

Hodson Developments (Ashford) Limited
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Date 1 August 2024
Your ref
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SPECIAL DELIVERY

Dear Sirs

Pre-Action Protocol Letter

Chilmington Green, Ashford Road, Great Chart ("the Site")

Comprehensive mixed use development under planning permission (12/00400/AS) (as amended) ("the Development")

We are instructed by Ashford Borough Council ("**ABC**") and Kent County Council ("**KCC**") (together "**the Councils**").

1 Proposed Claim for a permanent injunction

- 1.1 This letter is being sent to you in accordance with the Practice Direction on Pre-Action Conduct and Protocols (the "**Practice Direction**"). We refer you to paragraphs 13 to 16 of the Practice Direction concerning the court's powers to impose sanctions for non-compliance. Ignoring this letter may lead to our clients commencing proceedings against you and may increase your liability for costs.
- 1.2 The proposed claim by the Councils is for a permanent injunction to limit the number of dwellings that may be occupied or brought into residential use as part of the Development on the Site before a bond for the provision of works to the A28 road ("the **Bond**") has been provided pursuant to paragraph 1 of Schedule 18 of an agreement under section 106 of the Town and Country Planning Act 1990 dated 27th September 2017 (as amended) ("the **S106 Agreement**"). The Development now appears to the Councils to be in the position where more than 400 dwellings are in a position to be occupied.

2 Proposed Claimant

The proposed claimants are Ashford Borough Council and Kent County Council.

3 Details of the Councils' legal advisors

Bevan Brittan LLP
Fleet Place House
2 Fleet Place
London
EC4M 7RF

Counsel

David Forsdick KC
Landmark Chambers
180 Fleet Street
London
EC4A 2HG

4 Proposed Defendants

The proposed defendants are all those persons listed in the appendix to this letter, and any other relevant persons who have acquired an interest in the Site (unless exempted by clauses 2.4 – 2.9 of the S106 Agreement).

5 Correspondence to Date

- 5.1 On 24th May 2024, KCC wrote to all the landowners and developers involved in the Development to seek their proposals for compliance with paragraph 1 of Schedule 18 of the S106 Agreement before the 401st dwelling was occupied (“the **Trigger**”), but no substantive proposals were received by KCC. KCC has responded to the letters it has received. This correspondence can all be found in the Appendices.
- 5.2 Rather than provide the proposals as requested, on 13th June 2024, a letter was written by Fladgate solicitors, instructed by Hodson Developments (Ashford) Limited and its associated companies (“**Hodson**”) which, to summarise:
- 5.2.1 made no such proposals;
- 5.2.2 disputed the need for the works to the A28 (“the **A28 Works**”) to be secured by the Trigger; and
- 5.2.3 argued that:
- (a) the requirement for the Bond in paragraph 1 of Schedule 18 of the S106 Agreement should be discharged or varied;
 - (b) paragraph 1 of Schedule 18 of the S106 Agreement could not be enforced whilst there was an application to discharge it;
 - (c) Hodson was not under an obligation to provide a Bond to KCC; and
 - (d) any action to enforce paragraph 1 of Schedule 18 of the S106 Agreement “would be extremely unlikely”.
- 5.3 The letter dated 13th June 2024 referred to above is wrong on all those matters:
- 5.3.1 if, as is currently the case, there are no proposals to provide the Bond then paragraph 1 of Schedule 18 of the S106 Agreement will bite, and no occupations beyond 400 units will be permissible;
- 5.3.2 paragraph 1 of Schedule 18 of the S106 Agreement remains in force and binding until discharged or varied;
- 5.3.3 the making of an application to discharge or vary the Trigger under S106A of the Town and Country Planning Act 1990 (as amended) (“**TCPA**”) does not suspend the obligation to comply with it pending any decision on that application;

- 5.3.4 if it be necessary to so show (which is denied – this being a matter for any decision under s.106A and not in the context of a claim to enforce existing obligations), the obligation serves a useful planning purpose;
- 5.3.5 if, contrary to the above, it is necessary to so demonstrate, the Councils will demonstrate through evidence, including from highway consultants, that:
- (a) the Trigger remains the appropriate trigger (notwithstanding the Councils' offer to accept an undertaking as set out in paragraph 10 below);
 - (b) securing the A28 Works was and is fundamental to the acceptability of the Development beyond that number of occupations;
 - (c) the fact Hodson failed to comply with its obligation to KCC, in its section 278 Agreement dated 27 February 2017 between Hodson Developments (Ashford) Limited and others and KCC ("the **S278 Agreement**"), to provide a Bond following the requisite notice validly being served by KCC on 14 December 2017 does not have any effect on the obligation to comply with paragraph 1 of Schedule 18 of the S106 Agreement. The lack of obligation now to provide a Bond (if so be it) does not affect the enforceability of Schedule 18 paragraph 1 of the S106 Agreement – for the short reason that it is a negative obligation. If there is no Bond, there can be no occupations beyond the Trigger; and
 - (d) as to it being "extremely unlikely" that paragraph 1 of Schedule 18 would be enforced, the Councils jointly intend to, and the Councils hereby give notice through this pre-action protocol letter of their intention to, take action to enforce the requirements of paragraph 1 of Schedule 18 of the S106 Agreement.

6 The Essential Context

- 6.1 Planning permission was granted for the Development subject to the obligations in the S106 Agreement (including the S278 agreement referred to in it). Without the provisions of the S106 Agreement (and in particular, the obligations to secure the delivery of the A28 Works in the manner they set out and not to occupy more than 400 units until the Bond had been provided), permission would not have been granted.
- 6.2 In respect of the highway infrastructure, a key issue was the inadequate capacity of the A28 to accommodate all the traffic from the Development. The scale and extent of the work necessary to overcome this fundamental constraint to the Development were agreed at the time of the planning application being granted.
- 6.3 The structure of the obligations with respect to the delivery of the A28 Works is well known and is not repeated in detail here. In short, the A28 Works were to be carried out by KCC but were to be secured at no cost to it.
- 6.4 To achieve that, the S278 Agreement was entered into in 2017. In 2017/18, KCC got to the stage where it was ready to contract for the A28 Works, and under the terms of the S278 Agreement, served notice of the A28 Works, which in turn triggered the requirement for the Bond to secure and guarantee the costs of the A28 Works to be provided by Hodson. No Bond was provided, and thus, the contract for the A28 Works was not entered into by KCC.
- 6.5 As a result, the A28 Works have not been carried out.
- 6.6 The Councils were aware at all material times that without the Bond, occupations at the Development could not proceed beyond the Trigger and so informed Hodson. The planning purpose of the A28 Works and of the planning obligations in respect of the highway infrastructure was thus secured through this negative obligation.

- 6.7 All Proposed Defendants have at all material times been aware of the obligation under paragraph 1 of Schedule 18; their interests in the land of the Development have all at all times been bound by it yet the Development has proceeded without any proposals for complying with it. No alternative means to allow the A28 Works to commence to meet the planning imperative and highway need at the appropriate trigger point of 400 units have been put forward by the Proposed Defendants.
- 6.8 The number of units currently occupied is believed by ABC to be 359, with some 52 further units either complete or nearly complete. It is clear that several of the Proposed Defendants are continuing to market and exchange contracts for the sale of units irrespective as to the Trigger.
- 6.9 The position will, therefore, shortly arise where paragraph 1 of Schedule 18 of the S106 Agreement will be breached unless the undertaking sought below is given or an injunction granted.

7 S106A Proposals

- 7.1 In the last 4 years, Hodson has purported to make 4 applications under S106A of the TCPA to the Councils to vary or discharge varying obligations in the S106 Agreement (of which the first, second and fourth included discharging the obligation to provide the Bond in paragraph 1 of Schedule 18). The first two purported applications were not valid and in any event were rejected by the Councils; the third did not relate to the obligation to provide the Bond. There is a live appeal under S106B TCPA to the Planning Inspectorate in respect of the fourth purported application under S106A TCPA (which, amongst other matters, seeks to remove the requirement to provide the Bond from the S106 Agreement), which the Inspectorate has announced will be heard by a public inquiry. This application is referred to as 'Application No.2' in Hodson's statement of case submitted for the appeal under S106B TCPA¹.
- 7.2 Hodson has contended that unless and until its S106A application/appeal is finally concluded there is no ability to enforce the obligation in paragraph 1 of Schedule 18 of the S106 Agreement. That is wrong in law. The obligation remains valid until varied.
- 7.3 Further, the Councils do not accept that there is any highway case to justify varying or discharging the requirement for the Bond to be secured before more than 400 units have been occupied. If anything, the highway need is more severe than anticipated in 2017 when planning permission was granted for the Development.
- 7.4 Paragraph 1 of Schedule 18 of the S106 Agreement still serves a useful planning purpose and is enforceable.

8 The Current Position

- 8.1 Within Phase 1 of the Development, construction of parcels with current reserved matters approvals will deliver a total of 763 homes, and is being carried out by a number of landowners contemporaneously. The Trigger will be exceeded shortly, but it is not reasonably possible for the Councils to identify the precise point or the precise developer who will cause the limit to be breached.
- 8.2 Units beyond the Trigger have been and are currently being constructed and apparently offered for sale without regard to the restriction in paragraph 1 of Schedule 18 of the S106 Agreement.
- 8.3 All developing landowners appear to be proceeding as if they can continue to build out and sell homes for occupation irrespective of the Trigger.
- 8.4 That appears to have been confirmed by the 13th June 2024 letter from Hodson's solicitors, which shows a fundamental misunderstanding of the effect of paragraph 1 of Schedule 18 of

¹ [Appeal: AP-90647 \(site.com\)](https://www.gov.uk/appeals-to-the-tribunal/appeal-90647)

the S106 Agreement. If there is no Bond (for whatever reason), there can be no occupation beyond 400 units.

- 8.5 That letter provides no explanation as to why paragraph 1 of Schedule 18 of the S106 Agreement is not now enforceable.

9 The Claim

- 9.1 Unless an undertaking is given in the terms set out below, the Councils will be entitled to pursue a claim for a prohibitory permanent injunction to prevent the Proposed Defendants from breaching or causing, permitting or allowing the breaching of paragraph 1 of Schedule 18 of the S106 Agreement by allowing more than 400 units to be occupied before a Bond is provided. However, the Councils' current intention, in the light of the reserved matters approvals mentioned above, is to seek a prohibitory permanent injunction to prevent the Proposed Defendants from breaching or causing, permitting or allowing the breaching of paragraph 1 of Schedule 18 by allowing more than 763 units to be occupied before a Bond is provided.
- 9.2 Any claim for a prohibitory injunction, or to otherwise enforce the terms of the S106 Agreement, will include a claim against you for recovery of the Councils' costs.
- 9.3 The obligation is binding on all of the Site subject to the Development, on all the Proposed Defendants and all their interests in the Site.
- 9.4 There is no arguable defence. The terms of paragraph 1 of Schedule 18 of the S106 Agreement are clear. Any occupation beyond the Trigger will breach it. There is no agreement to vary or discharge it. The application to discharge it does not prevent it being enforceable pending any decision on the application (even if, which is denied, there is any merit in it).
- 9.5 Paragraph 1 of Schedule 18 of the S106 Agreement was a necessary part of the package of measures to ensure that the highway infrastructure necessary to make the Development acceptable is delivered in an appropriate framework and timescale. It is the current key means to ensure the necessary highway infrastructure is delivered. Without it, there would have been no permission, and there is no legal or highway case for severing it from the permission.

10 The Process

- 10.1 The Councils invite everyone with an interest in the Site to join in **an undertaking to them that no more than 763 units will be occupied or brought into residential use until a Bond has been provided, and to inform the Councils in writing in advance of 763 units being occupied or brought into residential use**. If you are aware of any party other than a private residential occupier and a mortgagee of such, who has an interest in the Site but is not listed in either the Appendix to this letter or the list of c.c.s at the end of this letter (e.g. because you have disposed of or charged land to such a party), kindly forthwith either pass a copy of this correspondence on to that party, or inform this firm of that disposition/charge.
- 10.2 Failing such an undertaking being provided, binding on all of the Site and parties with an interest in the Site, and in the absence of a Bond before the 401st dwelling is occupied, the Councils will apply for a *quia timet* injunction to prevent more than 763 occupations.
- 10.3 Once individuals go into occupation, it will be difficult to reverse that occupation: (1) under the terms of the S106 Agreement; and/or (2) because of the prejudice to individual *bona fide* purchasers. The Councils will have insufficient notice of the 401st unit on Site being occupied to wait until there is actual proof of breach of paragraph 1 of Schedule 18 and, of course, the impact on innocent third party purchasers about to move in of a last-minute application for an injunction would be potentially significant.
- 10.4 For the avoidance of doubt, irrespective of whether an injunction is sought/secured before the 401st unit is occupied, any breach of the Trigger will be the subject of an injunction application.
- 10.5 Legal action can be avoided by providing the undertaking requested.

- 10.6 Discussions with KCC can simultaneously occur as to how to meet the requirements of paragraph 1 of Schedule 18 of the S106 Agreement, whether in accordance with the S278 Agreement or otherwise, so that the A28 Works will be secured.

11 Documents

- 11.1 We enclose the following documents which are relevant to the proposed claim (in chronological order):

- 11.1.1 Appendix 1 - S.106 Agreement between (1) Hodson Developments (Ashford) Limited and others (2) ABC and (3) KCC dated 27 February 2017;
- 11.1.2 Appendix 2 - S.278 Highways Agreement between (1) KCC (2) Hodson Developments (Ashford) Limited (3) Chilmington Green Developments Limited (4) Hodson Developments (CG One) Limited (5) Hodson Developments (CG Two) Limited dated 27 February 2017;
- 11.1.3 Appendix 3 - Notice from KCC to Hodson regarding KCC's intention to start the A28 Works and request for the A28 works bond dated 14 December 2017;
- 11.1.4 Appendix 4 - Letter from KCC to Hodson regarding Hodson's failure to provide the A28 Works bond, and intention to enforce the S106 Agreement dated 3 April 2018;
- 11.1.5 Appendix 5 - Letters from KCC to the landowners set out below requesting proposals for the Bond dated 24 May 2024
 - a) Hodson Developments (Ashford) Limited;
 - b) Hodson Developments (CG One) Limited;
 - c) Hodson Developments (CG Two) Limited;
 - d) Hodson Developments (CG Three) Limited;
 - e) Hodson Developments (CG Five) Limited;
 - f) Chilmington Green Developments Limited;
 - g) BDW Trading Limited;
 - h) Brookworth Homes (Holdings) Limited;
 - i) Chelmden Limited;
 - j) Pentland Homes Limited;
 - k) Man Group;
 - l) Habitare Homes Limited;
 - m) In Place (CG) Limited;
 - n) In Place (CG) LP;
 - o) Jarvis (Great Chilmington) Limited;
 - p) Malcolm Jarvis Homes Limited;
 - q) Malcolm Colin John Jarvis; and
 - r) Beverley June Jarvis
- 11.1.6 Appendix 6 - Letter from Fladgate LLP on behalf of Hodson in response to KCC's letter dated 24 May 2024 dated 13 June 2024;
- 11.1.7 Appendix 7 - Letter from Osborne Clarke LLP on behalf of BDW Trading Limited in response to KCC's letter dated 24 May 2024 dated 14 June 2024;
- 11.1.8 Appendix 8 - Email from Man Group in response to KCC's letter dated 24 May 2024 dated 13 June 2024;
- 11.1.9 Appendix 9 - Letter from PINs accepting Hodson's appeal under S106B TCPA dated 5 July 2024;

- 11.1.10 Appendix 10 - Letter from KCC to Fladgate LLP in response to Fladgate's Letter dated 13 June 2024 dated 31 July 2024;
- 11.1.11 Appendix 11 - Letter from KCC to Osborne Clarke LLP in response to Osborne Clarke's Letter dated 31 July 2024; and
- 11.1.12 Appendix 12 - Letter from KCC to Man Group in response to Man Group's email dated 13 June 2024 dated 1 August 2024.

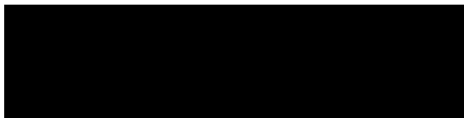
12 The Address for Reply and Service of Documents

Dalee Kaur
Bevan Brittan LLP
Fleet Place House
2 Fleet Place
London
EC4M 7RF

13 Proposed Reply Date

Please confirm your willingness (or otherwise) to provide an undertaking on the terms set out in this letter within 21 days from the date of this letter.

Yours faithfully



Bevan Brittan LLP

cc: Mortgagees:

1. Homes and Communities Agency
2. Paragon Development Finance Limited
3. Solutus Advisors Limited
4. Lloyds Bank PLC
5. Zorin Avenue Lendco 1 Designated Activity Company
6. Cheyne Capital Limited
7. Close Brothers Limited

ANNEX 1 - PROPOSED DEFENDANTS

	Name	Address
1	Hodson Developments (Ashford) Limited	Office Suite 9, 55 Park Lane, London, W1K 1NA
2	Hodson Developments (CG One) Limited	Office Suite 9, 55 Park Lane, London, United Kingdom, W1K 1NA
3	Hodson Developments (CG Two) Limited	Office Suite 9, 55 Park Lane, London, United Kingdom, W1K 1NA
4	Hodson Developments (CG Three) Limited	Office Suite 9, 55 Park Lane, London, United Kingdom, W1K 1NA
5	Hodson Developments (CG Five) Limited	Office Suite 9, 55 Park Lane, London, United Kingdom, W1K 1NA
6	Chilmington Green Developments Limited	Office Suite 9, 55 Park Lane, London, W1K 1NA
7	BDW Trading Limited	Barratt House Cartwright Way, Forest Business Park, Bardon Hill, Coalville, Leicestershire, LE67 1UF
8	Brookworth (South East) Limited	Brookworth House, 99 Bell Street, Reigate RH2 7AN
9	Chelmden Limited	The Estate Office Canterbury Road, Etchinghill, Folkestone, Kent, CT18 8FA
10	Pentland Homes Limited	The Estate Office Canterbury Road, Etchinghill, Folkestone, Kent, CT18 8FA
11	Habitare Homes Limited	5 th Floor, 20 Fenchurch Street, London EC3M 3BY
12	In Place (CG) Limited	Duo, Level 6, 280 Bishopsgate, London, EC2M 4RB
13	In Place (CG) LP	Duo, Level 6, 280 Bishopsgate, London EC2M 4RB
14	Jarvis (Great Chilmington) Limited	Great Chilmington Farmhouse Chilmington Green, Great Chart, Ashford, Kent, England, TN23 3DP
15	Malcolm Jarvis Homes Limited	Great Chilmington Farmhouse, Great Chart, Ashford, Kent, TN23 3DP
16	Malcolm Colin John Jarvis	Great Chilmington Farmhouse, Chilmington Green, Great Chart, Ashford, Kent TN23 3DP
17	Beverley June Jarvis	Great Chilmington Farmhouse, Chilmington Green, Great Chart, Ashford, Kent TN23 3DP