Case No: C1/2011/0225

Neutral Citation Number: [2011] EWCA Civ 1062
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(HIS HONOUR JUDGE PEARL)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 6th July 2011

Before:

LORD JUSTICE PILL
LORD JUSTICE RIMER
and
LORD JUSTICE MUNBY

- -

Between:

The Queen on the Application of Millgate Development Limited — **Appellant**

- and -

Wokingham Borough Council — **Respondent**

- -

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Mr John Pugh-Smith (instructed by Pitmans LLP) appeared on behalf of the **Appellant**.

Mr Guy Williams (instructed by Wokingham Borough Council) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Pill:

1. This is an appeal against a decision of HHJ David Pearl QC sitting as a deputy High Court judge on 14 January 2011 whereby he dismissed an application by Millgate Developments Limited ("the appellants") to quash a decision of Wokingham Borough Council ("the respondents"). The respondents had by letter dated 23 April 2008 refused to discharge an undertaking given by the appellants on 22 March 2007 under section 106(1) of the Town and Country Planning Act 1990 ("the 1990 Act"). On 10 October 2006 the appellants had applied to the respondents for planning permission to build 14 dwellings on land at Colemans Moor Lane, Woodley, Berkshire. The respondents' officers reported that the development was not appropriate to the character of the surrounding area. They also set out costs under the headings "highways", "leisure", "primary education", "secondary education" and "libraries" that the proposed development would attract, in line with the local plan, by way of contributions.

2. On 22 December 2006 the respondents refused permission. one of the reasons for refusal provided:

> "...the proposal fails to make satisfactory provision of adequate services, amenities and infrastructure needs and consequently would have an unacceptable adverse impact upon the amenities of the area. As such the proposal is contrary to policies DP4 and T4 of the Berkshire Structure Plan and Policies WOS4 WR7 WT1 WT3 and WET7 of the 'Wokingham District Local plan"

3. Under the heading "Information" in the same document the respondents stated that the refusal "could be overcome through the submission of an acceptable Unilateral Undertaking". The appellants appealed against the refusal of permission and the appeal was considered on the basis of written submissions by an Inspector appointed by the Secretary of State for Communities and Local Government ("the Secretary of State").

4. On 22 March 2007 the appellants submitted what they described as, and was, a section 106 unilateral undertaking in support of the appeal. Section 106 of the 1990 Act provides, insofar as is material.

> "1 Any person interested in land in the area of the local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and in sections 106A and 106B as a 'planning obligation') enforceable to the extent mentioned in the subsection (3)
> ....

(d) requiring a sum or sums to be paid to the authority...on a specified date or dates or periodically.

2. A planning obligation may a) be unconditional or subject to conditions;
...
c) if it requires the sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligations entered into and, if it requires the payment of periodical sums , require them to be paid indefinitely or for a specified period.

3. Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with sub section 9(d) –
(a) against the person entering into the obligation; and

(b) against any person deriving title from that person.
...
9. A planning obligation may not be entered into except by instrument executed as a deed which –
a) states that the obligation is a planning obligation for the purposes of this section;
b) identifies the land to which the person entering into the obligation is interested;
c) identifies the person entering into the obligation and states what his interest in the land is; and
d) identifies the local planning authority by whom the obligation is enforceable...
...
11. A planning obligation shall be a local land charge for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge."

5. Section 106A provides, insofar as is material:

"(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 this section and section 106B.

(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.

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."

6. The provisions of section 106A, as now enacted, were inserted into the 1990 Act by the Planning and Compensation Act 1991. The present appeal turns on the section 106A(1) procedure but I have cited 106A(3) because it may be relevant to the Act's construction that a different procedure is provided once the relevant period defined under the section has expired. Section 106B provides for an appeal to the Secretary of State against a decision of the local planning authority under Section 106A.

7. Clause 2.3 of the undertaking provided:

"The obligations contained in and created by this Undertaking shall not take effect unless and until the Planning Permission shall have been granted and Commencement of Development shall have taken place."

8. The leisure and library contributions stated in the undertaking were to be paid "provided that the council shall apply them towards leisure and library facilities within the Borough." Schools contributions were to be paid provided the respondents shall apply them towards the provision of school facilities "...where reasonably required by the Council in the light of the likely or actual impact upon such facilities in the Borough arising from the Development." The highways contribution was to be made provided it would be applied towards road safety measures and sustainable transport schemes reasonably required by reason of the impact of the development.

9. The contributions were by their terms to be paid "on or before the Commencement of the Development". They were not so paid and the development has been completed. Presumably no attempt to enforce was made at that stage because the provisos, to which I have referred in the undertakings, had not been met. Whatever the reason, the sum mentioned was not and has not subsequently been paid. The payments to be made under each of the specified headings were itemised. The total was in the region of £170,000. No evidence of how the sums were calculated, or as to what were they would be applied, was submitted for the consideration of the Inspector who heard the appeal.

10. A second undertaking was provided in April 2007 excluding the highways contribution but is not material for present purposes.

11. In an appeal decision dated 9 May 2007 the Inspector stated, when summarising his decision:

> "The appeal is allowed and planning permission granted subject to conditions set out in the formal decision. None of the conditions relate to the section 106 undertaking."

12. At paragraph 13 the Inspector stated:

> "The Council's request for contributions towards highways, leisure education and libraries are addressed by the Appellant through the submission of unilateral undertakings. However the Council produced nothing to show that those conditions are necessary in order to satisfy the test in Structure Plan Policy DP4, Local Plan Policy WOS4 or Circular 5/05, Planning Obligations. I therefore conclude that contributions to the provision of infrastructure are unnecessary and afford the unilateral undertakings little weight. "

13. Structure Plan Policy DP4, mentioned by the Inspector at paragraph 3 of his determination, provides:

> "Contributions may be sought from developers to provide additional infrastructure or services where they are needed to enable the development to take place and are directly and reasonably related in scale to the proposed development."

14. That policy reflects annex B to circular 05/2005, to which reference has been made in the course of the hearing :

> "B5 The Secretary of State's policy requires, amongst other factors, that planning obligations are only sought where they meet *all* of the following tests. The rest of the guidance in this Circular should be read in the context of these tests, which must be met by all local planning authorities in seeking planning obligations.
>
> A planning obligation must be:
> (i) relevant to planning;
> (ii) necessary to make the proposed development acceptable in planning terms;
> (iii) directly related to the proposed development;
> (iv) fairly and reasonably related in scale and kind to the proposed development; and
> (v) reasonable in all other respects.
> **B6.** The use of planning obligations must be governed by the fundamental principle that **planning permission may not be bought or sold**. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms (see B5(ii)).
> **B7.** Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a "betterment levy".
> THE SECRETARY OF STATE'S POLICY TESTS
> **B8.** As summarised above, it will in general be reasonable to seek, or take account of, a planning obligation if what is sought or offered is **necessary** from a **planning** point of view, i.e. in order to bring a development in line with the objectives of sustainable development as articulated through the relevant local, regional or national planning policies."

15. Having considered paragraph 13 of the determination, the appellant sought a correction of the order under section 56(2) of the Planning and

Compulsory Purchase Act ("the 2004 Act"). They sought to add to paragraph 13 the sentence :

> "This would therefore make it clear that no contributions are required."

16. The Inspectorate declined to issue a correction notice stating that paragraph 13 simply acknowledged the existence of unilateral undertakings. The writer stated that he could not share the appellants' view "that it detracts from the Inspector's conclusion on their necessity."

17. The respondents declined to remove the undertakings from the register of local land charges and by email of 14 January 2008 required the appellants within one month to meet the terms of the agreement dated 22 March 2007. Once the undertaking had become binding, its enforcement is determined by the provisions of the undertaking itself, it is submitted, not by the degree of nexus with the proposed development. That claim has not been followed by private law proceedings.

18. The present proceedings were commenced by the appellants on 29 May 2008. On 17 June 2008 the respondents served a witness statement including a detailed justification of each of the financial contributions claimed. The sum claimed by way of contribution was then and is at the latest calculation the sum of £140,000. The reasonableness of the figure was challenged by the appellants. They appear to accept that some payment within that amount was required.
19. The principles as to the legality of Section 106 undertakings were stated in Tesco Stores Limited v The Secretary of State [1995] 1 WLR 759. There was no question in this case of auctioning a planning permission: Lord Hoffmann at page 782. Lord Hoffmann stated at page 779:

> "Of course it is normal for a planning obligation to be undertaken or offered in connection with an application for planning permission and to be expressed as conditional upon the grant of that permission. But once the condition has been satisfied, the planning obligation becomes binding and cannot be challenged by the developer or his successor in title on the ground that it lacked a sufficient nexus with the proposed development."

20. At page 783C Lord Hoffmann stated:

> "Planning authorities have a discretion when applying a policy of attempting to obtain the maximum legitimate public benefit by means of a section 106 agreement."

It was not a choice, he stated, which should be imposed on them by the courts.

21. For the appellants Mr Pugh-Smith seeks a declaration that the respondents' decision requiring the appellants to comply with their undertaking was unlawful. He accepts the undertaking was lawful when given and complied with the test for such undertakings expressed in the authorities and circular 05/2005. What was unlawful, he submits, was a decision to enforce it in a sum now approaching £200,000, with the index linking provided in the undertaking, when the respondents knew that the entire sum was not required for the planning purposes stated. As I have said, the sum now claimed is £140,000, a concession having been made that the total contemplated earlier was no longer required for planning purposes.

22. I would analyse the situation as follows:

a) a reason for refusal of permission by the respondents was the absence of provision in the application for infrastructure needs. That was a legitimate reason for refusal. The appellants were invited to give a section 106 undertaking.
b) It was a predictable, lawful, and reasonable response by the appellants to offer such an undertaking and to do so by way of a financial contribution to highways, leisure and libraries facilities, and educational facilities.
c) The appellants gave an unconditional section 106 undertaking.
d) if planning permission was granted on the evidence before him the Inspector stated that there was nothing to show that the contributions were necessary on planning grounds. The undertaking was given little weight by the Inspector in granting permission. It appears very likely that the Inspector would have granted planning permission even in the absence of a section 106 undertaking.
e) On its own terms the undertaking became enforceable. Enforceability as a contractual obligation is a part of the rationale for the section 106 procedure.
f) The Inspector's approach does not cast doubt upon the lawfulness of the undertaking. Planning permission without giving weight to the undertaking does not mean that the undertaking was not given for a legitimate planning purpose. The Inspector was not overruling the local planning authority's view as expressed in the reasons for refusal. I will return to that issue.
g) The appellants did not, as they could have done when they were refused permission by the respondents, question the need for the facilities or the likely cost of the facilities provided.
h) I understand the dismay of the appellants when it emerged that they could have got planning permission without the undertaking they had given in a substantial sum of money.
i) in the circumstances the respondents were entitled to attempt to enforce the undertaking. That did not require analysis by them at the enforcement stage. Subject to the relevance of the development plan they were not making a planning decision but a decision to enforce a contractual undertaking. The relevance of that plan is the main point of issue in the case and I will return to it.
j) the enforceability of the undertaking cannot now be challenged on the basis that, when made, it lacked a sufficient nexus with the proposed development (Lord Hoffmann in Tesco).

23. Mr Pugh-Smith relies, in support of his argument based on the development plan, on section 38(6) of the Planning and Compulsory Purchase Act 2004:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

24. Counsel submits that the refusal of the respondents to discharge the undertaking was a determination under the Planning Act within the meaning of section 38(6). It was a decision taken under section 106A(1)(a) of the 1990 Act. Accordingly the decision must be made, by virtue of section 38(6), in accordance with the development plan unless material considerations indicate otherwise. Under Structure Plan Policy DP4, it is submitted, the contribution stated in the undertaking were no longer needed to enable the development to take place and, that being so, it was unlawful to refuse the application to discharge under section 106A(1), because the Inspector had stated in paragraph 13 of his determination that the undertaking was unnecessary.

25. Mr Pugh-Smith referred to the decision of Sullivan J in The Queen (Bachelor Enterprises Limited) v North Dorset District Council [2003] EWHC 3006 (Admin). He relies on it to establish that the decision not to discharge was a decision under section 106A(1)(a) of the 1990 Act. In that case the decision of a council not to modify a section 106 agreement was quashed. There had been no need for the developer to take the section 38(6) point in that case because the decision was quashed on other grounds. Mr Pugh-Smith submits that, now for the first time, it comes up for consideration. He relies, however, on the quashing of the decision in Batchelor Enterprises.

26. In Batchelor Enterprises the developer had entered into a section 106 agreement providing that part of the appeal site be maintained as a grassed open area. On appeal to the Secretary of State, a planning permission involving encroachment onto the area specified in the section 106 agreement was granted. Sullivan J held that in those circumstances the local planning authority could not lawfully conclude that the agreement should be maintained. The Inspector, and thus the Secretary of State, had squarely addressed the question whether the grassed open area still served any useful planning purpose. The Secretary of State had concluded that it was not necessary on amenity grounds to keep the whole of the area grassed and open. The council's view of the amenity had been rejected by the Secretary of State, acting as planning authority. The council failed to have regard to the implications of the Secretary of State's decision granting a planning permission which was based on a finding that it was not necessary to keep the area grassed and open. The undertaking had ceased to be relevant to the planning permission granted.

27. That is very different from the present situation in which there is no determination of the Secretary of State which deprives the undertaking of a planning purpose. The Inspector, for the Secretary of State, was prepared to grant the planning permission without giving weight to the undertaking and

found he could do so without giving any such weight. It does not in my view follow that the undertaking did not have and did not continue to have a legitimate planning purpose. Its validity, when made, is not challenged on the grounds stated in Tesco and in the circular. It does not cease to be valid because of the respondents' concession that they would not seek to enforce the entire sum due. The Secretary of State in this case was not overruling the local planning authority's view expressed in reasons for refusal to which the appellants responded

28. For the respondents Mr Williams relies on the test stated by Sullivan J in Batchelor at paragraph 29:

> "It is accepted that the question to be considered by the local planning authority in each case is the same: does the obligation still serve a useful planning purpose? Since the court in judicial review proceedings may not substitute its own answer to that question to that of the local planning authority, the question in relation to an application for judicial review in respect of a local authority decision under section 106A(1)(a) is whether a reasonable local planning authority could have concluded that the obligation still served a useful planning purpose. "

29. Mr Williams submits that the question can only be answered in the affirmative on the facts of this case. As to the argument based on section 38(6) of the 2004 Act, Mr Williams submits that the decision not to discharge under section 101A(1)(a) did not attract the provisions of section 38(6) even though the decision was made under the 1990 Act. It was a decision to enforce the undertaking and not a decision to grant planning permission. Sections in the 1990 Act which require regard to be had to the development plan do so explicitly. Mr Williams referred to sections 70(2), 77(4), 79(4), 91(2), 92(6), 97(2), 102(1), 172(1) and 172(2). Section 38(6) does not bite upon the decision and there is no need to revisit development plan policies, he submits. Even if the section does bite, it is submitted, an undertaking in accordance with the development plan when made does not cease to be in accordance with it by reason of a concession that the full amount undertaken to be paid is no longer appropriate. I agree with that submission.

30. Another factor to be considered in my judgment is whether a remedy by way of judicial review is appropriate in a case such as this. The undertaking was lawful when given. It would be enforced by a private law action contract. If and when a sum is claimed by the respondents in an action based on the undertaking, it will be open to the appellants to question whether the sum claimed under each head comes within the terms of the undertaking. Reference to those terms has been made and I need not expand on them. They reveal an area of argument that would be available to the appellants. Concessions have been made by the respondents. The points which in substance the appellants claim to make by way of judicial review can be employed as a defence to a private law claim. In this context a private law

shield rather than a private law action is available but an alternative remedy is available.

31. I do not consider that the Inspector's use of the word "unnecessary" in paragraph 13 of his determination assists the appellants. The Inspector was stating that he would grant planning permission without weight being given to the undertaking. He had not been assisted by any detailed statement by the respondents in relation to contributions. However, the undertaking remained a valid undertaking in Tesco and Circular 5/2005 terms as a valid contribution for planning purposes. The Inspector did not state that the contribution he mentioned fell outside those purposes. Had he taken that view, I would have expected him to say so expressly.

32. In my judgment there is no unlawfulness in the respondents stating that they will seek to enforce the undertaking only up to a certain amount. A reduction in their claim does not involve a finding that the remaining sum subject to the undertaking is there other than for appropriate planning purposes. I would refuse the application for a declaration. The decision to discharge was not unlawful. Reduction in the sum to be claimed does not involve an obligation to quash the undertaking.

33. I would reach the same conclusion had the application been to modify rather than discharge. The undertaking remains valid even if the precise sum of money offered cannot now be claimed and a partial defence may be available in a private action to enforce the undertaking. A relevant planning purpose is served and is not defeated by concessions or detailed arguments about quantum. There is no principle that a concession that a part of the sum is no longer required for specific planning purposes requires the discharge of the undertaking.

34. It is not necessary to consider other issues which have been raised during the hearing, including the possible impact of section 106A(3) to (6) on the construction of section 106(A)(1), nor is it necessary to consider broader issues as to the position on occurrence of a change in planning purpose or in the nexus between the new purpose and the original purpose. Those issues were considered by Richards J in The Queen (The Garden and Leisure Group Limited) v North Somerset District Council [2003] EWHC 1605 (Admin), paragraphs 28 to 29 and 46, and Ouseley J in Renaissance Habitat Limited v West Berkshire District Council [2007] EWHC 242 (Admin). I state only that I find nothing in those judgments contrary to the conclusion I have reached.

35. As a second ground for appeal, it is submitted that the respondents have no power to repay to the appellants sums paid under a section 106 agreement. It is a hypothetical point because no sums have been paid. I see no merit in this point. Councils have powers to conduct contractual negotiations. The undertaking is enforceable by way of private law principles. In any event, without full argument, it appears to me that a repayment would be incidental in circumstances such as these to the planning powers of the council (section 111, Local Government Act 1972).

36. For those reasons, and in agreement with the judge, I would dismiss this appeal.

Lord Justice Rimer:

37. I agree.

Lord Justice Munby:

38. I also agree.

Order: Appeal dismissed