Neutral Citation No. [2012] NICh 31 | *Ref:* DEE8552

Judgment: approved by the Court for handing down | *Delivered:* 25/10/12

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2010 No. 143044

LINCOLN CENTRE BELFAST LIMITED

Plaintiff;

-and-

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant.

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DEENY J

[1] The plaintiff in this action is a limited company. The court was told that it is a subsidiary of Andras House Limited and that that company has been active in the field of property development and the operation of hotels for some years in Northern Ireland. The relevant directors of both companies are Lord Rana and his son Mr Rajeesh Rana.

[2] The defendant is the principal public housing authority for Northern Ireland. It is the freehold owner of lands of about 2.6 acres in extent between Great Victoria Street, Hope Street and Sandy Row in the centre of the City of Belfast.

[3] In May 1996 the Housing Executive published a Hope Street Development Brief ("the Development Brief"). This document invited submissions from parties interested in developing and purchasing a 2.6 acre city centre site at Hope Street. The proposal was linked to possible part payment by the purchaser by building 27 dwellings for the Executive at Emerald Street off Woodstock Road. The plaintiff was one of a number of companies which entered a development submission. It was selected by the Housing Executive and they entered into a Development Agreement on 15 December 1998. These proceedings arise out of the interpretation and implementation of that Agreement, as amended by two supplementary Agreements. In the writ of summons of 9 November 2010 the plaintiffs claim the following:

1. A Declaration that the Defendant had failed and/or refused to consider the Plaintiff's proposed variations to the design of the approved development scheme and the Developer's Works, as submitted to the Defendant on 20 October 2010.

2. A Declaration that the Defendant is obliged, pursuant to the terms of the Development Agreement, as amended, to consider the Plaintiff's proposed variations to the design of the approved development scheme and the Developer's Works, as submitted to the Defendant on 20 October 2010.

3. A Declaration that the Defendant may not, pursuant to the terms of the Development Agreement, as amended, unreasonably withhold or refuse consent to the proposed variations to the design of the approved development scheme and the Developer's Works, as submitted to the Defendant on 20 October 2010.

4. An order for specific performance, requiring the Defendant to give true, proper, full and faithful consideration to the proposed variations to the design of the approved development scheme and the Developer's Works, as submitted to the Defendant on 20 October 2010.

5. An injunction restraining the Defendant from attempting to terminate the Development Agreement, as amended or from serving a Notice of Termination, pursuant to clause 17 of the said agreement.

6. Such further or other relief as appears appropriate to the Court.

7. Costs.

[4] The defendant has issued and served related proceedings commencing with a statement of claim endorsed on the writ of summons of 22 December 2010. The prayer in that statement of claim seeks the following:

1. An Order for Possession of the lands at Hope Street, more particularly defined in the Development Agreement referred to herein;

2. A declaration that the Development Agreement dated 15 December 1998 has been validly terminated by the Plaintiff and that each party is discharged from further obligation thereunder save as is provided for in clause 17 of the said Agreement;

3. Damages for trespass and/or mesne profits;

4. Damages for breach of contract;

5. An account of profits made by the Defendant in respect of its unauthorised user of the Site;

6. Interest on all sums found to be due and owing to the Plaintiff pursuant to section 33A of the Judicature (NI) Act 1978;

7. Further or other relief;

8. Costs.

It was agreed in the reviews leading up to the hearing of the plaintiff's claim herein that it would be heard first. It was heard by me on 25, 26, 27 and 28 June 2012. Mr Stewart Beattie QC appeared with Mr Paul McLaughlin for the plaintiff. Mr Stephen Shaw QC appeared with Mr Michael Humphreys QC for the defendant. The court has been provided with helpful written and oral submissions by counsel.

[5] It was further agreed that the said hearing would concentrate on one issue of contractual interpretation, albeit to be decided in the context of the surrounding factual matrix at the relevant times. The essence of the matter is that, apart from the Woodstock Road houses and the development of phase 1 of the scheme, a budget hotel known as Days Hotel, constructed and operated by the plaintiff company at Sandy Row, the rest of the site remains undeveloped. In March and October of 2010 the plaintiff informed the Executive that funding was not forthcoming to construct a basement car park across the rest of the site as envisaged in its development submission. It wished to alter the scheme to be built in a number of important respects very largely arising from the need to build a multi-storey car park above ground rather than an underground car park, which is significantly more expensive. The position of the Executive is that whilst it was prepared to consider a proposal, and did consider the March 2010 proposal, it was doing so without any contractual

obligation. It considered whether it was willing to vary the contract set out in the Development Agreement of 1998 and it concluded it was not. The position of the plaintiff is that the Executive is obliged within the existing contract to give consideration to its proposals for change and reject them only if they are unreasonable. In arriving at such an outcome the plaintiff says the defendant must take into account the financial difficulties the plaintiff has encountered, on its assertion, in developing this site.

HISTORY

[6] As the plaintiff has acknowledged the development of the site has had a difficult history. Following the making of the development agreement, nearly fourteen years ago, the plaintiff proceeded to seek and obtain planning permission. There was an initial permission of 1999 which was followed by a planning permission of 18 January 2000. Within the meaning of this agreement this constituted an acceptable planning permission. For connected reasons in or about 14 June 2001 the consideration was increased to £3.65m. The plaintiff then proceeded to build Days Hotel. It also acquired some additional adjoining land which it considered necessary in order to complete the entire development. That facility did permit a road closure order. But no further building proceeded on the site. This led to litigation between the parties in 2006. This was settled by way of a further supplemental agreement dated 13 May 2008. Essential features of that were that the target date would go back to 13 May 2011, clearly in ease of the plaintiff, with the indicative programme also being varied but that Lincoln would pay an outstanding sum of £1,892,065. It is important to note however that the plan was as previously agreed and approved for planning permission i.e. a basement car park with a hotel, apartments and offices built around an attractive piazza style entrance facing on to Great Victoria Street.

[7] Again the plaintiff failed to build on foot of that but the Executive was persuaded on 31 July 2009 to defer completion of the works until 13 March 2012. The basement works were to commence in November 2009. Again that did not happen. The Housing Executive had repeatedly expressed its concerns about the delay e.g. in a letter of 31 July 2009.

[8] On 21 October 2009 the Executive wrote to the plaintiff expressing its concern that it saw no evidence on site to suggest that preparations were being made for the work to commence in November 2009 as previously agreed. The letter concludes thus:

> "NIHE would like to remind Lincoln Centre that its approval of the application to amend the indicative programme of 4 June 2009 was an exception as made clear in its correspondence of 31 July 2009. NIHE continues to reserve all of its rights."

Mr Rajeesh Rana replied on 5 November 2009 assuring Mr Ivan Vallelly of the defendant that the works were programmed to commence within November 2009. That did not happen despite a further assurance from Mr Rajeesh Rana on 26 November 2009 that their contractor was in the "process of starting the works". The same letter then raised the issue of the plaintiff's bank's concerns about building the underground car park before the other parts of the work. I need not go through the subsequent correspondence in detail. Suffice it to say that a meeting took place on 10 February 2010 between representatives of the plaintiff, the Executive and the then Minister for Social Development. There Mr Rana outlined the proposal, inter alia, that the car park would now be over ground and not underground but that it would be "wrapped" by development and so would be effectively screened from view. The Minister is recorded as expressing sympathy with the arguments regarding the cost of the basement. But the Minister's sympathy does not alter the legal relationship between the parties to this action. The plaintiff was now proposing a radical alteration to the whole proposal. This was elucidated further in their letter of 12 March 2010 to the Housing Executive. There is a redacted draft minute for the Board of Executive of 30 June 2010 which sets out the position fairly. They were concerned about the lack of any significant progress and they had formed the view that "the proposed changes to this scheme provide a lower quality and piecemeal alternative which does not meet the original objectives of the design competition." This is amplified at various other points in the papers including page 284. This position was made clear to Mr Rana of the plaintiff by letter of 2 July 2010. Subsequently the Executive terminated the agreement both because of the unlawful user of the site as a car park and because the plaintiff had simply failed to perform its side of the bargain as previously agreed. The formal notice of that invoking of the appropriate clauses of the agreement was ultimately served as a Notice of Termination on 12 November 2010 (page 333).

INTERPRETATION OF THE AGREEMENT

[9] Counsel drew the court's attention to the canons of construction and the approach to be adopted by a court in interpreting contracts to be found in Chitty on Contracts and Lewison on the Interpretation of Contracts. I bear in mind the admirable summary of Lord Bingham of Cornhill in BCCI v Ali [2002] 1 A.C. 251. 259:

> 'To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified.'

I remind myself of the judgment of Lord Hoffman in ICS Ltd v West Bromwich Building Society [1998] 1All ER 98 at 114 ff.

[10] The defendant also draws attention to the judgment of the Supreme Court per Lord Clarke in Rainy Sky S.A. v Kookmin Bank [2011] UKSC 50, at para. 21:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so the court must have regard to all the relevance surrounding the circumstances. If there are two possible constructions the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

I bear this in mind. The plaintiff faces the formidable difficulty of persuading me that business common sense, at the time of entering into this agreement in 1998, would have contemplated that the developer of an important city centre site, owned by the public, would be entitled to leave it unbuilt for 12 years and come in at the end of that period of 12 years and ask for a major alteration in its proposals which would fall short of the design quality and provision of open space e.g. page 479 promised in the Development Submission.

THE DEVELOPMENT AGREEMENT

[11] I now turn to the Development Agreement of 1998. These parties, despite the assistance of experienced lawyers have been unable to agree on what it means and frankly I do not altogether blame them. It is not a happily worded document. I shall now turn to examining it.

A crucial aspect of the case is what constitutes Developer's Works which are defined at page 9 of the trial bundle as "the works to be carried out by Developer as generally described in Schedule 2." The plaintiff stresses the words 'generally described' as pointing to a non-prescriptive indication of the works to be carried out. Schedule 2 is to be found at page 70 of the bundle and is headed Developers Works. It reads:

> "Works which would be consistent with the approved Developer's Brief for the Site and approved Development Submission in accordance with Detailed Planning Permission and the Developers Plans and Specifications as altered or amended pursuant to provisions of this Agreement."

The plaintiff emphasises a number of points about this. Firstly we do not find in this Agreement, unhelpfully I have to say, a simple statement of what the works were to be e.g. an hotel, so many square foot of offices, so many apartments, so many restaurants and an underground car park. The plaintiff prays that in aid as showing that the development of this site, large by city centre standards, was an evolving process, consistent with many other clauses in the Agreement to which I must turn.

[12] The plaintiff stresses in Schedule 2 the use of the words "to be consistent with"; that again is not sharply defined or a prescriptive term. The Executive's position to a degree evolved in the course of argument over the hearing. An important point which they rely on regarding Schedule 2 is this. The approved Developer's Brief was published in 1996. It was succeeded by the submissions of those who wished to develop the site. It is an historical document and cannot be altered or amended in one sense and nor is there provision to alter or amend it within its own text.

[13] Likewise the Development Submission of the plaintiff here is a historical document. It was approved by the Executive when they selected the plaintiff (or its related company) to develop the site. Again it cannot be altered or amended as a matter of historical fact nor, although there are important references to flexibility within, does it contain a provision within its own text for amendment. It expressly proposes "basement and sub-basement parking to accommodate the development" (page 477).

[14] Thirdly detailed planning permission (for the Developer's Works) can only be altered or amended by, at the present time, the Planning Service of Northern Ireland. It cannot be altered by the parties to this Agreement. Therefore the Executive submits it is only the Developer's Plans and Specifications to which the words "as altered or amended pursuant to the provisions of this Agreement" apply.

[15] That is consistent with the definition of developer's plans and specifications to be found in the definition section at page 8 of the trial bundle. It reads as follows:

> "The plans, sections, elevations, drawings, specifications relating to the Developer's Works (as approved by the Executive such approval not to be unreasonably withheld or delayed) for which the developer is responsible under this Agreement showing (insofar as possible) the precise details of

> such development and (where appropriate) the expression shall include any variations, alterations and additions to and provisions of the developers plans and specifications."

The defendant relies on this as showing that it is indeed only the plans and specifications which can be amended subject to their approval not to be unreasonably withheld or delayed. The plaintiff seeks to say that the use of that language here and throughout the Development Agreement requires the court to 'read across' its right to amend subject to not unreasonable disapproval by the Executive in the Developer's Works themselves.

[16] To return to Schedule 2, the Executive's position is that the works which the developers were prepared to carry out would indeed be consistent with the developer's brief, which would not be difficult, and more importantly the Development Submission of the developer which the Executive approved and which would then be put into effect by an application for planning permission. It must be remembered that the planning permission, obtained as it was in 1999 and amended in 2000 has to be sent to the Executive which has 15 days in which to register an objection. If it does not do so it is deemed, as happened here, to approve the planning permission. Mr Shaw submits that at that point the Developer's Works have crystallised. They are entitled to amend their plans and specifications regarding matters of detail and finish and so forth but they are not entitled to subtract whole buildings or indeed to alter the Developer's Works in any way which would necessitate a fresh application for a different planning permission. Mr Shaw accepted my submission that he was really putting forward a five step process which led to clarification of what Developer's Works were.

[17] His admission that it might be argued that the planning permission of 2000 had in fact elapsed rather than being preserved by the building of Days Hotel might seem to tend to undermine that proposition. No such finding has been made at this time. But in any event it represents what the plaintiff had agreed to build. Mr Beattie QC helpfully opened the Development Agreement to the court. I have taken into account his submissions and those of Mr Shaw without feeling the necessity of setting out each one of them.

[18] The Indicative Programme is defined in the definitions Clause 1 of the Agreement, at page 12 of the bundle as: "The indicative programme for carrying out the development of the Executive's lands and the site as revised from time to time in accordance with this Agreement, the indicative programme at the date of this Agreement being set out in Schedule 5". Schedule 5 is to be found at page 73 of the Agreement. However when one turns to page 73 and Schedule 5 one thinks that that is simply not true. All that one finds there is a reference to the Executive's lands, which are apparently a reference to Emerald Street in East Belfast and to the programme of works as stated in the Executive's bill of quantities for those lands. But in regard to this Hope Street site one merely gets:

> "The programme of works indicated to the Executive from time to time by the developer in accordance with the developer's plans and specifications."

[19] Clause 7 of the Development Agreement commencing at page 39 of the book deals with the indicative programme. For convenience I set it out in full.

> "7.1.1 The Indicative Programme set out in Schedule 5 indicates the order in which the Developer intend (sic) to develop the Executive's Lands and the Site and the Indicative Programme may not be altered without the consent of the Executive such consent not to be unreasonably withheld or delayed.
>
> 7.2 The Parties recognise that the Indicative Programme may require variation in the future as circumstances dictate.
>
> 7.3 The Developer may at any time and as often as may be necessary apply to the Executive for its approval to alter the Indicative Programme.
>
> 7.4 Any such application shall be in writing and shall set out the Developer's reasons for wishing to alter the Indicative Programme supported by such information and documentation as shall be properly required.
>
> 7.5 It shall not be deemed unreasonable for the Executive to withhold its approval to an alteration to the Indicative Programme if to do so would or might:-
>
> 7.5.1 extend the Housing Target Date;
>
> 7.5.2 impede any other of the Works;
>
> 7.5.3 be fundamentally contrary to the principles of the Development brief (having regard however to any changed circumstances) against which the Developer originally submitted its proposal to the Executive for the development of the Site;
>
> 7.5.4 Make it less likely that the whole of the Site would be developed.

7.6 Once (and if) approved by the Executive the Parties shall initial the revised Indicative Programme which once initialled shall become the Indicative Programme for the purposes of this Agreement.

7.7 if any dispute or difference shall arise between the Parties as to whether or not the Executive should approve an alteration to the Indicative Programme such dispute or difference shall be referred to an arbitrator in accordance with Clause 24.

8. LICENCE

The Executive permits the Developer to enter the Executive's Lands immediately and the Site on or after the Date for Possession to carry out the Works on the following terms.

8.1 Pending completion of a phase of the Developer's Works (the completion of which phase would permit beneficial occupation by a sub-tenant of such relevant area) when the Developer shall be entitled to require the Executive to complete a Lease of such area in terms similar to the Agreed Lease providing a Certificate of Practical Completion has been issued pursuant to the provisions of Clause 11 hereof save that any fitting out works to be undertaken by the said sub-tenant shall not be taken into account in determining whether or not this Certificate of Practical Completion should issue and also providing that the appropriate payment is made pursuant to Clause 12 the Developer is the licensee of the Executive and in order to avoid misunderstanding the Parties expressly confirm and agree that nothing herein contained shall be construed as creating a legal demise or any greater interest in the Developer than a licensee in the terms provided and the Developer's licence to use the Executive's Lands and the Site and shall be determined immediately by any demand for possession of the premises properly made by or on behalf of the Executive pursuant to the terms of this Agreement.

8.2 The Developer is entitled to remain in occupation of the Site and Executive's Lands only so

> long as it shall carry on the Works in accordance with the terms of this Agreement."

[20] Mr Beattie suggested that there is much here of assistance to his case. The indicative programme can be altered with the consent of the Executive but "such consent is not to be unreasonably withheld or delayed". It may require variation "in the future as circumstances dictate". Clause 7.3 says "This may be as often as may be necessary. The reasonableness of the Executive's refusal of approval in this context does not arise from 7.5.1 or 7.5.2. But if it were required here it could be on the ground that it was quite fundamentally contrary to the principles of the Development Brief (having regard to any changed circumstances) …" The Development Brief of course is really just looking for regeneration of the locality. A change from an underground car park to a multi-storey car park could hardly be said to be fundamentally contrary to the principles of the brief. Furthermore Mr Beattie points out that the Executive is required to take into account changed circumstances, consistent with the rider to the Development Submission.

[21] Of assistance to him in his contention that the Executive must take into account the financial restraints upon the plaintiff is 7.5.4 : "make it less likely that the whole of the site would be developed". If that is a ground for refusing a change in the indicative programme it might be thought that logically it is a ground for allowing a change i.e. that the developer says the original submission cannot now be built out for lack of finance in accordance with its earlier submission.

[22] But the other view is that this relates to questions of timing and perhaps of the order in which different buildings are constructed on the site. The very fact that this is spelt out in as much detail here whereas there is no such provision with regard to the Developer's Works clearly shows that the parties intended the works to be of a different category. In effect Mr Shaw is inviting the court to apply from the field of statutory interpretation the maxim expressio unius est exclusio alterius: to express one thing is to exclude another.

[23] Clause 16 provides that the Executive may terminate the Agreement if at any time and for any reason, within or beyond the control of either party, any event of default has occurred. An event of default is defined in Clause 1 as:

> "Any of the events set out in Schedule 7 and the expression shall include any act or event which will (with the giving notice, lapse of time, making of any determination, fulfilment of any condition or any combination of the foregoing) become an Event of Default."

[24] Schedule 7 is to be found at pages 75-77 of the bundle. The Executive, which has purported to terminate the Agreement, relies on the following.

> "(1) The developer fails duly to perform or comply (after due opportunity is given to remedy same) with any material obligation on its part contained in this Agreement.
>
> (6) Repudiation. The developer repudiates, or does or causes to be done anything which clearly and unequivocally evidences an intention to repudiate this Agreement.
>
> (8) Failure to comply with indicative programme.
>
> (9) Material adverse change."

These provisions are clearly of assistance to the NIHE.

[25] I will not set out the whole lengthy clause in full. Again one has to express disappointment at the drafting of this document which, possibly with a desire to include everything, has lost clarity. I do note that pursuant to 4.3.2 the developer shall prior to commencing the developers work on the site "produce to the Executive evidence to the reasonable satisfaction of the Executive that funds are available to the developer sufficient to carry out the developer's works in their entirety." That would lean against an interpretation sought by the plaintiff that the Executive is obliged to take into accounts its inability to gain finance for the works for which planning permission was given in 2000.

[26] Clause 4.9 tells against the developer in my view rather than for it as the Executive's approval is not to be "unreasonably withheld or delayed" to works programme variations. But that relates to the timing of the works. In fact the Executive has been generous in granting extensions of time for the target date on a number of occasions over the years.

[27] Clause 4.11 requires the developer to use reasonable endeavours to procure that the developer's works are carried out "… in strict conformity with the developer's plans and specifications …." While reasonable endeavours is relied on by the plaintiff the strict conformity to the plans and specifications may count the other way although, pursuant to 4.13, they can ask the Executive to consent to variations of the same.

[28] Clause 31.2 reads as follows:

> "Any remedy or delay by either party or time or indulgence given by it in or before exercising any remedy or right under or relation to this agreement shall not operate as a waiver of the same nor shall any single or partial exercise of any remedy or right

preclude any further exercise of same or the exercise of any other remedy or right."

The defendant is entitled to rely on that clause in support of their view that they have not waived any rights they had under this agreement.

[29] I remind myself that I should read this agreement as a whole. As I have indicated it is not happily drafted. It is however the duty of the court to form a view in these circumstances. I return to Schedule 2, the definition of developer's works. It seems to me that on a proper reading of that clause, either on its own or, certainly, in the context of the agreement as a whole, it breaks down into four sub-clauses. The works would be consistent with the approved developer's brief for the site AND the approved development submission AND in accordance with detailed planning permission AND the developer's plans and specifications (as altered or amended pursuant to provisions of this agreement). That further amendment relates only, in my view, to the plans and specifications which are to implement the works, which are to be consistent and in accordance with the developer's submission and detailed planning permission, particularly for the reasons set out at [12] – [16] above. The 2010 proposals are not consistent with either. I consider that it would be an erroneous construction to "read across" the permissive clauses relating to plans and specifications, essentially lesser matters, and to the indicative programme, essentially about the timing and order of building, into the heart of what had been promised to be built by the developer in his submission, accepted by the Housing Executive and crystallised in the planning permission of 2000.

[30] I find that the arguments on behalf of the Northern Ireland Executive are persuasive here. I find that while the Executive was entitled to consider, without prejudice, the major alteration proposed on the part of the plaintiff in 2010, as any party to a contract may choose to do, that it was not under any obligation to do so. The long prior history as set out above and the radical nature of the alteration to the design support an interpretation of the agreement which did not require the Executive to re-open the issue of the underground car park simply because the plaintiff's bank disputed the financial feasibility of the project. Developers take on risks. They take the benefit if the market rises but must face the consequences if it falls. Given the great effluxion of time in the course of this development those risks have increased. I bear in mind the views of the Supreme Court cited at [10] above and conclude that the interpretation advanced by the plaintiff would have been completely contrary to "business common sense" in 1998 and is indeed so now.

[31] Such a conclusion means that I do not have to consider whether any such consent was or was not reasonably withheld but, for the assistance of the parties, I will do so if asked.