Case Name: *City of York v Trinity One (Leeds) Ltd* [2018] EWCA Civ 1883 (29 August 2018)

Full case: Click Here

Commentary: This is not a planning court case but concerns a section 106 agreement.

The appeals concerned a payment in lieu for affordable housing required under a section 106 agreement made in 2003. At first instance, the judge had found (Issue 1) that the developer was liable to pay a sum under the Agreement (and had determined the amount) and (Issue 2) that if the developer's appeal under section 106BC was successful, it would take effect retrospectively so as to extinguish the developer's liability.

The developer appealed against the judgement that they were liable to pay a sum and the Council appealed against the declaration that the appeal under section 106BC would have retrospective effect. Both appeals were dismissed.

Issue 1. The developer argued that the judge wrongly interpreted the wording of the relevant part of the Agreement and substituted another test for that which the parties themselves chose. The relevant part of the agreement provided for a commuted sum to be paid if the affordable housing was sold on the open market at which should be an amount of Social Housing Grant necessary to secure affordable homes of an equivalent type and size. A method for calculating the grant was given "for the avoidance of doubt". However, the method involved tables and the Housing Corporation which, along with Social Housing Grant had been abolished.

The Court considered principles set out by Lord Neuberger in Arnold v Britton [2015] UKSC 36. The sixth factor provided for a situation like this: an event has occurred which was not contemplated by the parties, namely the abolition of Social Housing Grant. The question is whether in that circumstance the intention of the parties is clear. If so, the court should give effect to that intention. The Court thought that the intention of the parties is very clear that the developer should pay a sum of money to the Council if they do not provide affordable housing. Since the hearing the decision of the Court of Appeal in Openworld Ltd v Forte [2018] EWCA Civ 783 had been published which supported the construction proposed: the Agreement should be read as requiring payment of a commuted sum which should be equivalent to the amount of SHG that would have been payable. The court is not using business common sense retrospectively to allow the Council to renege on a bad bargain; but rather there was a bargain to which the parties should be held.

Issue 2.
The Council submit "that a statute will only be construed as having retrospective effect if it is plain that it was intended to have that effect or, to put it another way, that such a construction is unavoidable". The Court dismissed this argument and held that sections 106BA and 106BC do affect accrued rights. The Council or the Secretary of State is required to discharge or modify the obligation if the conditions of section 106BA are satisfied. Although the statute is silent on the point, it also does not exclude accrued rights. The policy

behind the statute taken together with the practical effect of sections 106BA and 106BC indicate that the legislative provisions have retrospective effect. Although Parliament is presumed not to have legislated to alter accrued rights, the court held that the contrary intention is established.

The Council also submitted that if the court finds that sections 106BA and 106BC can alter accrued rights, this should not extend beyond the commencement of the legislative provisions. This was also dismissed: there is nothing limiting the operative provisions to this period of time, and there is no difference between an obligation accruing before the commencement of the provisions and an obligation accruing after. In either case, the contract may have been entered into before the provisions came into effect and thus without knowing of the effect of the same therefore sections 106BA and 106BC do affect accrued rights regardless of when they accrued.

Case summary prepared by Town Legal LLP