Neutral Citation Number: [2018] EWCA Civ 1883

Case No: A3.2017/0768 & A3/2017/0848

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
Mr David Halpern, QC
HC-2015-005153

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/08/2018

Before:

LORD JUSTICE KITCHEN
SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE HENDERSON

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Between:

The Council of the City of York	**Appellant**
- and -	
Trinity One (Leeds) Limited	**Respondent**

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- -

Mr Neil King QC and Mr Richard Turney (instructed by **Womble Bond Dickinson UK LLP**) for the **Council of the City of York**
Mr Paul Brown QC (instructed by **Walker Morris LLP**) for **Trinity One (Leeds) Limited**

Hearing date: 21 February 2018

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Approved Judgment

Sir Ernest Ryder, Senior President:

Introduction:

1. These are cross appeals against the orders of David Halpern QC sitting as a deputy judge of the High Court which were made on 8 March 2017. The appeals arise out of a claim by the Council of the City of York ("the Council") to recover a sum of money from Trinity One (Leeds) Limited ("TOL") in lieu of the provision of affordable housing by TOL within a residential development approved by the Council. The sum fell due under an agreement made on 6 October 2003 in accordance with section 106 of the Town and Country Planning Act 1990 ("the Agreement"). There is a separate appeal to the Secretary of State under section 106BC of the 1990 Act the merits of which are not before this court but which is relied upon in the alternative by TOL to reduce or extinguish its liability.

2. In his judgment, the judge identified two issues:

   i) Was TOL liable to pay a sum under the Agreement and, if so, how much?

   ii) If TOL's appeal under section 106BC is successful, will that take effect retrospectively so as to extinguish TOL's liability (if any)?

3. On the first issue, the judge found that TOL was liable to the Council although not in the sum claimed. The Council obtained judgment in the sum of £553,058 together with interest in the sum of £65,533.70: in total a sum of £618,591.70. On the second issue, the judge found that TOL would "be released from [the obligation to pay money], if and to the extent that the Secretary of State allows its appeal under section 106BC". The judge made a declaration in accordance with his conclusion. TOL was ordered to pay 50% of the Council's costs of the claim. TOL appeals against the judge's conclusion on liability and quantum and the Council appeals against the declaration as to the effect of the section 106BC appeal to the Secretary of State. The judge granted permission to appeal the two relevant paragraphs of his order.

Factual and procedural background:

4. There is a detailed factual background set out at paragraphs 17 to 35 of the judgment below which I gratefully adopt. I shall highlight what follows so that this judgment can be understood.

The Agreement:

5. On 6 October 2003 the then-owner of land at 187 Tadcaster Road, York ("the Site") entered into the Agreement by which a proportion of the housing to be constructed on the Site in accordance with outline planning permission granted on the same date was to be delivered as affordable housing units. In default of on-site provision, the Agreement required the owner to pay the Council commuted sums, on the sale of each of the affordable housing units on the open market.

6. The Site was acquired by TOL in 2004. Development commenced in 2005. In September 2006 TOL advised the Council that it had discharged its obligation to offer the affordable units to registered social landlords without success, and invited the Council to propose a commuted sum which should be paid. The affordable units were subsequently sold on the open market on various dates between September 2007 and August 2014.

7. The dispute between TOL and the Council centres on the wording of paragraphs 6.12.1 and 7.8.3 of Schedule 1 to the Agreement, which set out the method by which the commuted sums were to be calculated. Schedule 1 to the Agreement is inconsistent in its internal references to paragraphs and clauses but nothing turns on that and although there are slight variations in the wording of paragraphs 6.12.1 and 7.8.3, the core language of the paragraphs states that the commuted sum:

> *"shall be calculated on the amount of Social Housing Grant necessary to secure affordable rented homes of an equivalent type and size on another site [in a similar residential area in the City of York] which grant for the avoidance of doubt shall be calculated at normal grant levels from regional TCI tables provided on an annual basis by the Housing Corporation or such equivalent grant calculation current at the time and supported by the Housing Corporation"*

And "Social Housing Grant" is defined by clause 2.1.23 as:

> *"the grant that may be provided in respect of affordable housing in the Council's administrative area in accordance with Government and Housing Corporation Guidance."*

8. The commuted sum has been in issue between the parties since 2006. TOL denies that any sum falls due to the Council in accordance with the Agreement because it says that the Agreement does not provide a workable basis for calculating the sum due. The Council maintains that such a result would be perverse and invites the court to construe the relevant clauses to give practical effect to the parties' agreement.

The sections 106BA and 106BC issue:

9. On 24 April 2013, sections 106BA-BC of the 1990 Act came into force. On 29 April 2016, during the course of the proceedings below, TOL made an application to the Council pursuant to section 106BA to seek to release itself from the obligation to pay a commuted sum under the Agreement. The Council refused that application on 27 May 2016 and TOL appealed against that decision to the Secretary of State for Communities and Local Government in accordance with section 106BC.

10. On 1 September 2016, TOL amended its defence to the claim in these proceedings, contending that, if its appeal under section 106BC was allowed, then it would not be liable to the Council for any sum otherwise found due under the Agreement. The point was argued at trial. The judge agreed with TOL, and the Council appeals against this part of the Order.

11. TOL's appeal under section 106BC was heard on 25 April 2017, and dismissed by a decision letter dated 16 May 2017. However, that decision was successfully challenged by TOL in judicial review proceedings on the basis that the Inspector had made an inadvertent but material error of fact. The decision was quashed and the appeal remitted back for redetermination. A new hearing was listed for 15 March 2018. That has also been determined but the parties do not agree that this court should give any consideration to the contents of the same and it is understood that the redetermination is itself the subject of further judicial review proceedings.

The statutory and policy background:

12. There is a detailed review of the statutory and policy background to these appeals at paragraphs 3 to 16 of the judgment below. The relevant statutory materials are annexed to this judgment.

13. In summary, it was Government policy at the time of the Agreement that affordable housing would be provided as part of the development of a site. This would be achieved, inter alia, by agreements made in accordance with section 106 of the 1990 Act.

14. The Council published an Advice Note in September 2000 which set out its policy in relation to affordable housing. The Council stated that it would accept commuted payments in exceptional circumstances. At paragraph 45 of the Advice Note it was stated that the commuted sum would be based on the amount of Social Housing Grant ("SHG") necessary to secure an affordable home of an equivalent type and size on another site. In turn, this amount was to be calculated from the regional Total Cost Indicator ("TCI") tables provided on an annual basis by the Housing Corporation.

15. The Housing Corporation stopped publishing the TCI tables after March 2006, by which time they were no longer used to calculate the SHG. The system changed from a calculation based on inputs to a calculation based on outputs. In April 2011, the system changed again to replace SHG by the Affordable Homes Grant which was also calculated differently.

The judge's decision:

16. In order to understand the judge's careful reasoning, it is helpful to identify the material that he relied upon. There were four witnesses who gave oral evidence to the court:

    i) Mr Paul Landais-Stamp who was the Council's Housing Development Manager in 2003 and had been its Housing Strategy Manager since 2005. He gave evidence of the Council's policy in relation to affordable housing and section 106 agreements. In particular he stated, among other things which were noted in the judgment, that the purpose of requiring a commuted sum was to secure enough funding to provide equivalent affordable housing on another site.

    ii) Mr Ian Geoffrey Nixon who is the managing director of TOL and an experienced property developer.

    iii) Mr Parker who was TOL's expert. He produced a calculation he made for the purpose of TOL's proceedings under section 106BC using software known as 'Proval'. He accepted that the Proval calculation was not an 'equivalent grant calculation'. Although there are a number of differences between the methodology for the Proval calculation and the TCI tables, his evidence was that anyone familiar with affordable housing would understand 'equivalent type and size' to mean the same mix of houses and flats and the same number of bed spaces.

    iv) Mr Watson who was the Council's affordable housing expert. He produced a calculation for the commuted sum of £1,995,589. He did not use the TCI tables to come to his conclusion but instead used a different methodology. Mr Watson accepted that the Proval software produced results consistent with the previous Excel software. He noted, among other things, that size should not be limited to the number of bed spaces, because it includes floor area.

Issue 1 – contractual interpretation:

17. The judge analysed the contractual clauses in the following way. He concluded that the parties had agreed that:

i) The Owner shall pay a commuted sum to the Council within 28 days of the date of sale of each of the affordable homes on the open market;

ii) The sum shall be a calculation of the amount of SHG necessary to secure affordable homes of an equivalent type and size on another site in a similar residential area in the City of York;

iii) The grant for the avoidance of doubt shall be calculated:

a) At normal grant levels from regional TCI tables provided on an annual basis by the Housing Corporation; or

b) Such equivalent grant calculation current at the time supported by the Housing Corporation.

18. That analysis is uncontentious. It was common ground between the parties that the grant calculation at (a) (referred to as 'Part 3(a)') is no longer relevant as by the time any obligation arose under clause 6.12.1 the SHG regime was no longer in force. That left the parties' agreement as to the equivalent grant calculation at (b) ('Part 3(b)'). The judge set out in his judgment the Council's case and TOL's case about the construction of the clause and then proceeded to discuss the rival submissions and come to a conclusion.

19. A summary of that discussion is as follows. The judge noted that the grant calculation at Part 3(a) is inapplicable and Part 3(b) is the only alternative provision in the Agreement. He acknowledged the submission that if Part 3(b) is inapplicable, then nothing is payable to the Council. The judge noted that: (i) after March 2006 there was no "equivalent" to SHG; and (ii) there was no method of calculation which was "supported by the [Housing Corporation]" after March 2003. He concluded, however, that on its true construction a sum is payable under Part 3(b).

20. The judge reasoned that:

i) The Council and the original party to the Agreement shared (or must have shared) the understanding that developers were expected either to provide affordable housing on site or a commuted sum in lieu. The Agreement is consistent with that intention.

ii) The Agreement expressly contemplates that the old system might change, but on a literal reading it is only a limited change. Part 3(b) appears to assume that the Housing Corporation would continue in existence. The parties did not expressly address the possibility that the old SHG would be abolished without a direct replacement.

iii) "…there is a tension between this literal reading of Part 3(b) and the underlying purpose of the Agreement. In my judgment, it is clear from the Agreement as a whole that the parties intended payment to be made in accordance with Part 2. This requires Part 3(b) to be read so as to accord with that underlying purpose".

21. The judge held that this is one of those "very unusual cases" in which one can see from the language of the Agreement that the parties did not focus on the issue that arose which was intended to be covered by Part 3(b). He held that the parties would have intended to substitute whatever would produce the nearest equivalent figure. A literal reading of Part 3(b) would flout business common sense. The judge concluded that Part 3(b) is intended to provide a method of calculation which produces a sum

that is as close as possible to the figure that would have been payable, if SHG still existed. The judge used the calculation produced by Mr Parker for the purpose of the proceedings under section 106BC as the basis of quantum.

Issue 2 – the section 106BA and 106BC appeal:

22. The second issue involved a consideration of the interrelationship between the Agreement and the new statutory provisions (which were themselves time limited). First, the judge noted that the obligation on TOL to make payments under the Agreement arose no later than 2014. Second, the judge noted that the application under section 106BA was made on 29 April 2016 (the final day on which that section was in force). He framed the issue as whether TOL would be discharged from its accrued obligation to make a payment in lieu of providing affordable housing if its appeal to the Secretary State was successful.

23. The Council's argument was that legislation does not usually take away accrued rights, and Parliament had not intended to do so when enacting sections 106BA and 106BC. TOL's argument was that the phrases "is to have effect" in section 106BA(10) and "is or is to be" in section 106BA(13) are sufficient to make it clear that the section has retrospective force.

24. The judge recognised that section 106BA "is an unusual provision" and acknowledged that he had "not found it easy" to decide whether to construe the section as having retrospective effect. Ultimately, he decided that the section applies where the obligation has already fallen due, because that is clear from the words 'is or is to be provided' in subsection (13). The judge considered that this wording is sufficiently clear to take away accrued rights vested in the Council. In addition, he held that the definition of 'affordable housing requirement' in section 106BA(13) covers the situation where the developer is obliged to pay a sum in lieu of providing affordable housing. Thus, the Council is required to discharge or modify the obligation if the conditions of section 106BA are satisfied.

Grounds of appeal:

25. TOL has one ground of appeal: the judge wrongly interpreted the wording of what I have termed Part 3(b) of the Agreement and substituted another test for that which the parties themselves chose.

26. The Council has one ground of appeal: the judge erred in finding that the provisions in sections 106BA and 106BC of the 1990 Act applied to accrued rights to recover commuted sums under the Agreement.

Issue 1 – contractual interpretation:

27. The essence of TOL's appeal is that the judge did not interpret the words of the Agreement, rather he substituted his own test which was not that which the parties chose or intended. TOL submit that the judge should have concluded that Part 3(b) was inapplicable and that nothing was payable to the Council. In any event, TOL submit that the judge did not hold that the Proval calculation was an equivalent grant calculation nor could he have done so because the Proval method is different from that specifically agreed by the parties. Even if it could be argued that Proval was equivalent to the SHG calculation before 2006, it was not so at the time the affordable housing units were sold between 2007 and 2014.

28. In order to distinguish *Arnold v Britton* [2015] UKSC 36 (see below) on the facts of this case, TOL submitted that:

    i) The judge undervalued the language of the provisions to be construed to the extent that he ignored it;

    ii) Part 3(b) has a plain meaning just as it is agreed Part 3(a) has a plain meaning: in which case neither method of calculation is applicable;

    iii) Given that this is what the parties agreed, it is not for the court to identify what the parties should have agreed, simply because the wording actually used was ill advised or has resulted in an impact that is adverse to one or other of the parties;

    iv) What happened is not a circumstance that was not intended or contemplated by the parties. They did contemplate a circumstance in which the TCI tables were not in use. The alternative equivalent grant calculation involved important safeguards which were deliberate and which provided a level of certainty about the owner's liability. The judge's conclusion sets aside the express agreement of the parties.

29. The Council submits that the Agreement makes clear provision for the payment of a commuted sum which they submit is the primary obligation consistent with the underlying bargain of the contract. The other provisions are concerned with the calculation of the sum. The court should assist the parties to settle matters so as to preserve rather than to destroy the bargain.

30. The Council invites this court to uphold the judge's approach and to conclude that it did not extend beyond established principle for the following reasons:

    i) The primary obligation to pay a sum is patent and it has clearly arisen. The uncertainty with which the judge had to grapple went only to quantification;

    ii) The judge was faced with a choice between: (i) allowing the primary obligation to pay a commuted sum, and the underlying bargain, to be defeated; or (ii) to give effect to that bargain. The latter course is consistent with well-established contractual principles;

    iii) The judge was entitled to do the best he could to give effect to the bargain, and to find a sum which was as close as possible to the figure which would have been payable;

    iv) TOL's construction seeks to defeat both business common-sense and the true bargain between the parties. There is no doubt that the parties intended that commuted sums should be payable; indeed absent such provision, TOL would not have been granted planning permission for the development concerned.

31. In addition, the Council does not accept that the Judge was correct to find that if Part 3(b) "is inapplicable, then Mr Brown is correct that nothing is payable to the Council". The Council submits that if the words following "for the avoidance of doubt" cannot be applied, then the bargain should still be upheld and a commuted sum identified.

Issue 1 - discussion:

32. This issue turns on the balance between giving effect to the intention of the parties and the language of the contract. It is convenient to set out the principles which both parties rely upon from the authorities that were cited to us. In *Arnold v Britton* [2015] UKSC 36 Lord Neuberger sets out six principles, the first and sixth of which are relied upon by the parties:

i) the first factor is identified by Lord Neuberger at [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."

ii) the sixth factor is identified by Lord Neuberger at [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. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SCLR 114, where the court concluded that 'any … approach' other than that which was adopted 'would defeat the parties' clear objectives', but the conclusion was based on what the parties 'had in mind when they entered into' the contract (see paras 17 and 22)."

33. It is obvious that the language of the Agreement creates the problem that is to be solved. The Agreement did not only deal with the eventuality that SHG would be abolished. The Agreement expressly allowed for an equivalent method of calculation but did not contemplate that the system of funding for registered social landlords would fundamentally change. What then should be done? I have come to the conclusion that the judge's interpretation of the Agreement was correct for the reasons which he gave and for the reasons which follow.

34. The intention of the parties was that a commuted sum should be paid. This is a conclusion that is made clear at [61(i)] to [61(iii)] of the judgment and it is not disputed by TOL. The intention was translated by the parties into the primary obligation to make a payment of a commuted sum which is set out in paragraphs 6.12.1 and 7.8.3 of the Agreement. The Council says that planning permission would not have been granted without the commitment of TOL's predecessor to pay a commuted sum. In addition, the sum of money was originally capable of quantification; it is only subsequent events that led to the uncertainty. The uncertainty relates only to quantification not the principle of payment.

35. It would defeat the underlying purpose of the Agreement if the clause were unenforceable due to lack of certainty. The consequence would be that TOL would receive the benefit of planning permission without providing affordable housing or a commuted sum. In simple terms, that was not the bargain.

36. The sixth factor identified by Lord Neuberger in *Arnold v Britton* provides for a situation like this: an event has occurred which was not contemplated by the parties, namely the abolition of SHG. The question is whether in that circumstance the intention of the parties is clear. If so, the court should give effect to that intention. As I have explained above, I think the intention of the parties is very clear: TOL should pay a sum of money to the Council if they do not provide affordable housing. In

coming to that conclusion I have considered the careful guidance given in *Arnold v Britton* in the context of the guidance given in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 with the considerable assistance of the overview provided by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [8] to [14].

37. Since the hearing before us the decision of the Court of Appeal in *Openworld Ltd v Forte* [2018] EWCA Civ 783 has been published. Paragraphs [24] to [30] of the judgment of Simon LJ (with whom Arden and Newey LJJ agreed) describe a basis for construction that is analogous to the one that I suggest is correct in this case. If I needed further persuasion, *Openworld* provides clear support for the construction proposed.

38. If I am right then the quantification of that sum should be that which is equivalent to the amount of money which would have been provided had the SHG remained in being. Although this is a departure from the literal words of the contract, this is the only sensible solution to the problem posed by the abolition of the SHG on which the clause is premised. The clause provides that the developer should pay enough money so that the Council can provide equivalent affordable housing: the best the court can do is work out a roughly equivalent figure for that sum.

39. I have come to the clear conclusion that the judge identified a calculation which provided a roughly equivalent sum:

    i) Mr Geoffrey Nixon, the MD of TOL, gave evidence at the trial. At the time TOL bought the property, Mr Nixon estimated the commuted sum would be about £700,000. His planning consultant estimated a figure between £500,000 and £700,000. This is recorded in the judgment at [38].

    ii) The use of the Proval software recommended by TOL's expert was accepted by the Council's expert to produce a result consistent with the TCI tables. This is recorded in the judgment at [45]. The figure produced by the Proval software was £553,508, which is within the range contemplated by Mr Nixon.

    iii) The judge used this figure as the basis for his conclusion (see his judgment at [70]). As he remarked, it was a reasonable attempt to reach a figure equivalent to the SHG which would have been payable before 2006.

40. In summary, I think the Agreement should be read as requiring payment of a commuted sum which should be equivalent to the amount of SHG that would have been payable. Contrary to what TOL submits, the court is not using business common sense retrospectively to allow the Council to renege on a bad bargain; but rather there was a bargain to which the parties should be held. The decision of the judge gives effect to the intention of the parties and I would uphold his decision and dismiss TOL's appeal.

Issue 2 – the section 106BA and 106BC appeal:

41. The Council submit "that a statute will only be construed as having retrospective effect if it is plain that it was intended to have that effect or, to put it another way, that such a construction is unavoidable": *Lawrence v Financial Services Commission of Jamaica* [2009] UKPC 49 per Lord Clarke at [28]. Accordingly, they submit that the

judge was wrong to find that any prospective success on the section 106BC appeal could affect the existing liability of TOL to pay the sums due. They submit that it is not part of the statutory regime under sections 106BA and 106BC that accrued rights to recover commuted sums falling due under a section 106 agreement should be affected by the success of an application or appeal under these provisions. The Council submits that the judge's reasoning is flawed. It leads to the consequence, which the parties cannot have intended, that TOL may be able to take advantage of the Agreement to permit the sale of the affordable housing units on the open market, but not pay for doing so.

42. Their reasoning is as follows:

i) Pre-existing debts are not addressed in sections 106BA and 106BC.

ii) The power which TOL invites the Secretary of State to exercise is contained in section 106BA(5)(c) which provides that the authority may "determine that the planning obligation is to be modified to remove the requirement". They submit that that language contemplates a prospective effect, not an alteration to accrued obligations to pay money.

iii) Section 106BA(10) does not use language that has retrospective effect: it provides that a modified obligation has effect, and is enforceable, from the date of the determination and not earlier.

iv) The language of section 106BA(2) ("to have effect", "to be replaced/removed") and section 106BA(3) ("is not economically viable … so that the development becomes economically viable"; "is to continue to have effect") also points to this conclusion.

v) The duty in section 106BA(3) is to modify the obligation "so that the development becomes economically viable". That language suggests that the development in question must not yet have been carried out or completed.

vi) The provisions of section 106BC(10)-(13) are also entirely consistent with the submission that modifications to affordable housing requirements have effect only as from the date of the modification, and not retrospectively with the consequence that any pre-existing liabilities under the unmodified obligations will be unaffected by the modifications. They submit that the definition of affordable housing requirement in section 106BA(13) relate to the housing which is the subject of the obligation, i.e. planning obligations relating to affordable housing may relate to existing dwellings. The definition merely confirms that the requirement in question may relate to dwellings which already exist and which are already available. It says nothing about debts which have already accrued.

vii) This interpretation is consistent with DCLG Guidance: "*Section 106 affordable housing requirements"*. The purpose of the provisions in sections 106BA and 106BC is identified in that guidance as being to address section 106 agreements which are "an obstacle to house building", and to focus upon "stalled schemes" (see paragraph 2).

viii) The Council submits that to suggest that these provisions could enable a previously accrued liability to pay a commuted sum to be avoided would be plainly contrary to the statutory purpose of encouraging development to take place, and would reward developers for building and selling housing schemes while deliberately choosing not to meet their legal obligations.

ix) In any event, there has at all material times been a statutory provision which can be deployed to modify or discharge obligations in section 106 agreements, namely section 106A (together with section 106B). The difference is that section 106A does not contain the same duty to modify affordable housing obligations in the prescribed circumstances. It is submitted that there is no reason to strain the language of sections 106BA and 106BC where there is a provision capable of securing the same outcome.

x) It is also submitted by the Council that this construction is consistent with the general approach to contractual liability in the cases of rescission and frustration. It is said that in both instances accrued causes of action are generally unaffected by the contract coming to an end.

43. In the alternative, the Council submits that if section 106BA has the effect of altering accrued rights, a later decision pursuant to section 106BA cannot alter the obligation to pay sums which fell due before section 106BA came into force. Only two of the 13 obligations to pay commuted sums occurred after that date (25 April 2013). To construe the statutory provisions to have such a profound retrospective effect would cause serious unfairness to the Council.

44. TOL submits that there is nothing in the language of section 106BA which limits the procedure to cases where the development has not commenced or has stalled and that if an application under section 106BA succeeds, the result is that the section 106 agreement is enforceable as modified from the date of the modification. The language of section 106BA(13), and the phrase "is or is to be", in particular, makes it clear that section 106BA can be used where the obligation to make affordable housing available has already been triggered.

45. Furthermore, the judge's conclusion is entirely consistent with the underlying rationale behind sections 106BA and 106BC, namely the desire to release constraints upon the delivery of housing. Larger housing schemes are frequently subject to staged obligations, and the developer may reach the first of the triggers and be unable to continue the development. The judge's conclusion is also said to reflect the common understanding of the way in which sections 106BA and 106BC were intended to operate as to which TOL provided examples which included a Secretary of State's Appeal Decision, the decision in *Medway Council v. Secretary of State for Communities and Local Government* [2016] EWHC 644 (Admin) ("*Medway*") and the Council's own treatment of TOL's section 106BA application in this case over a period of some eight months.

46. TOL submits that the fact that s.106BA(5)(c) empowers the Secretary of State to "determine that the planning obligation is to be modified to remove the requirement" says nothing about whether the modification is to be retrospective and section 106BA(13) is broad enough to cover cases where the housing is to be provided by a local planning authority using commuted sums, because of the closing words of the

subsection, "and it is immaterial for this purpose where or by whom the housing is or is to be provided".

47. In response to the Council's submissions, TOL notes that the DCLG guidance does not enjoy any particular legal status and it is for the courts to interpret legislation. It also suggests that the Council's argument about section 106A supports TOL's case in the sense that the Council appears to accept that section 106A can have retrospective effect and it does not point to a material difference between the wording of section 106A and section 106BA. Given that section 106BA is the obvious route for these challenges, because it was specifically designed for cases involving affordable housing requirements, it would produce a procedural minefield if section 106A was in fact the appropriate route.

Issue 2 – discussion:

48. The first, and until this case, only case to deal with sections 106BA and 106BC was *Medway*. The case was decided by the late Mr Justice Gilbart. In *Medway*, the council was seeking judicial review of a decision of the Secretary of State under section 106BC. The fourth issue in that case is the first question in this appeal. Sadly, given that his guidance might well have been persuasive, Gilbart J held that it was unnecessary to determine the issue although he did remark that the Act was silent on the point.

49. I must accordingly return to first principles. The general principle is that legislation is presumed not to be intended to have a retrospective effect unless the contrary intention appears: Bennion on Statutory Interpretation (6th Ed), section 97. Lord Nicholls in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [18] and [19] refers to this, while noting that such principles are vague and imprecise and cannot be dependent on when a case is heard by a court. Lord Nicholls thus sought the underlying rationale and gained assistance from the judgment of Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724:

> "the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

50. Lord Nicholls then formulated the approach that is to be followed in this way: "the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision": (see [19]). The intention of Parliament will of course be a unitary one but the exercise will involve all admissible aids to construction as well as the language used.

51. Sections 106BA and 106BC are complicated provisions and it is difficult to identify from their language the precise intention of Parliament as respects the issue before this court. The following points can be made about the intention of Parliament from the language used:

i) Section 106BA is titled 'Modification or discharge of affordable housing requirement'. It is silent about the effect upon accrued rights of that process: they are neither expressly included nor excluded by the language used.

ii) The Council submits that section 106BA(5)(c), which uses the words 'is to be modified', contemplates a prospective effect not altering accrued obligations. TOL submits that the use of the future tense is a reference to the fact that the modification cannot come into existence until the Secretary of State has made a determination to that effect. I agree with TOL. I do not think that section 106BA(5)(c) assists either party.

iii) The same reasoning applies to section 106BA(10) and the other sections to which the Council points which use the future tense. The modification of the planning obligation is forward looking; this says nothing about accrued rights.

iv) Section 106BA(13) was relied on by the judge, and is relied on by TOL, to support the conclusion that section 106BA can affect accrued rights. In particular, it is said that the words 'is or is to be' imply that the section applies to obligations which have already arisen and obligations which are yet to have arisen. I do not think that these words are decisive of the point. I think the words 'is or is to be' relate to the use of the housing: is it being used as affordable housing or will affordable housing be provided in the future? To read into those words the retrospective effect claimed (without more) may be to place too high a burden on the language. This section is otherwise silent on the question whether accrued rights can be altered.

52. The relevant policy guidance may be examined to help understand the meaning of the legislation but only within strict parameters given that interpretation is not for the Executive. Those parameters are generally held to be the general purpose, giving context to the legality of a public authority's conduct rather than the precise meaning of the legislative provision (see, for example, *R (Risk Management) v Brent LBC* [2010] PTSR 349 at [109] to [11] per Pill LJ and [227] per Moore-Bick LJ). The relevant guidance is the DCLG Guidance: *Section 106 affordable housing requirements*, to which a local planning authority and the Secretary of State must have regard in making a determination under sections 106BA or 106CA: see section 106BA(8)(a). It is at least arguable that guidance which a local authority *must* have regard to in making a determination will weigh more heavily with a court charged with interpreting a legislative provision.

53. The purpose of the provisions in sections106BA and 106BC is identified as being to address section 106 agreements which are "an obstacle to house building", and focuses upon "stalled schemes" (paragraph 2). The Council submits that this guidance implies that the statutory purpose would be cut across if accrued rights were to be affected. TOL submits that the altering of accrued rights is consistent with this guidance. In fact, affordable housing obligations can arise part way through a development (as they did in *Medway*). It would be consistent with the purpose as expressed in the DCLG Guidance if such an obligation could be discharged or modified in order for the development to continue. I prefer TOL's submission in this regard.

54. There is, however, a more significant argument concerning the purpose and context of the legislative provisions that informs the solution. The statutory scheme provides a purpose for the modification and discharge provisions in section 106BA. At section 106BA(3)(a) the purpose is set out with clarity:

> "if the affordable housing requirement means that the development is not economically viable, the authority must deal with the application in accordance with subsection (5) so that the development becomes economically viable"

55. The way in which sections 106BA and 106BC work so as to achieve the purpose is that the developer makes an application to the council and then to the Secretary of State. The developer must submit evidence that the development has become 'not economically viable due to the affordable housing requirement'. The council and the Secretary of State will then determine whether the development is economically viable on the basis of the evidence submitted, and will determine which of the actions in section 106BA(5) are to follow if it is not viable.

56. There is thus a new public interest identified by Parliament in the legislative provisions which amended the 1990 Act (by section 7 of the Growth and Infrastructure Act 2013) which outweighs the pre-existing public interest in the provision of affordable housing. In introducing sections 106BA and 106BC Parliament interfered with and removed the right of local authorities to enforce or insist upon section 106 affordable housing agreements even in the circumstance that the local authority would not have granted planning permission without the affordable housing agreement. Section 106BA(3) is in terms an interference with pre-existing rights: it applies to agreements entered into before and after the 2013 Act amendments and it accordingly has retrospective effect. Economic non-viability may occur before or after liability is triggered with the consequence that the concept cannot be taken not to apply to parts of a development already completed.

57. The pre-condition of economic non-viability mitigates the risk of unfairness to the Council. The Council's accrued rights will only be affected if the Secretary of State deems the development to be not economically viable. The revised legislative purpose of facilitating development where affordable housing requirements have become too onerous is fulfilled and the effect on the Council is a necessary result of that.

58. The Council submits that section 106A is the legislative provision which TOL can avail itself of to alter accrued rights. The terms of sections 106A and 106BA are similar as regards the modification of obligations and there is no rational explanation for the conclusion that Parliament was content to authorise a retrospective application under section 106A but not under section 106BA. Either both sections can have retrospective effect or neither. Furthermore, section 106BA is clearly the more appropriate section to be used for the modification of affordable housing requirements given that it was designed specifically for developments involving affordable housing. I do not think that the existence of section 106A provides support for the Council's appeal.

59. In my judgment, sections 106BA and 106BC do affect accrued rights. The Council or the Secretary of State is required to discharge or modify the obligation if the conditions of section 106BA are satisfied. Although the statute is silent on the point, it

also does not exclude accrued rights. The policy behind the statute taken together with the practical effect of sections 106BA and 106BC indicate that the legislative provisions have retrospective effect. Although Parliament is presumed not to have legislated to alter accrued rights, I think that the contrary intention is established.

60. The Council submits that if the court finds that sections 106BA and 106BC can alter accrued rights, this should not extend beyond the commencement of the legislative provisions. I do not agree. There is nothing limiting the operative provisions to this period of time, and there is no difference between an obligation accruing before the commencement of the provisions and an obligation accruing after. In either case, the contract may have been entered into before the provisions came into effect and thus without knowing of the effect of the same. I consider that sections 106BA and 106BC do affect accrued rights regardless of when they accrued.

61. I would dismiss the Council's appeal.

62. Accordingly, for the reasons I have given I would dismiss both appeals.

Lord Justice Henderson:

63. I agree.

Lord Justice Kitchin:

64. I also agree.

Appendix - legislation

"106A.— Modification and discharge of planning obligations.

(1) A planning obligation may not be modified or discharged except—

(a) by agreement between the appropriate authority (see subsection (11)) and the person or persons against whom the obligation is enforceable; or

(b) in accordance with —
(i) this section and section 106B, or
(ii) sections 106BA and 106BC.

(2) An agreement falling within subsection (1)(a) shall not be entered into except by an instrument executed as a deed.

(3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the appropriate authority for the obligation—

(a) to have effect subject to such modifications as may be specified in the application; or

(b) to be discharged.

(4) In subsection (3) "the relevant period" means —

(a) such period as may be prescribed; or

(b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.

(5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against whom the obligation is enforceable.

(6) Where an application is made to an authority under subsection (3), the authority may determine—

(a) that the planning obligation shall continue to have effect without modification;

(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

(7) The authority shall give notice of their determination to the applicant within such period as may be prescribed.

(8) Where an authority determine under this section that a planning obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be

enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.

(9) Regulations may make provision with respect to—

(a) the form and content of applications under subsection (3);

(b) the publication of notices of such applications;

(c) the procedures for considering any representations made with respect to such applications; and

(d) the notices to be given to applicants of determinations under subsection (6).

(10) Section 84 of the Law of Property Act 1925 (power to discharge or modify restrictive covenants affecting land) does not apply to a planning obligation.

(11) In this section "the appropriate authority" means–

(a) the Mayor of London, in the case of any planning obligation enforceable by him;

(aa) the Secretary of State, in the case of any development consent obligation;

(b) in the case of any other planning obligation, the local planning authority by whom it is enforceable.

(12) The Mayor of London must consult the local planning authority before exercising any function under this section."

"106B.— Appeals in relation to applications under section 106A.

(1) Where an authority (other than the Secretary of State) —

(a) fail to give notice as mentioned in section 106A(7); or

(b) determine under section 106A that a planning obligation shall continue to have effect without modification,

the applicant may appeal to the Secretary of State.

(2) For the purposes of an appeal under subsection (1)(a), it shall be assumed that the authority have determined that the planning obligation shall continue to have effect without modification.

(3) An appeal under this section shall be made by notice served within such period and in such manner as may be prescribed.

(4) Subsections (6) to (9) of section 106A apply in relation to appeals to the Secretary of State under this section as they apply in relation to applications to authorities under that section.

(5) Before determining the appeal the Secretary of State shall, if either the applicant or the authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.

(6) The determination of an appeal by the Secretary of State under this section shall be final.

(7) Schedule 6 applies to appeals under this section.

(8) In the application of Schedule 6 to an appeal under this section in a case where the authority mentioned in subsection (1) is the Mayor of London, references in that Schedule to the local planning authority are references to the Mayor of London."

"106BA Modification or discharge of affordable housing requirements

(1) This section applies in relation to an English planning obligation that contains an affordable housing requirement.

(2) A person against whom the affordable housing requirement is enforceable may apply to the appropriate authority—

(a) for the requirement to have effect subject to modifications,

(b) for the requirement to be replaced with a different affordable housing requirement,

(c) for the requirement to be removed from the planning obligation, or

(d) in a case where the planning obligation consists solely of one or more affordable housing requirements, for the planning obligation to be discharged.

(3) Where an application is made to an authority under subsection (2) and is the first such application in relation to the planning obligation—

(a) if the affordable housing requirement means that the development is not economically viable, the authority must deal with the application in accordance with subsection (5) so that the development becomes economically viable, or

(b) if paragraph (a) does not apply, the authority must determine that the affordable housing requirement is to continue to have effect without modification or replacement.

(4) Where an application is made to an authority under subsection (2) and is the second or a subsequent such application in relation to the planning obligation, the authority may—

(a) deal with the application in accordance with subsection (5), or

(b) determine that the affordable housing requirement is to continue to have effect without modification or replacement.

(5) The authority may—

(a) determine that the requirement is to have effect subject to modifications,

(b) determine that the requirement is to be replaced with a different affordable housing requirement,

(c) determine that the planning obligation is to be modified to remove the requirement, or

(d) where the planning obligation consists solely of one or more affordable housing requirements, determine that the planning obligation is to be discharged.

(6) A determination under subsection (5)(a), (b) or (c)—

(a) may provide for the planning obligation to be modified in accordance with the application or in some other way,

(b) may not have the effect that the obligation as modified is more onerous in its application to the applicant than in its unmodified form, and

(c) may not have the effect that an obligation is imposed on a person other than the applicant or that the obligation as modified is more onerous in its application to such a person than in its unmodified form.

(7) Subsection (6)(b) does not apply to a determination in response to the second or a subsequent application under this section in relation to the planning obligation; but such a determination may not have the effect that the development becomes economically unviable.

(8) In making a determination under this section the authority must have regard to—

(a) guidance issued by the Secretary of State…

…

(10) Where an authority determine under this section that a planning obligation is to have effect subject to modifications, the obligation as modified is to be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.

…
(13) In this section and section 106BC—

"affordable housing requirement" means a requirement relating to the provision of housing that is or is to be made available for people whose needs are not adequately served by the commercial housing market (and it is immaterial for this purpose where or by whom the housing is or is to be provided);

"the appropriate authority" has the same meaning as in section 106A;

"the development", in relation to a planning obligation, means the development authorised by the planning permission to which the obligation relates;

"English planning obligation" means a planning obligation that—

(a) identifies a local planning authority in England as an authority by whom the obligation is enforceable, and
(b) does not identify a local planning authority in Wales as such an authority.
…"

"106BC Appeals in relation to applications under section 106BA

(1) Where an authority other than the Secretary of State—

(a) fail to give notice as mentioned in section 106BA(9),

(b) determine under section 106BA that a planning obligation is to continue to have effect without modification, or

(c) determine under that section that a planning obligation is to be modified otherwise than in accordance with an application under that section,

the applicant may appeal to the Secretary of State.

…

(6) Subsections (3) to (8) , (10) and (11) of section 106BA apply in relation to an appeal under this section as they apply in relation to an application to an authority under that section, subject to subsections (7) to (15) below.

(7) References to the affordable housing requirement or the planning obligation are to the requirement or obligation as it stood immediately before the application under section 106BA to which the appeal relates.

(8) References to the first, the second or a subsequent application in relation to a planning obligation are to an appeal under this section against a determination on the first, the second or a subsequent application in relation to the obligation (whether or not it is the first such appeal).

(9) Section 106BA(5)(d) (discharge of affordable housing requirement) does not apply in relation to an appeal under this section.

(10) Subsection (11) applies if, on an appeal under this section, the Secretary of State—

(a) does not uphold the determination under section 106BA to which the appeal relates (if such a determination has been made), and

(b) determines that the planning obligation is to be modified in accordance with section 106BA(5)(a), (b) or (c).

(11) The Secretary of State must also determine that the planning obligation is to be modified so that it provides that, if the development has not been completed before the end of the relevant period, the obligation is treated as containing the affordable housing requirement or requirements it contained immediately before the first application under section 106BA in relation to the obligation, subject to the modifications within subsection (12).

(12) Those modifications are—

(a) the modifications necessary to ensure that, if the development has been commenced before the end of the relevant period, the requirement or requirements apply only in relation to the part of the development that is not commenced before the end of that period, and

(b) such other modifications as the Secretary of State considers necessary or expedient to ensure the effectiveness of the requirement or requirements at the end of that period.

(13) In subsections (11) and (12) "relevant period" means the period of three years beginning with the date when the applicant is notified of the determination on the appeal.

(14) Section 106BA and this section apply in relation to a planning obligation containing a provision within subsection (11) as if—

(a) the provision were an affordable housing requirement, and

(b) a person against whom the obligation is enforceable were a person against whom that requirement is enforceable.

(15) If subsection (11) applies on an appeal relating to a planning obligation that already contains a provision within that subsection—

(a) the existing provision within subsection (11) ceases to have effect, but

(b) that subsection applies again to the obligation.

(16) The determination of an appeal by the Secretary of State under this section is to be final.
…"

1. Sections 106BA-BC TCPA 1990 were inserted into the 1990 Act by s 7(1) Growth and Infrastructure Act 2013 with effect from 25 April 2013. Section 7 GIA 2013 went on to provide:

"(3) The amendments made by this section and that Schedule apply in relation to planning obligations within the meaning of section 106 of the Town and Country Planning Act 1990 entered into before (as well as after) the coming into force of this section.

(4) Sections 106BA, 106BB and 106BC of the Town and Country Planning Act 1990, and subsection (5) of this section, are repealed at the end of 30 April 2016.

(5) The Secretary of State may by order amend subsection (4) by substituting a later date for the date for the time being specified in that subsection.

(6) The Secretary of State may by order make transitional or transitory provision or savings relating to any of the repeals made by subsection (4).”

It is to be noted that no order was made under s 7(5), and no transitional or transitory provisions or savings were made under s 7(6).