Claim No: E00CR539

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 4th March 2020

Before:

HIS HONOUR JUDGE SAUNDERS

Between:

CARSHALTON BEECHES BOWLING CLUB LIMITED	**Claimant**
- and -	
SEATON HOUSE SCHOOL	**Defendant**

Mr Robert Bowker of Counsel (instructed by Copley Clark, Solicitors of Banstead, Surrey) for the **Claimant**
Mr Charles Irvine of Counsel (instructed by Carpenter & Co, Solicitors of Wallington, Surrey) for the **Defendant**

Hearing dates: 24th, 25th, and 26th February 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.

HHJ SAUNDERS:

1. This matter concerns the determination of 3 preliminary issues relating to an opposed business lease renewal. The claimant uses the premises at 61a Banstead Road South, Sutton, Surrey SM2 5LH ("the premises") as a bowling club – which has been at this location for approximately 90 years. The defendant's premises are a private preparatory school – which is well regarded and, in one form or another, has also been present for a similar period. The defendant is the landlord; the club is the tenant.

2. The claimant seeks a new lease under the Landlord and Tenant Act 1954 ("the Act"). The application relates to, "premises known as First Floor Clubhouse, bowling green, and land with sheds" located at the premises.

3. By a Consent Order made by Croydon County Court (where the proceedings were initially issued) on the 17th December 2018, it was determined that there should be a trial of a preliminary issue, that being:

> "4.1 …. (1) the Defendant satisfies the grounds of opposition to the claim pursuant to sections 30 (1)(f) and 30(1) (g) of the Act; and (2) whether a claim for a new tenancy on the grounds of proprietary estoppel, as set out in the Amended Particulars of Claim is satisfied. shall be tried as a preliminary issue pursuant to PD 56 para 3.16."

4. The case was subsequently transferred to the Central London County Court for trial of the preliminary issues and that took place on the 24th – 26th February 2020 (inclusive).

5. At the hearing, the claimant was represented by Mr Robert Bowker of counsel and the defendant by Mr Charles Irvine also of counsel – who made submissions in line with their respective skeleton arguments. I am most grateful to both for their conscientious attention to this matter.

6. During the trial, I heard oral evidence from the following witnesses:

For the claimant

Mr Robert Rumsby – who is a Director and the Chairman of the claimants who was their only witness.

For the defendant

Mrs Judith Evans - who is the Chair of the School Governors (and who was the defendant's principal witness)

Mrs Debbie Morrison – who is a previous Headteacher of the school

Mrs Ruth Darvill – the current Headteacher

Mr Prash Patel – a governor who is tasked with financial matters

Mr David Amos – a Lloyds Bank Plc Relationship Manager who had dealings with the defendants

Ms Kim Barrowcliffe - a parent

Ms Kousalaya Iyengar – a parent

Dr Kalpna Shah – a parent

Mr Ben Jackman – a parent, who did not attend but where an appropriate Civil Evidence Act Notice was served

Ms Karen Erasmus – a parent, who did not attend but where an appropriate Civil Evidence Act Notice was served

Background

7. The defendant is the registered proprietor of the entirety of the premises from which it operates an all – girl preparatory school. The claimant occupies and operates a bowling club which consists of a clubhouse on the first floor of a building known as "Senior House", together with a bowling green and some sheds which are together known as 61a Banstead Road. The claimant occupied these premises pursuant to a Lease dated 8th February 2007 ("the Lease") for a period of seven years and six months commencing on the 1st September 2006, expiring on the 28th February 2013.

8. By a section 25 Notice dated 24th August 2017, the defendant had purported to terminate the Lease on the grounds set out in section 30(1)(f) and (g) of the Act. No other grounds were sought.

9. On the 22nd March 2018, the claimant issued proceedings under section 24 of the Act. The basis of the claim was expanded in the Amended Particulars of Claim so that it also included a claim in proprietary estoppel.

10. A site visit was unnecessary as the parties had provided me with numerous photographs which I have considered. In short, the bowling club (the claimant) sits in the middle of the site surrounded by the school. Classrooms are on the ground floor of School House with the bowlers occupying a clubhouse on the first floor. There is also a newly – constructed pavilion on the opposite side of the green from the main building. It must be said that both school and bowling club appear to have co – existed on site for a considerable period. This is largely historic.

11. The claimant has been in existence since 1930 – and so has been on site for 90 years. The land was originally set aside by neighbouring properties (a developer – a Miss Henry) as a community asset retaining the freehold and granting leasehold interests to both the claimant and the defendant. In 1935, the ground floor of the building was given up by the club to Seaton House School (as it then was) leaving the claimant just occupying the clubhouse which remains to this day, including a changing room, bar, lounge area, kitchen, two full sized snooker tables and WCs.

12. Both claimant and defendant then remained tenants on site until the 20th March 1992, when the defendant acquired the freehold subject to the claimant's tenancy. The defendant and claimant's relationship changed from that day – from both being tenants of a third party, they now became landlord and tenant. This has led to this unusual situation, in my view, where the bowling club is surrounded by a school – or, to look at it another way, the school has a bowling club at its centre.

13. I am not unaware that this is a decision of the utmost importance to both claimant and defendant.

14. The continuation of bowling on this site is highly important to the claimant. Without premises, the club is highly likely to fold as it will be difficult to obtain a suitable alternative. I recognize that it provides a highly important sporting and social benefit to the local community. I also recognize that it gives a considerable amount of enjoyment to the playing members and those from visiting clubs and, if I can voice my own opinion on these matters, believe that such facilities, in general, should be not only welcomed but encouraged for the good of society as a whole. I could not help observing the numbers of members of the claimant who were present at court throughout the trial which demonstrates the weight of feeling there.

15. On the other hand, it is unarguable that the defendant provides its own highly important service to the local community - it is highly rated, "punching above its weight" in terms of small preparatory schools and I observe that its fees are competitive opening its doors to school children from a wide range of backgrounds. The defendant's case has been supported by parents – some of whom were prepared to give evidence. I can equally understand why it wishes to provide enhanced facilities to improve the school.

16. In the context of these proceedings, I remind myself that it is important to put these competing interests aside except for those occasions where they may become relevant.

17. It is important here for me, first, to consider the issues that I must determine and, secondly, the relevant law.

The issues

18. There are two issues that I am concerned with:

    (a) Has the defendant made out an opposition to the grant of a new tenancy under section 30(1(f) and/or section 30(1)(g) of the Act?
    (b) If so, is the claimant able to succeed in a claim brought under the doctrine of proprietary estoppel for an interest in part of the overall estate?

19. The claimant's case (and I shall expand upon this later in my judgment) is that its key areas are:
    (a) Whether the defendant has a real prospect of complying with an essential condition on which planning permission was granted; and
    (b) Whether the claimant has provided sufficient evidence to prove that it has the financial resources to pay for the building works that, it is said, is fundamental to proving grounds (f) and (g).

The law

20. The position is largely settled law and agreed between the parties.

Sections 30(1)(f) and 30(1)(g)

21. The defendant can oppose the grant of a new tenancy under the Act if section 30(1)(f) or 30(1)(g) of the Act are made out, namely:

    (a) 30(1)(f): *"That on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of*

construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding"; and

(b) 30(1)(g): *"On the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence"*.

22. The law says that, so far as the defendant is concerned, and in relation to section 30(1)(f), there has to be a firm and settled intention to demolish or reconstruct the property currently occupied by the claimant – and that they have a reasonable prospect of success of bringing that about. I have been taken to Woodfall on Landlord and Tenant paragraph 22.106.

23. In so far as 30(1)(g) is concerned, the defendant has to show that it intends to occupy the property for itself.

24. The claimant, by Mr Bowker, has expanded upon these general propositions in some detail and they are matters which, in my view, are worth exploring.

25. He says that I should pay attention to the text in Woodfall where it says this about ground (f):

> "It is submitted that the following matters are significant in ascertaining whether the landlord has a sufficient intention to satisfy this ground…. It is not necessary to show that there is a signed and concluded building contract for the proposed works: Capocci v Goble (1987) (Digest) where a small development company (which had already carried out a similar development in the same town) had approached the landlord and were keen to carry out the development in question. A building agreement together with the expenditure of moneys by the developer was sufficient evidence to

support ground (f) in Peter Goddard & Sons Ltd v Hounslow LBC (1991) (Digest).

The test in Capocci v Goble (1987) (Digest) was applied by Hart J in Yoga for Health Foundation v Guest (2002) (Digest), namely "on the totality of the evidence is it shown that the landlord has definitely decided to carry out the work of re-development and that this decision has a reasonable prospect of being carried into effect". In Hillier (W) & Sons Ltd v Howmic Developments Ltd (1966) (Digest), the landlord sought to oppose the grant of a new tenancy and gave evidence that he had had a number of discussions with his bank regarding financing of a proposed redevelopment of the holding by a scheme comprising a terrace of five houses. No written confirmation of the availability of a loan was obtained from the landlord's bank, though his evidence included a submission that if the bank was unwilling to assist he would finance the project himself. The Court of Appeal held, inter alia, that if the evidence given by the bank manager had been available at the first hearing the decision might have been different, but it was too late to avoid the grant of a new tenancy. The landlord had only himself to blame for the failure to oppose the tenant's application for a new tenancy as the landlord's evidence was sketchy in the extreme, backed by no documents and no evidence from the bank until it was too late."

26. In other words, I should explore the question of the defendant's financial resources and whether the evidence adduced by them is sufficient to show this intention. (Hillier).

27. Moreover, the claimant's case in relation to financial resources places reliance on two cases:

    (a) Zarvos v Pradhan [2003] L & TR 30

    (b) EE Ltd v Chichester [2019] UKUT 164 (LC)

28. In Zarvos, I have been taken to an excerpt from Ward LJ (particularly those sections which are underlined) which reads as follows:

> "Ultimately there is a single question for the judge to decide, namely the question posed by s.30(1)(g) itself: does the landlord on the termination of the current tenancy intend to occupy the holding for the purposes of a business to be carried on by him therein? The judicial gloss put on those ordinary words arises out of Asquith L.J.'s explanation of the connotation of the word "intends". Hence the first element of the subjective intention, the genuine settled commitment to the project, and the second, a check on reality which is demonstrated by showing, objectively, that there is the real possibility of carrying it into fruition…I am satisfied the Judge concentrated on the second limb. That appears from various passages in his judgment. In para. [21] he said: "…What is important in this case is whether there is a reasonable prospect of Mr Zarvos running the new business on the premises." In para. [24] he observed: "What troubles me in this case is just this matter of practicality." Later in that paragraph he observed that: "The crucial point in this case is" [in essence, his ability to raise finance from the bank]. He concluded in para. [28]: "I am left with this, that <u>I have no reliable evidence at all that the bank is going to lend the £40,000 that Mr Zarvos says he is needed, or some sum approximating to that</u>, and without that I cannot say that I am satisfied that Mr Zarvos has a reasonable prospect of putting into effect what he tells me is his intention in running a business at the property."….In my judgment the Judge had to judge the case on the principal basis upon which it was put to him and <u>that required the raising of money to make it a practical proposition. So he rightly concentrated on the landlord's finances</u>…. He had ample justification, given the effective cross-examination by

> Mr Higginson of the projections, for finding that a prudent bank manager would be sceptical about the business plan….In the course of my reading into the authorities I chanced upon this observation, which appears apposite, from Lord Evershed M.R. in Fleet Electrics Ltd v Jacey Investments Ltd [1956] 1 W.L.R. 1027, 1036: "I have said, and I repeat, that the landlords may have been less than fortunate here and that had their case been worked out and put forward somewhat otherwise (and by saying that I am not, of course, making any criticism of the counsel who was then appearing for them) and had the evidence adduced been somewhat different in character, it may be that the judge would have tipped the balance in the other direction. But if the landlords were unfortunate, there is no reason why that should be visited on the tenants."

29. In EE, an Upper Tribunal case, which is at least persuasive, I have been directed to the judgment of Judge Elizabeth Cooke and AJ Trott FRICS, where again the relevant sections are underlined:

> "We share the Claimants' scepticism about the development of the Respondents' business plan. The Respondents were persistently reluctant to disclose their financial appraisals and did not do so absent specific directions from the Tribunal. We are satisfied that the business plans that we have seen have been prepared upon optimistic assumptions as to costs, income and other benefits. They are not consistent and have clearly been prepared "on the hoof" in response to the Claimants' case as it has been revealed to them. We do not think the Respondents have established the financial viability of their project in either its extended (four mast) or reduced (one mast) forms…Nevertheless, so far as financial resources are concerned we accept the Respondents can fund the redevelopment. The business plan for the original scheme proved to be over-optimistic, in view of the Claimants' unwillingness to participate, and the new business plan envisages far more modest revenues even with the free broadband factored in.

But on the other hand, the evidence for the Respondents is that they have considerable resources, much of it in the form of liquid funds or readily tradeable assets. (Mr Meyrick said in cross-examination that group turnover was £15m pa.) No doubt has been cast on that by the Claimants. Mr Haydn Morris' comment in the witness box had the ring of truth: "The Respondents can fund any number of masts if they so choose". The current scheme is essentially unprofitable and requires a financial contribution from the Respondents that might deter a less determined landowner, but if the Respondents have set their hearts on the redevelopment scheme then it is clear that money is no object. Whether they have indeed set their hearts on it is a different question which we explore below. Accordingly, we find that the first limb of the two-part test is satisfied; with planning permission granted, and their substantial resources, the Respondents have a reasonable prospect of being able, by themselves and without the need for the co-operation of others, to bring about their redevelopment scheme."

30. I should add here that EE although a case involving the Telecommunications Code, it is relevant as it applies essentially the same statutory test.

31. In so far as section 30 (1)(g), I should, once again, consider the text in Woodfall which is set out as follows:

> "All the circumstances should be examined to ascertain whether a firm and settled intention exists…Such an intention must be firm and settled and the firmer the proposals, the more likely it will be that the landlord is successful in his opposition. It is submitted that the diligent adviser should attempt to ensure that as many of the consents, planning permissions and plans and specifications as are necessary are secured by the

date of the hearing. Tangible consents, etc. are strong evidence of the landlord's intention. For example, in Chez Gerard Ltd v Greene Ltd (1983) (Digest), the landlords claimed they intended to occupy the holding for the purpose of a restaurant. The court had regard to the following factors:

(i) evidence of the landlord company's resolution;

(ii) the availability of finance;

(iii) absence of the need for planning permission; and

(iv) a draft of agreement with a restaurateur."

32. In other words, it is important for me to consider, in determining whether there is a firm and settled intention, that the firmer the proposals are then the more likely it is that the test will be satisfied – and where there are less firm proposals then it follows that it will be less likely. It is these allegations of a lack of firm proposals that forms the crux of the claimant's case.

33. I then turn to the question of proprietary estoppel.

Proprietary estoppel

34. The parties are agreed on the law. I agree that the most relevant exposition of the law is set out in Thorner v Major [2009] UKHL 18 at [29]. Here, Lord Walker says:

> "is based on three main elements […] a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance".

35. In the case of a promise based reliance (as is alleged here), he goes on to say:

> "where A makes a promise that B has or will acquire a right in relation to A's property and B, reasonably believing that A's promise was seriously intended as a promise on which B could rely, adopts a particular course of conduct in reliance on A's promise. If, as a result of that course of conduct, B would then suffer a detriment were A to be wholly free to renege on that promise, A comes under a liability to ensure that B suffers no such detriment […] That protection is available even if there is no contract between the parties, as B's claim depends not on showing that A was placed under an immediately binding duty as a result of A's promise but rather, it is submitted, on showing that, having made the promise, it would now be unconscionable for A to leave B to suffer a detriment as a result of B's reasonable reliance on the promise" (found in Snell's Equity, 34th edition, paragraph 12-036 – within the bundle of authorities)."

Safeguarding

36. At the heart of these proceedings, at least as part of the defendant's case, is that it is a school and safeguarding issues are highly relevant which preclude co - existence with the claimant. At paragraph 19.1 and 22 of its Amended Defence, it says: "it would be unconscionable for the Claimant to insist upon a new tenancy without giving priority to the Defendant's needs to safeguard the children in its care".

37. From the defendant's point of view, what is key is The Independent School Inspectorate's Regulatory Compliance Inspection Report dated November 2019 ("the Inspection Report") which is exhibited to Ms Darvill's witness statement and which particularly notes that the claimant's occupation of the premises has resulted in the defendant having *"not met"* requirements as to the pupils' welfare, health and safety and therefore, caused the defendant to fail – which is said to be devastating to the school and which prevent its continuation – Ms Darville's oral evidence records.

38. There are also concerns raised by the Independent Schools Association (see document 240Q) coupled with a Notice from the Department of Education which requires the defendant to enact an Action Plan to remove the risks identified in the Inspection Report with the real risk that the defendant could be removed from the Register of Independent Schools.

39. The claimant says that this is largely a "red herring". The claimant and the defendant have co – existed for a considerable period implementing chaperone procedures to protect the children and, in any event, the lease terms regulate the parties' relationship. In addition, there has never been any allegations of sexual impropriety. The defendant has not sought to oppose a new tenancy relying upon section 30 (1)(c) – based on use and management of the premises - which it could have done, if it was thought that this was so important. It is said that no such case has been pleaded and, in any event, the Section 25 Notice is strictly restricted to (f) and (g). It is this evidence which forms the thrust of the parents' evidence that I have identified above.

<u>The Evidence</u>

40. I remind myself that it is unnecessary for me to decide every single dispute of fact in this case, but to concern myself only with the matters that are relevant, in my view, to the issues before me.

41. I will deal with each of the three issues in turn. The first two involve similar issues so I will deal with them together.

Section 30 (1) (f) and (g)

42. 30(1(f): "*That on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding"*

43. 30(1)(g): *"On the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence*

44. The claimant makes several criticisms of the defendant's case. This can loosely be divided into (1) that the defendant has failed to show that it can finance the project and, (2) that the intent (if any) to comply with the condition of the planning permission is fanciful, as opposed to real.

45. The claimant says that the defendant must prove that it has the financial resources to pay for the proposed development work. This is crucial to satisfy ground (f) but also (g) as it is part and parcel of its intention to occupy the premises for its own business purposes.

46. I agree with Mr Bowker, for the claimant, that there must be sufficient cogent evidence to prove the nature of the work, the likely cost and an ability to pay for it.

47. The defendant's pleaded position is set out as "The Defendant intends to demolish the Property [which is defined as "First Floor Clubhouse, bowling green and land with sheds at 61a Banstead Road South, Sutton, Surrey, SM2 5LH"], save for the façade, and to build a new school house inside the façade".

48. Annex 2 to the Amended Defence set out the relevant plans and drawings.

49. The principal witness for the defendant is Mrs Evans. In her witness statement evidence (confirmed in her oral evidence), she says: "The school wishes to tear down the School building of which the club house is part, apart from the façade and to build a new school house inside the façade."

50. The claimant says that the difficulty with the defendant's case is that the cost of the proposed work is not expressly pleaded. The only documents which set out any reference to the proposed cost are minutes annexed to the Amended Defence – found at Annex 1. These run from the 26th September 2013 to the 14th June 2017. The only specific reference is to the cost of works in a minute dated 30th March 2017 which refers to a figure of £3.6 million.

51. This was dealt with by Mrs Evans in her evidence where she refers to the plans and drawings and says, at paragraphs 7 and 8, as follows:

> "In excess of 50% will come from our own cash reserves and the ultimate sale of one of our buildings"

52. This is a position that she confirmed in her oral evidence.

53. Mr Patel, a governor, also gave evidence on the proposed project. The claimant criticises his evidence to the extent that his written witness statement does not provide figures.

54. The claimant says that, assuming the cost of works is £3.6 million, it would follow that £1.8m will be raised from cash reserves and the sale of a building with the remaining £1.8m be raised by borrowing.

55. It is claimed that the evidence is simply not sufficient. In particular, there is a weakness, it is said, in the defendant's case in that there is a lack of evidence on the part of the defendant in demonstrating their ability to raise a loan of this size and repay it.

56. Mrs Evans says at paragraph 8 of her witness statement:

> "To date the banks that we have approached to fund the additional costs have not been able to support us, the last one and the first both making it clear that their issue was the risk to our reputation should there be a safeguarding issue due to the Bowlers being on site".

57. The safeguarding issue is said to be a considerable obstacle in the defendant's raising the sums required. Mrs Evans confirmed that this was the case, particularly with regard to raising funds from Lloyds Bank Plc. In her witness statement, at paragraph 3, she says:

> "Lloyds Bank have been unable to provide the loan required for the build, due to the bowling club having access to the grounds during school hours. This has raised safeguarding concerns for the bank and led it to rejecting the school loan application"

58. That position is confirmed, so the claimant says, by Mr Amos, a Relationship Manager – who dealt with the defendant – and who was called as the Bank's representative. He says at paragraph 4 of his witness statement:

> "Therefore, I explained that Lloyds Bank wouldn't have the appetite to take these exploratory discussions further at least until the safeguarding issue had been resolved."

59. A letter from Mr Amos to Mrs Evans written on the 19th August 2018 (sometime after discussions) reads as follows:

> "With this known, then fuller consideration could be given to the School's funding request with Underwriters focusing in the usual manner on the aspects above including financials & pupil numbers, the building plans themselves & prepayment/serviceability, governance & leadership and compliance/safeguarding which of course forms such an integral part of any appraisal."

60. The claimant argues that this is clear evidence that Lloyds were unable to move forward with the project.

61. Apart from Lloyds, the claimant also directs me towards the defendant's disclosure. These are found exhibited to Mrs Evans' witness statement. At paragraph 7, she states as follows:

> "5-year cash flows, 5-year forecast income and expenditure accounts and Balance sheets. The income and expenditure and cash flows for the next five years reflect the plans of the school in relation to the rebuilding
>
> of our main school building and assume that the bowlers will no longer be on the premises."

62. The parties are agreed that the only apparent reference is contained in a notation on a series of spreadsheets at page 190 which reads:

> "Note attached documents assume
> 1. Pavillion [sic] is completed on budget
> 2. Main school build costs £3,000,000"

63. There are some other documents. A letter from Barclays Bank Plc regarding a loan application dated 9th June 2017 which reads:

> "Thank you for your recent lending application. However, we are sorry to tell you that after careful consideration we are unable to agree your request for borrowing.
>
> This is because as responsible lenders:
>
> our decision to lend is assessed by your company's ability to repay the requested borrowing, this is known as affordability. Affordability is the amount of cash flow available to meet annual interest and loan repayments. Our view on this occasion, is that your business would be unable to repay the level of borrowing you have requested."
>
> A rejection.
>
> .

64. A further provisional assessment of an application is also contained in a letter from Gavin King of Ladybourne Business Finance, dated 12th September 2017, which reads as follows:

> "I have been passed your enquiry and I have spoken to two lenders who have indicated the following is available subject to formal underwriting and valuation.
>
> Loan Type: Development Loan then into Term Loan
>
> Loan Size: £1,900,000…reducing to c£1.3m
>
> Term: 2 years – then 15 years
>
> Interest Rate: £2.3% ABR to 2.55% ABR
>
> Lender fees: 1% or 1.5%
>
> Security Address: 67 Banstead Road South, 61A Banstead Road South & 51 Banstead Road South"

65. I have then been taken to a series of board minutes. The claimant says that these identify problems with funding such that the defendant cannot show, on the totality of this evidence, that there is a reasonable prospect of such funding being obtained.

66. Minutes from a meeting held on the 18th September 2018 (which the claimant notes coincide with Lloyds' letter of the same date) stated:

> "It is becoming difficult to confirm that lending has been declined by Lloyds on the grounds of safeguarding compliance. JE/PP [Judith Evans / Prash Patel] continuing to press for this and JE will chase up as they did promise to put something [in] writing."

67. Other minutes are said by the claimant to reveal similar difficulties. Examples of these include:

> "PP [Mr Patel] was keen to ensure that we were not setting budgets in future which eroded our money 'set aside' for interest which would be needed if and when development work commences." [7th May 2019]

> "Governors agreed this needs to happen as we may be closer to the time when Investment Funds may be needed to be spent on Development projects…Development needs to be revisited, TR [Tim Roads] and JE [Ms Evans] looking to meet with [redacted] to review previous plans and look at any alternatives. JE has also made contact with [redacted] Chair of Governors which has offered to show their developments." [1st July 2019]
> "TR and JE have met with [redacted] who construct for the Education Sector mostly with modular techniques which improves the time to construct and therefore often results in a much cheaper build. TR is trying to get them to

prepare outline plans that could be used in Pre- Planning discussions with the council to test the ability to get an alternative planning approval through within the same overall footprint and height." **[**1st October 2019]

68. The claimant's case is that this evidence is deficient in several respects:

(a) That the project costs vary (£3,6 million to £3million) and are not set out with any precision;
(b) Barclays failed to provide funding and, to all intents and purposes, that appears unqualified – as opposed to Lloyds which was linked with safeguarding;
(c) At least 3 other banks – Metro, HSBC and Handelsbank – have not offered finance and there is no evidence to suggest they made a link between that decision and safeguarding;
(d) The evidence that Lloyds will lend is not persuasive;
(e) The defendant's claim that it will use cash reserves and sale of buildings is too speculative.

69. It is, for these reasons, unable to meet the requirements set out in the authorities mentioned above.

70. The claimant's case is also based upon the assertion that the intent to comply with planning conditions is fanciful at best – as if the conditions cannot be complied with, then it can only be dealt with if the conditions are varied.

71. The claimant points to Condition (2) in the second schedule. This specifies that the defendant must comply with the document it had prepared in support of its application, namely, 'Seaton House School Extension and a new Bowling Clubhouse: Supporting Documentation'.

72. The claimant's position is that the defendant would re- locate the claimant's clubhouse to the pavilion. These conditions included the following:

> "the secondary aim is to provide [the claimant] with a fit for purpose Clubhouse that can be managed and accessed independently of the school building with both new facilities offering extended access for the local community"
>
> "[the defendant] understandably seek improvements to their facilities and a longer lease to secure their long-term future, which will be forthcoming after considerable investment in a new clubhouse"
>
> "Demolition will commence when the club has transferred to the new clubhouse"

73. The claimant's case is that the planning conditions cannot be complied with in full unless the claimant is re-located to the Pavilion. The evidence (and confirmed by Mrs Evans in the witness box) is that this is no longer the defendant's intention. They just want all the land back. I was informed in a note from the claimant's counsel, attaching the relevant documents and copied to the defendant's solicitor and counsel, that, following the trial, the claimant's solicitor wrote to the local planning authority regarding condition 2. The local planning authority replied on 2 March 2020 stating: "Condition 2 would only become

enforceable if the development is implemented, however it would not compel the school to allow the bowls club to relocated to the pavilion. i.e. they could build the pavilion, but never allow it to be occupied, or they could allow another bowls club to use pavilion. This would be a civil issue rather than a planning issue. The issue for the school is that it would not be able to use the pavilion for its own purposes due to the difference in land use between the school and bowls club if the permission were to be implemented."

74. The claimant says that it must follow that the defendant has obtained planning permission subject to a condition that will not be met. It, therefore, follows that the defendant cannot prove the intention required by both ground (f) or (g) because complying with planning consent is a fundamental prerequisite to carrying out the proposed work on the main building. In particular, the claimant identifies that there is no planning evidence before the court – for example, to show how such a planning consent might be varied.

75. The claimant has made some well – argued points but, in my view, it sets out with some difficulty as there has to be some merit in the proposition made by the defendant that, in the absence of any pleading (such as a Reply), it will find it difficult to put forward a positive case.

76. I accept that the directions do not allow for one – but it has always been within the claimant's gift to make an application at any time prior to trial – and that has not been done.

77. Be that as it may, I allowed Mr Bowker a wide scope in cross examination and the issues have become plain.

78. In dealing with ground (f), Mr Irvine has taken me to 7 – 139, 7- 140 and 7 -155 of Reynolds and Clark's Renewal of Business Tenancies. It is clear that "intention" applies equally to ground (g) as (f) and I should deal with them in a similar manner. In terms of intention, I should apply Lord Evershed's test in Fleet Electrics v Jacey Investments [1956] 1 WLR 1027 at [1032[which reads;

> "…..there must be a firm and settled intention not likely to be changed, or in other words that the proposal for doing the work has moved' out of the zone of contemplation ….into the valley of decision"

79. The first aspect of intention is a subjective assessment of the state of mind of the landlord (Zarvos) – with such intention being relevant <u>at the date of the hearing.</u>

80. The second aspect is an objective assessment of the realistic prospects of implementing the intention held (Zarvos). The leading case of Betty's Cafés Ltd v Phillips Furnishing Stores Ltd [1958] 1 ALL ER 607 (House of Lords) approves the judgment in Cunliffe v Goodman [1950] 1 All ER 720, where Asquith LJ said as follows:

> "An 'intention' in my mind connotes a state of affairs which the party intending…. does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about , by his own act of volition…"

81. It is, therefore, a question of fact and degree as to whether the defendant had the necessary intention.

82. It is also important for me to refer to the case of Europark (Midlands) v Town Centre Securities [1985] 1 EGLR 88 at this point. This was a ground (g) case. This was a case where intention was found where the landlord had obtained some items of equipment but had (a) no architect's plans and (b) had not yet recruited staff. Mr Irvine points out, quite correctly, that in this case there are architect's plans and staff are already in place.

83. In terms of financial ability, I would also refer to A Levy & Sons v Martin Brent Developments [1987] 2 EGLR 93. In that case, there was no contract for demolition, no contract for building and no materials for the redevelopment, and yet it was held that there was sufficient intention – in a ground (f) case.

84. Significantly, Reynolds and Clark's commentary is quite telling:

> "It was pedantic in the circumstances to expect the court to go into questions of the precise origin of any funds that were to be used, which bank account was to provide them or anything of that nature."
>
> I must add that it would be right to distinguish it from this case as much reliance was placed on the fact that the landlords were a public limited company dealing with properties over many years. Nevertheless, the import of the case is quite clear.

85. In this case, I am satisfied, from the evidence, that the defendant intends to carry out the work. It is the case that there have been plans afoot since 2004 – evidenced by undisputed ongoing discussions with the Club. I would refer to the resolutions of the defendant in this respect. Interestingly, this is accepted by the claimant along with later steps towards development. I refer to paragraphs 14-18 of the claimant's Amended Particulars of Claim which confirm this.

86. Mrs Evans was quite clear in her evidence, in my view, such that I find the development to be a genuine intention. I made a note of her evidence where she said:

"The school fully intends to demolish and reconstruct the building to be used by the school. It has no option – it's at the end of its shelf life and cannot continue in its present state".

87. Interestingly, her account is entirely consistent with the claimant's own pleaded case. The Amended Particulars of Claim admits the following:

(a) That the defendant's made an application for planning permission in 2004;
(b) That there was a meeting between the claimant and the defendant in June 2015 to discuss the proposed redevelopment;
(c) That the defendant told the claimant of its intent to redevelop in 2014;
(d) That the defendant told the claimant of its intent to occupy the first floor in October 2015;
(e) That Mrs Evans wrote to all parents of schoolchildren about the proposals in December 2015;
(f) That the defendant applied for planning permission in January 2016.

88. Mrs Evans' evidence was supported by Mr Patel who I regarded as a very persuasive witness – he did not seek to embellish knowing his limitations but, in my view, was knowledgeable, intelligent, and genuinely sought to assist the court in understanding where the defendant was in terms of the development plans (bearing in mind he acts as a governor (as does Mrs Evans) on a voluntary basis). He explained his understanding of the costs of works as he has been involved in dealing with finances – and I found his evidence to be credible. In particular, he was helpful in explaining plans regarding the nursery, the sale of the nursery property to raise funds for the development, its valuation and the manner in which these matters had been recorded. These were broadly similar to the matters that Mrs Evans set out in her evidence such that the School's evidence is, in my view, consistent.

89. The evidence is further supported by both the current Headteacher, Ms Darvill and the former Headteacher, Mrs Morrison – both of whom outlined their concerns that the educational landscape had changed and that safeguarding issues made the continued co – existence of the school with the bowls club near impossible. I found their evidence (albeit brief) honestly given – expressing a very real concern about the need to satisfy the Independent Schools Inspectorate's requirements (in the light of the seriousness of their most recent report) and its threat to the school – rather than any perceived malice against the bowlers, and I make this absolutely clear, despite no allegation of sexual impropriety having ever been made. However, I would add that safeguarding requirements in an educational context go much wider than simply matters of this nature and the School has to be conscious of these at all material times so their concern is, in my opinion, entirely understandable.

90. As further evidence of the intention, there is also the notation that I have referred to above at page 531. Here, there is spreadsheet budget for the year 2016/2017 where there is clear reference to "building project costs". This is broken down into phases with a reference to borrowing. There is also additional evidence in the form of the modular building costs, the approach to an architect, and so on. This is again entirely consistent with the defendant's plan to demolish and reconstruct for their own business purposes.

91. I must also take into account the undertaking given by Mrs Evans at trial. The terms of the undertaking, given on oath in the witness box, where I am satisfied that she was aware of the consequences of breach were as follows:

> "… in the event of the Defendant obtaining possession of the First Floor Clubhouse, bowling green, and land with sheds at 61a Banstead Road South, Sutton, Surrey SM2 5LH, the Defendant shall as soon as practicable:

(i) Demolish the whole of the Senior House Building, including the First Floor Clubhouse at….

(ii) Reconstruct a Building ("the New Building") in the footprint of the Property;

(iii) Not use the New Building for a period of 5 years for any purposes other than a business …….by Seaton House…(for) the education of pupils attending Seaton House School….and some ad hoc licensing arrangements when not being used by the School…"

92. The claimant places considerable store on the fact that, in its view, the undertaking is meaningless in that its terms can be avoided particularly in that it is expressed as "soon as practicable".

93. I accept that, as Chair of the Board of Governors of the Defendant, and following an emergency Board Meeting held towards the conclusion of the trial (the minutes of which I have seen), that she had authority to give this undertaking upon behalf of the Defendant. It was given during the trial and perfected on the last day of the hearing – being the 26th February 2020. I attach a copy to this judgment [annexure 1].

94. In so far as its terms are concerned, I do not accept they are meaningless. I remind myself that it is one factor to be considered but, in more practical terms, it is sufficient – particularly in terms of showing the Defendant's intention.

95. The suggestion that it is meaningless does, in my view, underestimate the importance of the undertaking given by the defendant in this context. At its lowest, it expresses an intention to carry out the works – an intention which I find has existed for a considerable period of time. The Chair of the Governors, by giving this undertaking,

has exposed herself to the threat of prison upon its breach – and that is not a matter to be taken lightly. In my view, it is compelling evidence of an intention to carry out the works and is supportive of my above findings. The undertaking must have considerable weight in view of the penalty that potentially could be imposed by the court if it is not complied with.

96. The status of an undertaking was explained by Romer J in Espresso Coffee Machine Co. Ltd v Guardian Assurance Co. Ltd [1959] 1 WLR 250 where he said:

> "Nothing could be clearer than the evidence which he gave, and he repeated more than once, in categorical terms, in the evidence that he gave on behalf his company, that his company did intend, if they got possession of …… to go into occupation. When one adds to that the fact the counsel was authorised to offer, and did offer, to the court the undertaking in the form which my Lord has read, the matter really seems to be put beyond any doubt. Some undertakings are of course unacceptable… The undertaking seems to me to compel fixity of intention- (referring to *Betty's cafe*.) That undertaking had been given and accepted, it is perfectly decisive of the fixity of intention which I agree is a requisite element."

97. The required fixity of intention is, in my view, present here.

98. For the purposes of both grounds (f) and (g), I, therefore, find that the Defendant had the necessary intention. As to the extent of that intention, and for the avoidance of doubt, I accept Mrs Evans' evidence (which was entirely clear) that the School intended to carry out the works in the drawings attached to her Witness Statement – but, even then, as a fall-back position, there could be different work undertaken (perhaps on grounds of cost) (perhaps the modular building project discussed during the trial) but that this did not affect the requisite intention (which I find) to carry out these works.

99. I have been asked by Mr Bowker, for the Claimant, following the trial, to rule on the whether this intention extends to occupying the bowling green. Other purposes were floated in evidence at the trial – to include using it as an exercise area for the children attending the school. I find; therefore, it does extend to that area likewise.

100. Having made these findings, I, therefore, find, from the evidence before me that, on the face of it, and as at the date of the hearing, Seaton House School had both the necessary subjective intention to fulfil both 30 (1)(f) and 30(1) (g) of the Act. Moreover, on the face of it, I find that there is a reasonable prospect that the work will be completed.

101. In making this determination, I have considered the claimant's two issues (which I have already set out above) where it is said that, despite their claimed intention, the defendant has not shown that it has either the financial ability to carry out the work or that its intention to comply with the planning conditions is little more than fanciful.

102. First, I will deal with the financial position of the defendant.

103. The starting point must be that the defendant is in possession of property upon which it can secure funds for the development. The reason that the defendant cannot secure such funding is wholly dependent on the safeguarding issue – Mr Amos makes it clear in his witness statement at Page 203 (at paragraph 4) and in his decision letter at page 205.

104. I found him to be a compelling and highly competent witness. He has worked for Lloyds Bank Plc for 35 years – 20 of which he has been a Relationship Director. He is the nearest one is going to have to an "expert" and he is authorized by the bank to speak upon their behalf. His words, therefore, carry some considerable weight. I accept that his recommendations for funding would be likely to be formally approved. His evidence was clear – but for the safeguarding issues on the site, he would recommend the level of borrowing that the defendant sought to complete the re – development.

105. This level of borrowing is not fanciful. The School did not simply approach Lloyds – I note that the broker (page 569) was prepared to arrange a loan of £1.8 million reducing to £1.2 million on the sale of property. I also accept that approaches to the other Banks were less formal and so it would be difficult to read much into the fact that they did not progress any further.

106. The figures make sense. The defendant has cash reserves of £1.5 million- the loan would be £1.8 million reducing to £1.2 million upon sale of the nursery property. This would cover the anticipated build costs which, I am told, are currently thought to stand at £3million. This is, in my view, expenditure and borrowing which is within a reasonable range of tolerance and is sufficient to demonstrate a reasonable prospect of such an outcome where there is sufficient equity.

107. Turning to the planning point, it must be said that there is already some considerable evidence of the conditions attached to the planning permission having already been complied with. Condition (4) (please see page 183) relating to noise and condition (5) also relating to noise have already been complied with -I refer to the emails at pages 768 – 777 of the third bundle.

108. In terms of condition (9). There is already an Energy Statement at pages 734 – 753. There have also been moves through contractors, Caradon and Wheatwood to deal with surface water run – off – found at condition (11).

109. Against that backdrop, the claimant's main criticism is an inability to deal with condition (2) – that the claimant should move into the pavilion. That is wrong in my view for several reasons.

110. Putting aside the suggestion that this has not been pleaded (and where that argument has some force), it is apparent that the pavilion has never been the claimants to use. The claimant has accepted that Senior House is to be

demolished and, as Mr Rumsby accepted in his evidence, that the club would only move if terms for a new Lease could be agreed.

111. I also consider that the local planning authority cannot determine issues with regard to the ownership of land – the pavilion is something outside that. The document attached to the planning application is, in my view, more aspirational – and, as such, the fact that the intentions may have changed is insufficient to prevent the defendant complying with condition (2). The application is properly made out – and relies on appropriate drawings and plans which set out the development. The local planning authority's recent email dated 2nd March 2020, brought to my attention after the trial, confirms this.

112. In the context of intention, I am of the view that there is a reasonable prospect of compliance with the local planning authority.

Proprietary Estoppel

113. The claimant's alternative case is that all the elements of a proprietary estoppel are made out and that the court may give effect to the equity by allowing the claimant to remain where it is or by a relocation to the new Pavilion.

114. I have taken an excerpt from Mr Bowker's very helpful skeleton which sets out the law. He says that, in order to succeed, the claimant will have to establish the following (as set out in Megarry & Wade):

> "(i) An equity arises where:
>
> (a) the owner of land (A) induces, encourages or allows B to believe that he has or will enjoy some right or benefit over A's property;
>
> (b) in reliance upon this belief, B acts to his detriment to the knowledge of A;

(c) A then seeks to take unconscionable advantage of B by denying him the right or benefit which he expected to receive.

(ii) This equity gives B the right to go to court to seek relief. B's claim is an equitable one and subject to the normal principles governing equitable remedies.

(iii) The court has a wide discretion as to the manner in which it will satisfy the equity in order to avoid an unconscionable result, having regard to all the circumstances of the case, including, but not limited to, the expectations and conduct of the parties.

(iv) The relief which the court may give may be either negative, in the form of an order restraining A from asserting his legal rights, or positive, by ordering A either to grant or convey to B some estate, right or interest in or over his land, to pay B appropriate compensation, or to act in some other way.

(v) The issue in any given case is whether it would be unconscionable for A to deny that which he has allowed or encouraged B to assume to his detriment."

115. This is non - controversial. It is pleaded as two representations – (1) that the claimant would be allowed into the Pavilion and (2) that it would enjoy the benefit of similar or substantially the same lease terms.

116. It is said that, in reliance on these representations, that the claimant supported the defendant's planning application, applying to remove a restriction and the defendant's further planning application.

117. Despite this, it is said that the defendant's unconscionable conduct was the defendant's opposition to the new Lease and/or its opposition to similar or substantially the same terms.

118. In my view, the difficulty that the claimant has with this assertion is lack of evidence. I note that there is nothing in support contained in the Amended Particulars of Claim.

119. This is only dealt with in Mr Rumsby's witness statement. He says, at paragraph 6, as follows:

> "Assurances were also given by the Defendant to the extent that, in return for the Club supporting the proposed development plans, the Defendant would at its own expense provide alternative accommodation for the Club by way of a new pavilion, and kit it out to the Club's reasonable requirements including kitchen, changing rooms and bar and remove the two snooker tables from the Clubhouse to the Pavilion"

120. Apart from this assertion, there is very little supportive evidence of this *quid pro quo*. It is at odds with the pleaded case. Even putting this aside, it lacks particularity. I ask the rhetorical questions: when were these representations made, by whom and what was the substance of them?

121. Even in his oral evidence, under cross – examination, Mr Rumsby was, with the greatest respect, rather vague. He made vague assertions that the Club would be "kept on site" but not the representations set out at paragraph 6. If one considers the claimant's own documents (these being Minutes of the Club dated 25th July 2016 at page 348 and a Chairman's Report found at page 342), they make no mention of this proposal which, in view of its significance, I would have expected.

122. I, therefore, do not consider that the claimant can establish that such representations were ever made on the balance of probabilities.

123. Even if I am wrong about that, my view is that they were so vague as to lack the requisite certainty.

124. I need go no further – the claimant cannot, in my view, establish a case on the doctrine of proprietary estoppel.

Conclusion

125. Having made these findings, the claimant's claim does not succeed. In the usual course of events, I would make what, in effect, is a Possession Order in favour of the defendant for a period of 3 months. In view of the Inspector's Report, I am asked to give less time to the Club.

126. I trust that this matter can be agreed by the parties along with an appropriate Order for approval. If there are any residual issues which require determination, then a directions hearing can be listed – following the formal handing down of this judgment – when these matters can be heard.

HHJ Saunders

30th March 2020