Neutral Citation No. [2014] NICh 12 | *Ref:* **DEE9242**

Ex tempore Judgment: approved by the Court for handing down | *Delivered:* **07/01/2014**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BELFAST HEALTH AND SOCIAL CARE TRUST

Plaintiff;

-v-

CAR PARK SERVICES LIMITED

Defendant.

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DEENY J

[1] On 24 January 2012 the plaintiff in this action, the Belfast Health and Social Care Trust, issued a writ of summons against the defendant, Car Park Services Limited. Therein the plaintiff sought a declaration that it was entitled to the payment of rent for the use by the defendant of car parking spaces at the Royal Victoria Hospital within the ownership of the plaintiff. Further it sought a declaration that the said car parking spaces which are said to be identified in the schedule attached to the writ are outwith the terms of the project agreement concluded between the plaintiff's predecessor in title, the Royal Group of Hospitals and Dental Hospital Health and Social Services Trust, and the defendant, dated 21 October 1996. Thirdly, the plaintiff sought damages in respect of this rent said to be owing to the plaintiff from the defendant regarding the contract and/or damages for breach of contract arising out of a purported agreement of 9 August 2006 as well as other related reliefs.

[2] The defendant obtained the leave of the Master to enter a conditional appearance to that writ of summons by way of an order of 28 February 2013 and such a conditional appearance was entered by the defendant's solicitors Messrs Tughans on 25 April 2013. Subsequently, after some delay I note, on 11 October 2013 a summons was issued in this Chancery Division by which the defendant sought an order pursuant to Section 9 of the Arbitration Act of 1996 staying the plaintiff's proceedings on the grounds that the issues within the said proceedings fall to be determined by arbitration pursuant to the dispute resolution

procedure specified in an agreement, that is, in fact, the same project agreement between the plaintiff and the defendant dated 21 October 1996. That was supported by an affidavit and a statement of claim which had been served on 31 May 2013 as exhibited. Correspondence shows that the plaintiff had threatened to mark judgment because no defence had been received to that statement of claim but the defendant had issued the summons for a stay before judgment had been entered against them.

[3] What is before the court therefore today is the defendant's application to stay the action on foot of the Arbitration Act. The court has had the benefit of the exchange of affidavits between the parties and the collation of relevant documents in a trial bundle by the defendant applicant's solicitors. The court has also had the benefit of helpful skeleton arguments from Mr David Dunlop of counsel for the defendant and from Mr Brett Lockhart QC for the plaintiff and thanks to that the court feels able to resolve this matter without reserving further on the issues. I take into account all the submissions of counsel even if they are not all expressly referred to in this ruling.

[4] The key point in the matter is the agreement between the parties but before turning to that I will turn briefly to the Arbitration Act 1996 and the defendant relies on Section 9 thereof in seeking a stay and, in particular here, on Section 9(4):

> "On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

And therein we see the principal thrust of this Act to encourage arbitration and to make it clear that the court will keep the parties to their arbitration agreements or clauses unless the court is satisfied of one of these three matters. Here the issue would be whether the arbitration agreement or, at least, the dispute resolution clauses in the agreement of 1996 between the parties, is and are inoperative. It might be of relevance to briefly mention Section 7 which has been cited in argument. It reads:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

In the event it does not seem to me that that section advances matters.

[5] The agreement between the parties was drafted by solicitors experienced in these matters. It is a lengthy agreement and it contains a considerable number of schedules and it is necessary to turn to what the parties actually agreed, which seems to me to dispose of this case. It is my duty to interpret the agreement and I find that I am able to do that applying the well-known canons of construction. The modern tests to be applied in the construction of a document including, perhaps, in particular Investors Compensation Scheme Limited and West Bromwich Building Society (1998) 1 WLR 896 House of Lords; (1998) 1 AER 98 can be summarised as requiring the court to ascertain the intention of the parties. The court should seek to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been made available to the parties in the situation in which they were at the time of the contract. I seek to do that bearing in mind Mr Dunlop's contention that the parties could not have contemplated the situation that has arisen. The situation that has arisen may be briefly summarised as follows. The agreement dealt with the building of a multi-storey car park and certain other car parks on the site of what was then known as the Royal Group of Hospitals at Grosvenor Road, Belfast. Subsequently, and some years after that, it is agreed this defendant did operate other car parks on land belonging to the plaintiff, the successor in title of the Royal Group of Hospitals for the benefit of persons using those hospitals. As is apparent from the writ of summons the plaintiff complains that they are owed payments by the defendant for the use of those car parks. There is a very live issue as to what these payments should be but it is acknowledged that the defendant has not made payments. Mr Dunlop seeks to rely on Clause 47(1) of the agreement which is an entire agreement clause but more particularly on Clause 42 of the agreement which bears the rubric Dispute Resolution Procedure:

> "Except where expressly provided to the contrary or otherwise agreed in writing, any dispute arising out of or in connection with this Agreement, whether between the Trusts and Service Co[mpany] or the Trust representative and Service Co[mpany] shall be resolved in accordance with the procedure set out in Schedule 17 [Dispute Resolution Procedure]."

[6] So the net issue before the court is whether that dispute resolution procedure is applicable to this writ action relating to these additional car parks operated for some years by the defendant. Is it a "dispute arising out of or in connection with this agreement"? I turn to the clauses of the agreement to see whether it is covered by this arbitration agreement.

[7] The first thing I observe is that at the very beginning of the agreement, to be found at page 57 of the trial bundle, there are four recitals, the first of which is to the effect that the Government of the United Kingdom has adopted a policy of encouraging private sector participation in projects undertaken by public bodies. As counsel says, therefore, this is an early example of a private finance initiative

contract. It seems to me B is of assistance to the court in interpreting the agreement and it reads:

> "In accordance with that policy, the Trust invited tenders in May 1996 from interested persons for the financing, design, construction, equipping and operation of, and the provision of certain services in connection with, a new multi-story car park to be built at the Royal Victoria Hospital and for the finance, design and execution of upgrading work at, and the operation of other existing car parks at the same site."

[8] So the tender sent out by the Trust on foot of this policy and on which the defendant company subsequently contracted was clearly referring to two specific things: the construction and operation of a new multi-storey car park and the upgrading and operation of "other existing car parks at the same site"(authorial underlining). That is relevant to deciding whether the dispute, currently the subject of the writ and statement of claim, arises out of or in connection with the agreement. The point made by the plaintiff, the respondent to this application, in the earlier correspondence and affidavits and counsel's submission is that the car parks, the subject of that dispute, are neither the multi-storey car park which the defendant did in the event build nor other car parks which were existing at the same site in 1996. I think it is a simple and in my view it is a strong point in favour of the plaintiff's opposition to this stay. At page 59 of the trial bundle in the definition clause one finds a definition of car parks and the interpretation clause rather than a definition clause and the interpretation is as follows:

> "Car parks means the MSCP, the University car parks and the Trusts car parks."

[9] MSCP is, of course, multi-story car park. So these car-parks are specified. It does not say any and all car parks on the site, on the Grosvenor Road site, or any or all car parks on the Royal Group of Hospital land at Grosvenor Road; it is specific to those three car parks. If one reads on in the lengthy interpretation clause, covering many pages, one finds that MSCP itself is defined as meaning the multi-story car park to be construed in accordance with this agreement and one finds Trust car parks means the Site other than the university car parks and the University car parks means the Monica, Mulhouse and Microbiology car parks shown in the plan contained in paragraph 1 of Schedule 4. I pause there to observe that Mr Dunlop's clients did not have a copy of that map, though it was attached to the pleadings at one point, but they did not have it from their original document, it seems. The map I will turn to in a moment, but the very fact of those definitions I consider is helpful to the Trust in this case. But the interpretation is not to be based solely on those two factors delineated to date. At page 71 of the trial bundle still in the interpretation clause one finds the meaning of Site: "site means the areas of land at the Trust,

Grosvenor Road, Belfast BT12 6BA shown outlined in red on the map set out in Part 1 of Schedule 4 [land matters] required for the project facilities" and a copy of that map is agreed. I have been provided with a coloured copy and one sees in blue hatching the proposed multi-storey car park site and that is within a red line covering main car park A and main car park B. An adjoining red line covers estates area car park. The yellow line covers the Children's Hospital car park site. There are a number of other red lines covering the three university sites, i.e. Mulhouse, Monica and Microbiology and then furthermore there are three red lines covering what are described on the map as the mortuary area car parks. So they are all specified and it is common case that the car parks in relation to which the Trust is now suing the defendant are not within those red lines. It seems to me to pose a very considerable difficulty to the defendant to argue that the dispute now being pursued by way of writ of summons does indeed arise out of or in connection with this agreement when the draftspersons of the agreement were careful enough to define the existing car parks and to delineate them on an attached map.

[10] Counsel helpfully took the court through other relevant parts of the Agreement. I take into account his submissions. I can well understand that his clients are concerned at the claim for large amounts of rent exceeding, they would say, the amounts that were to be paid under the project agreement of 1996, but it seems to me that those points do not really assist the court in a piece of contractual interpretation. He did make a point that might be relevant namely, that his clients would have a substantial counterclaim, but Mr Dunlop submitted or asserted that that counterclaim would be under the agreement so that if this stay was refused by the court you would have the unsatisfactory situation of the Trust suing but the effective counterclaim being heard by an arbitrator under an agreement who might arrive at a different conclusion from the court. Mr Lockhart with his customary good sense was swift to intervene at that point to say that on the contrary if the court refused the stay the Belfast Health and Social Care Trust would be happy to have any counterclaim advanced by the defendant company heard by this court as part of the proceedings which the Trust has already commenced.

[11] To turn to a further, and undoubtedly relevant, part of the original project agreement I address the dispute resolution procedure as set out in Schedule 17 of the agreement and to be found beginning at page 296 at the trial bundle. Mr Dunlop sought to rely on it as a broad statement of the nature of any disputes and with respect to his argument I will set out paragraph 1.1 of the schedule:

> "In the event of any dispute or difference between the Trust and Serviced co[mpany] or the Trust representative and service co[mpany] arising during the contract period in regard to any matter or thing whatsoever arising out of this Agreement or in connection therewith, but excluding any disputes or differences arising prior to the licence commencement date under Clauses 2 to 16 inclusive, Clause 25 or

> Clauses 32-37 inclusive, the said dispute or difference shall be referred in writing by either party with a copy where appropriate to the Trust representative to the Liaison Committee. The said disputed difference shall be determined by the Liaison Committee in accordance with paragraph 1.5."

[12] Now Mr Dunlop says, legitimately, well that is very broad 'any matter or thing whatsoever arising'. Well those words are broad but they do continue 'out of this agreement or in connection therewith'. Paragraph 3.1 which deals with arbitration i.e. if the Liaison Committee does not achieve a resolution of the matter and if it is not appropriate for it to go to an expert which it is acknowledged would not be the case here, the matter would go to arbitration under the agreement and the clause there is in similar terms:

> "Disputes or differences which fall to be determined by arbitration pursuant to this paragraph 3 are any disputes or differences between the Trust and Service co[mpany] or between the Trust's representative and Service co[mpany] not being disputes or differences to be referred to an expert pursuant to paragraph 2.1 which arise during the contract period or after determination or repudiation of this Agreement in regard to any matter or thing arising out of this agreement or in connection therewith…."

And words follow which it is not necessary to quote. So again it is out of this agreement or in connection therewith. It seems to me that the draftsman could have put there or earlier in the document it could have said "with regard to the provision of car parking at the Royal Hospitals, Grosvenor Road, Belfast", but the parties did not put that in. They made it clear that it was arising out of this agreement or in connection thereof.

[13] Mr Dunlop, turning from those points, drew attention to the fact that there was provision in the agreement for the Trust to claw back sections of land and if they did so they were liable to compensate the defendant or they could make other areas available in lieu of compensation. But when questioned by the court he had to acknowledge that where this had happened, as his client would say, the correspondence did not show any specific agreement that these additional areas were in substitution for areas originally in the agreement of 1996 or in lieu of compensation and at least one example of the absence of such an agreement is to be found at page 34 of the book in a letter from the relevant director of the Trust.

[14] As I quoted at the beginning of this judgment the plaintiff is saying there was a binding agreement in 1996 regarding these additional car parks. Mr Dunlop tells the court that this is disputed but he says even taken at its height it is of assistance to

him. With respect I do not see that the documents to the file in and around page 310 do not refer to the 1996 agreement; they do not seem to me to assist the defendant applicant here. Now I have taken into account, furthermore, his citation of authorities and his written argument and his oral argument including the judgment of Lord Hoffman in Premium Nafta Products Limited v Fili Shipping Company Limited [2007] UKHL [2007] 4 All ER 951 and I take that into account. But I think it is not necessary for me to quote it but merely to state that.

[15] The plaintiff relied on surrounding circumstances as pointing to its interpretation being correct. I do not think, in fact, I need to rely on those but I note that when the plaintiff did serve a notice to quit on the defendant in regard to these additional car parks the defendant threatened through its solicitors and correspondence to seek an injunction and invoke the project agreement but it did not do so. That is not determinative but it is certainly an inconsistent position, whatever the reason, with the position now being adopted. Again both parties seem to agree that the arbitration provisions are rather unwieldy which if one were applying a broader discretion might be a relevant factor again in favour of the plaintiff. But my task here is a narrower task to decide whether the parties here intended in the 1996 agreement to have a dispute about additional car parks covered by the arbitration clause of this agreement. It seems to me that Recital B is against that. The definition of site is against it; the expressed delineation of the car parks both in words and on the map is against that. It seems to me that this dispute about the additional car parks operated for some years by the defendant to this action is not a dispute arising out of or in connection with the project agreement of 1996 which relates to the existing car parks at that time and the multi storey car park to be built. I therefore find in favour of the plaintiff and refuse the defendant applicant's application for a stay.