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Judgment: approved by the Court for handing down (subject to editorial corrections) | ***Delivered:*** **16/11/11**

2010 No 039461

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

LESLEY McCAUGHAN

Plaintiff;

and

BELWOOD HOMES LIMITED

Defendant.

MASTER ELLISON

[1] This is an application by the defendant for a stay pursuant to section 9 of the Arbitration Act 1996 ("the 1996 Act") of the plaintiff's action for specific performance of a building agreement dated 5 February 2007, alternatively, for rescission of both the building agreement and sale agreement of the same date and repayment of the sum of £515,000 together with interest, and further and in the alternative, for damages by reason of the alleged misrepresentation, negligence and breach of contract of the defendant.

[2] The main alleged misrepresentation appears to be to the effect that the dwelling to be constructed on the relevant site would have the benefit of a bio disc sewage treatment works to be constructed by the defendant and adopted by the Water Service or Department of Regional Development. The express

terms of the building agreement the subject of the alleged breaches of contract appear to be as follows (so far as relevant):-

> "1. The Builder shall build and completely finish in a good and workmanlike manner for the employer upon the site mentioned in the schedule, a dwellinghouse and premises (hereinafter called `the dwellinghouse') therein shortly described as to the site number, type and situation in accordance with the plans and specifications lodged by the Builder with and passed and approved by the appropriate authorities."
>
> "16. Subject to the Employer complying with the requirements of all appropriate authorities, the Builder shall at his own expense make all arrangements for the supply to the works of water and electricity and for the drainage therefrom of foul sewage and waste water."
>
> "17. The Builder shall at his own expense ensure that the sewers … servicing … the works shall be provided and laid as soon as practicable to a standard acceptable to the appropriate statutory undertaking. The Builder shall at the like expense ensure that same be maintained to such a standard until adopted and taken over by such statutory undertaking and shall furnish a Bond in accordance with current legislation as security that this will be done. The Employer shall not be entitled to delay his performance of this agreement until the services mentioned in this sub-clause have been completed or taken in charge. The Builder undertakes to have said services taken in charge by the statutory undertaking as soon as possible."

[3] The arbitration agreement upon which the defendant relies is contained in Clause 19 of the building agreement and reads:-

> "19. If any difference shall arise between the Employer and the Builder touching these presents or anything herein contained, or the rights, duties or liabilities of any party in connection with the dwelling, either party may refer the matter to the

> Conciliation Service offered by the NHBC or by any other insurance backed warranty scheme and if the matter has not been resolved within 30 working days of such referral or such longer period as both parties shall agree then such mediation shall be deemed to be at an end and, subject to the rights of the parties to arbitration under any insurance backed warranty scheme, the matter of dispute shall be referred to the arbitration of a person to be agreed between the parties, or failing such agreement within 14 days of the date of a written request by either party to the other, by a person (who shall be a Fellow of the Chartered Institute of Arbitrators) to be appointed by the President for the time being of the Law Society of Northern Ireland on the request in writing of either party, and such appointment shall be in accordance with and subject to the provisions of the Arbitration Act 1996 or any statutory modification or re-enactment thereof."

[4] The plaintiff by his counsel Mr David Dunlop instructed by Greer Hamilton & Gailey has indicated an intention – which I understand to be provisional - not to proceed with the specific performance aspect of his claim ("as it would appear that the defendant may now be in a position to establish the adoption of the Bio Disc Plant in due course") but to focus on rescission or damages instead. However the claim for specific performance remains in the amended statement of claim and will be considered later in this judgment.

[5] The court can only refuse a stay under section 9 of the 1996 Act if satisfied that the arbitration agreement is "null and void, inoperative, or incapable of being performed". An arbitration agreement is a legally robust instrument provided it is drawn in sufficiently wide terms to cover the type of dispute under consideration. In Russell on Arbitration (23rd Edition, 2007) at paragraph 2-010 it is stated as follows:-

> "Section 7 of the Arbitration Act 1996 enables the arbitration agreement to survive not just termination or breach of the matrix contract but also more serious defects. Unless otherwise agreed by the parties, the arbitration agreement may survive as a distinct agreement even if the contract in which it is contained is regarded as invalid, non-existent or ineffective. The validity of the matrix contract may therefore be determined by arbitration in accordance with the arbitration agreement, and the resulting award will be enforceable, even if the tribunal determines that the matrix contract is invalid."

[6] Moreover at paragraph 2-011 it is stated as follows in Russell:-

> "Similarly, even where the matrix contract is held to be void, the arbitration agreement which forms part of it may still be upheld as a valid and independent agreement, so that any disputes must be referred to arbitration …. for example, if there were an alternative claim in tort or for restitution which was within the scope of the clause, the tribunal would continue to have jurisdiction conclusively to determine that claim."

[7] I believe that the scope of the arbitration agreement is broad enough to cover the dispute. Clause 19 of the building agreement covers any difference which arises between the employer and the builder "touching these presents or anything herein contained, or the rights, duties or liabilities of any party in connection with the dwelling". I agree with Mr Gibson of counsel instructed by McIldowies for the defendant that this language would cover a non-contractual claim such as rescission based on misrepresentation. I am in no doubt that a sewerage scheme is a matter "in connection with" the dwelling: and see paragraph 2-004 of Russell dealing with non-contractual claims; also

paragraph 2-70 of that text covering the presumption of "one-stop adjudication" and paragraph 2-075 where it is stated as follows:-

> "The tendency now is very much to treat claims based on other causes of action as within the tribunal's jurisdiction, particularly if they relate to the same facts as other contractual claims falling within the arbitration agreement."

[8] Section 48 of the 1996 Act reads as follows in setting out the remedies available to the arbitral tribunal:-

> "48(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regard to the remedies.
> (2) Unless otherwise agreed by the parties, the tribunal has the following powers.
> (3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
> (4) The tribunal may order the payment of a sum of money, in any currency.
> (5) The tribunal has the same powers as the court –
>
> (a) to order a party to do or refrain from doing anything;
> (b) to order specific performance of a contract (other than a contract relating to land);
> (c) to order the rectification, setting aside or cancellation of a deed or other document."

[9] It is submitted for the plaintiff that by reason of section 48(5)(b) the tribunal would have no power to order specific performance in the present case as the relevant contract would be "a contract relating to land". I refer to the judgment of Etherton J in Telia Sonera Ab v Hilcourt (Docklands) Ltd [2003] EWHC 35. That case concerned a lease agreement and, in the same document, an agreement for "Refurbishment Works" to be begun within 10 days of the completion date for the lease. An issue arose before the arbitrator

as to whether he had power to order specific performance of Telia's obligation to carry out the refurbishment works in view of the limitation in section 48(5)(b). The judge agreed with the arbitrator that "a contract relating to land" should be "treated as confined to a contract for the creation or transfer of an interest in land". The judge approved of the "narrow test" used by the arbitrator, and said that, while in response to the question whether the individual term which was breached related to the creation or transfer of an interest in land "the answer would be that the individual term did so relate as it was part of the consideration for the creation of the lease", however:-

> "On the other hand, as I have indicated, since the relief sought by Hilcourt does not involve the enforcement of any executory obligation related to the transfer of land, that is to say transfer of the land itself or money that must be paid in order to obtain it, or any other obligation which it is necessary to fulfil prior to and as a condition of obtaining the land, then the words in parenthesis in section 48(5)(b) of the 1996 Act do not apply."

[10] I agree with Mr Dunlop for the plaintiff that when both contracts in the present case are read together the contractual matrix as a whole should be regarded as, in substance, a contract for the transfer of an interest in land. That said, Mr Gibson's argument for the defendant was that the approach of the arbitrator in Telia as approved by Etherton J was to look not at the contractual matrix as a whole but only at the refurbishment obligation the subject of the breach for the purpose of ascertaining the relevant contract and whether the exclusion in section 48(5)(b) applied. In the present case the claim to specific performance as particularised in the statement of claim

relates only to the building agreement, not the agreement for transfer. However the plaintiff is alleging in his statement of claim that the defendant is in breach of contract (and guilty of misrepresentation) by reason of its non-compliance with a number of specific planning conditions. These are as follows (the numbering being as at paragraph 8 in the statement of claim):-

> "(iii) Failing to agree the specification of the sewerage and treatment plant with the Water Service before commencing construction;
>
> (iv) Failing to ensure that the package plant was completed before the premises were handed over; (or, as stated in paragraph 7(c) "before any properties are occupied");
>
> (v) Failing to obtain an Article 17 approval before the construction work commenced on site; …
>
> (vi) Failing to obtain approval from Environment & Heritage Service prior to construction commencing; …"

More general breaches are alleged at paragraphs 8(vii) and 8(viii) of the statement of claim:-

> "(vii) Causing and permitting the premises to be erected and sold to the plaintiff without the benefit of planning permission;
>
> (viii) Causing and permitting the premises to be in breach of planning permission".
> [Emphasis added].

[11] I believe these planning requirements are of the nature of or tantamount to Etherton J's "obligations which it is necessary to fulfil prior to and as a condition of obtaining the land." A transfer of land that is not in compliance with planning stipulations would clearly place the transferee and

the land transferred on the wrong side of planning legislation and, in the present case, make a hollow mockery of so much of the services easement granted in the transfer deed as relates to sewerage. There are important differences between the facts of the present case and those of Telia, in which the agreement for refurbishment provided that the refurbishment works would only be commenced after the relevant lease had been granted, whereas the building agreement and agreement for transfer in the present case were essentially concurrent and interdependent contracts forming a single conveyancing transaction – if not a single contract - completed on the strength of undertakings relating to title, building control, planning and associated matters. In his analysis approved by Etherton J in Telia the arbitrator remarked that "in the present case there is no difficulty in treating the building obligation in clause 4.1 as a separate obligation from the obligation to grant and take the lease – not least because the time for performance of the building obligation does not begin until the lease has been granted." The situation in the present case is, as I have indicated, quite different. Compliance with the planning stipulations is at least as fundamental to the satisfactory transfer of the land and the acquisition of a marketable or "good" title as it is to the satisfactory completion of the construction works. No planning issue appears to have arisen in Telia, in which the contractual matrix appears to have been more straightforward. Etherton J said that historically the exception in section 48(5)(b) appears to have arisen "to reflect that category of work specifically assigned to the Chancery Division, which had

particular expertise in conveyancing matters, and contracts for the sale of land in particular." The present case is one in which particular expertise in such matters would be most helpful in any adjudication.

[12] I find that the exception in section 48(5)(b) does apply to a claim for specific performance of the relevant terms of the building agreement and an arbitrator would therefore have no power to deal with such a claim.

[13] Accordingly the order I will make will dismiss the defendant's application for a stay and award costs to the plaintiff.