IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM
THE CENTRAL LONDON COUNTY COURT HHJ Johns QC
[2022] EWHC 2025

No. CH-2021-000235

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 6 July 2022

Before:

MR JUSTICE MEADE

B E T W E E N :

AHGR LIMITED — Appellant/Claimant

- and -

(1) LUKE KANE-LAVERACK
(2) PETER KANE-LAVERACK — Respondents/Defendants

MR N. DUCKWORTH (instructed by Colman Coyle Solicitors) appeared on behalf of the Appellant/Claimant.

MS M. STACEY QC and MR N. GRANT (instructed by Payne Hicks Beach LLP) appeared on behalf of the Respondents/Defendants.

A P P R O V E D J U D G M E N T

MR JUSTICE MEADE:

1 This is my Judgment on an appeal from the decision of His Honour Judge Johns QC, sitting at Central London County Court. His Judgment (the 'Judgment') is dated 29 September 2021. Permission to appeal was given by Trower J on 16 December 2021. I respectfully agree with Trower J that this was an appropriate matter for an appeal, turning as it does on an almost pure question of interpretation of two documents. Mr Nathaniel Duckworth appeared for the claimant before me, and Ms Myriam Stacey QC and Mr Nick Grant for the defendants. I am grateful to all Counsel for the concise oral and more detailed written submissions.

2 An outline of the case can be found in paras.1 and 2 of the Judgment, which I incorporate by reference, and further details of the factual history at paras. 3 to 9. The Judge made factual findings at paras.10 to 13. No challenge to them is made on this appeal, although Ms Stacey says that in one scenario, depending on my conclusions on the issues, if I were to find that the judge had erred in his approach, then he did not address himself to the right test and I should remit the matter. That is not, however, at the forefront of her submissions because her main argument is that the Judge was right.

3 At para.14 the Judge identified the key clause in the lease, clause 2.4, noting however that the planning permission is crucial to the interpretation of the lease and of that clause. The central importance of the planning permission is common ground between the parties.

4 At para.14 the judge cited authority, in particular *UBB Waste (Essex) Limited v Essex County Council* [2019] EWHC 1924, and *Trump International Golf Club v The Scottish Ministers* [2015] UKSC 74. Ms Stacey referred me in the course of argument to other authorities and other paragraphs of the *Trump* decisions for reasons I will come to later in this judgment.

5 At para.17, the Judge turned to the planning permission and set out the terms in which permission was given, and that concludes with the critical phrase "live / work unit". Para. 18 identifies the key drawing, Drawing 404A, and records a comment by the Planning Officer in terms which the judge quoted and which I incorporate by reference. Para. 19 relates to the shading on Drawing 404A, and contrasts that with an earlier document, the difference being whether or not there was separate demarcation of living space and work space.

6 Then at para.20, the Judge referred to a document of 9 February 1999 from the London Borough of Southwark, a guidance document, referred to before me as "the SPG", which is the expression that the Judge, for example, used at para.33. The Judge quoted extensively from the SPG at paras.21, 22, 23 and 24. At para.25, the judge recorded Mr Duckworth's submission that the SPG was admissible extrinsic material for the purposes of interpreting the planning permission.

7 The Judge stated his conclusion rejecting the claimant's case and went on to give his reasons. The structure of his reasoning is significant, given the nature of the appeal. At para.27 he recorded that both sides proceeded rightly on the basis that "live / work" without more was capable of meaning "live and / or work", and therefore not requiring both uses - i.e. he accepted that the planning permission was properly open to interpretation and was not unambiguous on its face. That much was common ground, and I record that it was also common ground that "live / work" as a kind of permission was *sui generis* and to be interpreted accordingly.

8 The judge then gave his principal reason for his rejection of the claimant's case, which was based on the nature of the premises as shown on the plan. He said that they were not shown simply as a "live / work" unit in the sense of a unit designed with residential accommodation in one part and a space suiting a range of B1 uses in another part, but as a conventional flat, and he referred back to the Planning Officer having said something to that effect in the note. In my view, at this stage of the Judgment at least the reliance on the Planning Officer's comment was minor, just a cross-reference.

9 At para.28 the Judge recorded that there was also use of an oblique or slash on other plans referenced in the planning permission for other units in Bickels Yard, and I will return to that when I deal with the criticisms of the Judge's reasoning. At para.29, the Judge identified that there were potential criminal sanctions for breach of planning permission and he said that that pointed to adopting a narrower construction where that was available. At para.30 he said that the defendants' construction would serve a planning purpose allowing work beyond C3 residential permission, even if not requiring it. At para.31 he reiterated the distinction between Unit 8 and other "live / work" units with demarcated zones.

10 So at this stage of his Judgment the Judge had interpreted the planning permission in accordance with the defendants' case, and he turned to consider the SPG separately. He rejected it as an aid to interpretation because, he said, it was not incorporated in the planning permission (see para.34).

11 In para.35, which I interpret as being a separate point from that in para.34, he considered the contents of the SPG and said that in his view it had no influence on the planning permission. Indeed, he said that the absence of its influence on the planning permission was striking.

12 At para.36 he looked at whether the lease itself affected his conclusions, and at para.36(ii) he said that by the time of the lease, on the evidence before him, the physical state of the unit pointed to suitability for residential use only, and that one factor in construing a lease was the physical state of the premises. Further, he said that it was at least possible, as a matter of planning law, to have regard to how planning permission was actually implemented, citing *Wood v SSHCLG* [2015] EWHC 2368 in support of that. At para.36(iii), he pointed to the user covenant restraining the use of any part of the premises other than for "live / work", and he said that that fitted more easily with the interpretation that he had arrived at in connection with the planning permission. These points, it will be apparent, are not essential to his conclusion, bearing in mind what he had said about the planning permission, but they did go further to reinforce it.

13 At para.37 he went on to deal with a point that had been made about what the meaning of "work" would be if he had been wrong about both living and working being required by the planning permission, and he rejected a submission by the claimant that "work" required running a business. As I say, this was a contingent finding because on his main finding both were not required by the planning permission of the lease. It did not arise in the event.

14 At para.38 he said that clause 3.5 of the lease made no difference separately from clause 2.4, and that was very much the course of the argument before me.

15 He then went on to deal with some matters not raised on this appeal, and at para.57 he dealt with the issue of contractual costs. Later, not included within the Judgment but following further argument, he made an order preventing the defendants from recovering their costs from the service charge. The contractual costs issue and the s.20C issue about recovery of costs from the service charge were held over from the main hearing on this appeal because,

on the day of the hearing of the appeal, time ran out when we had reached the conclusion of the argument on the main points about interpretation of the planning permission and of the lease.

16 After that somewhat lengthy summary, I identify the basic question for me as being whether the judge was right in his interpretation of the planning permission and, subsidiary to that, whether he was right on the points about the lease itself, which he covered at para.36.

17 The defendants, through the submissions of Ms Stacey, also raise various points not relied on in the Judgment. There was, I observed, no respondent's notice. The first one was to point out that the Oxford Style Guide says that the most common of an oblique in the English language is to denote alternatives. Although I do not think this point requires a respondent's notice, and is the sort of point typically taken in argument about the interpretation of documents, I do not find it of assistance one way or another. The Oxford Style Guide is talking about use of the oblique across the whole scope of the English language without reference to context at all, and in my view mere statistical prevalence of use of this kind cannot be of material help in interpreting a document.

18 Secondly, reliance was placed on the way in which other London boroughs have dealt with "live / work" or indeed "work / live" in terms of planning. These documents post-dated the planning permission as well as being about other boroughs and other contexts and I did not find them of assistance.

19 Third, a point was made about condition 4 in the planning permission. This was a complex issue, which at least partly depended, so far as I could tell, on the facts, and I would not have permitted this to be run without a respondent's notice. I therefore take no account of it.

20 Fourth, there was a somewhat subtle point that to construe "live / work" narrowly so as to require work as well as living would be to introduce an implied restriction on the planning permission, and that any restriction had to be by way of condition, not part of the description of the operative part of the permission itself. This submission was based on a number of cases, including *Manchester City Council v SSHCLG* [2021] EWHC 858 (Admin). I accept the existence of this principle of law as it applies to implying restrictions, but I reject the extension argued for by Ms Stacey, attractively though it was put. I am not undertaking an exercise in implying a term, but in construing an ambiguous phrase. Were the argument correct, it seems to me it would require the court always to choose the narrower meaning of the operative part of a planning permission, and the cases cited to me by Ms Stacey do not support that proposition.

21 So, having trimmed away the defendants' additional points for the reasons I have just given, I return to assessing the correctness of the Judgment on the grounds relied on by the judge. Mr Duckworth organised his attack on the judge's reasoning and conclusion under 11 headings. These seem to me to overlap, and although I will take them sequentially some of them very much go together, given the way the argument before me unfolded.

22 The first was that the judge's construction proceeded on the erroneous assumption that the term "live / work unit" in Southwark's grant of planning permissions had no intrinsic meaning at all. The judge did not say, in my view, that there was no intrinsic meaning. He said "and / or" had the broader and more permissive sense. On the authorities that I have identified, the meaning may be contextual, including in the context of the whole of the planning permission with its drawings. These contextual matters may differ from one planning permission to another, which means that "live / work" may indeed have a different

meaning from one permission to another, even within a single borough, but that to my mind does not make good the force of Mr Duckworth's submission.

23 I will say at this stage that, in my view, the SPG illustrates how broad and protean the general concept of "live / work" may be. I emphasise that I am not purporting to use the SPG here to construe the planning permission. That comes at a later stage in the argument. I am just using it to illustrate the fact that "live / work" is not the sort of term that one would expect to have a fixed and immutable meaning, whatever the context.

24 The second and third criticisms raised by Mr Duckworth are said to turn on the Judge's construction of the planning permission being heavily influenced by his erroneous assumption that "live / work" could only ever mean "live and work" if the planning plans showed separately designated work space and living space. In para.23(1) of his written submissions Mr Duckworth pointed out that the evidential basis for this starting point cannot have been the SPG because the Judge later held that that was extraneous to the planning permission. I agree with this, but I do not think the Judge made that error. His observation in what was certainly a critical part of his reasoning was, rather, that Unit 8 was to all intents and purposes and appearances just an ordinary flat on the plans which are incorporated in the planning permission. He also submitted that the Judge was unduly influenced by other planning permissions, such as one in Archie Street, but the Judge did not conclude that those were particularly important, and I think it is clear from the parts of the Judgment in question, in particular para.27, that he was taking his lead from what was undoubtedly an admissible guide to interpretation, namely the plans which went with the planning permission.

25 I also take the view that the Judge did not conclude that showing different areas for different uses physically marked on the plans was the only way to denote live and work, but he did find that its absence - i.e. the absence of separate demarcation - was significant.

26 The fourth error relied on by Mr Duckworth was to say that the Judge was wrong to conclude that the SPG should not be taken into account when construing the planning permission, given that the phrase was, as he had found, ambiguous. In my view, it is very clear on the authorities cited by the Judge that ambiguity opens the door to possible use of extrinsic material, but it does not mandate them. I agree with the Judge that, not being referred to in the planning permission, the court should in general set its face against referring to documents such as the SPG.

27 Fifth, it is submitted that the Judge misunderstood the SPG in any event. Obviously, this only arises if the Judge was wrong in rejecting its relevance in the first place, and I have held that he was right to reject it. I would observe that having read the SPG, having been taken through it by counsel and having looked at the quotes from it in the Judgment, it covers a very wide range of circumstances ranging from a single disabled person at home working at their job so as to save the burden of commuting, to a large premises with a physical set-up specifically adapted in part only for work and / or with designated work areas on their plans. To my mind, that makes it entirely rational for the London Borough of Southwark to have intended a permissive, broad scope to that which was allowed under the headline rubric of "live / work" with the intention of mandating work where appropriate by imposing conditions, including physical conditions of the premises, or by demarcating work-only areas on the plans. This is not the way the Judge approached construction as such, because of course he rejected reliance on the SPG, as I have said already, with which I agree, but I do find it comforting that the overall position makes sense in a general way, as I have indicated.

28 The sixth attack on this part of the Judgment is that the Judge was wrong to rely on events after the grant of the planning permission. In my view, he did not do that. What went into his reasoning was that the plans with the planning permission showed the premises just as being a residential flat. There was a somewhat complicated question about the location of the kitchen in the flat and whether it changed over time, but in my view what went into the reasoning was that the flat was just a flat.

29 Seventh, it is said that the Judge was wrong to conclude that the layout of the unit as shown on the plans was such that the unit could only have been intended for a use as a residential flat. This is related, as I see it, to the way the judge expressed himself in para.36(ii) when dealing with the interpretation of the lease. In the first sentence of that sub-paragraph he said:

> "By the time of the lease on the evidence before me, the physical state of Unit 8 pointed to suitability for residential only use."

In my view, what the Judge was saying was that the physical state of Unit 8 was such that it was suitable to be used as a residence alone - i.e. purely for a residence and not for a business. That is different from saying that it was only suitable for residential use. It may be slightly pedantic, but to my mind there is a difference between saying that the physical state pointed to "suitability only for residential use", which the Judge did not say, and "suitability for residential only use", which he did.

30 The eighth criticism was that the Judge was wrong to regard a live and work interpretation of the planning permission as being too uncertain to have been intended, as he did at paras.35 and 36. In my view, Mr Duckworth is right to say that there is a significant degree of uncertainty surrounding both sides' constructions, by which I mean not that they are conceptually uncertain but that applying them to the facts in a given situation could lead to uncertainty. The critical difference it seems to me is that the claimant's construction would require the defendants to do something of uncertain scope at the risk of serious sanctions, whereas the defendants' construction merely permits it.

31 The tenth criticism is that the Judge was wrong in his treatment of the oblique strokes in Shop & Warehouses / B1 / B8, and B8 / A1 on the associated shading key on Plan 403B, as he did at para.28 of the Judgment. I agree that there is some force to this criticism because the judge did not expressly identify and deal with the fact that in the designation "Shop & Warehouse / B1 / B8", the ampersand, at least superficially, looks like it is a straight "and" and that does not fit entirely with the Judge's analysis of the oblique used later in the same expression. So I would agree that there is a literal tension which the Judge did not explicitly address, but in reality and taking the overall sense of the expression, I do agree with him that it seems more likely to have been intended permissively.

32 The eleventh criticism focuses on what the Judge said at para.30 about the defendants' interpretation serving a planning purpose by encouraging increased work use by allowing some work beyond C3. In my view, what the Judge was doing was conducting a cross-check. He was asking himself, for his own comfort in his conclusion, whether that which he had decided served a planning purpose. If he had asked himself that question and come to the conclusion that it did not, then he would have needed to go back and check his reasoning. He was doing no more than that, in my view. This part of his reasoning did not drive his conclusion and nor did he say that it did.

33 So, for these reasons, I reject Mr Duckworth's criticisms of the Judgment, and in substance I agree with the Judge for the reasons that he gave.

34 I will say that the importance of this issue to the parties, and perhaps in particular to the defendants, led to very extensive written submissions put in for the purposes of the appeal, but in the end it is actually quite a narrow issue based on a rather modest amount of material and I am confident in my conclusion that the Judge was right for the reasons that he gave.

35 Having reached that conclusion there is no need to go further and to rely on the extra points on the lease in para.36 of the Judgment, but I will say that I agree with them and, in a sense, I have touched on para.36(ii) anyway in dealing with Mr Duckworth's criticisms.

36 I also do not need to engage with the meaning of "work", having concluded that there was no requirement in the planning permission and therefore no requirement under clause 2.4 for the defendants to carry out any work, but I will say that I agree with the conclusion that the Judge reached at para.37. Running a business, which was the contention that the claimant made for the meaning of "work", is in my view a very different concept from "work", and there is no justification for replacing one concept with another different one in the name of interpreting words. Furthermore, at this stage of the argument, I would only have needed to consider what "work" meant if I had concluded, as I did not, that the SPG was an admissible aid to interpretation. If it had been then I would have needed to take account of the very broad matters which fall within "live / work" contemplated by the SPG, to which I have referred earlier in this judgment.

37 Finally, had I agreed with the claimant in other respects, my finding would have been that the defendants did not carry out any work before 2014, having regard to the Judge's factual findings at para.10, but that there was work carried on after that, and in my view the factual findings of the Judge are more than adequate for making that determination. My conclusion would not have turned on the question of whether the work had to be more than merely negligible. My view would have been that it was significant.

38 So, for those reasons, I dismiss the appeal on the main argument and will now hear submissions on the matters that were held over until today.

L A T E R

39 Following on from my earlier Judgment on the interpretation of the planning permission and of clauses 2.4 and 3.5 of the lease, I now have to deal with consequential matters. The first one is a claim for contractual costs under clause 2.8 of the lease. The Judge dealt with this in paras.57 and 58 of his judgment, and his reasoning fell into two parts under para.58:
(i) was that there was no breach and therefore that costs could not have been properly incurred for that reason alone. Then sub-para.(ii) was that reliance on such clauses involved showing an intention to forfeit. That, as a proposition of law, is not disputed but the Judge went on to say that it had not been shown in this case.

40 Ms Stacey submits, and I do not think this is challenged but in any case I accept it, that it would be adequate to uphold the judge's overall conclusion on contractual costs for her clients to succeed on either (i) or (ii). I will deal with (ii). This is a fact dependent issue. What the judge said was that the intention to forfeit which he had identified as having to be shown, had not been shown. He said that the written evidence of Mr Thornton, who I think it is agreed is the relevant witness, did not mention forfeiture, and nor did his oral evidence despite what the Judge said was extensive cross-examination and despite the reference to

s.168 of the 2002 Act and the Particulars of Claim, but, the Judge said, "instead it was plain the case was about money", and that was clear from para.17 of Mr Thornton's witness statement and his answers in cross-examination.

41 Mr Duckworth argues that since the Particulars of Claim identified the possibility of forfeiture that was an adequate expression by the claimant of a desire ultimately for forfeiture if it came to it; Mr Thornton not having been challenged on that in cross-examination, that was good enough. In a sense, this is what is sometimes called a *Browne v Dunn* point or a failure on the part of a party cross-examining a witness to put their case, such that the party ought not to be allowed in closing to argue that which was not put. Unusually, it is not categorically clear before me whether it was argued to the judge that this was a *Browne v Dunn* situation. Mr Duckworth's recollection is that it was, Ms Stacey's is that it was not, but I do not have the transcript to resolve that question. I cast no aspersion on either Mr Duckworth or Ms Stacey. Experience tells one that it is quite easy to misunderstand or misrecollect these things and it may not have been described in terms of *Browne v Dunn* or failure to put a case. In any event, I will assume in Mr Duckworth's favour that that was said. That being so, it seems to me that the Judge knew what the gist of the defendants' argument was - i.e. that the case was all about money. He made a factual finding, as I see it, that Mr Thornton never said anything differently - in other words, never said anything differently than that it was about money. I agree that there was no absolutely explicit question to Mr Thornton along the lines of, "You are not interested in forfeiture, are you?" but there were questions along the lines of, "This case is really about money".

42 I think it is pertinent to note that the defendants' skeleton of 8 September 2021 said that the claimant had led no evidence of an intention of the relevant kind, and whether or not that made it through to Mr Thornton I do not know, that was not expressly asked of him, but I think it was more than enough for the defendants to put the claimant on notice of their case, and, substantively speaking, I think that the Judge had more than enough basis to conclude that the case had adequately and fairly been put and that the claimant had failed to make good the factual proposition that there was an intention to forfeit.

43 I remind myself as well that this is an appeal. As I said in my main Judgment earlier this afternoon, in relation to interpretation of the lease and of the planning permission, what I have to consider are almost pure points of law. This point is a very different one. This is directed at the Judge's finding of facts, assessment of the witness and assessment of the fairness of the procedure before him. For reasons I have given I conclude that he was right, but even if there was some doubt there can be no question but that he was operating within the generous margin of error given by an appellate court to the finder of fact. So I rule in favour of the defendants on this point.

44 I suspect that the defendants are also correct about point (i) but I do not feel the need to decide it since my decision on point (ii) is conclusive of the question of whether to award contractual costs.