

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between

DUNNES STORES (BANGOR) LIMITED

v

NEWRIVER TRUSTEES 11 LTD

DEENY I

[1] The court has before it today (9 June) two applications made in the ongoing proceedings between Dunnes Stores (Bangor) Limited and Newriver Trustee 11 Ltd and Newriver Trustee 12 Ltd. These proceedings relate to a scheme which the defendants are proposing to implement at a shopping centre known as the Abbey Centre in Newtownabbey. There were earlier interlocutory proceedings for an injunction which this court has dealt with and in which the court gave a judgment.

[2] The case is listed for trial next Monday 15 June 2015. On Monday 8 June 2015 the plaintiff's solicitors, Messrs Johnsons, lodged two ex parte applications in the Chancery Office seeking the leave of the court to issue Khana subpoenas. One of these was to be issued and served on W D R and R T Taggart (a firm) of an address in Belfast "acting through a responsible officer and requiring the discovery of data and documentation held as set out in further detail at Schedule 1 hereto." Schedule 1 thereof sought:

- (i) All schemes of development which had been prepared at the request of Abbey Centre Limited in relation to the construction of a new unit at the Centre.
- (ii) Any notes or communications between you and Abbey Centre Ltd in relation to the works or any proposed scheme of development.

[3] Attached was a draft writ of subpoena. I shall deal with this application in relation to W D R and R T Taggart first. The draft writ was erroneous in saying it was issued by special order of the High Court as required by Section 67(4) of the Judicature Act (Northern Ireland) 1978. That provision is not applicable here. That provision relates to the issue of subpoenas in other parts of the United Kingdom which does require the leave of the High Court. Mr Peter Girvan, for Dunnes Stores, accepted that at the commencement of the application before the court today, 9 June, the court having listed the matter for hearing because of concerns it had about the ex parte written applications. However, he does require the leave of the court and seeks it pursuant to the decision of Sir Donald Nichols VC, as he then was, in Khanna v Lovell Durant White [1995] 1 WLR 121 Ch.; [1994] 4 All ER 267. It seems to me that this application faces formidable difficulties. The application is supported by an affidavit of Mr Gareth Liddy, solicitor, of Johnsons, acting for the plaintiff and he avers in that that the documents are necessary to dispose fairly of the cause or matter.

[4] Mr Girvan was unable to point to any precise matter in the pleadings upholding that contention. The thrust of his argument was as follows. The scheme proposed by Newriver interferes, the plaintiff submits, with its rights to quiet enjoyment, its rights under the long lease between the parties and any rights it might enjoy from the doctrine of derogation from grant. He submits that the existence of an alternative scheme which may have been explored in the past by the previous owner of the centre could show that the centre owners could have improved the property but with less interference to the plaintiff's right and that that opens a train of inquiry. I am doubtful about that. Mr Douglas Stephenson, counsel for the defendants, who helpfully attended, submitted that that was not the case. The issue was whether the scheme they were proposing interfered with the defendant's rights and he submitted these documents were not necessary.

[5] I am in considerable doubt as to whether such documents are necessary but in any event it seems to me that I do not expressly have to rule on that for this reason. Rather optimistically the ex parte notice was asking the court to make an order returning this Khana subpoena for Friday 12 June. But that of course, even if it were served today would allow Messrs Taggarts only two days in which to respond. The rules relating to subpoenas require 4 days' notice. It seems to me that it would be an entirely inappropriate use of the power vested in the court to order these people, who are complete strangers to the current proceedings, to gather up documents which in all likelihood are archived and to hurry to court under the injunction of a court order, at expense to themselves, particularly as they see the draft writ does not expressly refer to the plaintiffs being responsible for the costs, although the affidavit does. It seems to me quite unfair to do that to them. They would be particularly troubled as, if they had such documents, they would have come into existence because the Taggarts were acting on behalf of the former owners of the centre, Abbey Centre Ltd, and would no doubt want to consult them, without disrespect to this court, before handing them over. Mr Girvan said they could come in on the return date and object but that puts them to the trouble and expense of instructing

solicitors to take advice very urgently on a matter that again, has at the moment absolutely nothing to do with them.

[6] I would observe in any event that the ex parte notice as originally drafted omitted to ask for a reduction of time for the service of the subpoena. An amended notice in regard to the other application does do that. So the simple answer here is that I am going to refuse this application with regard to Messrs W D R and R T Taggart. If the plaintiff wants to go ahead and serve a subpoena res judicata upon them they are at liberty to do so and give them 4 days and have them come on the second day of the hearing next week or object. That does not require the leave of the court and it does not require me as the possible trial judge to determine whether or not it is necessary at this time.

[7] What I have said applies very largely *pari passu* to the other ex parte notice for leave to issue a Khana subpoena. Again there was no application to reduce the 4 days required for service. Again it was to be returnable on 12 June. It has the added objection that the subpoena is to be served on the former owners, care of a firm of accountants in Coleraine, so inevitably there would be a delay in getting it to Abbey Centre Ltd itself. The schedule is very lengthy, asking at (1) for “any documents, correspondence, note or reports in your possession, custody or control relating to the rationale and decision to put a direct entrance from the car park into the Next Group PLC unit”. Pausing there, that is a very broad category of documents. It goes on at (ii): “any documents, correspondence, notes or reports in the possession, custody or control concerning any objections made by the plaintiff or others in relation to the planning application in respect of the proposed works at the centre including but not limited to...”and then there are six categories of correspondence that follow that quotation. Thirdly, there is a request for tenancy schedules and other schedules from 2008 to date including but not limited to any asset management schedules of strategy.

[8] That third item may be relevant but can be obtained on subpoena *ad duces tecum*. It is quite unrealistic to ask the court to make an order to require these former owners to produce these documents in the timescale proposed. I refuse that application also.