Case No: 1LB01930

IN THE CENTRAL LONDON COUNTY COURT

Date: 10/01/2013

Before :

HHJ DIANA FABER

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Between :

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF SOUTHWARK	**Claimant**
- and -	
THE COMMUNITY YOUTH PROVISIONS ASSOCIATION	**Defendant**

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MR SIMON BUTLER (instructed by) for the **CLAIMANT**
MR WILLIAM EAST (instructed by **Sidley Austin LLP**) acting pro bono for the **DEFENDANT**

Hearing dates: 12th , 13th November 2012

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JUDGMENT

1. This is a claim for possession of rooms 22A and 22B on the second floor of the Thomas Calton Centre, Alpha Street, London SE15 4NX. The tenancy is governed by the Landlord and Tenant Act 1954.

ISSUES

2. This is a hearing of three preliminary issues which are set out at page 28 of the trial bundle. They are as follows: (1) Whether the Claimant intends to demolish or reconstruct the premises or a substantial part of those premises or to carry out substantial work of construction at the premises or part thereof and whether it could not reasonably do so without obtaining possession of the premises; (2) whether the Claimant intends to occupy the premises for the purposes or partly for the purposes of a business to be carried out by it therein and (3) whether the Claimant's decision to issue a s 25 notice and commence and prosecute this action was unlawful.

3. The Claimant served a notice under section 25 terminating the tenancy and refused a new tenancy on grounds (f) and (g) of section 30. Those grounds give rise to issues (1) and (2). The Defendant contests both those grounds.

4. The third issue arises out of the Defendant's contention that the decision to issue the section 25 notice was unlawful. The first breach relied on by the Defendants is that of the Claimant's duty under section 71 of the Race Relations Act 1976 in that it failed to have regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity between persons of different racial groups. Mr East clarified the Defendant's case during trial by saying that it did not allege actual discrimination by the Claimant.

5. The second breach relied on by the Defendant is that of the Claimant's duty under section 149 of the Equality Act 2010. The specific provisions relied upon were notified to the court during Mr East's closing submissions and they are section 149 (1) (b) and also, as "marginally relevant", (c). The first is a requirement to have due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. The second requirement is to have due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

6. The Defendant has two further grounds for alleging the unlawfulness of the decision making process. It alleges that it had a legitimate expectation that the dispute between it and the Claimant in relation to the premises would be resolved by a process of arbitration rather than litigation, which the Claimant has not honoured.

7. The last ground for defending the claim is that the Defendant alleges that the decisions to issue and serve the section 25 notice and to issue and prosecute these proceedings were *Wednesbury* unreasonable on the following grounds: the Thomas Calton Centre is grossly under utilised and there is no demand for the use of these two rooms; alternatively, if the Claimant does intend to use the rooms as it alleges, it could use alternative space in the Centre; in addition the Claimant is aware that the decision to evict the Defendant would hamper the latter's valuable work without providing any corresponding benefit due to the lack of demand for the space.

EVIDENCE, SUBMISSIONS AND RULINGS MADE BY THE COURT

8. There was an agreed trial bundle and 7 additional coloured photographs, 2 enlarged plans labelled by me "X1" and "X2", written opening skeleton arguments, an agreed dramatis personae and chronology of key documents, an agreed bundle of authorities, a further bundle of authorities submitted by Mr East and a list of issues submitted by Mr East which was not agreed. I gave permission to the Claimant to adduce a second witness statement by Mr Long.

9. I heard evidence from Mr Long and Ms Duncan for the Claimant and read their witness statements. I also read statements from Mr Cremin, Mr Wiles and Mr Jenkins which were served on behalf of the Claimant. They were agreed by the Defendant save that the point of law in paragraph 5 of Mr Cremin's was not agreed (I was not shown the regulations referred to there) and Mr East told me that paragraph 6 of Mr Jenkins' statement, which says that the works cannot be carried out while the CYPA are in occupation, was not a legal

opinion, he had not sought to cross examine him and that "we do not dispute that". Both counsel made oral closing submissions to the court.

10. I have carefully considered the evidence and submissions and will only repeat them in this judgment so far as is necessary to explain my conclusions.

11. References in square brackets are to pages in the trial bundle and, where oblique strokes are used, to paragraph numbers on those pages.

SECTION 30 (1) (f)

12. The Defendant put the Claimant to proof that it intends to upgrade and improve the facilities in the premises. However at trial it became clear that the Defendant is not challenging the Claimant's intention to carry out the works. It denies that the works amount to demolition and/or reconstruction of the premises and denies that the Claimant is not reasonably able to do the work without obtaining possession [4, 9a, 9b]. In relation to the issue of whether the Claimant is able to do the work without obtaining possession the Defendant relies on s 31A (1)(a). That provides that the court shall not hold that the work intended cannot be done without obtaining possession if the tenant agrees to the inclusion in the terms of the new tenancy terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the tenant.

13. Acknowledging that the effect of the works will be to amalgamate the rooms with those of the Claimant, the Defendant is willing, pursuant to section 31A, to agree in the terms of a new tenancy to allow the Claimant access and facilities to carry out the work. In those circumstances the Defendant maintains that it would be entitled to erect its own new partitions.

14. The unchallenged evidence of Mr Long, a chartered surveyor, [54/16] is that the building, with the exception of the premises in issue, has been repaired and refurbished at a cost of more than £1 million pounds. The precise figures are in documents (which Mr Long had not seen before) attached to Ms Duncan's first statement. Further unchallenged evidence [53/11 and X1 and X2] is that after the proposed works the premises (two rooms on the second floor) will cease to exist because they will be subsumed into the rooms on either side of them. Mr Long marked X1 in green to show the walls which are to be removed and on X2 he wrote " Room 23" and "Room 21" to show the rooms into which the premises will be subsumed. Thus the works will result in there being two larger rooms instead of the four currently there. Further unchallenged evidence is that the wall separating the two rooms 22A and B from each other is structural [53/9] and that the walls separating the premises from the other two rooms, 21 and 23, are partition walls.

15. It is Mr Long's evidence that the asbestos in the premises will be disturbed when building works commence so that no one can occupy the premises or the adjoining rooms during the works. There is a specialist's plan in an extract

from a report which shows shaded areas [69] . Mr Long accepted that those shaded areas do not have asbestos throughout them. He said that parts of each of the shaded areas have asbestos in them. He had looked at the entire report to form that view (it was not before the court save for the agreed extract in the bundle). His evidence is supported by the opinion of the architect Mr Jenkins [95/5] in that he says that the space has to be vacated while the work is done. So does Mr Cremin [89/5] who, as contractor engaged by the Claimant, employed the specialists in asbestos who prepared the report.

16. Mr McDonald's proposition that the work could be done in a couple of days and thus at half term or in the holidays [105-106/ 17-18] was not put to Mr Long or Ms Duncan. Nor was his evidence that the Defendant had offered that facility but that the Claimant had not taken it up. On the other hand Mr McDonald, was not challenged on that evidence in cross-examination. None of the Claimant's witnesses said how long the works would take.

FINDINGS SECTION 30 (1) (f)

17. Any suggestion that the Claimant did not genuinely intend to do these works to the Defendant's rooms which were part of a much larger scheme of works would have been ridiculous, bearing in mind that all the other work has been done.

18. The next issue under (f) is whether or not this is work of demolition or reconstruction. Although the partition walls are not load bearing and although the centre load bearing wall and the floor will remain, I hold that the works are demolition of the demised premises because the removal of the partition walls will have the effect that the premises will no longer exist. They will be subsumed in the neighbouring rooms occupied by the landlord.

19. The last issue is whether or not the Claimant could carry out the works without taking possession of the premises. The Defendant relies on *Heath v Drown* (1973) and on Mr McDonald's unchallenged evidence [106/18] that the Defendant had offered the Claimant the opportunity to enter the premises to carry out the work and that only a couple of days in the holidays or half term would have sufficed for the works. The Defendant also relies on an implied right of re-entry to carry out repairs to support its case that the landlord did not need possession to do the works.

20. As I understood it, the Claimant's response to this was that it had not been put to any of its witnesses that the Defendant had offered to provide access and that none of its witnesses had been challenged on their evidence that it was necessary to gain possession to undertake the works.

21. However I note that none of the Claimant's witnesses stated how long the works would take nor how long they would need to be in possession of the premises to carry them out.

22. The Claimant did not challenge the alleged implied right of entry to carry out repairs.

23. *Heath v Drown* is authority for the proposition that in relation to section 30 (1) (f) "obtaining possession" means putting an end to such rights of possession as are vested in the tenant under his current tenancy. So in that case, where it was conceded that the landlord could carry out the intended work under the reservation in the agreement, he could not avail himself of s 30 (1) (f).

24. Although there is no concession by the Claimant in this case, the effect is the same because there is no challenge to the alleged implied right to enter to carry out works and no evidence which contradicts the Defendant's evidence as to its offers to let the Claimant enter and as to the length of time the repairs would take.

25. Thus I hold that the Claimant has failed to prove that it could not reasonably do the works without obtaining possession of the holding.

26. It is therefore not necessary to go on to consider s31A.

SECTION 30 (1)(g)

27. The Claimant's case is that it intends to occupy the premises for its adult learning service for those aged 19 and over in accordance with the terms of its funding from the Skills Funding Agency [5]. The Defendant's counsel conceded just before the close of the hearing that the rooms would be used to some extent and that he had not put to Ms Duncan that they would not be used at all. The Defendant's case is that as a matter of law in accordance with *Patel v Keles* (2010) the intention to use the premises must have a reasonable prospect of being realised and that if the intended occupation is only for a "fleeting or illusory" period it cannot qualify. In support of its case it puts forward evidence that the Centre was, before the works, and still is, under-utilised.

28. The Defendant also denies the alleged terms of the funding [10-11].

29. Ms Duncan's first witness statement sets out the courses provided by the Claimant and the age limitation [30/2] and states that the Defendant's work does not meet the criteria of the Service's funding from the Agency. She produces the funding allocation letter [31/4, 35] of 14th May 2008 and the Service's bid [40].

30. The former records that the Claimant has applied for financial support "to provide new facilities for parents and children to learn together and improve access and layout of the building as described in your first stage application and subsequently amended in your second stage application". Only the first stage application has been produced to the court. The only other reference in that documentation to the use of the premises is as follows: "The LSC's financial support may have to be repaid should the premises cease to be used for Adult and Community Learning and purposes ancillary thereto".

31. The bid sets out that the Centre is used by the Adult Learning Service and as to 20% Further Education funded activity. Classroom space is not exclusive to

either and the 20% for FE will continue. But, although she accepted that FE could relate to people aged 16-19 years old, Ms Duncan said that theirs (the council's) was exclusively for adults aged over 19 and that younger people were only included if they were learning with their parents. There was no documentary support for her allegation that the Claimant's or the Agency's funding was limited to people aged 19 and over.

32. The Defendant's work currently focuses on young people outside mainstream education providing them with tuition in core subjects [102/6].

33. Apart from Ms Duncan's general proposition that the Defendant's work "does not meet the criteria of our funding" there was no independent evidence that the Defendant's activity was outside the description of the restriction in the grant letter of "Adult and Community Learning and purposes ancillary thereto".

34. As to utilisation of the premises Ms Duncan's first statement said that the space was required to accommodate increasing number of learners who want to join classes in ESOL (English for speakers of other languages), English and Maths. She said that would be done by increasing class sizes and the number of classes in the week including afternoons and early evenings. She also said in respect of those same subjects that 90 new learners wanted classes in January 2012 and 32 were on the waiting list in February 2012 [32/7].

35. That description of the type of class which the Claimant intends to increase conflicts with the bid which contemplated [42] increases in programmes in childcare and family learning programmes. Ms Duncan's witness statement fails to mention the childcare courses which feature very largely in the bid [41/1, 2, 3; 42; 43/6, 7; 44/8]. This disparity cast doubt on the reliability of her evidence.

36. Furthermore one of her answers showed unequivocally that she was not trying to assist the court. She was asked by Mr East about the table she produced with her second witness statement. He asked her "that table is of little use in deciding whether this building is underused" and she replied "I don't know". Since the document was hers I was surprised that she did not know whether or not it addressed the use of the building in which the premises in issue are located. So I pressed her and said "You don't know how it could be used for that?" at which point she admitted "you can't".

37. When it was put to her by reference to the minutes [534] that during a meeting in March 2011 those present were firm in predicting that in the future the building would be under-used and that the Claimant's officers did not argue with that, she replied "there is an expression of that, yes". Asked about the report at page 165/2.4 she said "our delivery is increasing and the number of learners is increasing even though getting less funding from SFA so this is not 100% accurate." It was put to her that paragraph 2.5 expresses concerns about the council's ability to maintain this building and she said "the council have just agreed further investment in the building and still get annual funding from SFA so because we are successful in generating the learner numbers our grant is being improved and the whole building is run from the grant funding."

However she did agree that there is currently a review under way which is considering the future of the Service and that she did not know whether or not it would be wound up.

38. Shown Mr McDonald's surveys allegedly evidencing under-use of the premises she said she did not know whether they were accurate. But she did say that the rooms shown as empty in a survey of 24.9.2010 namely the three in the portacabin and a further three in the old school keeper's house were not usable as they did not meet health and safety and disability legislation requirements respectively. Then she was shown a survey recording that the portacabin rooms were being used and she said "I don't know". Mr McDonald admitted in cross-examination that the Claimant is using rooms 21 and 23 at present.

39. The only challenge put in cross-examination to Mr McDonald about his surveys showing numerous rooms as having "0" occupancy on particular days [181/9-181-23 for the most recent surveys] was as follows: Q you have provided detailed docs surveys but use of rooms 23 and 21 and other rooms fluctuate depending on time of day A no, during 10-12 and 1-3 every day of week as published, have classes in different areas of centre, during days usage fluctuates. Q re rooms 21 and 23 they are being used A yes as is CYPA area. Q but 21 and 23 Claimant is using those rooms A yes at present. Hoped Claimant would relocate it. Q yes but question for judge is whether local authority intend to use that space you have no evidence they don't intend to use it A no evidence that SALS will exist in future".

40. I have looked at the 4 September 2010 surveys (6 months before the s25 notice was served) which show the following rooms wholly unused for the following days, each page records one day and the numbers are the room numbers (I have left out the rooms said by Ms Duncan to be unfit for use):

41. [146]17, 9, 11, 13, 14, 15, 1, 3;

42. [147]24, 17,9, 13, 14, 15, 1,2,3;

43. [148] 20, 18, 17, 9, 11, 13, 14, 15, 8, 1, 3;

44. [149] 21, 27, 18, 17, 9, 10, 11, 13, 14, 15, 16, 1, 2, 3.

45. I have looked at the September and October 2012 surveys which show the following rooms wholly unused for the following days. Each page records one day and the numbers are the room numbers (I have left out those rooms marked as tutors rooms, those subject to a question mark and those said by Ms Duncan to be unfit for use) :

46. 181/9 rooms 20, 27, 26, 17, 12,15, 14 ;

47. 181/10 27, 17, 2, 3 ;

48. 181/11 22, 27,26, 17, 1,2,3;

49. 181/12 29, 27, 18, 17, 12, 3;

50. 181/13 22, 20, 29, 30, 28,27,26, 17, 16, 15, 14, 1,2,3;

51. 181/14 20, 29, 27,26, 17 , 15;

52. 181/15 30, 17, 2, 3;

53. 181/16 30, 17 , 1,2,3;

54. 181/17 20, 21,29, 17,2,3;

55. 181/18 22,20,29, 30,28,2726,17 13 16,15,1,2,3;

56. 181/19 20, 29,27, 26 17, 13,2;

57. 181/20 29, 30, 27,17,2,3;

58. 181/ 21 25,22, 30,27,17,1,2,3

59. 181/22 27,17,13,12,11,2,3;

60. 181/23 25,22,29,30,27,26,17,13,12,16,15,142.

FINDING SECTION 30 (1)(g)

61. The Claimant argued that underuse is legally irrelevant but in my view that is to disregard the true nature of the Defendant's argument which is that taking together the alleged underuse of the premises, the report [165-167] of the Claimant's committee dealing with the future of the Adult Learning Service and discussions on the same topic at the meetings dealing with the future of the Claimant's adult learning service, the Claimant cannot prove that its intention to use the premises has a reasonable prospect of being realised or that the intended occupation is for any more than a "fleeting or illusory" period.

62. So the issue of intention is another issue of fact for me to decide.

63. In the light of the concession that the rooms would be used to some extent I have to find that the Claimant has proved that it intends to use the rooms and that its intention has a reasonable prospect of being realised. Thus the only way the Defendant could succeed in relation to this ground is if I were satisfied that the occupation would only be for a fleeting or illusory period.

64. The Claimant's case is strengthened by the absence of evidence of any other explanation for the proposed works other than the Claimant's intention to use the two larger rooms. There is no evidence, for example, that the Claimant wants to let them to anyone else or that it intends to sell the building or even that it has explored doing so.

65. Ms Duncan's written evidence of people waiting for courses [32/7] was not challenged in cross examination. Her evidence that more money for the building has been approved by the council is more recent than the content of

the report which refers to February 2012 as being in the future [167/5]. So if that evidence is accepted both those aspects strengthen the Claimant's case.

66. In addition the Claimant is using the rooms to either side of the holding, albeit that is not of itself evidence that it needs the larger rooms that will be created by these works.

67. Some aspects of Ms Duncan's evidence were unreliable. They were as follows: her unwillingness to assist the court in the respect noted above; the conflict between the uses for the premises listed in the bid and those in her first witness statement and the lack of documentary support for her evidence that to allow the Defendant to continue its work in the premises would have been contrary to the restriction in the Claimant's funding.

68. I heard no detailed submissions based on Mr McDonalds surveys: I seem to be the only person who has performed the above breakdown of the contents.

69. It seems to me to be very strange, given the reliance by the Defendant on underuse of the building, that the Claimant has not investigated that allegation and produced evidence as to the usage of the rooms.

70. Underuse of the other rooms, however, does not of itself undermine what the Defendant has now admitted, namely a real intention to use this holding once subsumed into rooms 21 and 23. Nor does underuse mean that the intended use of the two larger rooms must be fleeting or illusory. The current undisputed evidence is that the SALS still exists, that it has a waiting list for places on courses and that the Claimant's funding of it has increased. In those circumstances I cannot find that the use would only be fleeting or illusory.

71. The Claimant has thus succeeded in proving ground 30 (1) (g).

ILLEGALITY : EQUALITY ISSUES

72. It appears that the Claimant no longer relies on the point concerning whether or not the duties are engaged as dealt with in the Defendant's skeleton argument paragraph 19(1). The Claimant conceded in closing submisstions that it did not have regard to s71 of the Race Relations Act when issuing the s25 notice and that it did not have regard to section 149 of the Equality Act when it commenced proceedings.

73. However the Claimant submits that those failures do not of themselves make the decisions unlawful. It is the Claimant's case that, as evidenced by Mr Long's second statement dated 8.11.2012, after service of the Defence dated 30.9.2011 the council did have due regard to the relevant factors as the law requires according to the judgment of Wilkie J. in *R v Surrey County Council* (2012).

74. The Defendant's case is that at that point it could not have been *due* regard because, having commenced the action, the Claimant would have been biased towards allowing the proceedings to continue. Mr Long did not accept that proposition when it was put to him in cross-examination.

75. The Defendant relies for support for its argument on *R (Elias) v Sec of State for Defence* (2005), a decision of Elias J,in particular in paragraph 99. He was considering the lawfulness of the criteria under a compensation scheme for internees of the Japanese in the Second World War. The Secretary of State required that claimants should have a parent born in this country. The judge held that the purpose of section 71 was to ensure that the public body paid due regard at the time that the policy was being considered and not when it had become the subject of challenge. Furthermore he said that "there will be in many cases a tendency, perhaps subconscious, to make the assessment whether discrimination might arise with an eye on the outcome of the litigation. That will not produce the same unbiased analysis as might occur if consideration is given to the section 71 factors at the relevant time".

76. In response to this point the Claimant pointed to the Defendant's concession that there had been no actual discrimination in this case thus, it argued, there is no evidence of bias. Furthermore the Claimant relied on the case of *Barnsley v Norton* (2011) in the Court of Appeal (and later than the case dealt with in the last paragraph) as authority for the proposition that the Claimant can put right an initial failure to have due regard because the duty to have due regard is a continuing one. That case concerned a claim for possession proceedings in which there was a disability issue. Lloyd L.J with whom Kay L.J. agreed said in paragraph 26 " if the Council's position had been that it did not have regard to the section 49A duty when commencing the proceedings because, for example, it needed to establish its right to possession first, which was not in the event accepted by Mr Norton, and that once that was accepted or proved it would then give consideration to the implications of Sam's disability before pressing for an order for possession, that could have been a proper and rational position to take so long as it did give such consideration at the later stage. As was accepted on both sides, it is not the case that a public authority's obligations in this sort of respect are necessarily to be discharged by a decision once and for all at the outset".

77. The Defendant sought to distinguish the two cases from each other on the grounds firstly that in *Elias* the scheme was already in place and secondly that in *Barnsley* the issue was as to due regard prior to deciding on a remedy but I reject those as not substantive reasons for the different approaches. The fact that the parties agreed on the last point mentioned in *Barnsley* is of course relevant in that the Court of Appeal did not hear argument on the issue.

78. In any event it seems to me that Carnwath L.J.'s judgement was on a different basis. He said in paragraph 42 that the council's decision to take possession proceedings without having due regard to its duty under the Act was defective in law. In paragraph 43 he said however that the duty was to have such regard as was appropriate in the circumstances so in that case it was enough if the authority had in mind the need to take steps on account of the disability at the appropriate time. In that case it was sufficient to do so after judgment on entitlement to possession and before any order was made.

79. So this issue is fact sensitive and I must decide whether on the facts of this case the statutory requirements for due regard were satisfied by consideration after the service of the Defence case statement in September 2011.

80. At this point I remind myself that this is the second action for possession: the first had to be discontinued in January 2011 because of failure to serve the correct notice. This is relevant as demonstrating the Claimant's solid commitment to possession proceedings prior to the exercise of its duty of giving due regard to the statutory considerations. Furthermore a requirement highlighted in previous case law (for example *Williams v Surrey CC.* (2012) at paragraph 16 (viii)) has not been satisfied in this case in that the Claimant has not produced any record of the substance of the consideration described in outline list form in paragraph 5 of Mr Long's second witness statement [100/30]. On the facts of this case the evidence shows clearly that the Claimant had a very firm commitment to this claim for possession. Thus the court has need of a contemporaneous record of the substance of the Claimant's consideration in order to be persuaded that the said firm commitment did not bias the consideration of the factors set out in that paragraph. Absent such evidence, I can only find that the Claimant has failed to establish that it did give unbiased due regard to the statutory factors.

LEGITIMATE EXPECTATION

81. It is plain to me that Clause 10 of the Compact [143] is a dispute resolution clause which provides for resolution of disputes as to the meaning and application of the Compact. It is not intended to apply to other types of dispute. The letter [115] relied upon by the Defendant makes it plain that this dispute is not as to the meaning and application of the Compact. This plank of the defence therefore falls away.

IRRATIONALITY

82. Here it is necessary to return to the evidence considered under the head of section 30(1)(g) above. Having made the findings set out under that head, I cannot hold the Claimant to have been irrational in its decision making.

REMEDY

83. I have found a breach of the Equality Act requirements and that is no small matter because in the circumstances of this case with the Claimant's firm and settled commitment to expensive litigation I fail to see how it could in the future give unbiased due regard to the statutory requirements under the Equality Act.

84. I dismiss the claim for possession.