



Pinsent Masons



BY RECORDED DELIVERY

Ms Kim Dero
Interim Chief Executive
Hammersmith & Fulham Council
Town Hall
King Street
Hammersmith
London
W6 9JU

Our Ref 661382.07000

6 July 2017

Dear Madam

SITE: THE SITE OF THE PROPOSED DEVELOPMENT OF STAMFORD BRIDGE FOOTBALL STADIUM UNDER APPLICATION REFERENCE NUMBER 2015/05050/FUL (THE "DEVELOPMENT SITE")

CLAIM NO: HC-2017-001462

CLAIMANTS: (1) LOUIS CHARLES JOHN CROSTHWAITE AND (2) LUCINDA MARGARET CROSTHWAITE

DEFENDANTS: (1) FORDSTAM LIMITED, (2) CHELSEA FOOTBALL CLUB LIMITED, (3) CHELSEA STADIUM LIMITED, (4) THE HOTEL AT CHELSEA LIMITED, (5) CHELSEA LEISURE SERVICES LIMITED, (6) CHELSEA FC PLC

MATTER: PROPOSED ACQUISITION OF THE SITE UNDER S 227 OF THE TOWN AND COUNTRY PLANNING ACT 1990 AND SUBSEQUENT APPLICATION UNDER S 203 OF THE HOUSING AND PLANNING ACT 2016 TO OVERRIDE EASEMENTS OR RIGHTS

1. INTRODUCTION

- 1.1 We act for Mr Louis Crosthwaite and Mrs Lucinda Crosthwaite, the registered freehold owners of a detached residence at 1-2 Stamford Cottages, London SW10 9UP (the "Crosthwaite family home").
- 1.2 Louis and Lucinda live at the Crosthwaite family home with Mr Nicolas Crosthwaite (Louis' father and Lucinda's husband) and Ms Rose Crosthwaite (Louis' sister and Nicolas and Lucinda's daughter).
- 1.3 The proposed development on the Development Site, which now benefits from a planning consent, will cause substantial interference to rights of light the Crosthwaite family home enjoys over the Development Site.

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- 1.4. The Claim, which was issued in the Chancery Division of the High Court on 19.5.17, seeks an injunction to restrain the defendants from unlawfully interfering with those rights of light.
- 1.5. The first, second, fourth, fifth and sixth defendants in the proceedings (the "**CFC Defendants**") have instructed Eversheds-Sutherland LLP to act for them. The third defendant has instructed Travers Smith LLP to act for it.
- 1.6. The purpose of this letter is to address the following comments made by Eversheds-Sutherland LLP in an open letter to this firm dated 12.6.17:-

"Your clients are aware that our clients intend to make a request to the London Borough of Hammersmith and Fulham to acquire an interest in development site pursuant to section 227 of the Town and Country Planning Act 1990, and hold it for planning purposes, so that section 203 of the Housing and Planning Act 2016 can be engaged. This could not realistically be [sic] made in advance of the grant of planning consent on 31 March. Since the grant of in-principle consent, our clients have been in discussions with the London Borough of Hammersmith and Fulham to initiate the acquisition ..."

- 1.7. Our clients' position is that they will take all legal action available to them in the event that you make a decision to acquire the Site under section 227 and/or if rights under section 203 of the Housing and Planning Act 2016 are relied upon, including, if relevant, their right to issue proceedings to review the lawfulness of any decision or action taken by you.

2. SECTION 227 OF THE TCPA 1990

- 2.1. Any arrangement where LBHF acquires land by agreement and then sells it back to the developer of the stadium will be subject to careful scrutiny by a court on any judicial review, particularly insofar as use of the legislation would be to seek to override easements of light and to avoid an injunction or damages in lieu of an injunction.
- 2.2. Section 227(1) of the TCPA 1990 provides that a council can acquire by agreement any land which they require for any purpose for which a local authority may be authorised to acquire land under s226. In this case, it is arguable that the Development Site is not land which the council requires for development. It has been held in this context that "*required*" means more than '*convenient*' and less than '*indispensable*': it means necessary in the circumstances of the case. See e.g. R v Leeds CC, ex p Leeds Industrial Co-Operative Society (1997) 73 P&CR 70 and Sharkey v SSE (1992) 63 P&CR 332.
- 2.3. Section 226(1) of the TCPA 1990 contains a power to acquire land provided that the council think that the acquisition of it will facilitate the carrying out of the development of land. In addition, under s226(1A) the council must think that the development is likely to contribute to the achievement of the economic, social or environmental well-being of the area. To rely on this section, LBHF would therefore be required to demonstrate how the well-being requirement would be satisfied.

3. SECTION 203 OF THE HPA 2016

- 3.1. Section 203 of the HPA 2016 provides that a person (which could include the developer of the stadium as successor in title to LBHF) may carry out building work even if it involves interfering with a right such as a right to light, provided that:-
 - 3.1.1. there is planning permission for the building work;



- 3.1.2 the work is carried out on land that has at any time become vested in or acquired by the council;
 - 3.1.3 the council could acquire the land compulsorily for the purposes of the building work; and
 - 3.1.4 the building work is for purposes related to the purposes for which the land was acquired.
- 3.2 As to the requirement at paragraph 3.1.2 above:-
- 3.2.1 LBHF must acquire the land on which the works will be undertaken which interfere with the right; and accordingly
 - 3.2.2 LBHF cannot just acquire a token interest in the Development Site: it must acquire at least the part of it on which the relevant interfering works will be undertaken. Relevant factors may include whether the CFC Defendants have development funding for the proposed development and/or whether one or more of them has a proprietary interest in at least the part of the Development Site where the proposed structure that will cause the interference to our clients' easement of light would be situated.
- 3.3 As to the requirement at paragraph 3.1.3 above:-
- 3.3.1 notwithstanding paragraph 573 of the explanatory notes to the HPA 2016, it is arguable that the requirement that "*the authority could acquire the land compulsorily for the purposes of the building or maintenance work*" should be confined to circumstances where the land could have been compulsorily acquired, i.e. where compulsory acquisition was a real prospect; and accordingly
 - 3.3.2 in the event it is not, then reliance on the s 203 power can be challenged.
- 3.4 It would be arguable that there would *not* be a real prospect of the Development Site being compulsorily acquired *if* the following requirements in the Government's guidance on compulsory purchase would not be met:-
- 3.4.1 if it cannot be said that reasonable steps have been taken to seek to acquire the necessary rights by agreement;
 - 3.4.2 if it cannot be said that all the necessary resources are likely to be available to achieve the development within a reasonable time-scale or if there is no evidence of how the funding shortfall is intended to be met;
 - 3.4.3 if, save in exceptional circumstances, it would not be reasonable to acquire land on the Site with little prospect of the scheme being implemented for a number of years; and
 - 3.4.4 if the scheme were facing physical or legal impediments to implementation, including the need to reach agreements with third parties.
- 3.5 Other requirements of law and policy on compulsory purchase include, for example, that it is necessary to demonstrate a compelling case in the public interest. In our clients' view, it is arguable, in the circumstances, that this policy requirement cannot be satisfied in this case.



3.6 If and when LBHF considers whether or not to acquire the relevant land in order to engage the protection in s 203 of the HPA 2016, it will need to ensure that the decision is taken properly in public law terms. This will require, *inter alia*, LBHF to take a rational decision, excluding immaterial considerations and taking into account all relevant considerations. Relevant considerations would include *inter alia*:-

3.6.1 whether agreement could be reached voluntarily, for example by negotiation;

3.6.2 whether it is necessary to take this step in order to enable the development to proceed, which could encompass various factors, including whether the development, or a *sufficient development*, could proceed without interfering with our clients' rights;

3.6.3 whether it is necessary in the public interest for the development to proceed; and

3.6.4 whether the interference with the rights to light is justified and proportionate, including in human rights terms.

3.7 In this respect of those considerations, we note:-

(a) the area of the new stadium that will cause the interference to rights of light at the Crosthwaite family home is an area of the new east stand which could be cut-back or the stadium re-designed so as not cause the interference. It is not the case that our clients' rights prevent the whole stadium being built. A substantial stadium could be constructed on the Development Site that does not interfere with our clients' rights of light;

(b) the new stadium will have a disproportionate amount of "hospitality" seating which, generally, takes up more space than general admittance seating. There will be 16,937 hospitality seats at the new stadium which is approximately 28% of the total seats. By comparison, the Emirates Stadium has 9,361 hospitality seats, which is approximately 16% of the total seats. Meanwhile, Wembley, which is a special case in that it was designed to host special events, has 17,252 hospitality seats. That is approximately 19% of total seats and only 315 more than the new Chelsea stadium notwithstanding that Wembley has 30,000 more seats (90,000 compared to 60,000); and

(c) the number of general admittance seats (which generally take up less space than hospitality seats) in the proposed new stadium will, in fact, decrease proportionately. In the existing stadium, 88% of seats are general admission where in the new stadium only 73% of seats will be (Design and Access Statement Part 03, paragraph 3.2, page 16).

4. COMMUNICATION

4.1 We do not have any information relating to your discussions with the CFC Defendants except that such discussions are, apparently, taking place. Nor do we have any information as to what documents the CFC Defendants have disclosed to you, including any without prejudice correspondence which might have passed between our clients and the CFC Defendants since 2015.

4.2 However, we refer to the recent decision of the High Court on without prejudice privilege, EMW Law LLP v Mr Scott Halborg [2017] EWHC 1014 (Ch.), in which Newey J noted at [44] that the authorities show that the without prejudice rule can be *waived* only with the consent of both parties to without prejudice correspondence or discussions. The question that arose in EMW was whether relevant without prejudice documents can be *shown to a third party* only if both parties to the without prejudice negotiations agree? Newey J held at [45] as follows:-

"The answer, I think, must be "No". The voluntary provision of a document has, as it seems to me, to be distinguished from compulsory disclosure. The fact that a party to without prejudice negotiations is entitled to withhold communications within their scope on disclosure cannot mean that he is not free to show them to someone else if he so chooses, at least if there is a legitimate reason for doing so." (our emphasis)

4.3 In the event that full disclosure has not been provided to you by the CFC Defendants, the decision as to whether you now request that is at your discretion.

4.4 For the avoidance of doubt, our clients do not consent to the disclosure of any privileged documents or correspondence, including any without prejudice correspondence relating to the rights of light issue that our clients may have exchanged with the CFC Defendants (including through solicitors) since 2015, and therefore do not waive privilege over any such documents.

We presume that you will take independent legal advice on the content of this letter.

Yours faithfully

Pinsent Masons LLP

Pinsent Masons LLP

Copy to: Ms Tasnim Shawkat (Director of Law) and Ms Juliemma McLoughlin (Lead Director of Planning and Development). Both by post: Hammersmith & Fulham Council, Town Hall, King Street, Hammersmith, London W6 9JU.