the statutory scheme in the TCPA (sections 106, 106A and 73) included these features.

62. In my judgment, the reasonable reader would regard the protection of the £1 clause as safeguarding performance of the 2004 affordable housing obligation; and not as safeguarding performance of a different affordable housing obligation, inconsistent with and different from the obligations, performance of which was safeguarded by the £1 clause at the time it was agreed.

63. I agree with the claimants' submission that Camden could have served notice to invoke the £1 clause at any time from 2 June 2010 to 14 January 2018, but chose instead to renegotiate in a manner that could, and in the event did, render the £1 clause inoperable.

64. By the same reasoning, the deed of variation of October 2018 was, in my judgment, ineffective in the event that the charity should decide to impose the restrictive covenant as permitted under clause 4.2.1 of the 2004 agreement.

65. For those brief reasons, while both parties' interpretations are arguable, I prefer the submissions of the claimants and I propose to grant a declaration along the lines set out in the claimants' pleaded case.