Neutral Citation No: [2012] NICh 30

Ref: DEE8619

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 11/10/2012

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CROCKAGARRAN WIND FARM LIMITED

-v-

ARTHUR McCRORY AND MARY McCRORY

DEENY J

[1] The hearing today relates to the construction of a lease, with certain variations thereto, relating to land at Crockagarran, Pomeroy, County Tyrone which is currently being used as a wind farm by the plaintiff company, which is apparently a subsidiary of the Electricity Supply Board in the Republic of Ireland. The wind farm generates electricity which is sent to the National Grid. The lease at the heart of the dispute before me was entered into by the defendants Arthur and Mary McCrory, who are man and wife, with their own son Adrian McCrory and it was made on 8 October 2007 and by that they leased part of their farm at Crockagarran to the younger Mr McCrory for a period of sixty years with a minimum and very substantial rent. Mr McCrory junior then entered into negotiations with Crockagarran Wind Farm Limited and was apparently paid some £7,000,000 for the assignment of his leasehold interest at Crockagarran. That was done on 20 March 2008. There was one variation in the Deed of Consent by the defendants to that transaction to which I will refer subsequently and there was a further variation of 2010 which is of limited relevance, save that counsel for the defendants points to it being expressly done when he says there is no express reference to what the plaintiff wishes to do. Mr Douglas Stevenson of counsel appeared for the plaintiff and Mr Aidan Sands of counsel for the defendants and I am obliged to counsel for their helpful written and oral submissions.

[2] The crux of the matter arises from the interpretation of the agreement. The plaintiff is in negotiations to purchase land, adjoining the land at Crockagarran which they have on leasehold assignment from the defendants for the purposes of operating their wind farm for slightly less now than sixty years. Immediately adjoining it there is land which the current owner is willing to sell at Gortfinbar and which constitutes "neighbouring lands" clearly within the meaning of the lease to which I will turn and literally adjacent lands marching with the southern boundary of the Crockagarran demised property. The plaintiff wishes to build a further wind

farm on this adjoining land and that would involve putting a cable down between the turbines in the new wind farm, but to make that effective it has to be connected to the National Grid. As pointed out by Mr Sands they could build themselves a new switch house containing transformer and control rooms and an electricity sub-station to achieve that, but such a step is a costly one. So what the plaintiff wants to do is to take the cable from the new wind farm on the adjoining lands, run it through the demised property that they have demised from the defendants to this action, to the switch house which they have already built on the Crockagarran wind farm. They have shown on a map a pink line across the demised property indicating where that would go. The cable would be underground. The trench would be approximately 60 cms wide and would be reinstated after it was laid and it would link the new wind farm, presuming the negotiations were successful, with the switch house. Out of caution they did not want to agree to purchase the property, and I have already mentioned how costly the purchase Crockagarran was for the plaintiff company, they did not want to purchase it until they knew that they could install this cable, because obviously if they were not able to do so the adjoining land would be less valuable to them, at least to the extent of building a new switch house and perhaps more because there may be other technical difficulties. So they sought the consent of the defendants to the action to the laying of the cable. There was correspondence and such consent was not forthcoming. Counsel draw attention to the fact that the defendants are willing to do it but they feel that they are entitled to be paid a premium for their consent and that they are not obliged to give their consent to this work being done. There was nothing remotely improper about that, but the issue becomes one of the proper interpretation of the agreement between, originally the McCrorys, but now assigned to the plaintiff company.

[3] I say two things by way of preface. First of all I quote Chitty on Contract,30th Edition, Vol. 1 at paragraph 12.042.

> "The object of all construction of the terms of a written agreement is to discover therefrom the common intention of the parties to the agreement. The principles which govern the construction of contracts are the same at law and in equity for simple contracts and for specialities.
> 12.043
> The task of ascertaining the common intention of the parties must be approached objectively. The question is not what one or other of the parties meant or understood by the words but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in a situation in which they were at the time of the contract" [per Lord Hoffman in Investors

> Compensation Scheme Limited and West Bromwich Building Society [1998] 1 WLR 896.]"

So I do not see any great difficulty in principle in construing this agreement but that disposes of a point made by Mr McCrory in an affidavit that he was asserting what was in contemplation of the parties but that seems to me not a proper matter for me to take into account. It would be particularly inappropriate here because of course the dispute is not between him and his son, but with a third party to whom the son assigned the leasehold interest with his consent. The key issue therefore is how this document properly read is to be construed and how it would convey itself to a reasonable party informed of the factual matrix.

[4] I might dispose of one other preliminary point by way of an excess of caution. Mr Stevenson would have relied on contra preferentem if the agreement had led me to conclude that it was sufficiently ambiguous to allow the application of that doctrine and he referred to the decision of this court in Hollway and Hollway v Sarcon [2010] NI Ch. 15, at [22], with regard to the restricted role for contra preferentem. But in fact the position is that Messrs Logan and Currie, solicitors, acted for both parties in the original lease; there was no criticism of that because obviously they were members of the same family and presumably existing clients. So it would not seem to me that it would necessarily be a proper application of contra preferentem – against the maker - in any event whatever view I took of the lease.

[5] It is right then to turn to the lease, the main lease, of 8 October 2007. There is a definitions clause. Mr Sands points to the definition of "The Electric Cables and Wires" and that "means :"The electric cable and wires now on or to be laid/erected on the Landlords Property by the tenant to facilitate the Wind Power Project." The landlord's property is the original farm of Mr and Mrs McCrory which is wider than the land demised by the lease. The Wind Power Project is itself defined on the second page thus: "means the harnessing of wind power in a wind power farm to generate electricity on the Demised Property". So the wind power project and references to it are referring only to the demised property and not to other lands. Counsel also debated before me, and it is perhaps convenient to deal with that now, the meaning of the "Turbines" which is defined as follows:

> "means the wind generating turbines to be constructed on the demised property pursuant to Clause 3 of the second schedule and shown indicatively on the plan together with any additional turbines that may be constructed from time to time during the term and Turbine shall have a corresponding meaning."

The words between "second schedule" and "and" were added by a deed of variation of the 20 March 2008 between the parties to this action. Mr Stevenson

prays this in aid as showing a contemplation of additional turbines being constructed and given that turbines on the demised property are already covered in the original meaning he says logically then this must be a reference to turbines constructed outside the demised property. But Mr Sands submits that the key words are "shown indicatively on the plan" and what this is referring to are turbines over and above the original indicative plan. He says, without being contradicted, that a seventh turbine was indeed erected and has been erected on the demised property. It seems to me that both points are valid and that the definition is open to both interpretations and that as it is ambiguous it does not assist me greatly in arriving at a proper reading of the lease.

[6] I then turn, passing the demise under the lease, to the Tenant's Covenants to be found at Clause 4 and it is agreed 4.3 and 4.4 are of particular relevance and later I will turn to 5.5 and 5.7. Paragraph 4.3 reads as follows:

> "Not to use the Demised Property otherwise than for and in connection with the construction, installation, repair, replacement, use and operation of the Turbines and Ancillary Equipment, the Electric Cables and Wires, the Electricity Sub-Station and Unmanned Switch House thereon (if any) and all matters associated with the wind power project."

Mr Stevenson wisely prayed this in aid only tentatively. At first blush it might be thought that the language, the use of such words as 'in connection with' the electricity sub-station and 'all matters associated' might allow the plaintiff to rely on this clause to put the cable across the land to facilitate the development of the adjoining land. But I accept the submission of Mr Sands that two phrases would lean against that interpretation. First of all there is the express reference to the Electric Cables and Wires with capitals i.e. as defined in this lease and that definition is confined to the demised property. Secondly, Clause 4.3 ends by relating back to the wind power project, which as I said a little earlier, is also restricted to the Demised Property. I accept Mr Sand's submission that that does not assist the plaintiff here.

[7] One then turns to the next Clause, 4.4, which reads:

> "Not to carry out any other any works (save for those referred to at paragraph 4.3 above) on the Demised Property or that part of the Landlord's Property over which the tenant is entitled to exercise rights hereunder without the Landlord's consent in writing (which consent shall not be unreasonably withheld or delayed) save for the erection of temporary fences on the demised property and if necessary the landlord's property which the tenant reasonably deems

> necessary while the construction works are being carried out."

That means there are certain works that the tenant, the lessee, is entitled to carry out without permission i.e. temporary fences, while the construction works are being carried out and the work specified in 4.3. But in regard to other matters he does need the consent of the landlord in writing, but such consent shall not be unreasonably withheld or delayed. Mr Stevenson accepts on balance that his client does need the consent, but he submits Mr and Mrs McCrory's refusal of consent is unreasonable because what the lessee/plaintiff wants to do is a lawful user of the property.

[8] Mr Sands has helpfully referred the court to two decisions in this jurisdiction. One is of Campbell LJ in Paco Retail UK Limited v Castle Court [1999] NIJB 211, the other is of Weatherup J, 7 September 2001 Libra Limited and Finnbrook Investments Limited v Laganside Corporation and in the latter the learned judge refers to the leading case of International Drilling Fluids Limited and Louisville Investments Uxbridge Limited [1986] 2 WLR 581 a judgment of Balcombe L.J. which has been quoted again more recently and relied on by the Court of Appeal in England in Iqbal v Thakrar [2004] EWCA Civ. 592 a judgment of Peter Gibson L.J. with whom Longmore L.J. agreed. The net effect of that is actually really very simple - that if it is a lawful user then the landlord cannot withhold his consent to what is being done. So the real issue is whether this lease permits something over and above Clause 4.3, namely the laying of a cable to connect the switch house on the demised property to the proposed turbines on the adjoining lands. In regard to that therefore it is right to turn to the landlord's covenants, the first two clauses I have cited being tenant's covenants. At 5.5 one finds this as a covenant on the landlord:

> "Not to deal with the Landlord's Property in any manner whatsoever which could prevent or interfere in any way with the Wind Power Project on the Demised Property and any adjacent lands on which the Tenant has constructed Turbines and the exercise of the rights granted in connection therewith."

The words underlined are a very clear recognition that the tenant may well construct turbines on adjacent lands and the landlord is prohibited from preventing such a development. Mr Stevenson relies on that strongly as pointing towards his client's right to take such a step. Furthermore at 5.7 we find this:

> "Not to object to or to make any claim against the Tenant in respect of the Wind Power Project whether on the Demised Property or any adjacent lands on which the tenant has constructed or intends to construct turbines."

Now it might be said that the landlord is seeking to make a claim in respect of the wind power project, not on the demised property but extended to the adjacent lands which he has expressly agreed not to do. Certainly it is a pointer again in favour of the plaintiff that such a development was contemplated and was a lawful user under the lease.

[9] One then turns to the Second Schedule to the lease which in the plaintiff's contention puts the matter clearly on its side of the line. The Second Schedule, it is right to acknowledge, is headed 'Rights included in the Demised Property', which is phrased possibly slightly ambiguously but that is how it is headed. The first clause deals with roads and the second clause deals with Electric Cables and Wires. But again the capital letters indicate that it is electric cables and wires as defined in the definition clause and therefore relating to the demised property. Indeed Mr Sands goes on to properly point out that all but one of the 14 sub-paragraphs in this second schedule appear to relate to either the demised property or the landlord's property i.e. the original farm. But there is a very important exception at Clause 5 and that reads as follows:

> "The right to construct transformer buildings and control buildings and the installation of associated equipment to connect the Demised Property or any other neighbouring lands on which Turbines are constructed or are to be constructed by the Tenant to any grid system and, without prejudice to the generality of the foregoing, the construction and carrying out of any other works as may reasonably be required to be carried out by the Tenant for the operation of a Wind Power Project on the Demised Property."

[10] Now it can be seen that the second half of that clause is not a limitation on the first half; on the contrary it begins by saying without prejudice to the generality of the foregoing. So that second half of the clause clearly only does relate to the demised property but it is acknowledging that the first half may be wider. In my view it is wider and the words are relatively clear that the tenant has a right to construct transformer buildings and control buildings and the installation of associated equipment. Stopping there counsel for the defendants acknowledges that, but he says that associated equipment just refers to what you would find in the transformer buildings and control buildings. It is common case incidentally that they are works that you will find in the switch house with the electricity sub-station and all designed to transfer the electricity generator by these wind turbines into a voltage form that can be fed into the National Grid.

[11] Now Mr Sands' submission might be arguable, although I point out it does not expressly say "and the installation in those buildings of associated equipment" were it not for the words that immediately follow the words associated equipment,

namely "to connect the demised property or any other neighbouring lands … to any grid system" and it seems to me that that was a very clear intention on the parties that the tenant had a right to build buildings, which is considerably more of course than laying a 60 cm wide trench, to assist him in conveying electricity from turbines and neighbouring lands to the grid system which he has access to through the switch house on the demised property. That is the natural and ordinary meaning of the words. I accept the submission by plaintiff's counsel that paragraph 2 of the second schedule is just speaking about the practicalities of laying cables but in any event cable is defined there in the way to be found in the lease. We have the switch house including the sub-station on the demised property and it is perfectly natural that somebody who was drawing up this lease and obviously hoping to sell on the leasehold interest as happened would want to leave open the possibility to a purchaser as here that if the first wind farm proves successful they might expand into adjoining land. All these lands are apparently hill lands, in part forested, and at least in part suitable for these wind turbines. I have taken into account carefully Mr Sands submissions in regard to this and I bear them in mind. But it seems to me that the key point is that the second half of paragraph 5 rather than limiting the first half in fact is acknowledging it that it is wider and the width of it is the right to connect turbines on the neighbouring lands to the National Grid via associated equipment which in my view includes cabling and equipment used to join it to the permitted buildings.. It is a clear principle of contractual interpretation that one reads the clauses and that one reads an agreement as a whole and I do not see anything in the agreement contrary to the interpretation which Mr Stevenson invites the court to put on it and I so rule.

[12] The originating summons poses three questions as follows.

(1) Is the defendants' consent to the plaintiff's proposed works for the installation of an underground cable required under the terms of a lease dated 8 October 2007 between the defendants and Adrian McCrory as varied by a Deed of Variation and Consent dated 20 March 2008 between the defendants and the plaintiff and Deed of Variation dated 22 June 2010 between the defendants and the plaintiff?

The answer to that, because Clause 4.3 does not assist the plaintiff sufficiently in my view, is yes, consent is required pursuant to Clause 4.4.

(2) If the defendants' consent is required for the proposed works are the defendants under an obligation not to unreasonably withhold or delay giving that consent?

The answer to that must be yes.

(3) If the answer to question 2 is in the affirmative, have the defendants unreasonably withheld or delayed giving such consent?

The answer to that is yes consent has been unreasonably withheld because the proposed user by the plaintiff tenant is a lawful user pursuant to Clauses 5.5 and 5.7 of the lease and paragraph (5) of the Second Schedule to the lease and the lease read as a whole.