Neutral Citation No: [2022] NIKB 4	*Ref:* **HUM11927**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **16/09/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(COMMERCIAL LIST)

_____

Between:

O'HARE & McGOVERN LIMITED

Plaintiff

and

OBEL MANAGEMENT LIMITED
and
OBEL GROUND LIMITED

Defendants

_____

David Dunlop KC and Robert McCausland (instructed by McIldowies) for the Plaintiff
Sean Brannigan KC and Anna Rowan (instructed by O'Reilly Stewart) for the Defendants

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HUMPHREYS J

Introduction

[1] On 10 June 2008 Donegall Quay Limited ('DQL') as Employer and the Plaintiff ('OHMG') as Contractor entered into a JCT Standard Form Building Contract with Quantities ('the Contract') to construct the Obel development in Belfast.

[2] The works which were the subject of the Contract were certified as practically complete on 11 May 2012.

[3] In December 2019, in the wake of the Grenfell Tower tragedy, the Government introduced a requirement that all buildings of over 18 metres in height must have an external wall system certificate of compliance ('EWS1') to ensure that cladding has been properly assessed for fire risk.

[4] As a result of survey work carried out for the purposes of the EWS1 in respect of the Obel Tower, a number of significant defects have allegedly been identified which prevented the EWS1 from being issued. On 1 June 2022 a pre-action protocol letter was written to OHMG, which resulted in the instant proceedings being issued.

The Contract

[5] Clause 7 of the Contract provides as follows:

> "7.1 Subject to clause 7.2, neither the Employer nor the Contractor shall without the written consent of the other assign this Contract or any rights thereunder
>
> 7.2 Where clause 7.2 is stated in the Contract Particulars to apply, then, in the event of transfer by the Employer of his freehold or leasehold interest in, or of a grant by the Employer of a leasehold interest in, the whole of the premises comprising the Works or (if the Contract Particulars so state) any Section, the Employer may at any time after practical completion of the Works or of the relevant Section grant or assign to any such transferee or lessee the right to bring proceedings in the name of the Employer (whether by arbitration or litigation, whichever applies under this Contract) to enforce any of the terms of this Contract made for the benefit of the Employer …"

[6] It was not in dispute that clause 7.2 did apply to the Contract.

[7] The Works were described as:

> "… the construction of a Mixed Use Development with Fit-Out works to the Basement Carpark and including all associated external works and drainage; as defined in the Tender Documents, Specifications and Drawings."

[8] The Works were divided into three sections:

(i) Block 3 – a seven storey office block with ground floor restaurant/retail accommodation;

(ii) Block 2 – an eight-storey apartment building with ground floor restaurant/commercial accommodation;

(iii) Block 1 – a 28 storey apartment block, known as Obel Tower.

The Proceedings

[9] By a writ of summons issued on 16 June 2022, OHMG seeks a declaration that the defendants have no cause of action or standing to pursue a claim in connection with or concerning the construction works performed under the Contract. Injunctive relief is also sought restraining the pursuit or prosecution of such proceedings.

[10] Proceedings were issued by DQL (which is now in voluntary liquidation), Obel Management Limited and Obel Ground Limited on 24 June 2022 against OHMG seeking specific performance of the obligations under the Contract and/or damages in respect of breach of contract.

[11] The claim advanced by OHMG was heard by the court on an expedited basis, involving as it did a pure point of law as to whether the plaintiffs in the DQL action enjoyed any cause of action as a result of a purported assignment pursuant to clause 7.2 of the Contract.

The Title

[12] The freehold title to the lands upon which the Works were constructed belongs to the Department for Communities ('DfC'), as successor to the Department for Social Development ('DSD'), and is comprised in three Folios, namely AN46573, AN36124 and AN152705 Co Antrim.

[13] By a Lease dated 23 June 2010 the DSD demised to DQL all these lands for a term of 999 years which are now comprised in Folio AN181283L Co Antrim. By this Lease, DQL covenanted to complete the building works and, after completion, to keep the demised premises in good and substantial repair and condition.

[14] DQL then entered into various sub-leases:

(i) On 23 June 2010 DQL demised the part of the lands known as the Obel Tower to Obel Limited ('OBL') for a term of 998 years;

(ii) On 23 June 2010 DQL demised the part of the lands consisting of the office block to Belfast Harbour Commissioners for a term of 998 years;

(iii) On 1 September 2011 DQL demised the part of the lands consisting of the second office block to Obel Offices Limited for a term of 990 years;

(iv) On 20 October 2017 DQL demised the part of the lands consisting of the smaller residential block to TIMEC 1580 Limited for a term of 998 years.

[15] By clause 4.2.1 of the sublease to OBL, DQL covenanted that it would, during the first 12 years of the term, repair any damage to the demised premises and/or the building caused by or otherwise attributable to an inherent defect and to keep the entire development in a good state of repair and condition. In this context, inherent defect was defined to mean any defect in design or construction arising from any act, omission or default of DQL or its professional team or contractors in the construction of the Obel Tower.

[16] It is evident therefore that DQL had ongoing obligations in respect of the entirety of the development, including the Obel Tower, which arise both as a result of the terms of the original Lease and the subleases.

[17] On 7 December 2018 OBL transferred its leasehold interest in the Obel Tower, being the lands and premises comprised in Folio AN181280L Co Antrim, to Obel Ground Limited ('OGL').

[18] DQL entered members' voluntary liquidation by a resolution passed on 28 June 2019 and Stuart Irwin of KPMG was appointed liquidator. On 30 March 2022 the liquidator, acting in his capacity as agent for DQL, with the consent of DfC, transferred its entire interest in the land and buildings comprised in Folio AN181283L Co Antrim to Obel Management Limited ('OML').

[19] Thus, at the date of this hearing, the title to the lands comprising the Obel Tower was held as follows:

(i) Freehold title DfC;

(ii) Superior Leasehold title OML;

(iii) Inferior Leasehold title OGL.

The Assignment

[20] On 30 March 2022 the liquidator of DQL also entered into a deed which stated that the company:

> "… assigns the right to bring proceedings in the name of [DQL] under clause 7.2 of the Construction Contract, as well as all interests, rights, remedies and choses in action vested in [DQL] under or in connection with the Construction Contract, to [OML] absolutely."

[21] It was OHMG's case that this deed was ineffective in assigning to OML the right to bring proceedings in the name of DQL to enforce any of the terms of the Contract.

[22] It is evident that clause 7.2 comprehends four events which may trigger an entitlement to effect such an assignment:

(i) A transfer by the Employer of his freehold or leasehold interest in the whole of the premises comprising the Works;

(ii) The grant by the Employer of a leasehold interest in the whole of the premises;

(iii) A transfer by the Employer of his freehold or leasehold interest in any Section of the Works;

(iv) The grant by the Employer of a leasehold interest in any Section of the Works.

[23] The question to be determined therefore is whether any one of these events occurred so as to enable the clause 7.2 assignment to take place.

Consideration

[24] The learned authors of Keating on Construction Contracts (11th edition) have described the right created by this sub-clause as 'extremely limited' in that the benefit of the Contract may not be assigned, only the right to bring proceedings in the name of the Employer.

[25] The clause received some judicial consideration from Jefford J in *Aviva v Shepherd Construction* [2021] EWHC 1921 (TCC). She determined that the wording of the clause was limited to the transfer or grant by an Employer and did not encompass a subsequent transfer. Such a limitation was justified by the fact that the right created by clause 7.2 is by way of exception to the general principle of clause 7.1.

[26] In this case, no question of a subsequent transfer arises but counsel for OHMG seek to adopt some of the principles of contractual interpretation alluded to by Jefford J in support of their contention.

[27] These principles have been the subject of frequent judicial analysis at the highest level in recent times, including in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance* [2017] UKSC 24. From these and related authorities the following principles can be derived:

(i) The interpretation of contracts is a unitary and objective exercise in which the court ascertains what a reasonable person, possessed of all the relevant background facts known to both parties, would have understood them to have meant at the time they entered into the contract;

(ii) Where the parties have used unambiguous language, the courts must apply it and give words their ordinary and natural meaning;

(iii) A contract is to be read as a whole;

(iv) The natural and ordinary meaning of words may be departed from where they produce an absurd or inconsistent outcome;

(v) Where alternative interpretations are available, it is open to the court to apply the one which accords with business or commercial common sense, although it is no function of the court to relieve a party from the consequences of a bad bargain.

[28] OHMG's argument was to the effect that business common sense was offended by a situation where the Employer grants a lease of premises to party A and later transfers its reversionary interest in the premises to party B and, as a consequence, effects a clause 7.2 assignment to party B. As such, it was contended, the court should construe clause 7.2 in such a way as to find that a clause 7.2 assignment could only be made to the original lessee, party A.

[29] In the circumstances prevailing in the instant case, this would limit clause 7.2 to an assignment to OBL and render the assignment to OML ineffective.

[30] The first problem with the argument is that it gains no traction from the wording of the clause itself. It contains no such limitation to one single transaction or to an original transferee or lessee.

[31] Secondly, there is no basis to contend that the words used in the clause are ambiguous or capable of maintaining more than one reasonable interpretation. The natural and ordinary meaning of the words is that an Employer may make such an assignment, at any time after Practical Completion, to a party to whom he has transferred his leasehold interest.

[32] Thirdly, even if there were some alternative interpretation open, there is no basis to say that business common sense would prefer the limitation which OHMG seek to impose. It is clear that DQL continued to have significant obligations in respect of inherent defects, repair and maintenance under the matrix of lease and subleases. There can be no doubt that such obligations could give rise to very significant liabilities both to the DfC and to the sublessees concerned. It makes entire commercial sense for DQL to be able to assign any right of action against OHMG under the Contract to a party which is going to assume such obligations and potential liabilities.

[33] On 30 March 2022 when DQL transferred its leasehold interest to OML, it did so in respect of the whole of the premises which comprised the 'Works' under the Contract. It mattered not that DQL had previously granted sub-leases of parts of the

premises to other parties. The transfer was a trigger for the entitlement to make an assignment of the right to bring proceedings in the name of DQL under clause 7.2. As a result, the assignment was valid and effective and there is no basis to contend otherwise.

Conclusion

[34] As a result, this action must fail and I enter judgment for the defendants. I will hear counsel on the question of costs and in relation to directions for the prosecution of the action already commenced in the name of DQL.