2017 EWHC 777 (QB)

Case No: HQ16X02767

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10th April 2017

Before :

MASTER DAVISON

- -

Between :

CHALFONT ST PETER PARISH COUNCIL	**Claimant**
- and -	
HOLY CROSS SISTERS TRUSTEES INCORPORATED	**Defendants**

- -
- -

Mr Matt Hutchings QC (instructed by **Simons Muirhead & Burton LLP**) for the **Claimant/Respondent**
Mr Mark Lowe QC & Mr Asitha Ranatunga (instructed by **Farrer and Co LLP**) for the **Defendant**

Hearing date: 14th March 2017

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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.

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Master Davison:

Introduction

1. This is an application to strike out the claimant's claim or to grant summary judgment in the defendant's favour on that claim. In the interests of economy, I will set out only a condensed narrative of the events giving rise to and the procedural history of the claim. A fuller narrative can be found in the decisions of His Honour Judge Foster QC and of the Court of Appeal in the earlier and separate judicial review proceedings brought by this claimant and to which the defendant was joined as an interested party: *R (on the application of Chalfont St Peter Parish Council v Chiltern District Council* [2013] EWHC 2073 (Admin) and [2014] EWCA Civ 1393.

2. On 21 December 2010, Chiltern District Council ("the council") granted planning permission for a mixed-use development on the site of the former Holy Cross Convent School in Chalfont St Peter, Buckinghamshire. The school had been run by the defendant, whom I will refer to as "the Order", until 2006, when it (the school) closed. The planning permission was the culmination of "round one" of a contentious planning battle. The claimant, who I will refer to as the Parish Council, chaired by Mr Richard Allen, opposed planning permission for the development in favour of a rival plan, which involved re-locating the existing Chalfont St Peter Church of England school to the site. That rival plan has never got beyond its formative stages. It was not financially viable if the Order gained a planning permission which enabled them to realise a full residential sale price for the site. Hence the Parish Council's objection.

3. The planning dispute came to be focused on two areas of land within the site: Areas "A" and "B". Both these areas were open areas. It was acknowledged by the Order that Area B had been used as a playing field. Area A was a much larger area comprising approximately 1.2 hectares. In respect of this area, the Order maintained that it had been used for informal recreational purposes only, whereas the position taken by the objectors was that it too had been used as a playing field.

4. The relevance was this: if Area A had been used as a playing field, the planning authority's policy "R2" on "Loss Of Existing Sports Facilities Throughout The District" established what amounts to a presumption that the development would be refused. The planning committee would only depart from that policy if they had reason to do so. Thus, given the size of Area A, a large amount of money turned or potentially turned on whether this area had or had not been used as a playing field. On this issue, the objections to the planning application were spearheaded by Sport England. The original planning application had not featured any replacement playing pitches at all. In response to Sport England's objection, a revised application was submitted which retained one playing field only. This did not satisfy Sport England, who maintained that this did not adequately reflect the loss of the playing fields (plural) involved and which included Area A as well as Area B. By letter dated 3 August 2010, they renewed their objections, this time supported by grainy aerial images (of unstated provenance) which purported to show that Area A had been used as such. The writer of the letter maintained that the "proposed development results in the loss of playing field land equivalent to the entire grassed area, which is approximately 1.2 ha". This drew a response from Gerald Eve, the Order's planning consultants. The thrust of the response was that the Sisters and the caretaker could not recall this area being used as a formal playing pitch by the former school. It had been used to lay out a track for the annual sports day events and as a "temporary pitch" – but it had not been put even to this use for the last nine years. The recommendation of the council's officers was that permission should be granted and it appears that, in so recommending, they accepted the representations that only Area B and not Area A had been used as playing fields.

5. In the event, the planning permission which was granted only provided for the replacement of the sports pitch on Area B, i.e. one sports pitch. It allowed Area A to be used for housing. The development that is now going ahead provides for some 60 houses on this area. The selling price which the Order realised on this basis was around £31 million.

6. On 18 March 2011, the Parish Council brought judicial review proceedings against the council seeking to quash the planning permission. It is the scope of those proceedings that is most germane to the strike out application. But I should note that that was not the only challenge which the Parish Council instigated or involved itself in. The planning application was referred by Sport England to the Secretary of State for a decision whether the SOS wished to call it in. (This was because of the loss of open space and playing pitches.) The Parish Council, through its planning consultants, CERDA, made detailed submissions to the SOS in a letter dated 25 August 2010. The submissions included reference to "robust and reliable evidence provided by Sport England as to the extent of playing pitches to be lost". The SOS decided not to call it in. The Parish Council also issued a challenge under the provisions of section 113 of the Compulsory Purchase and Planning Act 2004 against the decision of the council to adopt the Aylesbury District Core Strategy in which the site was identified as a strategic housing allocation.

7. The judicial review proceedings were protracted and, again, I will do no more than summarise. Leave was granted by Mr Ockelton, sitting as a Deputy High Court Judge. The judicial review itself was heard by His Honour Judge Foster QC, also sitting as a Deputy. He gave judgment on 17 July 2013 refusing the application for judicial review. Permission to appeal was granted by Sullivan LJ 12 March 2014. The appeal came before the Court of Appeal (Moore-Bick, Beatson and Briggs LJJ) on 7 & 8 July 2014. Judgment dismissing the appeal was given on 28 October 2014. The judgments of both HHJ Foster QC and of the Court of Appeal are lengthy and detailed. For present purposes, the point to note is that the "playing fields issue" was addressed by way of a submission from the Parish Council that the planning authority had made a mistake of fact as to their true extent. This rested on the aerial photographs, now supplemented by statements from a former Headmistress, Esme Staniforth, and a former teacher and Head of Physical Education, Angela Woods, as to the extent of the playing fields. The challenge failed, essentially on the basis that for a mistake of fact to be a valid ground in judicial review proceedings, the fact had to be "uncontentious and objectively verifiable" – a label that could not be applied to the playing fields issue. This was the effect of the decision in *E v Secretary of State for the Home Department* [2004] EWCA Civ 52. I will return to the rationale for this principle.

8. That was not quite the end of the judicial review proceedings. By letter dated 24 November 2014, the Parish Council's solicitors sought to re-open the appeal under CPR 52.17. That application was refused by Moore-Bick LJ on 18 April 2015 – again because of the principle in *E v Secretary of State*.

9. The Claim Form in this claim was issued on 3 August 2016, i.e. some two days before the expiry of the 6 year limitation period. The Claim Form claims damages including exemplary damages for conspiracy to injure. The Particulars of Claim make it clear that an ingredient of the conspiracy, and, indeed, a cause of action in its own right, is the tort of unlawful interference, the unlawful means being deceit. It is alleged that Area A had been in use by the school as a formal playing pitch, in particular for both hockey and rounders, and as a running and athletics track right up to the time when the school closed. The Order therefore made, or allowed to be made on its behalf, representations which they knew to be false. They knew them to be false because the actual use of Area A was a matter of "common knowledge among the Sisters and staff at the school". The Order's intention is alleged to have been to prevent or interfere with what I have described above as the rival plan (described in the Particulars of Claim as "the Proposal"), namely to move the Church of England school on to the larger site, funding this at least in part by then selling off the Church of England school's site for residential development.

The application

10. The Order issued its Application Notice on 21 November 2016. The application states that the claim seeks to re-litigate issues which have already been decided by a court of competent jurisdiction and/or amounts to a collateral attack on an earlier decision of the court and is therefore an abuse of process.

11. The application is supported by a set of written Submissions (a skeleton argument) of the same date and a brief statement from Maria Strauss, the Order's solicitor, dated 17 November 2016. That statement exhibits the grant of planning permission and the (no fewer than) six judgments in the judicial review proceedings. The nub of the Submissions is that the Parish Council had superabundant opportunities to put forward its case of fraud at an earlier stage and, in particular, in the judicial review proceedings and that it is a blatant abuse of process to raise that allegation now.

12. In response, the Parish Council has filed further and fuller statements from the two teachers referred to above, plus one further teacher. It has also filed a series of good quality, aerial photographs; I was taken to 5 such dating from July 2003 to July 2006 and one taken post-closure in November 2006. The teachers comment on the photographs. But they speak for themselves. They do, on the face of them, show that Area A was used as a formal playing field with clearly marked out pitches. The Parish Council also referred to 9 letters to the "Buckinghamshire Advertiser" written in 2010. These were from former teachers (including Ms Staniforth) and pupils. The letters referred to Area A having been use for hockey, athletics etc. The writers included two former pupils now working respectively as a solicitor with Herbert Smith Freehills and as a managing director of UK Equities. I was told that it was the Parish Council's intention to contact these witnesses and to deploy their evidence. The Parish Council also filed statements from Mr Allen, the former chairman, and Mr Peter Gould, its solicitor.

The law

13. The application to strike out is based upon abuse of process (CPR 3.4(2)(b)) and the familiar authority of *Johnson v Gore Wood & Co* [2002] 2 AC 1. Summarising that decision, Lord Bingham, giving the lead judgment on abuse of process (with whom all the Law Lords agreed), held that:

    a. The underlying public interest is to have finality in litigation and a party should not be "twice vexed" by the same matter. The bringing of a claim may amount to abuse if the court is satisfied that the claim should have been raised in the earlier proceedings if it was to be raised at all: 31A-C.
    b. The onus is on the party alleging abuse to show this: 31B-C.
    c. It is however wrong to hold that because a matter *could have* been raised in earlier proceedings it *should have* been, so as to render the raising of it in later proceedings necessarily abusive. That would be *"too dogmatic"* an approach to what is a broad, merits-based judgment: 31C-D.
    d. The question to ask is: whether in all the circumstances a party's conduct is an abuse rather than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances: 31F.

14. The submissions of the parties on these principles appear sufficiently from the conclusions set out below.

Conclusions
Abuse of process

15. The starting point is that allegations of fraud are not to be made lightly. That is, perhaps, especially the case where such allegations are made against a defendant such as this one. It is a professional rule that a lawyer may not allege fraud without clear instructions from his client and apparently credible evidence supporting the allegation. The Parish Council's experienced litigation solicitor was well aware of this rule and has been scrupulous to observe it. I have referred to the evidence in support of the allegation of fraud. Mr Gould, very properly, did not omit to record his interview with the caretaker. The caretaker "stuck to his guns", that is to say he maintained his recollection that Area A had not been used as a playing field. It is no part of my function on this application to make findings. Suffice it to say that there is credible evidence that Area A was in use as a formal playing field right up to the time that the school closed and that this must indeed have been "common knowledge".

16. The more difficult issue is whether it is open to the Parish Council to allege fraud at this point in time. Certainly, the ordinary observer would think that it is unsatisfactory that that allegation should be raised only now – 6 years after the events and after multiple hearings in the High Court and Court of Appeal about the same subject-matter. However, whilst I sympathise with the position that the Order now finds itself in, I cannot strike out the claim. My reasons follow.

17. A necessary first step in the Order's argument is that fraud could have been alleged in the judicial review proceedings. The difficulty is that the authorities and the whole underlying rationale of the judicial review procedure favour the opposite proposition, namely that it was simply not open to the Parish Council to allege fraud in those proceedings. The body charged with the duty to make findings of fact in this case was the planning authority. It is a cardinal feature of judicial review proceedings that the court will not ordinarily embark upon a re-hearing of the underlying facts. Firstly, that would be to usurp the function which Parliament has vested in the planning authority. Secondly, judicial review is a procedure fundamentally unsuited to finding facts – particularly heavily contested and contentious facts.

18. It was argued on behalf of the Order that fraud "unravels everything" and that this included a fraudulently obtained planning permission. Reference was made to the well-known case of *Lazarus Estates Ltd v Beasby* [1956] 1 QB 702 in which Lord Denning MR (then Denning LJ) stated the general principle and applied it in order to overcome a strict time limit that would otherwise have deprived the defendant tenant of a legitimate defence based upon the fraud of his claimant landlord. The Order maintained that this could be applied to planning proceedings and cited the cases of *Welwyn Hatfield BC v SSCLG* [2011] UKSC 15 and *R v Bassetlaw DC ex parte Oxby* [1998] P & CR 283 in support of that argument.

19. The problem with this approach is that it is clear that in judicial review proceedings in order to prove a mistake of fact a party can only rely on new evidence if that evidence is uncontentious. I have already referred to the case of *E v Secretary of State* which explains why the Court of Appeal were not prepared to entertain the Parish Council's judicial review ground based upon mistake of fact. The case of *LB Richmond upon Thames v Kubicek* [2012] EWHC 3292 is to the same effect. At paragraph 27 of his judgment, Leggatt J observed:

> "If, in order to decide that there has been a material mistake of fact, the court was entitled or required to resolve a factual dispute itself, then the court would be substituting its own finding of fact for that of the public body to which Parliament has given that task. Accordingly, to require that the fact has been 'established' in the sense of being not merely objectively verifiable but uncontentious seems, with respect, to be essential if a workable distinction between errors of law and errors of fact is to be maintained."

Of course, fraud would be an *a fortiori* case. The case of *Oxby* (relied upon by the Order) is an example where the Court of Appeal expressly stated that:

> "If this case had depended upon the substantiation of allegations of fraud against individuals, it would have been appropriate that the council be required to pursue their claim by an action commenced by writ. Such issues are not normally suitable for judicial review proceedings."

20. Further, whilst there is precedent for the Administrative Court reviewing decisions vitiated by the fraud of the decision-maker, there is no authority to support the proposition that where the decision-maker has acted properly but the applicant procured the decision by fraud, this amounts to a legitimate ground of review. *Prima facie*, the remedy in this situation is an action for fraud. The *Welwyn Hatfield* case relied on by the Order was not an instance of the decision-maker's decision being procured by fraud. In that case, a builder had permission to construct a hay barn, but in fact constructed a building with the outward appearance of a hay barn and fitted out internally as a dwelling-house. He and his wife "lay low" in their barn / dwelling-house for 4 years and then applied for a certificate of lawfulness of existing use. An inspector found that the builder had intentionally deceived the council by acting as he had done. He, the inspector, was the relevant decision-maker and he was not deceived. On the contrary, he made the relevant findings of fraud. The effect of the decision of the Supreme

Court is that, given his fraud, the builder was not entitled to rely on the normal four year period for taking enforcement proceedings. It is not authority for the proposition that a court can judicially review a decision procured by the fraud of a third party. Counsel were unable to find any such case, even though fraud can hardly be unprecedented in the context of a process where very large sums of money turn on the decisions of planning committees. Had fraud been raised in these judicial review proceedings, I think it is virtually certain that the court would simply have refused jurisdiction and invited the Parish Council to pursue that claim by ordinary action.

21. But if I am wrong about that, I still need to consider whether the Parish Council *should* have raised fraud in the judicial review proceedings. To quote from Lord Bingham's speech in *Gore Wood*, this requires a "broad, merits-based judgment, which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before". The analysis in paragraphs 19 & 20 above immediately demonstrates a very good reason why it would be unreasonable to have expected the Parish Council to have raised fraud before. They were represented by an experienced team led by Ian Dove QC. The Parish Council have not waived privilege in the advice that that team gave. But it is obvious that the decision not to allege fraud was taken upon advice and, given the legal position I have described, no one could say that the advice was wrong. As Mr Hutchings QC, for the Parish Council, observed in his skeleton argument, in that legal context it would hardly have assisted the judicial review to have placed emphasis on the extent to which the facts were contentious. Mr Lowe QC, for the Order, pointed to this very passage as evidencing a choice on the part of the Parish Council, i.e. a considered decision not to raise the issue of fraud. That may, indeed, be so. But it was a choice that was forced upon them and it is not an abuse of process for them to have exercised it in the way that they have done. On the contrary, it was, as it seems to me, reasonable for them to have exhausted their remedies in the judicial review proceedings (which might, if they had been successful, have rendered an action for fraud entirely unnecessary) and then bring this claim. This claim is a different type of claim brought for different purposes and governed by different procedural and evidential rules. I do not think that it amounts to "twice vexing" or "unjustly harassing" the Order. Finally, there is some force in the submission (based on policy grounds) that if the claim is made out, then the true abuse of process here is the abuse of the planning system, which if the claim were struck out would go unpunished and un-redressed.

22. Two further points require mention.

23. First, an aspect of the abuse of process argument was that the present claim is a collateral attack on the decisions arrived at in the judicial review proceedings. The relevant authority is *Secretary of State for Trade & Industry v Bairstow* [2003] EWCA Civ 321. Sir Andrew Morritt V-C summarised the principles as follows:

> "(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. (b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of sections 11 to 13 of the Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumption must satisfy the test formulated by Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* 4 App Cas 801, 814, cf the cases referred to in paragraphs 32, 33 and 35 above.) (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

I do not see how those principles can realistically be said to be engaged in this case when the Order was not formally a party to the judicial review proceedings, when the principal findings and conclusions are not challenged and when the remedy sought is quite different. Even if they were engaged, the application of them would not be materially different or lead to any different conclusion from that mandated by *Gore Wood*.

24. Second, it was suggested that the Parish Council ought to have taken up and advanced its case of fraud to the planning authority itself in the four month interval between the decision of the committee and the formal grant of planning permission. This adds nothing of substance to the arguments based upon the alleged failure to pursue fraud within the context of the judicial review and has the added difficulty that the principles of abuse of process are directed towards second claims. These principles pre-suppose a first claim – not a failure to make a claim (and as to which the only constraint is the relevant limitation period).

Summary judgment

25. The law on summary judgment is set out in CPR 24.2(a)(i) and in the well-known case of *Three Rivers DC v Bank of England* [2003] 2 AC 1. I need not recite these provisions. Suffice it to say that on this part of the application, the burden is on the Order to demonstrate that the Parish Council has "no real prospect of succeeding on the claim".

26. With no disrespect to the very cogently expressed arguments of counsel, I can deal with this aspect more shortly.

27. The Order relied on two main points: (1) that it was fanciful to suggest that the Order had the requisite intention to injure the Parish Council and (2) that the Parish Council would never be able to show that the fraudulent misrepresentation as to the extent of the playing fields (if such it was) was material to the grant of the planning permission.

28. I have come to the conclusion that these are both matters for trial. To put it another way, the Order has not persuaded me that the Parish Council has "no real prospect" of success on these issues.

29. I will deal first with intention to injure. The site swap proposed by the Parish Council appears to have been non-viable if the site belonging to the Order were to carry a "full residential value" price ticket. The Order knew that. It served the Order's interests to achieve the optimum price by maximising the area of the site that could be devoted to development and to close down an alternative proposal that was less advantageous. On those facts, it is reasonably arguable that the Order knew that the misrepresentation (which I must, for present purposes, attribute to it) would kill off the Proposal and, by inference, that they so intended. That inference is not rebutted by evidence from the Order. No statement, e.g. from one of the Sisters, has been filed. To a limited extent, that omission provides support for the inference; see the judgment of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd (No. 2)* [2002] W.T.L.R. 95. It is, of course, likely that the Order's dominant motive was to get the best price. But the Parish Council does not have to demonstrate that an intention to kill off the Proposal was the sole or dominant intention; see *Revenue & Customs Commissioners v Total Network SL* [2008] UKHL 19 at paragraph 213. It suffices if it formed part, albeit a significant part, of their intentions. It is reasonably arguable that it did.

30. In such circumstances, the claims for wasted expenditure and the loss of the opportunity of delivering the Proposal are reasonably arguable.

31. The Order took a subsidiary point, which was that the Proposal was at too preparatory a stage for its loss to sound in damages. The Proposal "lacked substance" and "a healthy dose of reality" needed to be applied when considering the extent, if any, to which the Parish Council had lost anything of value when it foundered. An analysis of the reasoning of the Court of Appeal when rejecting the challenge to the council's Core Strategy demonstrated that the land swap proposal was "dead in the water".

32. It appears to me that there may be something in these arguments. But, self-evidently, they are not arguments that I could confidently rule on without further evidence and a closer examination of the facts – a matter for a trial and not a summary judgment application. My task is to assess whether they deal a "knock-down blow" to the Parish Council's case such that they demonstrate that the Parish Council has "no real prospect" etc. They fall short of this. The interests that fall to be protected or reflected in a damages award in a case of this nature are simply the claimant's economic expectations; see *Douglas v Hello!* [2007] UKHL 21 at paragraph 8; see also the case of the "African canoeists" there referred to: *Tarleton v* M'Gawley (1794) Peake 270. Whether the Proposal was viable is a classic planning issue upon which there will, no doubt, in due course be expert evidence. For present purposes, it's enough that it was a proposal that comprised and reflected economic expectations on the part of the Parish Council that were not fanciful or unreal. That test is met. I do not think that I can treat the Court of Appeal's analysis of the inspector's reasoning in relation to the adoption of the Core Strategy as mandating a different outcome. Mr Hutchings QC was correct to point out that the inspector had approached the question of viability given the planning permission. That, of course, took as a starting point the very thing that would be in issue in this claim.

33. As to materiality, this is even more obviously a matter for trial. The Order's own Submissions impliedly accept that the extent of the playing fields was at least a material consideration and that does, indeed, seem only common sense. Realistically, how could it not have been? His Honour Judge Foster QC seems to have accepted that this was material; see paragraph 21 of his judgment. A misrepresentation does not have to be the sole, or even the dominant, inducement. I do not have the material to conclude and nor has the Order demonstrated to me that the planning permission would plainly have been given even if (what I must assume to be) the true position as to the extent of the playing fields had been known. To frame that in the language of CPR 24, I cannot say that the Parish Council has "no real prospect" of succeeding on this issue.

34. For these reasons, I dismiss both limbs of the Order's application.