Howsons Ltd v Redfearn and another

[2019] EWHC 2540 (TCC)

Queen's Bench Division (Technology and Construction Court)

Judge Nigel Bird

9 July 2019

Judgment

MR J. FRAMPTON appeared on behalf of the Claimant.

MR P. BURY appeared on behalf of the Defendants.

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

JUDGE NIGEL BIRD:

1 This is an application by Howsons Ltd. brought by way of summary judgment to enforce the decision of an adjudicator, Mr Lewis Ayers, published on 22 March 2019. The application has been resisted on the ground of jurisdiction. The want of jurisdiction raised is that which appears at section 106 of the Housing Grants, Construction and Regeneration Act 1996, namely where the construction contract is with a “residential occupier”, the adjudication scheme has no application. The real question on this application is this: if the employer occupies or intends to occupy the property as a dwelling but has no lawful right to do so (because the property is a barn and there is no planning permission for use as a dwelling house) can he still rely on the exemption?

The Planning Position

2 The property in question is a converted barn which lies in North Yorkshire. It is isolated but would provide an idyllic spot for a family home.

3 At the time Howsons undertook their works of construction for Mr and Mrs Redfearn, the property was unoccupied but had the benefit of planning permission for the development of a “live/work unit”. The permission was subject to various conditions, and granted by reference to certain plans dealing with the internal layout and the external appearance of the barn. Those planning documents formed part of the instruction given by Mr and Mrs Redfearn to Howsons and described rooms as (for example) conference rooms, workshops, meeting rooms, office kitchen and office bathroom.

Planning Policies

4 The barn is to be found within the local planning area of Craven. In 1999 Craven adopted a district local plan. Local plans are now a requirement of the Town and Country Planning Act 1990 and of the Planning and Compensation Act 1991. The local plan is designed, in broad terms, to assist those charged with making planning decisions with a view to ensuring consistency. The Craven district local plan includes a section dealing with industry, employment and tourism. Within that section one finds policy EMP9 (the EMP prefix stands for "employment"). Policy EMP9 deals with the conversion of buildings to employment-generating uses with ancillary living accommodation (to a "live/work unit"). That policy is set out at p.183 of the bundle and comprises a short introductory paragraph, seven numbered sub-paragraphs and then two concluding paragraphs. EMP 9 provides that planning permission for the conversion of rural buildings such as the barn to employment-generating uses with ancillary living accommodation will be granted provided the proposal accords with all the local plan policies and with the seven numbered points. The sixth numbered point provides that the application must relate to an employment use "which is designed so that it can be used independently of the dwelling space", and the seventh point requires the planning application to demonstrate that the building is of sufficient size to accommodate a genuine business use and that any residential accommodation will be ancillary to that business use. Point 7 continues that proposals for substantial residential accommodation with a token area given over to business use will be considered to be residential development and will therefore fall outside the scope of the policy.

5 It is clear from the local plan that the general rule is that planning permission to convert a barn to a residential use will not generally be granted. The policy allows an exception to the general rule where the conversion of the barn is such that so that it will increase employment in the region. In that case, a change of use to allow ancillary living accommodation is likely to be permitted.

6 At p.200 in the bundle are certain frequently asked questions. Responses are provided by the local planning authority. One of the questions is:

> "I would like to change the live/work unit I am living in into a normal residential property. Is it possible to do this?"

The answer, which is not contested as a matter of planning policy or law, is:

> "No, this is not possible. Rural buildings are generally converted to live/work units where a normal house would not be acceptable. If a purely residential conversion would have been acceptable at the time of conversion, this type of application would in all likelihood have been pursued."

7 The planning guidance makes clear that legitimacy of the ancillary residential use will not be judged by reference only to the amount of space it occupies. What is important in planning terms, it seems to me, is that the residential use is *ancillary* to the business use. The guidance continues as follows:

> "While the policy refers to an ancillary residential use it is not considered that this means that the employment premises must be larger than the residential accommodation and a 30% designation will normally be acceptable provided that the resulting employment premises are sufficient to accommodate a genuine business use. Nevertheless, the employment premises are of primary importance in terms of a live/work conversion; it is on this basis that permission would be granted for a conversion scheme and occupation of the ancillary residential accommodation is always tied to the use of these employment premises."

8 The guidance ends, at p.205 in the bundle, with an emboldened warning in large font. The warning is headed “AN IMPORTANT NOTE ON PLANNING ENFORCEMENT”. It begins with these words:

> “Craven District Council is very keen to support people who wish to run a genuine business from a live/work unit, as these businesses can significantly benefit the rural economy.
>
> However, it is important to remember that rural buildings are given planning permission to be converted to ' live/work' units where normal houses would not be acceptable. The Council considers it very important that the policy is not abused and will therefore take appropriate action when it is discovered that a genuine business use is not being undertaken.”

There are, under four bullet points, a series of warnings, which includes a warning that the Council's Planning Enforcement Team will monitor the use of barns converted to live/work units in a number of ways. It ends with the words:

> “When it is found that the restriction on residential occupation is not being complied with, in that the required business usage is not being carried on, enforcement action may be taken to compel the occupiers to move out.”

9 The planning permission granted on 30 July 2013 is an important document. It is an extension of a permission granted in 2010. It granted permission for the proposed development identified in the application, that is the conversion of a redundant barn to a live/work unit. Some 16 conditions were specified. A number of the conditions, as was pointed out during the course of submissions, refer to policy EMP9, principally from 7 onwards. Condition 12 provides as follows:

> “The building [i.e. the barn] shall be occupied and operated only for the dual purposes of business floorspace with ancillary residential floorspace. Residential floorspace shall not be occupied unless the business floorspace is used for business purposes or vice versa. “

The reason given for that condition is as follows:

> “… so as to ensure that the development is appropriate for this rural location in accordance with the requirements of policy EMP9 of Craven District Local Plan.”

At condition 15 there is (perhaps unusually) an ongoing obligation to provide business accounts on a yearly basis.

10 It is notable then that the planning permission that is granted is not planning permission for a dwelling house, it is granted in circumstance where planning permission for the development or change of use to allow use of a building for residential accommodation would not be granted. The planning permission relates to a live/work unit in which living space is ancillary to business use.

<u>The Dwelling House Exemption</u>

11 Section 106(1) of the Act makes it clear that Part II of the Act does not apply to a construction contract with a residential occupier. Subsection (2) defines what is meant by a construction contract with a residential occupier as being:

> "… a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence."

Following section 2 there is a short definition section which makes it clear that "dwelling" means a dwelling house or a flat, and there is further a definition of dwelling house which is said not to include a building containing a flat. There is also reference to a definition of a flat. It is clear that the wider definition in section 101 of the Act of a dwelling house which includes outside space does not apply, and I accept the submission that the definition of dwelling house, as has previously been found by Coulson J (as he then was) is, within the scope of the Act, a narrow definition.

12 There is a small number of cases that deal with the section. I was referred to a decision of His Honour Judge Overend in *Samuel Thomas Construction Ltd. v Bick and Bick*. The date of the decision is 28 January 2000. It is unreported, but has been referred to in subsequent cases. Mr and Mrs Bick bought land comprising 4 barns, a garage block and a courtyard. They engaged the Claimant to do some drainage work and carry out works on 2 barns (one of which they intended to live in) and the garage block. That case concerned the definition of the words "principally relates". The learned judge found that, even though 65 per cent of the relevant contract sum was spent on works done to the barn in which the employers intended to live, work was done on other buildings which were not dwellings, and therefore the judge felt unable to conclude that the contract principally related to work on a dwelling. So much appears at p.50 at paras. E and F of the report.

13 I was referred to *Shaw v Massey Foundation and Pilings Limited* [2009] EWHC 493 (TCC). Coulson J (as he then was) noted that the burden of establishing that the exemption applies lies with the employer (the Defendant here). At paras.31 and 36 the learned judge refers to the narrow definition of dwelling house that I have already touched on.

14 I was referred also to *Westfields Construction Ltd. v Lewis*. This is a further decision of Coulson J (as he then was). This decision was described during the course of submissions as "the last word" on the subject. At para.10 of the judgment, the Judge noted that:

> "Section 106 was intended to protect ordinary householders, not otherwise concerned with property or construction work, and without the resources of even relatively small contractors from what was, in 1996, a new and untried system of dispute resolution."

The Judge also made it clear (para.11) that section 106 needed to be approached with common sense. He pointed out that:

> "… it ought to be plain, on a brief consideration of the facts, whether the employer is or is not a residential occupier within the terms of the exception. "

I accept that the latter case is authority for the proposition that a minute analysis is unhelpful, and that common sense should at least be a sensible guide.

15 The only question that needs to be answered in deciding if the section 106 exemption applies is whether or not the relevant contract was with a residential occupier (that is, was it a contract that principally relates to operations on a dwelling house which one of the parties occupies or intends to occupy as his residence). It might be said that the key elements of the questions are (a) the existence of a dwelling house and (b) actual or intended occupation as a residence.

Does the Exemption apply?

16 On its proper construction in my judgment, section 106 must be read so as to require that the occupation of the relevant building as dwelling house is lawful. It would in my judgment be wrong to read the statute in such a way that an individual who was prepared to occupy a property in breach of planning permission was rewarded with exemption from a statutory scheme. If the occupation could be unlawful, in broad terms the employer would be entitled to rely upon his own wrong to come within an exception to the Act and to rob the contractor of the benefit of the scheme.

17 When the contract was entered into, it seems to me to be clear that the plans to which Howsons worked showed that part of the property (indeed around 30 per cent of the property) was to be used for business purposes and the remaining parts for residential use. The intention of the employer at the time the contract was entered into is difficult to divine. The best indicator perhaps lies in the defence. The Defendants aver (see para.30) that they occupy 220 sq.m of the 245 sq.m of the barn as their home (that is 90%), the remainder being a home office. They suggest (para.16) that only 12 sq.m is used for business purposes (leaving 233 sq.m or 95% as living space). The Defendants appear to accept (see paras.12, 23, 31 and 32) that the barn is not being used as – and never was to be used as - a live/work unit.

18 In a witness statement of 10 June 2019, Mrs Redfearn says (para.18) that the office area at the barn is “minimal”. She accepts that the barn was converted “to a family home” (para.19) and (at para.26) clearly accepts the works were done to create a detached house and not a business. Explaining that no employees come to the barn she says (para.28) “nobody but us would want to come here” and (at para.29) she accepts that no business is run from the barn.

19 If one looks at other documents within the bundle, there are promises made that in fact the property has been used partly as a business and so in accordance with the planning permission.

The LPA Position

20 The Defence refers (para.26) to a compliance visit carried out by the local planning authority (“LPA”) and to the apparent satisfaction expressed by the LPA. Correspondence shows that the visit took place on 25 April 2017 (see p.482 of the bundle letter dated 6 June 2017). The LPA were told that a room shown on the built plans as a cinema room was in fact a conference room. Leaving aside the fact that this flies in the face of the matters pleaded in the Defence, it appears that the LPA were not convinced. They asked that a declaration be signed and returned to them. The declaration was signed and completed on 23 June 2017 (see letter of 14 June 2019 at page 525 of the bundle). It certified that 78 sq.m (31% of the total space of 254 sq.m) of the barn was used for workspace and 176 sq.m for living accommodation and that the workspace was used for general office space, the testing and construction of solar kits, make up of presentation material for exhibitions, custo mer and staff training and the presentation of high profile projects and for monthly financial meetings.

21 There is a clear and obvious difference between on the one hand the Defence and Mrs Redfearn's evidence and on the other hand the declaration relied on by the LPA. I am not satisfied on the evidence I have seen that the LPA have expressed satisfaction that the use of the barn was lawful. In fact it seems to be likely that it has relied very heavily on the declaration I have referred to.

Conclusion

22 In my judgment, the exemption that the Defendants seek does not apply to them. From the evidence prepared for the present application and for the adjudication, it seems clear that there is no lawful right to occupy the barn as a dwelling house. The burden to satisfy me that the exemption applies lies on the Defendants. In order to discharge that burden they would in my judgment need to establish that their use of the barn is a lawful, authorised, use. The Defendants have it seems to me not made any effort to establish any such use. In fact their evidence establishes the contrary and appears to treat planning control as an inconvenience which they are free to disregard (see para.12 of the Defence where the live/work designation for which planning permission was granted is described as a "label" which "serves as a distraction form the facts").

23 I am therefore prepared to grant summary judgment to the contractor on the ground that there was no lawful intention to occupy a dwelling house at the time the contract was entered into.

Alternative Case

24 If I am wrong about that then I should go on to consider the nature of the works. Do they principally relate to the dwelling or not? The only way to answer the question sensibly is by reference to lawful use. I therefore proceed on the basis that the barn was being used in the manner set out in the declaration of 23 June 2017, that is for 31% business use and 69% as a dwelling. The exercise is an artificial one because it ignores the defence and the up-to-date evidence.

25 In my judgment, the works would not in that case principally relate or the dwelling. Even if Mr Bury is right and I proceed on the basis that the dwelling simply relates to the living areas within the building, it is not possible, in my judgment, following a proper analysis set down by Coulson J (as he then was) to conclude that the works do in fact principally relate to that area of the barn. That question, as is clear from the decision of his Honour Judge Overend, is not simply a matter of adding up items of work or even expenditure; the question is more subtle than that.

26 In reality, a good deal of the works related to both the area in which the defendants lived and to what ought to have been the business areas. Applying the common-sense principles that Coulson J (as he then was) set out, I am entirely satisfied that it would not be appropriate to describe these works as principally relating to a dwelling. In my view, they related to something of a completely different nature, that is a live/work unit.

27 So for those reasons, both for the planning reasons that I have dealt with, and also on an analysis of the type of works undertaken or nature of the works undertaken, I am entirely satisfied that the defendants have failed to persuade me that they fall within the exception of section 106. In those circumstances, no other appropriate defence having been raised, I am satisfied that summary judgment ought to be granted and I so order.

28 None of the conclusions recorded in this judgment is binding on Mr and Mrs Redfearn should any future dispute with the LPA arise.

LATER

29 It seems to me that it is appropriate to consider, given the background against which the debt arose, that the late payment of debts provisions apply, but I propose to say that a rate of interest of 6 per cent is appro-

priate, taking into account the fact that, although the defendants are individuals, Howsons have been kept out of their money for longer than one would reasonably expect, and it is appropriate to encourage parties to comply with adjudication awards.

LATER

30 I now turn to deal with the issue of costs. There is no issue with the principle of costs, it seems to me, and that is that Mr and Mr Redfearn must, because they are the losing party, pay Howsons' costs. The only question is what the level of those costs is. I am invited to assess the costs on the standard basis, which means I am concerned to enquire if the costs are both reasonable and proportionate. A point has been raised about rates. The rates fixed for the relevant geographical location of the solicitors for Outer London are £317 for a grade A fee earner and £126 for other relevant fee earners. I do not consider those rates to be fixed. They are, first of all, expressly said to be guideline rates. The guideline rates themselves are now considerably out of date and do not necessarily deal with specialist litigation in the Business and Property Courts, which this is. I therefore have no difficulty in applying the rates as sought. However, applying those rates, I accept the point that the heavy reliance on grade A fee earners is perhaps, whilst understandable from Howsons' point of view, not proportionate from the paying party's point of view. I propose to take a broad brush approach to that and to allow total costs in the sum of £17,000.

LATER

31 The rules at CPR 52 are clear: I should only grant permission where I am satisfied that there is a reasonable prospect of success. I am entirely satisfied, given the authorities to which I have been referred and the factual context in which the matter was aired, that there is no reasonable prospect of success on the appeal, and therefore I decline permission. Permission having been sought, the order should set out where permission to appeal can now be sought, and that would be, this being a High Court case, the Court of Appeal.