Neutral Citation Number: [2020] EWHC 3529 (QB)

Case No: QB-2020-003006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2020

Before :

MR JUSTICE BOURNE

- -

Between :

Aspire Luxury Homes (Eversley) Ltd

Claimant

- and -

Hart District Council

Defendant

- -
- -

Matt Hutchings QC (instructed by Holmes & Hills LLP) for the Claimant
Saira Kabir Sheikh QC (instructed by Hart District Council) for the Defendant

Hearing date: 4 December 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE BOURNE

Mr Justice Bourne :

Introduction

1. This is an application by the Defendant local authority to strike out the Claimant's claim for a declaration and damages.

The facts

2. On or around 26 January 2018 the Claimant acquired land at the rear of Chantreyland, New Road, Chequers Lane, Eversley Cross, Hook, Hampshire ("the land") from Oakford Homes ("Oakford"). The land had the benefit of conditional planning permission granted by the Defendant to a previous owner on 24 February 2015 for the construction of six houses. That permission was subject to an agreement, made under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"), which bound the then owner of the land and also any successor in title, including the Claimant.

3. A further planning permission was granted to the Claimant in 2019 and, in connection with that grant, the Claimant entered into a variation of the section 106 agreement on 26 March 2019. This application is concerned with the meaning and effect of that varied agreement ("the agreement"), though the variations themselves are not material to this application.

4. There is no dispute that the agreement imposed obligations relating to affordable housing on the Claimant. Essentially, two of the dwellings permitted on the land were required to be affordable housing units and those units had to be provided before more than two other new dwellings on the land could be sold on the open market.

5. That obligation is imposed by clause 14 of the agreement, which provides:

> "AFFORDABLE HOUSING
>
> 14.1 No more than 2 of the Open Market Dwellings upon the Site shall be legally completed by way of sale unless and until:
>
> 14.1.1 the Affordable Housing Land has been conveyed/transferred from the Owner to a Registered Provider from the Council's list of Approved Registered Providers (in a Clean Condition together with all Services, Service Installations and Access provided up to at least the boundary of the Affordable Housing Land); or
>
> 14.1.2 if the Owner has entered into a contract (approved by the Head of Governance and Monitoring Officer and the Head of Housing Services) with a Registered Provider for the construction by the Owner for that Registered Provider of the Affordable Housing to a standard ready for occupation such agreement shall include provision for the transfer of the Affordable Housing Land (in a Clean Condition and fully serviced and accessed as aforesaid) to a Registered Provider or to the Council where the provisions of clause 14.3 apply

> 14.2 In the event of an agreement not being reached with the Registered Provider with regard to the transfer of the Affordable Housing Land prior to Commencement of Development of the Affordable Housing Units and/or in the event the parties having used reasonable endeavours to agree a transfer of the Affordable Housing Land to the Registered Provider and such a transfer has not been completed then the Parties shall offer any other Registered Provider approved by the HCA ("Alternative Registered Provider") in writing to purchase the Affordable Housing Units on the same terms as those offered to the Registered Provider
>
> 14.2.1 The offer to the Alternative Registered Provider to purchase the Affordable Housing Units shall remain open to the Alternative Registered Provider for the period of three months.
>
> 14.3 If no agreement has been reached with regard to the transfer of the Affordable Housing Land in accordance with Clauses 14.2 the parties shall be at liberty to transfer the Affordable Housing Land to the Council on the same terms as those offered to the Registered Provider.
>
> 14.4 The Affordable Housing Units shall be constructed as a minimum in accordance with such specifications and standards as may from time to time be published by the Homes and Communities Agency including the Code of Sustainable Homes up to the relevant Code Level for such Affordable Housing Units applicable at the date of their construction.
>
> 14.5 Subject to the foregoing clauses the Affordable Housing Units shall at all times be occupied and managed in accordance with the objectives of a Registered Provider and in accordance with such published housing register and allocation system as may be adopted by the Council from time to time and where the occupant meets the criteria set out in the nominations agreement in place between the Council and Registered Provider
>
> 14.6 The Affordable Housing Units will not be used for any other purpose other than as Affordable Housing provided that such an obligation shall not apply to a mortgagee in possession or charge (or to a receiver appointed thereby) of a Registered Provider or housing association or such other affordable housing provider to which the Affordable Housing Land has been transferred or to the successors in title to such persons."

6. When the Claimant acquired the land from Oakford, a purchaser, Heylo Housing Ltd ("HHL") was in negotiations to buy two "shared ownership units" of affordable housing ("SOU") on the land from Oakland for £624,000. HHL is or was a "registered provider" within the meaning of clause 14, but was not on the Defendant's list of Approved Registered Providers. However, the Defendant had indicated its approval of the proposed purchase by HHL, in particular by an email dated 1 November 2017.

7. After the Claimant's acquisition of the land, it continued negotiations with HHL for that proposed purchase, but on 30 May 2018 HHL withdrew from the transaction.

8. Since then, the Claimant has sought an alternative purchaser for the two SOU but no registered provider has made a comparable offer. The best offer received was £482,500.

9. Meanwhile, on 21 November 2018, the Claimant applied to the Defendant for a variation of the agreement under section 106A of the 1990 Act, based on an assessment of the viability of the development subject to the agreement. Although it seems that that application was never formally determined, the Defendant has not shown any willingness to agree to the variation.

10. By February 2019 the six permitted dwellings had been built. However, clause 14 prevented the marketing of four of them and continues to do so unless its effects have been exhausted in some way.

11. On 5 April 2019, a Director of the Claimant wrote to the Defendant, stating:

> "Paragraph 14.2 has been invoked in that agreement was not reached with the 'Registered Provider', who dropped out. Subsequently, the affordable housing was offered to 'Alternative Registered Providers' as identified by the Council. None of the Alternative Registered Providers was able to make an offer '… on the same terms as those offered to the Registered Provider
>
> Hence Paragraph 14.3 has been invoked, with the Affordable housing Land being on offer to the Council '… on the same terms as those offered to the Registered Provider. For the avoidance of doubt, would you make sure, through your housing department, that they are, or are not willing to make an offer '… in the same terms …'
>
> Assuming that the Council does not make an offer in the same terms, then it is concluded that there are no Registered Providers, including the Council willing to make an offer for the Affordable Housing in the same terms. Hence the requirement for the Affordable Housing, having dropped through the whole safety net of Section 14.0, must be deemed to be unnecessary, and having satisfied the rigour of the S106 Agreement – hence the requirement can be waived."

12. It is common ground that the Defendant has not accepted the invitation to take a transfer of the Affordable Housing Land.

13. On 19 September 2019 the Claimant's solicitors sent a letter before claim to the Defendant, asserting that the effects of clause 14 had been exhausted. The basis for that assertion is described further below. The letter threatened to bring a claim for a declaration to that effect, plus damages and costs, but without otherwise discussing the type of claim.

14. The Defendant responded on 9 October 2019, rejecting the Claimant's contentions and asserting the continuing effect of clause 14. The letter enclosed an opinion by counsel putting forward broadly the interpretation of clause 14 on which the Defendant now relies.

15. On 6 January 2020 the Claimant's solicitors wrote again, this time enclosing draft Particulars of Claim. There was no further response.

16. In or around June 2020, the Claimant issued a statutory appeal to the Secretary of State against the Defendant's failure to determine its application for a variation ("the planning appeal"). The planning appeal was validated by the Planning Inspectorate on 7 August 2020. The introduction to the appeal document states:

> "1.8. The three issues for the appeal to consider are:
>
> 1.8.1. 1) the viability of the development and its ability to support affordable housing in the manner prescribed by the S106
>
> 1.8.2. 2) the need to withhold any market dwellings from the market to ensure the delivery of affordable housing
>
> 1.8.3. 3) the continued effectiveness of the cascade mechanism in Clause 14 of the S106 having regard to the circumstance of affordable housing provision, the willingness of RP's to provide appropriate offer and the appellant's diligence in seeking the same.
>
> 1.9. It is concluded that the S106 Agreement fails to fulfil a planning purpose in a number of areas under scrutiny such that:
>
> 1.9.1. The development is not viable and does not support affordable housing at any level.
>
> 1.9.2. The withholding of market dwellings from sale is unnecessary to encourage the provision of affordable housing, should it be found necessary to make such provision.
>
> 1.9.3. The cascade mechanism has been exhausted as set out in the legal opinion of Wayne Beglan."

17. The final line quoted above is a reference to an opinion by counsel which was annexed to the appeal.

18. This claim was issued on 26 August 2020.

The claim

19. By this claim the Claimant seeks to establish that the effects of clause 14 are now exhausted and that it is free to sell open market dwellings on the land with no surviving obligation to provide affordable housing.

20. In particular, the Claimant contends that clause 14 has taken effect in the following way:

    (i) The SOU have not been conveyed as contemplated in clause 14.1.1.

    (ii) There has been no contract for transfer of the SOU to any registered provider or to the Defendant as contemplated in clause 14.1.2.

    (iii) Since no agreement was reached for a transfer to HHL, clause 14.2 required the Claimant to offer the SOU to any other registered provider on the same terms as those offered to HHL.

    (iv) The Claimant made such offer or offers and kept them open for at least three months as required by clause 14.2.1.

    (v) No agreement having been reached with any registered provider, the Claimant and Defendant were "at liberty to" make a transfer of the SOU to the Defendant on the same terms as were offered to HHL. However, the Defendant declined to enter into such a transaction.

21. On the face of it, clause 14.1 continued to bite, in other words no more than two dwellings could be sold on the open market because there had been no transfer of the SOU to a registered provider, nor any compliant contract for the SOU to be transferred to a registered provider under clauses 14.1 or 14.2 or to the Defendant under clause 14.3.

22. Clause 14.6 also appeared to remain in force, preventing the SOU from being used for any purpose other than affordable housing.

23. However, the Claimant claims that clauses 14.1 and 14.6 have no further effect.

24. That contention is based in particular on the meaning of the word "offer" in clause 14.2. The Claimant argues that it made a relevant "offer" to HHL to sell the SOU for £624,000. Therefore, since no agreement was reached with HHL, clause 14.3 contemplated a transfer to the Defendant "on the same terms", that is to say at the same price i.e. £624,000. The Claimant argues that it has performed its obligation by making that transfer available to the Defendant.

25. In the alternative, the Claimant contends that even if that was not the intended meaning of "offer", nevertheless the Defendant is estopped from contending that that was not its meaning. That estoppel is said to arise because, to the Defendant's knowledge, the Claimant purchased the land in reliance on HHL being willing to purchase the SOU for £624,000 and the Defendant having "provided its approval of HHL's intended purchase of the two SOU as a Registered Provider". In those circumstances, the Claimant argues, either the Claimant and Defendant had agreed as a "convention" that the word "offer" in the varied section 106 agreement meant the terms offered to HHL, or the Defendant had expressly or impliedly represented that the word "offer" would have that meaning and the Claimant relied on that representation to its detriment in purchasing the land.

26. The Claimant further advances a damages claim on the basis that the Defendant has wrongfully prevented it from developing and marketing the land without providing affordable housing, and that it is sustaining a continuing loss as a result.

Statutory framework

27. The material provisions of sections 106 and 106A of the 1990 Act state:

> "**106**
>
> (1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation …, enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority [(or, in a case where section 2E applies, to the Greater London Authority)] on a specified date or dates or periodically.
>
> …
>
> (3) … a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—
>
> (a) against the person entering into the obligation; and
>
> (b) against any person deriving title from that person.
>
> …
>
> (5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.
>
> …
>
> (9) A planning obligation may not be entered into except by an 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 in 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 …

…

106A

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

(a) by agreement between [the local planning authority] and the person or persons against whom the obligation is enforceable; or

(b) in accordance with —

(i) 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 local planning 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.
>
> …"

28. The "relevant period" under section 106A(3) is five years, so that period (if it runs from the original section 106 agreement) has not yet elapsed (although a refusal by the local planning authority to consider a modification of a section 106 agreement within that time is amenable to judicial review: see *R (Batchelor Enterprises Limited) v North Dorset DC* [2003] EWHC 3006 (Admin), [2004] JPL 1222).

29. Where the local planning authority does not give notice of determination under section 106A(3) or determines that a planning obligation shall continue to have effect without modification, there is a right of appeal to the Secretary of State under section 106B.

The application to strike out

30. The Defendant applies for the claim to be struck out under CPR 3.4(2). It contends that:

(i) The issue about the meaning of the section 106 agreement is an issue of public law which can or should be raised by way of a claim for judicial review and not by this civil claim under CPR Part 7. The claim should be struck out for that reason, or alternatively should be transferred to the Planning Court and directed to continue as if commenced under CPR Part 54.

(ii) The claim is also an abuse of process because it is brought in parallel with the planning appeal.

(iii) In the alternative, there are no reasonable grounds for bringing the claim, which has no prospect of success, because (per the Defence):

> "23. … the Claimant has failed to use reasonable or any endeavours to transfer the land in accordance with Clause 14.1.1 or 14.1.2 or 14.2. the question of transferring the land to the Defendant and the proper interpretation of Clause 14.3 simply does not arise.
>
> …
>
> 25. It is a matter of fact that HHL are not and never have been on the Council's Approved List of Registered Providers.

> Therefore, it is indisputable that the Clause 14 has not been discharged."

Is the claim an abuse of process?

31. Ms Kabir Sheikh QC submits that the claim turns entirely on an issue of public law, namely the existence or extent of the Claimant's planning obligation under the section 106 agreement. She points out that the agreement did not confer any rights on the Claimant but only created a planning obligation, and did not place any obligation on the Defendant, let alone any obligation which could be enforceable by private law claim.

32. The Defendant therefore relies on what has become known as the "exclusivity principle" in *O'Reilly v Mackman* [1983] 2 AC 237 whereby "a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law" must use the judicial review procedure, in which public authorities have the benefit of the initial requirement for permission and a short time limit.

33. Ms Kabir Sheikh QC prays in aid *Trim v North Dorset DC* [2010] EWCA Civ 1446, [2011] 1 W.L.R. 1901 and *T & P Ltd v Sutton LB* [2020] EWHC 879 (Ch). Both of these were planning cases in which ordinary civil proceedings were held to be an abuse of process by application of *O'Reilly v Mackman* [1983] 2 AC 237.

34. In *Trim* the landowner in ordinary civil proceedings claimed a declaration that a notice served on him for breach of a planning condition was unlawful because it was served more than 10 years after the breach alleged. The Court of Appeal struck out the claim because service of a breach of condition notice was "a purely public law act", with "strong public interest in its validity, if in issue, being established promptly" (per Carnwath LJ at [26]). The Court acknowledged that the exclusivity principle might be relaxed in cases where public and private law issues overlap, but it remained the law that "purely public acts should be challenged by judicial review". The Court also declined to treat the claim as a claim for judicial review and to extend time for it.

35. *T&P* was a claim for a declaration that a development fell within the ambit of an exception to a Direction by the local authority under Article 4 of the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2015. Deputy Master Bowles, sitting in the Chancery Division, held that the construction of such a Direction was "quintessentially one of public, rather than private, law" in that it did not operate exclusively as between the developer and the local authority but affected a number of property owners in similar situations. That public law question was not interlinked with any separate private law rights as between the developer and the local authority, and the use of private law proceedings was not justified.

36. I also asked the parties to look at *Milebush Properties Ltd v Tameside MBC and Hillingdon LBC* [2011] EWCA Civ 270. There, one local authority (Hillingdon) had granted planning permission to a developer, subject to a section 106 obligation to grant a right of way over a service road in favour of a neighbouring landowner. A second local authority (Tameside) had acquired the land, and the obligation, from the developer. The neighbouring landowner brought private law proceedings claiming declarations relating to the extent of the right of way against Tameside, which disputed

the neighbour's interpretation of the obligation and against Hillingdon, to whom it would fall to enforce the obligation. A majority of the Court of Appeal (Moore-Bick LJ dissenting) decided that such a claim had to be brought by judicial review, the case in reality being "about the planning objectives of a planning authority and about the performance of planning obligations on which the decisions resting with the planning authority are important, even paramount", rather than concerning "a private law dispute about the construction of a deed" ([47]). Ms Kabir Sheikh QC submits that this case too supports the Defendant.

37. Mr Hutchings QC distinguishes the present case from *Trim* and *T&P* because the issue is not one of purely statutory planning rights and liabilities, or the meaning of legislation, but instead concerns obligations under a section 106 agreement which are contractual in nature: see *Ali* (below).

38. Mr Hutchings QC also quite rightly points out that in *Milebush*, the Claimant was not a party to the section 106 agreement and therefore could not and did not assert any contractual or other private law issue arising from it.

39. In support of his submission Mr Hutchings asserts that local authorities often bring civil proceedings to enforce to enforce planning obligations by injunction. For example, in *Newham London Borough Council v Ali* [2014] 1 WLR 2743 a Trust operated a faith centre and mosque. In the course of planning enforcement proceedings relating to the faith-based use of the land, the trustees entered into a unilateral deed of undertaking which created a planning obligation under section 106, namely to make a further planning application by a deadline and, in default, to cease the use of the land as a place of worship and to remove all associated buildings and fixtures. The trustees did not comply with the obligation and the local authority brought civil proceedings for an injunction requiring them to carry out the removal works. The judge granted the injunction. The issue on appeal was whether the judge's discretion had been exercised correctly. Dyson LJ at [16] observed:

> "16. It is not in dispute that planning obligations entered into under section 106 of the 1990 Act are contractual obligations: see, for example, *R (Millgate Development Ltd) v Wokingham Borough Council* [2012] 3 EGLR 87 , para 22(e) and *Stroude v Beazer Homes Ltd* [2006] 2 P & CR 75 . The mechanism for enforcement is provided by section 106(5) : "a restriction or requirement imposed under a planning obligation is enforceable by injunction."

And:

> "17. … If a person wishes to contend that a planning obligation no longer serves a planning purpose, then it should seek to discharge or modify the obligation under section 106A or 106B. That is the route by which Parliament decided that a person might be relieved from its planning obligation."

40. Mr Hutchings QC also referred to *Stroude v Beazer Homes Ltd* [2006] 2 P&CR 6. There, both the claimant and the defendant (and other persons) were parties to a section 106 agreement with the local planning authority. The claimant contended that a term

should be implied into the agreement, giving him a right of access to a parcel of land. He registered a caution at the Land Registry, the defendant objected and the Land Registry directed that the matters should be resolved by the claimant bringing proceedings in the Chancery Division to determine the implied term issue.

41. In *Stroude*, Mr Hutchings QC relies on passages in the judgment of Warren J at [38] and [39], stating that a section 106 agreement is a contract which falls to be construed according to normal contractual principles, notwithstanding its statutory context, and that section 106 agreements can (expressly or by implication) create rights as between landowners, as well as between landowners and local authorities.

42. Mr Hutchings QC also referred to *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988. There, a student challenged the mark given to her examination paper. By an amendment at appeal stage the student alleged breaches of contractual rules under the university's student regulations. The university contended that any claim should have been made by judicial review. Sedley LJ distinguished cases such as *O'Reilly v Mackman*, noting that parties had been allowed to sue in contract in cases where "a statutory relationship happened to include a contractual element", such as *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624. In *Clark*, said Sedley LJ, there was instead "a contractual relationship which happened to possess a public law dimension". The claim was allowed to proceed despite being brought outside the judicial review time limit, it being noted that the Court has powers under the CPR to restrain an action if and when procedures are actually misused. In other words, a court could decide that choosing to bring a civil action outside the judicial review time limit instead of bringing an in-time judicial review was an abuse of process, without there having to be a hard-edged rule by which every claim necessarily has to be brought by one route rather than the other.

43. In my judgment, none of the cases is precisely on point.

44. Mr Hutchings QC was right to distinguish *Trim*, *T&P* and *Milebush* for the reasons set out above. Those cases are, however, a reminder that questions of public law arising from planning obligations will normally be raised by judicial review proceedings.

45. *Newham v Ali* was not concerned with the question of which procedure should be used in a claim such as the present one. It was, instead, just an example of a local authority using a private civil action to enforce a planning obligation. However, it does highlight the oddity of a local authority having to raise any question of the meaning of a section 106 agreement in an ordinary civil claim, whereas according to the Defendant's submissions a developer can only raise such a question by way of judicial review.

46. *Stroude v Beazer Homes* similarly shows that the Court in a civil action can construe a section 106 agreement at the suit of a private party i.e. not the local planning authority.

47. In my judgment, the key distinction is between the construction of a section 106 agreement, and its validity.

48. Whilst it may be dangerous to generalise, it seems to me that the validity of a section 106 agreement is highly likely to be a question of public law, suitable only for judicial review (save where it is raised as a defence to an ordinary claim by the local planning authority to enforce the agreement).

49. Construction of a section 106 agreement, on the other hand, is not different in principle from construction of any contract, as *Stroude* shows. Whilst arguments about abuse of process may arise in an individual case, I see no strong reason of principle why an issue over the meaning of a section 106 agreement should not be dealt with in the same way as an issue over the meaning of any other contract.

50. I am fortified in that view by the recent decision of the High Court in *Norfolk Homes Limited v North Norfolk District Council, Norfolk County Council* [2020] EWHC 2265 (QB). There Holgate J heard, and allowed, an application by a developer under CPR Part 8 for a declaration that conditions contained in a section 106 agreement made in connection with an earlier grant of planning permission, properly construed, did not apply to development of the same land under a later grant of planning permission.

51. No *O'Reilly v Mackman* point was taken in *Norfolk Homes*, which therefore is not authority on the point. But it is another example, in addition to *Stroude*, of the Court construing a section 106 agreement in ordinary proceedings untrammelled by the requirements of judicial review.

52. I therefore reject the Defendant's contention that the choice of an ordinary civil claim in this case was an abuse of process. There is a dispute about the meaning of the agreement and/or about whether, on the facts, the Claimant has discharged its obligations under the agreement. That being so, a claim under CPR Part 7 is an available route.

53. Nor do I consider that any abuse is apparent from the Claimant having also lodged a planning appeal. The appeal is against a refusal to vary the section 106 agreement. Although a claim is made in the appeal notice that the effects of clause 14 have been exhausted, the direct relevance of that assertion to the appeal is doubtful, and the main thrust of the appeal is clearly the quite different contention that development subject to the section 106 agreement is not viable. So, whilst there is an overlap of subject matter, the appeal and the claim are different and do not duplicate each other.

Are there reasonable grounds for bringing the claim?

54. Ms Kabir Sheikh QC, for the Defendant, reminds me that the purpose of a section 106 agreement is to make a development acceptable to the local planning authority. By such an agreement, a developer takes on what is referred to as a "planning obligation", performance of which ensures that the development is in accordance with relevant planning policy. That process, she submits, did not confer any contractual rights on the Claimant which can be enforced in this claim.

55. Moreover, submits Ms Kabir Sheikh QC, clause 14 of the agreement could not cause the obligations on the Claimant to be discharged save by transfers or contracts for transfers which, it is common ground, have not taken place. Clause 14.3 contemplates the possibility of the SOU being transferred to the Defendant, but it does not state either that the Defendant is obliged to take the transfer or that the Claimant is discharged from its obligation if the Defendant declines.

56. Ms Kabir Sheikh QC further submits that the Claimant's case on the meaning of the word "offer" cannot succeed. HHL was not on the Defendant's list of Approved Registered Providers, so any "offer" to HHL could not engage clause 14.2 or 14.3 of

the agreement. And the Claimant's argument, in the alternative, that the Defendant is estopped from denying that "offer" is a reference to the terms on which the SOU were offered to HHL, is doomed to failure because of the ruling of the House of Lords in *R v East Sussex CC ex p Reprotech and others* [2002] UKHL 8, per Lord Hoffmann:

> "33. … I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council v Secretary of State for the Environment* [1981] 578, 616, estoppels bind individuals on the ground that it would unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone." (See also Dyson J in *R v Leicester City Council. ex p. Powergen UK Ltd* [2000] JPL 629, 637.)"

57. The claim may face formidable difficulties. However, I am not persuaded that it discloses no reasonable grounds so that it should be struck out.

58. As Mr Hutchings QC submitted in response, clause 14.3 must have some purpose. The drafting, whereby the parties are (or may be) "at liberty to" enter into a transfer, leaves the position unclear. Whilst it is not obvious that clause 14.3 discharges the obligation if the Defendant declines to take a transfer, it seems to me that that is a possible interpretation. Clause 14 does appear to be concerned with what should happen if the landowner has difficulty in finding a provider of affordable housing at a suitable price. It is not obvious that the parties intended that, in this situation, the landowner should effectively be stranded in ownership of developed property which cannot be sold.

59. Ms Kabir Sheikh QC argues that a developer in that situation has a solution under section 106A of the 1990 Act. I am not convinced by that point. As I have said, the right to request a modification or discharge under section 106A (triggering a right of appeal under section 106B) does not arise until five years have elapsed.

60. The question of whether the Claimant's obligations have been discharged under clause 14 seems to me to raise disputes of fact as well as law, which should be resolved at trial and not by this summary application. The meaning of clause 14 will need to be explored in light of whatever admissible evidence is adduced, to determine the issues including (1) whether the negotiations with HHL did or did not engage clause 14, (2) the meaning of "offer", (3) whether any party used "reasonable endeavours" within the meaning of clause 14.2 and (4) the effect (if any) of clause 14.3 in light of the facts of this case, including the Defendant not having accepted a transfer. These issues include the estoppel issue raised by the Claimant, even if its chances of success appear remote in light of *Reprotech*.

Conclusion

61. This application will therefore be dismissed, and it is also not appropriate to transfer the case to the Planning Court to be continued as if commenced under CPR Part 54.