Case No: C1/2015/3852

Neutral Citation Number: [2017] EWCA Civ 317
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE OUSELEY)
CO5902/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2017

Before:

LORD JUSTICE DAVIS
LORD JUSTICE LEWISON
and
LORD JUSTICE McCOMBE

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Between:

	MICHAEL PRITCHETT	**Appellant**
	- and -	
	CROSSRAIL LIMITED	**Respondent**

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- -

Timothy Straker QC and Karishma Vora (instructed by Sharpe Pritchard LLP) for the Appellant
Nathalie Lieven QC (instructed by Winckworth Sherwood) for the Respondent

Hearing date: 6 April 2017

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Judgment **Lord Justice McCombe:**

1. This is an appeal from the judgment and order of 11 November 2015 of Ouseley J dismissing the appellant's application for judicial review of a decision of the respondent to offer land at Dean Street and Great Chapel Street, London W1 for sale in the open market. The appeal is brought with permission granted by order of 27 April 2016 of Laws LJ.

2. The initial application for permission to apply for judicial review had been refused by Patterson J (on consideration of the papers) on 30 January 2015 and (after renewal at an oral hearing) by Holgate J on 3 March 2015. Permission to apply for judicial review was granted by Patten LJ on 23 July 2015 on an application for permission to appeal from the order of Holgate J.

3. The respondent is in the course of developing a site at and around Tottenham Court Road station in London for the purpose of construction of its London "Crossrail" railway line. On a part of the site being so developed stood a block of flats known as Diadem Court. The appellant was the leasehold owner of a flat in that block. The block, along with a number of other properties, was compulsorily acquired by the respondent under powers conferred by The Crossrail Act 2008 for the purpose of construction of the ticket hall of the redeveloped station. The block and a number of other properties were then demolished.

4. Following completion of the station development there will be a significant site above ground which will no longer be required for the purposes of the new railway or the ticket hall at the station and will be available for disposal by the respondent and for subsequent development. Planning permission for certain residential development has been obtained to this end.

5. The disposal of land initially acquired by a public or quasi-public body pursuant to compulsory purchase powers and no longer required for the relevant public purpose has long been subject to rules to enable the former owners to have first refusal of the option to re-acquire the land at market value. These are the well-known *Crichel Down Rules* ("the CD Rules") which are currently to be found in a Circular from the Office of the Deputy Prime Minister of 31 October 2014 (ODPM Circular 06/2004). In the case of land acquired for Crossrail purposes, the rules have been supplemented by a document entitled *"Crossrail Information Paper C10 – Land Disposal Policy"* ("the Policy"), in the copy before us stated to be "APPROVED Version 2 – 20/11/07".

6. The appellant contends that, in the events that have happened, he (and certain other parties co-operating with him) are entitled to purchase the surplus site in accordance with the Policy. The respondent says that, under the Policy, it may offer the site for disposal on the open market. The matter turns upon the proper interpretation of the Policy. As to this, Ouseley J has held that the respondent's argument is correct; the appellant says that he was wrong to do so. The judgment bears the neutral citation [2015] EWHC 3474 (Admin).

7. I would have liked to confine my judgment to stating simply that I agree with the judge's conclusion for the reasons that he gave. However, in particular since the judgment does not appear to be generally available publicly, I must set out more fully the relevant

considerations and my own reasons for thinking that the appeal should be dismissed.

8. The main purpose of the Policy is set out in a Guidance Note to its provisions to be found in Appendix 2 to the document. Paragraph 2.2 of the Note states as follows:

> "2.2 The main purpose of the Crossrail Land Disposal policy is to capture the situations at stations and other sites where land is materially changed in character and the requirement to offer back an interest in land to the former owners would be excluded. The Crossrail Land Disposal Policy is supplementary to, and not in replacement of the Crichel Down rules. The exceptions from the obligation to offer back sites to former owners (apart from the specific aspect of land materially changed in character) contained in the Crichel Down Rules apply to all Crossrail land acquired under compulsion and subsequently released for disposal."

9. As stated in the quoted paragraph in their standard form, the CD Rules do not afford to previous owners of compulsorily acquired land a first opportunity to repurchase in cases where the relevant land has materially changed in character since acquisition (para. 10 of the CD Rules). This was modified in the case of the Crossrail project where much surplus land to be offered for disposal was likely to have changed significantly in character. The site in issue in this case affords a classic example. In such cases, the Policy provides for such land, assembled from a number of individual parcels, to be disposed of as a whole rather than in a fragmented fashion: see paragraph 3.3 of the Policy which states:

> "3.3 Where larger sites have been assembled from a number of individually owned land parcels, it is expected that these sites will be disposed of as whole, rather than in fragmented manner, in order to meet the Guiding Principles."

10. Paragraph 4.1 of the Policy provides:

> "4.1 Where the Secretary of State intends to dispose of an interest ….. to which this policy applies, holders of Qualifying Interests [of which the claimant was one] will, subject to the [Policy], be given first opportunity to acquire that interest at the market value before it is offered to the general market."

Paragraph 4.2 sets out, in five further sub- sub- paragraphs "Guiding Principles" which include, in 4.2.4 and 4.2.5, these points:

> "the need to secure in the public interest the carrying out of development ….. associated with the Crossrail Works …..; and the need for the land disposal to achieve the best value reasonably obtainable in so far as this is consistent with principles outlined above."

11. The Policy also makes provision for assessment, in financial terms and otherwise, of the ability of persons wishing to acquire the site to perform the objective of the transfer for the intended development (para. 4.4 of the Policy).

12. Paragraph 5 of the Policy defines "Qualifying Interests" for the purpose of an offer of re-purchase. They include freehold owners of the site or part of it and leaseholders of the whole or part with an unexpired term of 21 years at the time of disposal. It also includes the following at paragraph 5.1(iv):

> "Where there was fragmented ownership of the site at the date the property was acquired or occupied ….. under ….. the ….. Bill as enacted, a consortium of former owners who have indicated a wish to purchase the land collectively."

13. Central to the issue in this case are paragraphs 5.2 and 5.3 of the Policy which are in these terms:

> "5.2 Where only one expression of interest from a former owner or long leaseholder with a Qualifying Interest is made to acquire a site, that person will be given the opportunity to acquire the site at market value within the timescales set.
>
> 5.3 If there are competing bids for a site from former owners, it will be disposed of on the open market."

14. The mechanics for expressing an interest under these provisions, in the case of a site such as the present which has materially changed in character, appear in Appendix 1 to the Policy and provide for a letter to be sent to the former owner inviting the purchase of an interest in the whole site at the valuation fixed by the Secretary of State's valuer and then,

> "The former owner will be given two months from the date of that letter to indicate an intention to purchase. Where there is no response or the former owner does not wish to purchase the property or there are competing bids from former owners, it will be sold on the open market and the former owner will be informed by a recorded delivery letter that this step is being taken."

Paragraph 2 of Appendix 1 then states:

> "If the former owner wishes to purchase the site and there are no competing bids there will be a further period of two months to agree terms, other than value, from the date of an invitation made by or on behalf of the disposing department. After these terms are agreed, there will be six weeks to negotiate the price. If the price or other terms cannot be agreed within these periods, or within such extended periods as may reasonably be allowed (for example, to negotiate appropriate clawback provisions), the property will be disposed of on the open market."

There are further provisions in Appendix 2 to the Policy enabling a period for negotiation of a purchase price and, in default of agreement, for the property to be disposed of in the open market with "…the holder(s) of (a) Qualifying Interest(s) [being] free to bid in the competition".

15. In the present case, the circumstances giving rise to the dispute about the application of these provisions were as follows.

16. On 3 February 2014, Crossrail wrote to those with qualifying interests a letter of the type envisaged by Appendix 1 to the Policy. The letter identified the site for disposal and included the following passages:

> "As the holder of a Qualifying Interest in the Site, the Policy entitles you, together with any other person or persons also having a Qualified [sic] Interest, to be given first opportunity to acquire the interest at market value before any offer for sale in the general market …
>
> … You have two months to respond to this letter by advising us whether or not you wish to express an interest in purchasing the Site at the market value and on the Terms of the Disposal set by TfL. The disposal will be by way of a development agreement which will contain certain controls over the development, which will be above the new Crossrail station. When the development is complete, a lease of a minimum of 125 years will be granted for the air space above the station. If we do not hear from you within the two month period, or we receive more than one expression of interest, this invitation will be withdrawn and the Site will be sold on the open market. You will be informed by a further letter if this step is taken."

17. The appellant wrote to the respondent expressing his interest in acquiring the site by

letter of 3 April 2014. In his letter he explained that he was working with a named company in a joint venture and said the venture would be willing to explore working in partnership with other persons holding a qualifying interest who expressed interest in the acquisition.

18. As it turned out, two other qualifying interest holders expressed interest in the purchase within the two month period allowed for so doing. Later, in July 2014, the respondent went on to make enquiries through Deloitte LLP as to the financial capability of each interested party.

19. On 10 April 2014, however, the respondent wrote to the appellant saying that there had been more than one expression of interest and that, in that state of affairs, the site could not be offered under the terms of the Policy but would be offered on the open market. Subsequently, it seems, the appellant had identified one of the other interested parties (Aviva plc) and in June 2014 he informed the respondent that he was in a consortium with them also. The appellant, the judge records, had not discovered the identity of the third interested party (Pearl & Coutts Ltd, with others) until he received the Deloitte report in September 2014.

20. On 17 September 2014 the respondent wrote communicating the outcome of Deloitte's report and stating again that, as there was more than one expression of interest the site would be offered on the open market. On 12 November 2014, a pre-action protocol letter was written on behalf of the appellant which included the information that there was by then a consortium of all three parties.

21. It was put to the judge by Mr Straker QC for the appellant that the policy underlying the Rules (and this Policy) was to enable past owners – either separately or together in a consortium – to have the right of first refusal before the relevant land is offered on the open market. The expressions of interest were, it was submitted, at no stage "competing bids" within paragraph 5.3 of the Policy; the words "expression of interest" (paragraph 5.2) and "competing bids" (paragraph 5.3) are different and, therefore, must mean different things. Therefore, two "expressions of interest" did not make "competing bids" for the purpose of paragraph 5.3. Otherwise, the argument went, the broad ambit of the Crichel Down principle, now enshrined in the CD Rules, would be frustrated. (The appellant's core submission to that effect remained the same on this appeal.)

22. The judge rejected that argument. He tested the language of paragraphs 5.2 and 5.3 by the procedure required to be adopted pursuant to paragraph 1 of Appendix 1. He found that that procedure catered for three situations that might arise on inviting expressions of interest: no response, response declining to express interest and more than one expression of interest. In each case, the result (per that paragraph) was that the disposal went to the open market. A different result followed if there was only one expression of interest. The judge took the view, therefore, that where there were two or more

expressions of interest there were "competing bids" for the purpose of paragraph 5.3 of the Policy.

23. The judge also took the view that the machinery for negotiation envisaged with a single prospective purchaser could hardly be applied with three individual bodies; there either had to be one body or a competition.

24. The judge found that his view of the Policy was reinforced by paragraph 15(6)(ii) of the Rules which states as follows:

> "In the case of land to which (i) applies [that is a site for development ….. which comprises two or more previous landholdings …..] consideration will be given to a consortium of former owners who have indicated a wish to purchase the land collectively. However, if there are competing bids for a site, it will be disposed of on the open market."

25. The judge had also noted that Mr Straker QC, who appeared for the appellant below as he did on the appeal, accepted that his construction of the Policy would require the respondent to enquire and determine whether those who expressed interest were acting individually or in consortium and, in effect, to give each an opportunity of forming a consortium. The judge considered that this was an impracticable operation of the Policy.

26. In his argument on the appeal, Mr Straker continued his submission that the interpretation of the Policy arrived at by the judge frustrated and narrowed, rather than implemented, the underlying principles both of the Rules and of this Policy (as a purported extension of the CD Rules). He also repeated to us his submission as to the difference in language adopted in the differing parts of paragraph 5.1 (i) to (iv) and in paragraphs 5.2 and 5.3. He submitted that the judge had failed to give due recognition to these differences. In his skeleton argument, he put it this way in paragraphs 16 to 18:

> "16. The language of 5.3 is different from the language of 5.2. In 5.2 it is stated that where there is one expression of interest from someone with a qualifying interest that person will be given the opportunity to acquire the site at market value. The preceding paragraph had identified who that someone within 5.2 might be. These are identified at 5.1 (i) to (iv). The last being a consortium of former owners indicating a wish to purchase the land collectively.
>
> 17. Accordingly, it is clear that different language is used to describe different circumstances. An expression common to a number of parties in acquiring an interest in a site is differentiated from someone competing with another to buy a site. Different

> language reflects differing circumstances and if different language has been chosen within the same provision it must sensibly be supposed to convey a different meaning.
>
> 18. Crossrail asserted and the judge accepted that where there is more than one expression of interest there are competing expressions of interest to which the words competing bids are applied. However, this is to deny any difference of meaning between different words deliberately chosen."

27. In opening his oral argument, Mr Straker formulated three main propositions:

i) A "competing bid" (for the purpose of the Policy) would be an "expression of interest" but an "expression of interest" would not necessarily be a "bid", still less a "competing bid";

ii) If the respondent, in making a decision, construed an "expression of interest", made in whatever terms, as a "competing bid", it misconstrued the Policy;

iii) Such a construction would lead to an unfair process and outcome that undermined the policy represented by the CD Rules, this Policy and the policy objective identified by Bingham LJ (as he then was) in *R v Commission for the New Towns, ex p. Tomkins* (1988) 58 P&CR 57 at 65, expressed in these terms:

> "This policy objective is also reflected in the August 1983 guidelines, which commend the practice of selling surplus land with planning permission, where this is obtainable, so as to make sure that the sale price fully reflects the development potential of the land. But the guidelines reflect another policy objective also: that the former owners of land which had earlier been compulsorily purchased for purposes of new town development and is not now needed for that purpose should ordinarily be given the first opportunity to buy back what had been their land at its full current open market value, taking account of development prospects."

28. Mr Straker argued three subsidiary points:

i) The Policy expressly distinguishes the concepts of "expression of interest" and "competing bids" and the expressions must mean two different things;

ii) The process under the Policy provides for a consortium to be created;

iii) The Policy, therefore, requires the respondent to ask the question whether there are competing bids and to inform itself appropriately as to whether there are such bids.

29. Mr Straker was asked what he said was the difference between an "expression of interest" and a "bid" for the purposes of the Policy. As I noted it, he said that the former was, for example, a statement that, "I have an interest in acquiring an interest [in the site] …"; the latter was, for example, a statement that, "I would like to acquire [the site] and I suggest [so and so] as the deal", but not necessarily identifying a price. An expression of interest may, it was suggested, lead to a "bid" but would not necessarily do so.

30. We were also directed by Mr Straker to one other feature of the CD Rules, namely the provisions dealing with cases where boundaries of agricultural land, forming the subject site in former fragmented ownership had been obliterated so preventing land still of predominantly agricultural character from being sold back in its original parcels. For this eventuality, appendix B of the CD Rules provides (among other matters) as follows:

> "(a) Each former owner will be asked whether he or she wishes to acquire any land.
>
> (b) Where former owners express interest in doing so, disposing departments will, subject to what is stated in (c) to (e) below, make every effort to offer them parcels which correspond, as nearly as is reasonably practicable, in size and situation to their former land…."

31. Finally, Mr Straker argued that the construction of the Policy favoured by the respondent and accepted by the judge led to certain "obvious injustices":

i) There was a contrast of abilities for former owners to re-acquire land in cases of former single interests on the one hand and multiple interests on the other. The single owner could relatively easily acquire back his former land whereas one or more multiple owners could not do so;

ii) There were difficulties for multiple owners in identifying each other so as to consider forming a consortium;

iii) The short time scales led to an element of chance as to whether multiple owners could participate in the re-acquisition process, whether alone or with others.

In the end, it was argued, there must come a moment when the respondent had to ask itself expressly whether or not there were competing bids and, in order to answer that question, it had to inform itself as to the status of the expressions of interest received and whether the persons making them were acting as a consortium or might be interested in so acting.

32. For my part, I do not accept these submissions. In my judgment, the judge was entirely correct in his construction of the Policy. The document is not a statute. It is a policy and it cannot be construed as a statute would be. It is necessary to pick up its sense from the document as a whole. It cannot necessarily be expected that language will be used in the Policy as it would be in a statute, or for that matter in a contract or other legal document.

33. I consider that paragraph 5 of the Policy as a whole is dealing with "Qualifying Interests" and how expressions of interests are made. There is no question, at the stage envisaged under paragraph 5 or paragraph 1 of Appendix 1, of any "bids" as such emerging. Questions of price are to be determined by a valuer in the case of a single expression of interest. The consortium example of qualifying interest in paragraph 5(iv) is of a consortium of former owners "who have indicated a wish to purchase the land collectively", i.e. who have expressed an interest. That interest must expressed within the two month period identified in paragraph 1 of Appendix 1. If that does not happen or if there are "competing bids" i.e. competing expressions of interest, as I read it, within that two month period, sale on the open market will ensue. Here there was more than one expression of interest and the respondent, in its letter of 4 April 2014, indicated (as it had said it would in its letter of 3 February 2014) that the sale would proceed on the open market. It said so again in the letter of 17 September 2014. The fact that it chose to assess, in the period in between the two letters, the viability of the various interested parties as purchasers and developers was a matter entirely for it and is immaterial to the issue of interpretation of the Policy before us.

34. I agree with the judge that it is necessary to read the whole Policy, including paragraphs 5.2 and 5.3, together with the procedures envisaged. When this is done the meaning, to my mind, is absolutely clear. The concept of "expression of interest" is expressed in three different ways in paragraph 5: viz. "indicated a wish to purchase the land", "expression of interest…to acquire a site…", and "competing bids". Taken together, those phrases are describing one or more expressions of interest in acquiring the property in question.

35. I do not consider that such an interpretation frustrates the policy of the CD Rules at all. The CD Rules apply to cases where the land in question has not materially changed in character. This Policy is designed to include sites which have so changed. It is not necessarily apparent that the policy considerations in the two cases will be identical. The interested parties here were the appellant, who had owned an individual flat, and other parties who had had interests in other individual parts of the site. None would be stepping back into a property of the character that he or it had previously owned. They

would be getting the opportunity of commercial benefit from a potential new development of the whole site of an entirely different character. This is hardly the situation faced by the former owners of Crichel Down, whose erstwhile property gave rise to the principles now expressed in the CD Rules. Nor is it the same as a case where boundaries of agricultural land have become obliterated; the land in such a case remains agricultural in character and the policy in such a case is to offer such land to former owners "…in parcels which correspond, as nearly as is reasonably practicable, in size and situation to their former land". There is no question here of any of the interested parties being offered parcels anything like corresponding in size and situation to their former holdings.

36. In short, I also agree with the submission made by Miss Lieven QC for the respondent that a straightforward reading of the Policy as a whole makes it clear that two or more expressions of interest, whether from individuals or from individuals and a consortium or consortia, amount to competing bids for the purpose of paragraph 5.3. Paragraphs 5.2 and 5.3 are presenting contrasting situations: paragraph 5.1 speaks of where "…there is only one expression of interest…"; paragraph 5.3 is dealing with the contrasting situation where paragraph 5.2 does not apply, namely where there is more than one expression of interest and there are, therefore, "competing bids". This interpretation is supported, as the judge found, by paragraph 15(6)(ii) of the CD Rules. On the appellant's case, there are no criteria for determining how one moves from a number of expressions of interest to competing bids.

37. As I indicated at the beginning of this judgment, I cannot better the reasons given by Ouseley J in his judgment for dismissing the application for judicial review. I agree with those reasons and with the judge's conclusion. I have merely sought to express the same result in my own terms and to address certain additional points made to us during the course of argument. I would, therefore, dismiss this appeal.

Lord Justice Lewison:

38. I agree

Lord Justice Davis:

39. I also agree