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| crestIN THE HIGH COURT OF JUSTICEQUEEN’S BENCH DIVISIONADMINISTRATIVE COURTPLANNING COURT**[2022] EWHC 3466 (Admin)** | No. CO/4125/2021 |

Royal Courts of Justice

Tuesday, 22 March 2022

Before:

MRS JUSTICE LIEVEN DBE

B E T W E E N :

THE QUEEN

on the application of

 HODSON DEVELOPMENTS (ASHFORD) LTD & Ors. Claimants

- and -

ASHFORD BOROUGH COUNCIL & Anor Defendants

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MR P LETMAN and MR J DARBY (instructed by North Star Law) appeared on behalf of the Claimants.

MR D KOLINSKY QC and MR M HENDERSON (instructed by Invicta Law Ltd) appeared on behalf of the Defendants.

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**JUDGMENT**

MRS JUSTICE LIEVEN:

1. This is a renewed application for permission to proceed by way of judicial review to challenge a decision of the two defendants, Ashford Borough Council and Kent County Council in respect of a request by the claimant, Hodson Development (Ashford) Limited and various associated companies, to modify or discharge a planning obligation, pursuant to s.106A of the Town and Country Planning Act 1990. The application is made before the expiry of the five years and therefore under 106A(6) the local planning authority have a broad discretion whether or not to modify.
2. The leading case on modification under this provision is *R (Garden Leisure Group Limited) v North Somerset Council* [2003] EWHC 1605 per Richards J (as he then was). That case sets out that there are four essential questions to be asked. (See para.28) What is the current obligation? What purpose does it fulfil? Is it a useful purpose? Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?
3. The development in question here is a very large one, over 5,000 homes with an assumption in the original section 106 and the planning permission that it would be built out over a prolonged period of over 20 years. The agreement was dated 27 February 2017. There was an application which was largely refused, then judicially reviewed. That judicial review was settled and I will refer to the consent order in a few minutes. One of the terms of the consent order was that the developer could put in a fresh application which would be considered. It did put in such an application. It was considered and again largely, though not wholly, refused. Then a second judicial review was brought. Mrs Justice Lang refused permission on the papers on 19 January 2022, and this is a renewal of the application.
4. Given that this is a permission judgment, I do not need to set out the terms of the decision letter or the application for the request at any length.
5. Mr Letman, who appears before me on behalf of the developer claimant, advances five grounds of challenge. I will deal with each one and the responses in sequences.
6. The first relates to the consideration in the decision of viability. There are two limbs to this ground. The first is that the local authorities were wrong to take the view that viability of the development was not a relevant consideration under section 106A and the particular application. The second part of ground 1 is that in any event in their consideration of viability, they erred in law. The way this is dealt with in the decision letter was that the local authorities said that they did not consider viability to be a matter for the decision, but they did go on to deal with viability.
7. As far as the first part of this ground is concerned, whether viability is a material consideration, I remain unconvinced that it is not a material consideration, however given that it was dealt with, and therefore firstly, what I am going to call "ground 1(a)", is academic; and secondly the claimants would undoubtedly fail under s.31A of the Senior Courts Act, because the decision would inevitable be the same given that the matter was taken into account. I am not going to consider whether or not viability was legally a material consideration because that is a somewhat complicated point of law and would involve considering a number of previous cases. It is sufficient for the purposes of ground 1 that the local authorities in this case did consider viability with some care and detail, in and around paras.49 of the decision letter.
8. Mr Letman's complaint under what I will call "ground 1(b)" is that although the LA took into account viability they did not do so fairly or rationally. This is because the process adopted here was that the claimants put in their submissions and the details as to why the 106 should be amended under 106A; the local authority then sought independent advice in respect of viability from a consultant and did not go back to the developer for further comment upon that independent advice.
9. So far as the process is concerned, in my view any argument as to breach of natural justice is wholly unarguable. That is because, firstly, the preamble to the consent order set out the process to be adopted, which was precisely that which the local authority did adopt. So if the developer was going to argue that it had to have the right to come back if any independent advice was sought, that should have been part of the consent order. Further, and in any event, I do not think there is any such right on the facts of a case like this. It is for the developer to put in the material they want in support of their application. It is for the local authority then to consider that material. If the local authority then makes a material error, then the risk is upon them that they did not go back to the developer to check anything. In my view, there is no duty in natural justice or any other principle of fairness that the local authority has to go back to the developer.
10. Next Mr Letman argues that in respect of a number of points that were taken into account by the local authorities in considering viability, they made material errors. The first of those is the adoption of a finance cost figure of 3 per cent where Mr Letman says that is irrationally low and the true figure should have been 7 per cent. In my view, such an argument is wholly without merit in a planning judicial review such as this. The Planning Court is not the place to argue the difference between 3 and 7 per cent and what is the appropriate finance costs. Fundamentally, that is the difference between a pre or post five-year case because if this was a post five-year case, Mr Letman's clients could go and argue the merits of 3 or 6 per cent in front of a planning inspector. It is impossible to argue in front of a planning judge in the Planning Court that the adoption of 3 per cent is itself *Wednesbury* unreasonable.
11. Secondly, he says that the reprofiling of the infrastructure costs was carried out incorrectly. Again, in my view, that is impossible to sustain as a *Wednesbury* challenge. There is consideration in the decision letter of how costs are to be dealt with, and there is no evidence that the figure in question would have been materially different.
12. Thirdly, he says that there are issues about assumptions on improved sales figures and other additional costs. Again, this is a hopeless argument in a planning judicial review. Those are matters of judgement for a local planning authority.
13. In my view there is no arguable point under ground 1.
14. Ground 2 is in effect a challenge to the reasons given for the refusal of the request. The planning authorities produced a long decision letter but also a schedule setting out each limb of the requests and the reasons for refusal. Mr Letman argues that the reasons set out in that schedule are largely formulaic and fail to engage properly with the detail. There are a number of answers to this.
15. Firstly, the reasons in the schedule have to be read with the reasons in the decision letter as a whole. Mr Henderson says, the reason for this is that many of the issues are dealt with in the thematic part of the decision letter.
16. Secondly, the reference to the relevant policies in the Area Action Plan is, in my view, a perfectly appropriate and lawful way to approach reasons where there are multiple requests such as this. Thirdly, and in any event, if one reads the reasons and then reads the decision letter as a whole, it is quite clear in respect of each and every request why they were refused.
17. Ground 2 is equally without merit.
18. Ground 3 is an argument that the planning authorities erred by not acceding to the developer's request for a variation of the indexation provision in the section 106 agreement. Again in my view, this is a hopeless argument in a planning judicial review. The indexation date was 2014 and Kent County Council, which appears to have been leading on this particular point, explains why the base date of April 2014 was taken. That was the date where the original planning balances were struck. The purpose of indexation is plain: in order to make sure that the infrastructure costs within the 106 can be met, and whether or not the indexation should change is again one for the local planning authority subject only to *Wednesbury* irrationality. There is simply no material here that would support a rationality challenge.
19. When pressed, Mr Letman accepted that the submissions his own client made in respect of indexation to the local authority before they made the decision were extremely thin. There have been further communications about indexation since, but that is post-decision material which cannot possibly form the basis of an error of law by the decision-makers. The claimant says that the indexation figure produces figures above the actual cost but I have seen absolutely no evidence to make that point good, even if it was a matter for this court.
20. Ground 4 is in respect of bonds which the developers were required to produce in respect of various parts of infrastructure, including at least one new school. The developer said, in its submissions to the Council, that it now could not produce such bonds because they were no longer available to it. When I asked Mr Letman about why, he accepted that is because his client at the relevant time was not a good enough covenant to be given such a bond by the market. Mr Letman suggested that it was irrational in those circumstances for the local planning authorities not to discharge the bonds. I disagree with that argument. It seems to me that where the local planning authorities are legitimately concerned to ensure, for example, that educational facilities are provided, to simply discharge the bonds in circumstances where the developer no longer is a good enough covenant, is leaving the local authority wide open to the possibility that the developer will not provide the educational facilities, and the local authority will have to pick up the tab. That is why a bond is provided. So there is nothing arguably irrational about continuing to require such a bond.
21. Ground 5 is that the local authorities erred in law in failing to have regard to the effects of Covid 19 pandemic on the development. The difficulty with this ground is that the effects that the developer was seeking for the local authorities to have regard to were effects on the viability of the development. So in effect, ground 5 just brings the court back to ground 1. In practice, the planning authorities did consider the impact of Covid 19 in broad terms. They did not, for example, consider the impact on the developer's financing facilities, but that would have gone directly back to the issues on the viability. I cannot see that ground 5 raises any separate or arguable point.
22. I should note finally that when this claim was pleaded, there was a ground 6 which is described as a general failure to consider the claimant's submissions fairly and/or to provide adequate reasons. Other members of the Planning Court have already deprecated such broad grounds (Holgate J) and I would entirely agree with that. These cases are supposed to be properly pleaded and it is not appropriate to have some kind of general catch-all at the end that might allow counsel to think up a point late in the day.
23. For all those reasons, I consider this claim to be unarguable and I will not grant permission.

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**CERTIFICATE**

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This transcript has been approved by the Judge