Neutral Citation Number: [2023] EWHC 363 (Ch)

Case No: CH-2022-000119

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS LIST
ON APPEAL FROM HHJ DUDDRIDGE SITTING AT THE COUNTY COURT IN CHELMSFORD
DECISION OF 28 MARCH 2022
CASE NUMBER: F01CM008

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 23/02/2023

Before :

SIR ANTHONY MANN

- -

Between :

MAN LIMITED	**Appellant**
- and -	
BACK INN TIME DINER LIMITED	**Respondant**

- -
- -

Jamal Demachkie and **Priya Gopal** (instructed under Direct Access) for the **Appellant**
Philip Brown (instructed by **Tees Law LLP**) for the **Respondent**

Hearing date: 15th February 2023

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Approved Judgment

Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. A copy of the judgment in final form as handed down should be available on The National Archives website shortly thereafter. The deemed time and date of hand down is 10am on Thursday 23rd February 2023.

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SIR ANTHONY MANN

Sir Anthony Mann :

1. This is an appeal from a decision of HHJ Duddridge sitting in the County Court at Chelmsford in which he allowed an application for a new business tenancy made by the respondent, Back Inn Time Diner Ltd, under the Landlord and Tenant Act 1954. In his decision, handed down on 27th March 2022 he found that the landlord/appellant (Man Ltd) had not established the sole ground of opposition which was run before him, namely that the landlord intended to redevelop the premises, and his order of 16th June 2022 so declares. The landlord challenges that decision. In this appeal the landlord says that the judge was wrong to conclude, as he did, that the landlord had not established the means of funding a redevelopment to an appropriate degree, and there is also an attempt to challenge an interlocutory ruling as to the admission of evidence and another ruling in which the judge (it is said) failed to reopen his decision when an important new fact emerged between the circulation of his draft judgment and its handing down. Permission to appeal was given on 2 grounds related to the first point, but was refused on paper in relation to the latter two points, but the application for permission was renewed before me on the hearing of the substantive appeal.

2. Before me the landlord was represented by Mr Jamal Demachkie, who did not appear below; the tenant was represented by Mr Philip Brown. It is right that I should record that in appearing before me Mr Demachkie was assiduous in rejecting points that he considered could no longer properly be run and in confining himself to that which were perceived to be at least arguable.

3. The factual background can be shortly stated and appears in the clear and thorough judgment of the judge below. The appellant is the landlord of premises at 13 Cottage Place, Chelmsford in which the tenant, the respondent, runs an American-style diner. The lease expired on 31 May 2018 and on 14 June 2018 the tenant gave a notice under section 26 of the 1954 Act seeking a new lease. A counter notice was served by the landlord on 30 July 2018 raising various grounds for objecting, including persistent delay in paying rent, other breaches of covenant, an intention to redevelop under section 30(1)(f) of the Act and an intention to occupy the premises and carry on a business there. By the time the matter got to trial all grounds of opposition save for the redevelopment ground had been abandoned. An order had been made for the trial of the redevelopment issue as a preliminary issue in the litigation. It was that redevelopment issue that was subject of the trial and of the ultimate judgment. The judge below held that the landlord had not established the relevant intention within the Act.

The legal background and the relevant tests

4. There was no dispute as to the applicable law. Under the 1954 Act a landlord is entitled to oppose the grant of a new tenancy under section 30(1)(f) on the ground:

> "That on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

5. In paragraph 23 of his judgment, Judge Duddridge set out various propositions of law, supported by authority, and his propositions (which he then sought to apply) were not and are not challenged by the parties to this appeal. At the heart of this appeal are the following:

(a) The landlord needs to show that it intends to carry out development falling within ground (f), which requires an assessment of two elements – the subjective element of whether the landlord subjectively intends to carry out the development and secondly (and significantly for this appeal) whether the landlord has an objectively realistic prospect of implementing that intention. The burden of proof is on the landlord to establish those two elements – see *Gregson v Cyril Lord* [1963] 1 WLR 41 and *Zarvos v Pradham* [2003] EWCA Civ 208.

(b) The relevant time at which it has to be shown is at the date of the trial.

(c) As to the objective element, the intention is not proved "if the person professing it has too many hurdles to overcome, or too little control of events." (*Cunliffe v Goodman* [1950] 2 KB 237.

6. In the present case the ability to get planning permission and the ability to get funding for the redevelopment were live issues. In relation to those the judge said as follows:

> "(f) However, where planning permission is required, a landlord does not have to prove on the balance of probabilities that it will obtain planning permission, merely that it has a reasonable prospect, meaning a real rather than a fanciful chance of doing so, a prospect that is strong enough to be acted

> upon by a reasonable landlord rather than one that a reasonable landlord would ignore: [authorities cited] …
>
> (h) Although ground (f) states that "… on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises…", this has been interpreted to mean within a reasonable period after the termination of the tenancy under s.64. The landlord must therefore show that it has the subjective intention to carry out the works and objectively has a real prospect of being able to do so within a reasonable period after the date of termination: [authorities cited]. If the landlord will be unable to overcome any practical obstacles to development within a reasonable time fixed by the court, then he will not demonstrate the required intention and his objection to a new lease on ground (f) will fail."

There was no challenge to the judge's analysis in relation to planning permission set out in his subparagraph (f). Both sides accept that that is the correct test. Nor was there any challenge to the judge's determination as to the time at which one assesses the practicability of achieving the redevelopment in subparagraph (h).

The judge's findings

7. In his judgment the judge below made the following determinations which are relevant to this appeal and the applications for permission to appeal:

> (i) During the evidence in chief of the landlord's main witness (its director Mr Man) the claimant sought to introduce bank statements to evidence funds available to him which could be used for the proposed development. Those documents were capable of going to the financial ability of the landlord to carry out the development and thus the objective factor referred to above. Those documents were not produced before the trial and their use was first foreshadowed in the landlord's skeleton argument exchanged very shortly before trial. The judge refused to allow the admission of that material. This refusal is the subject of the first application for permission to appeal, permission having been refused on paper by Bacon J.

(ii) One of the issues relevant to the ability of the landlord to carry out the development was the state of an outstanding planning application. The landlord had submitted various previous applications for planning permission, and they were all turned down. At the time of the trial there was an appeal outstanding from the most recent of those applications, and a decision was awaited from the Planning Inspectorate. In fact the case of the landlord at this stage was that it did not intend to implement that permission if granted because it involved a small piece of land which was not under the landlord's control, but it hoped to use the fruits of a successful appeal as a sort of springboard to a further application which would not have involved the use of that small piece of land. It was the availability of that putative planning application (the "stepped scheme") that the judge was invited to rely on. He held that it had not been demonstrated on the evidence that the outstanding appeal had a real prospect of success (paragraph 44), and even if it was successful he was not satisfied that there was a real prospect that planning permission on the putative application would be forthcoming so as to allow the redevelopment to take place within the proper timeframe for the purposes of the Act.

(iii) In addition, the landlord had not discharged the burden of proving that it would be able to fund the development within a reasonable time after the termination of the tenancy (paragraph 52). I shall have to return to the more precise findings about this. This decision is subject to this appeal, and permission to appeal has been given on the point.

(iv) Accordingly, the landlord had not established its objection to a new tenancy under ground (f). This is appealed with permission, on the basis of the point in (iii).

(v) That is what the judge's draft judgment, distributed in advance of a hand-down, had said. However, one or two days before hand-down, the planning inspector delivered his/her decision in favour of the grant of planning permission. In those circumstances the landlord invited the judge to review or re-open his decision (which had not been formally delivered). Having considered the

authorities on re-opening decisions Judge Duddridge decided that he would assume that in the light of the grant of planning permission the landlord did now have a "real prospect of getting planning permission within a reasonable period of time". However, he refused to "re-open" his decision because the problem of funding still existed and the grant of planning permission did not affect that determination. He therefore dismissed the application to review his decision. He recorded his decision in an approved transcript of the short judgment he delivered on the point, and by adding a two paragraph post-script to his draft judgment. This decision not to re-open the whole decision for review is subject to the renewed application for permission to appeal.

8. The logical way of dealing with the issues arising on this combined permission and appeal hearing is to deal first with the point about the introduction of the bank statements (the first permission point), then to deal with the main appeal as it stands and without the second permission point, and then deal with the permission application in relation to the judge's declining to "re-open" (if that is the right word) his decision in his draft judgment. That is because if permission were granted on the first point it would affect the reasoning on considering the main appeal; and the judge's decision on the re-opening point is capable of being affected by the reasoning in his main judgment, which needs considering in the context of an appeal.

The first permission point – the admission of the bank statements

9. Having heard argument on this point first at the hearing before me, I made a determination at that point that permission to appeal should be refused with my reasons to follow. I took that course, rather than waiting to deliver an overall judgment on all points, because a decision the other way, had I taken that course, would have affected the arguments on parts of the appeal for which permission had been given. Since I reached a clear view I expressed it at the time so that the rest of the appeal could be conducted in that light. This part of this judgment therefore contains my reasons for my decision on permission.

10. As I have indicated, the attempt to introduce these statements was foreshadowed by a reference in counsel's skeleton argument exchanged and delivered one working day before the hearing. Even then they were not produced to anyone in advance of, or even at, the hearing. There was an attempt to introduce them after Mr Man had confirmed his witness statement and he was invited by his counsel in the witness box to produce them by way of a supplementary question in examination in chief. It is

said that they go to the question of whether funds were available for the development. That prompted a debate about whether they should be allowed in so late. They were never shown to the tenant's side or the judge. The debate took place without anyone else seeing them.

11. The judge ruled against their admission. In a short ex tempore judgment he held that they could not be relied on unless he gave permission under CPR 31.21 (no party may rely on a document which ought to have been disclosed unless the judge gives permission), and treated the landlord as requiring relief from sanctions under the principles in *Denton v T H White* [2014] EWCA Civ 906 (a topic on which, for some reason, the landlord's counsel did not address him). On the first step (was the breach serious), he found that it was. On the second step (was there a reason for the breach) he found there was no good reason. It appears that the reason advanced for the late disclosure was a sensitivity on the part of Mr Man, (and perhaps counsel too, who had recently been scammed) to disclosing sensitive information. The judge observed that that was not a good reason and that it appeared that the documents had been held back either deliberately or because someone had not really applied their mind to what ought to be disclosed. There is no challenge to the judge's reasoning or determination on those questions on this appeal.

12. Then he turned to the third question in *Denton*, namely a review of all the circumstances. In that connection he said:

> "4. Should I admit the documents having regard to all the circumstances? In my judgment, no, not where there has been a significant breach, where there is no really good reason for that breach, and where they are produced so late in the day. The question might have been different had they been disclosed late but in good time before this trial started but to produce them only at the start of evidence-in-chief is really not acceptable, in my view, and it would not be just to admit these clearly relevant documents now.
>
> 5. Insofar as there is any prejudice flowing from that, then that prejudice should fall on the defendants' shoulders, given that it is the defendant's breach of the rules which has led to this situation so I am not prepared to admit these bank statements into evidence."

13. Mr Demachkie submitted that that demonstrated an error by the judge in considering the third *Denton* factor. In dealing with the third element the judge in fact just referred back to the preceding two, and failed to consider other matters including the

fact that there had been no history of other breaches of the rules (a factor under CPR 3.9(1)(b) and he did not consider whether there was prejudice to the parties. It was not suggested by the judge that any prejudice to the tenant could not be remedied by an adjournment. If the statements had altered the course of the trial, leading to the landlord succeeding where it might not otherwise, then that could be remedied in costs.

14. I refused permission to appeal for the following reasons. The judge's decision was the exercise of an evaluative discretion from which an appeal would only be allowed if the judge erred in principle, took into account an irrelevant factor or omitted to consider a relevant one. An appeal would have no real prospects of success. It is based on a point that was not actually taken by counsel for the landlord below, so points about relative prejudice and other matters within CPR 3.9 (to which *Denton* requires attention to be paid) were not actually raised and it would be unfortunate, though not impossible, for the appeal to succeed on the basis of a complaint that points that were not raised were not dealt with by the judge. As the White Book at paragraph 52.21.5 points out:

> "Reasons for judgment will always be capable of having been better expressed. A judge's reasons should be read on the assumption that the judge knew (unless they have demonstrated to the contrary) how they should perform their functions and which matters they should take into account ... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that they misdirected themselves .."

15. It must be borne in mind that this was an ex tempore judgment delivered at an unexpected juncture at the beginning of the evidence in the case, and that the landlord's counsel did not seem prepared to argue the point. Notwithstanding that, it appears that the judge did in fact have relevant points in mind. His paragraph 5 shows that he was aware of possible prejudice to the landlord in the course that he adopted, and since he was aware of the point to which the statements were said to go he must have had prejudice to the landlord's case in mind.

16. In addition, the judge returned to the point in paragraph 33 of his main judgment, and he did so in terms which showed that he had questions of prejudice to the landlord well in mind. He said:

> "33. It is only fair to mention that, as part of his evidence in chief, Mr Man sought to adduce bank statements showing his financial position but I refused to admit them in evidence for reasons I gave in an ex tempore judgment at the time: essentially because he had failed to disclose any bank statements during disclosure and I refused relief from the sanction imposed by CPR 31.21. To that extent, he has been deprived of an opportunity to make good a deficiency in D's evidence. However, I have to decide the issues on the evidence that has been properly adduced and the onus is on D to produce the evidence required to prove its case in compliance with the CPR and Court Orders. Whilst Mr Harris correctly submitted that I should have regard to the whole of the evidence, including Mr Man's oral evidence, and I could therefore find that D had proved its case based on his oral evidence and the limited documents, a party that does not provide evidence that it would be expected to produce, to support its case on disputed issues, is vulnerable to the Court deciding that it has not provided sufficient evidence to prove its case. In short, whilst I accept Mr Man's evidence about his subjective intention and consider, below, how this affects the subjective intention of D itself, I am troubled by the relative paucity of robust, up to date evidence about the likely cost of the works and D's ability to fund them. I will return to this in my findings below."

17. Mr Demachkie rightly accepted that I was entitled to look at that paragraph so far as it reflected on the discretion he had exercised, and it is quite clear that he had well in mind that his decision left a potential evidential gap in the landlord's case (he does not seem to have been invited to look at the statements de bene esse).

18. None of the justifications for interfering with the result of a judicial evaluative exercise exist in this case. The decision to refuse permission to appeal is further bolstered by the fact that the decision was in the nature of a case management decision, with which an appellate court is even less inclined to interfere.

19. For those reasons, therefore, I held that there was no real prospect of success on this ground and I refused permission to appeal.

Ground 2 – whether the judge applied the wrong test to an evaluation of whether the landlord had demonstrated the availability of funding for the proposed development.

20. I have set out above the legal approach that the judge adopted. This point concerns the objective element of intention referred to by him – the demonstration of an ability to carry out the development. On the facts of this case there were two principal elements which needed to be dealt with – the availability of planning permission, and the availability of funding. As already pointed out, the judge was satisfied with neither, though he reconsidered the former as a result of the arrival of the decision on the planning appeal.

21. So far as funding is concerned, it is averred by Mr Demachkie that what has to be demonstrated is not that funding be demonstrated on the balance of probabilities, but a lesser level of proof, namely that there is a real, as opposed to fanciful, prospect of getting funding. That is correct, and it is accepted by Mr Brown for the respondent tenant. The authorities tend to discuss this level of proof more in the context of establishing the availability of planning permission, but it was not suggested to me that the position is any different in relation to the availability of finance. In the planning context Saville LJ held that a landlord did not have to establish more than a reasonable prospect of getting planning permission in *Cadogan v McCarthy & Stone* [2000] L&TR 249 at p254:

> "A reasonable prospect in this context accordingly means a real chance, a prospect that is strong enough to be acted on by a reasonable landlord minded to go ahead with plans which require permission, as opposed to a prospect that should be treated as merely fanciful or as one that should sensibly be ignored by a reasonable landlord. A reasonable prospect does not entail that it is more likely than not that permission will be obtained."

22. The same reasoning has been applied to the obtaining of finance in *DAF Motoring Centre v Hutfield & Wheeler* [1982] EGLR 59:

> "The final matter that was debated in the evidence before the learner judge was the financial feasibility of the scheme and on the authorities that have been decided upon this section the position is this, that a landlord who wishes to obtain possession under subparagraph (f) must prove his intention by showing, firstly, that he desires to carry out the redevelopment and, secondly, that it is a reasonably feasible prospect for him to do so … (page 59 per Griffiths LJ)"

23. In the same case Slade LJ cited Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1957] Ch 67:

> "The test is surely now quite clear and can be stated in simple language, as was done by Diplock LJ in *Gregson v Cyril Lord* [1963] 1 WLR 41 at 46, where he formulated the second limb in the simple words: 'Landlords must prove that in point of possibility, they have a reasonable prospect of being able [in that case] to bring about this occupation by their own act of volition' or (for this purpose) to carry out the proposed redevelopment."

24. Mr Demachkie's appeal on this point is based on his proposition that the judge below applied the wrong test. It is said he applied a stronger test, suggesting the balance of probabilities, or at least something more demanding than a real prospect.

25. In this connection Mr Demachkie pointed out the number of occasions on which the judge posed the right test, in terms, in relation to the required planning permission. He pointed to a contrast with the language used by the judge when he was referring to the availability of finance:

> "32. However, I am concerned about the general lack of substantial up-to-date, objective evidence showing that D <u>will be able</u> to carry out the development if planning permission is granted. Specifically, as discussed further below, there is only very limited evidence of the likely construction costs and D's ability to fund them. Given that these matters are clearly in issue and that the burden of proof lies on D to establish ground (f), I would expect it to support its case with detailed documentary evidence about these matters. As it is, it's case rests on Mr Man's evidence supported by only limited, and in some cases out of date, documents. [Mr Demachkie's emphasis]

….

> 50(c) … [The company] might be able to obtain a development loan secured against the property but has provided no evidence (such as an offer of a loan or offer in principle) to show that it <u>will</u> be able to do so. [Mr Demachkie's emphasis]
>
> …

> 52… However, although I accept that [Mr Man] genuinely believes that he will be able to fund [the development) the evidence is quite unsatisfactory given that this is a contentious issue which D is required to prove, and in respect of which it could properly be expected to provide robust evidence showing its financial ability to carry out the development within a reasonable time of obtaining possession of the property. This is exacerbated by the lack of any substantial evidence showing the likely costs of the proposed development. In these circumstances, notwithstanding Mr Man's clear personal conviction, I am not satisfied that D has discharged the burden of proving that it will be able to fund the development within a reasonable time after the termination of C's tenancy…
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> …
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> 56 [The postscript added after the planning appeal decision] … [I now accept that] D now has a realistic prospect of obtaining planning permission for the stepped scheme within a reasonable period of time after termination of the tenancy… I also found that D had failed to prove that it would be able to fund the development within a reasonable time after the end of the tenancy."

26. That last citation is an example of the contrast which Mr Demachkie draws attention to. The reference to planning permission suggests the right test (reasonable prospect) whereas the reference to funding suggests something else. There are other parts of the judgment, which I have not set out, in which the planning permission issue was described in similar terms. So far as the first two quotations are concerned, Mr Demachkie draws attention to the verb "will" which, again, is said to indicate that the judge was applying the wrong test. In addition Mr Demachkie relies on the reasons given by the judge for refusing permission to appeal in which he said:

> "2. The burden was on the Defendant to prove that it would be able to fund the proposed development. The Defendant failed to disclose sufficient financial documents to prove its case on that issue."

27. I agree that the wording used by the judge might be capable of justifying the inference which Mr Demachkie seeks to draw, but a proper reading of the whole of the judgment indicates clearly that the judge had the right test in mind.

28. At paragraph 23 set out the correct legal test:

> "(a) D needs to show that it intends to carryout development falling within ground (f). This requires an assessment of two elements:… (ii) whether D has objectively realistic prospects of implementing that intention."

The judge was clearly aware that finance had to be considered under this second limb, as well as planning permission, and he indicates that he was aware that the law required him to treat both the same. His awareness also appears from paragraph 23(h) where he said:

> "(h) Although ground (f) states that "… on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises…", this has been interpreted to mean within a reasonable period after the termination of the tenancy under s.64. The landlord must therefore show that it has the subjective intention to carry out the works and objectively has a real prospect of being able to do so within a reasonable period after the date of termination…" (the emphasis on "on" is the judge's; the emphasis on "real prospect" is mine)."

This informs the proper construction of his paragraph 24 where he said:

> "24. The key issues are therefore:
>
> a. Whether D subjectively intends to carry out the proposed development;
>
> b. Whether D has a real, as opposed to fanciful, prospect of being able to do so within a reasonable time after the assumed termination of the lease… In his skeleton argument, Mr Brown identified the following three sub- issues involved in considering the practicality of D's proposals:
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> (i) Whether D has a reasonable prospect of obtaining planning permission for its intended development;
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> (ii) Whether the intended development can be constructed if planning permission is granted;
>
> (iii) Whether D will be able to fund the development."

29. In my view that paragraph demonstrates that the judge was applying the law as he had previously set it out to be in terms of his tasks, and the opening words of subparagraph (b) ("real, as opposed to fanciful, prospect") qualify the three sub-sub-paragraphs which follow, even though the words "reasonable prospect" do not appear in (ii) or (iii). There is no indication anywhere in the judgment that he considered different tests applied to the different elements of the feasibility of the project.

30. Furthermore, the judge refers to the point again in his subsequent judgment about reopening his decision. In paragraph 2 he refers to the fact that he was satisfied that the defendant had the subjective intention to carry out the development and then says:

> "The objective ability to [carry out the development) turned on two issues: first of all, whether the defendant had a real prospect of getting planning permission for a development that it could carry out within a reasonable time and, second, whether the defendant had a real prospect of being able to fund the works that it wishes to do to carry out that development, so that it could commence the development within a reasonable time after termination of the lease."

31. That clearly sets out the correct test and it is to be inferred that he had indeed applied that test in relation to financial matters in his main judgment. In paragraph 12 of this additional judgment there is a further reference to the point:

> "12. I have decided I should not [reopen my decision]. The reason for that is the planning permission issue was only one of two issues which went to whether the defendant had a real prospect of being able to develop within a reasonable period of time. The second issue was the funding issue."

32. Again that demonstrates he had the correct test in mind. True it is that at the end of that paragraph he refers to the absence of "evidence before the Court of the kind the Court would expect to demonstrate an ability to fund the development", which does not use the magic words, and Mr Demachkie relied on that as further evidence that the wrong test was applied. I do not consider that those words, in that context, demonstrate that. That is not least because in the following paragraph judge says:

> "13. On that basis, I was not satisfied, for that reason also [i.e. the money reason] that the defendant had a reasonable prospect

> or a real prospect of being able to develop within a reasonable period of time after the termination of the lease."

33. That analysis of the judgment shows that the proposition of Mr Demachkie to the effect that the judge applied a stricter test on funding was wrong. The judge applied the correct test. It follows that this ground of appeal fails.

Ground 4 – the judge reached the wrong conclusion on the adequacy of the evidence of financing for the development

34. Under this ground (a ground on which permission to appeal was given) Mr Demachkie seeks to argue that the judge erred in finding that the landlord could not satisfy the objective limb of intention based on the evidence which was available to him. The way the ground of appeal is framed makes this look as though the complaint was that the judge mis-assessed the evidence that he had, or ignored some evidence, or gave it inadequate weight, or something like that. In fact it turned out that this attack was a very limited one.

35. There is no suggestion that the judge did not take into account some particular potential element of financing of which there was evidence. It seems to be accepted that the judgment records the judge's having considered all elements that were put forward and which he decided were inadequate. These elements are all dealt with in paragraph 50 of the judge's judgment, and since it is not said to be incomplete, save in one respect which I will come, I do not need to set out that paragraph.

36. The only respect in which that paragraph is said to be inaccurate is in subparagraph (a):

> "(a) I have already explained that I did not permit Mr Man to rely on the bank statements he wished to produce in his evidence in chief. There is no other documentary evidence showing his or Mrs Mann's personal ability to fund the development. During his oral evidence, he referred to a number of other properties that he owns directly or indirectly through other companies, which he said were largely unencumbered and could be used as security for loans or sold to raise the funds if required. There is no documentary evidence to support that oral evidence, some of which was

> given to me for the first time in re-examination, although two properties are referred to in the offer of a bank loan referred to below."

37. This ground of appeal is based on the last sentence in which it is said there was no documentary evidence to support the oral evidence of the availability of other properties. Mr Demachkie points out that there was actually evidence of the ownership of one property available at the hearing (187 St Marys Lane, Upminster). That makes the judge's observation that there was no documentary evidence of ownership wrong. He submits that if the judge had known that there was evidence then it might well have made a difference to his assessment of the financing.

38. The failure of the judge to identify this particular piece of evidence is entirely understandable when one understands how the evidence on the point was developed. As Mr Demachkie accepted, there is no reference at all to the availability of these properties as security in evidence in chief. There is a reference to 187 in a short passage in the witness statement dealing with Mr Man's history as a property developer. There is no connection between that and availability of property as security. There was in evidence a historic letter from Barclays bank making a loan offer and referring to a security requirement, but the identity of properties required as security was redacted. It was not until re-examination that Mr Man identified other properties that might be available for security purposes. There was certainly no documentary evidence of title to those properties.

39. In all those circumstances it is not surprising that the judge said there was no documentary evidence of properties which might be made available as security. Technically there was evidence of ownership of one, but the link between that and security was slim if it existed at all. If the judge failed to consider evidence of ownership of 187, this mistake was attributable entirely to the way the case was run by the landlord. Mr Brown (who did appear below) tells me, and I accept, that counsel never referenced this single property as being available to support funding.

40. In the circumstances it is impossible to believe that this understandable mis-statement by the judge is of a matter which would have made any material difference to his consideration of the evidence of funding. That evidence, as described by the judge, was very thin in circumstances in which one might have expected it to be much better. The judge's determination on the point was entirely justifiable and it is impossible to believe that this one additional factor would have made any difference at all.

41. This ground of appeal therefore fails.

Ground 3 – in considering whether to reopen his decision, the judge failed to take into account the impact on funding of the availability of planning permission

42. Permission to appeal on this ground was refused; Mr Demachkie seeks to reopen that decision on this oral hearing.

43. This ground now has a more limited scope than it originally had. Mr Demachkie now confines himself to one point only. I have set out above the circumstances in which the judge was invited to reopen his decision (as the matter was put to him) shortly before he formally handed down his draft judgment. As I have recorded, he declined to reopen his decision on the basis that, while the situation had changed in relation to planning permission, and he took that into account, nonetheless his decision in relation to the lack of evidence of a real prospect of funding still stood. Having referred again to the landlord's failure to establish the availability of finance to a relevant standard he said:

> "13. On that basis, I was not satisfied, for that reason also, that the defendant had a reasonable prospect or a real prospect of being able to develop within a reasonable period of time after the termination of the lease. The granting of the planning permission, I am afraid, does not alter that position and I do not accept that it is properly open to me (in the sense that it would be a properly justifiable decision on these facts) to revisit my decision at trial, that Mr Man should not be able to produce documents for the first time when he gave his evidence-in-chief or to revisit the part of my judgment which concludes that the defendant has not discharged the burden of proof on that issue because it had not provided documentary evidence that the court could properly expect it to have provided.
>
> 14. Those reasons, although the planning issue is a material issue, and the application for me to reconsider my judgment has been properly made on that basis, I do not think it makes a difference to the ultimate decision that I reached because the funding issue remains, and am not satisfied that I should revisit the conclusions that I came to on that issue."

44. He therefore refused the application before him to reconsider his decision.

45. Although he originally had another point based on the availability of funding from Mr Man's sister, Mr Demachkie indicated that he did not feel able to run that point and he confined himself to one point only. His point was that the availability of planning permission was capable of affecting the value of the property and therefore it affected and enhanced the possibility of raising finance for the proposed redevelopment. He said that the judge failed to consider this point, and that he should have considered it and concluded that the trial needed to be re-opened in order to assess it and re-assess the decision on funding.

46. It is not surprising that this point was not referred to by the judge, because there is no evidence at all that it was raised with him. If it was to be a good and substantial point one would have expected the landlord to advance the point before the judge with some evidence, and if it were not possible to get evidence before him at the time (which is likely to have been the case in the present matter, because the planning decision came only a day or two before the hand-down of the judgment) then that litigant ought to have asked for a delay in the hand-down so that appropriate evidence could be put in. Nothing like that seems to have happened. In the circumstances the judge decided the application on the basis of the material before him, and justifiably so.

47. In the circumstances the judge was entirely correct in refusing the application. He could only decide the matter on the basis of the material before him, and that material did not come close to satisfying the very significant burden a litigant bears in inviting a judge to reconsider his or her decision, which is what the application before Judge Duddridge in effect involved. Mr Brown invoked the recent decision in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223 on the heavy burden placed on a party that wishes to have a decision revisited between the hand down and the drawing of the consequential order. I do not need to decide whether or not that heavy burden applies in the circumstances of the present case where the judgment has not yet been handed down, but there are still aspects of finality which impose a significant burden on the applicant. In this case the applicant did not even begin to establish such a case.

48. In the circumstances there would be no prospect of a successful appeal on this point and I refuse permission.

Overal disposition

49. I therefore, despite the commendable efforts and clear submissions of Mr Demachkie, refuse permission to appeal on Grounds 1 and 3 and dismiss the appeal on Grounds 2 and 4.