

A s.106 obligation to transfer land to the Council for a nominal sum of £1 where affordable housing had not been delivered by a specified date was no longer enforceable

On 5 May 2023, Kerr J handed down judgment in University College London Hospitals Charity and Middlesex Annexe LLP v The Mayor and Burgesses of the London Borough of Camden [2023] EWHC 1070. The case concerned the enforceability of a clause in a s.106 agreement entered into in 2004 by the NHS Foundation Trust and Camden Council relating to the grant of planning permission for the University College London Hospital on Euston Road.

Pursuant to that agreement, the Claimants' predecessor in title agreed to deliver affordable housing on the Middlesex Annexe site in Camden by 1 June 2010. Failing that, the agreement entitled the Council to require the landowner to transfer the land to it for a nominal sum of £1 and entitled the landowner to impose a restrictive covenant preventing the Council from using the land for any purpose other than affordable housing.

The agreement also provided, at clause 3.7 that "*Nothing in this Agreement shall prohibit or limit the right to develop any part of...the Middlesex Annexe Site....in accordance with a planning permission...granted...after the date of this Agreement*".

For various reasons, the delivery of the affordable housing required under the 2004 agreement became unviable and it was not delivered by the specified date. In 2018, the Claimants secured permission for a mixed-use scheme on the Middlesex Annexe site subject to its own affordable housing obligations. However, the Council maintained that the £1 clause remained enforceable.

The Claimants sought a declaration from the Court that the £1 clause was no longer enforceable in light of clause 3.7; the restrictive covenant that they would impose on any transfer of the land to the Council and the 2018 planning permission. If the land was transferred subject to a covenant that restricted its use to affordable housing only, the 2018 scheme could not be delivered because that scheme authorised a mixed-use building comprising affordable housing, commercial space and medical facilities. As such, the Claimants argued that transfer of the land subject to the restrictive covenant would "*limit the right to develop...part of the Middlesex Annexe Site*" in accordance with the 2018 permission such that the £1 clause was no longer enforceable in light of clause 3.7 of the agreement.

Having regard to the principles of interpretation summarised in Norfolk Homes Ltd v North Norfolk DC [2021] PTSR 863, the High Court found that the £1 clause was no longer enforceable by the Council. The Council could have been enforced at any time up until the grant of the 2018 permission, but thereafter, its effect would be to prohibit or limit the right to develop the site in accordance with the 2018 permission, such that it could no longer be enforced in light of clause 3.7 of the agreement.

A copy of the judgment can be found [here](#).

David Matthias KC and **Isabella Tafur** acted for the Claimants, instructed by Pinsent Masons. **Morag Ellis KC** and **Emyr Jones** acted for the Defendant.