Neutral Citation No [2019] NICA 65 | *Ref:* **MOR11114**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **25/11/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

PORTER PROPERTY LIMITED

Appellant;

-and-

SEYMOUR DUGAN AND DORA DUGAN

Respondents.

Before: Morgan LCJ, Stephens LJ and Treacy LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from an Order of Horner J declaring that the appellant was obliged at its own expense to lay out and make up the Private Access Road to the boundary of the Plaintiff's land with sewers and services (other than lighting) in accordance with Planning Permission S/2013/0044/F to requisite private road standards to the reasonable satisfaction of Mr Hutcheson, a chartered architect. Mr Mark Orr QC appeared with Mr Watt for the appellant and Mr Ringland QC appeared with Mr Ringland for the respondent.

Background

[2] The background facts were not in dispute and were helpfully set out by Horner J. The respondents are the former owners of the lands comprised in Folio DN139300 County Down ("the appellant's lands"). The respondents sold the appellant's lands to Snoddons Construction Limited ("Snoddons"). The appellant's lands are now owned by the appellant and Coby Developments ("Coby"). The respondents are the current owners of the adjacent Folio 4189 ("the respondents' lands"). The Deed of Transfer dated 10 October 2005 which created Folio DN139300 County Down expressly reserved certain rights in favour of the respondents. These reservations constrained the appellant's ability to develop its housing development on the said lands known as Farriers Green as it wished. Negotiations were entered

into between the parties resulting in an agreement which was set out in an open letter dated 30 May 2012 ("the May agreement") from the appellant's solicitor to the respondents' solicitor.

The key provision in the agreement was at A.1 which provided:

> "That they will not object to an application by your client for detailed planning approval on your clients' retained land with access taken through sites 11 and 12 of our clients' Farriers Green development as shown on the attached map ('the Private Access Road') or across such other amended route through sites 11 and 12 (if any) as may in the reasonable opinion of Mr Hutcheson be reasonably necessary to make the Private Access Road suitable to serve the intended development on your clients' land or required to satisfy the statutory authorities. Our client understands that your clients' advisor Mr Hutcheson will submit your clients' application for planning approval as soon as practicable." (sic)

[3] It was also provided at A3 that within a period of six months following receipt of notification that planning approval had been granted to the respondents, the appellant would "at its expense lay out and make up the Private Access Road with sewers and services (other than lighting) ("the Services") to requisite private road standard to the reasonable satisfaction of Mr Hutcheson. The Services will be connected to the main source of outfall (with NI Water consent if required)".

[4] There was then a provision that upon the Private Access Road being completed ownership of the area of the Private Access Road would be transferred to the respondents subject to such rights under or through the same as might be reasonably necessary "for the benefit of our clients' adjoining development".

The approach of Mr Hutcheson

[5] The Private Access Road ("the appellant's road") shown on the map attached to the May 2012 agreement was positioned at the western edge of site 12 with no portion of it laying within site 11 on the east. The central issue in the appeal concerned the decision-making of Mr Hutcheson who obtained planning approval for a Private Access Road along the eastern boundary of site 11. The learned trial judge found Mr Hutcheson an impressive witness in whom he could have confidence.

[6] In his report prepared for the first instance hearing Mr Hutcheson explained that his design avoided creating features that were explicitly referred to in planning policy as being detrimental to environmental considerations such as the need for retaining walls, culverting rivers or actions that would jeopardise the survival of existing trees. He noted that it was important to reduce the cost of elements that did not add value to the overall project such as extensive earthworks and increased road

area which added to the cost of construction without increasing the value of the houses. Since this was a back land development it did not have the visual presence of development on the main frontage and the circuitous route requiring three full luck steering turns on the plan attached to the letter of 30 May 2012 would be off-putting and become tiresome over time.

[7] He noted that his proposal avoided the most extreme difference in level that existed between site 12 and the respondent's land and avoided the need for extensive retaining structures in the land of both parties. It stayed well away from the existing stream and the existing trees in the western boundary of site 12. It gave a point of entry into the respondent's land that reduced the amount of road that would have to be built at a cost to the development and the area of land released by not having a road over it could be given to one of the house sites proposed by the respondents thereby creating a larger site and adding variety to the development.

[8] He also considered that it would be beneficial to the appellant's land because it resulted in a shorter length of road, would require less filled material to build the road up, would avoid retaining structures within sites 11 and 12 and a greater area of site would be left available for development. He noted that the portion of sites 11 and 12 that would remain would join other lands owned by the appellant and merging of those lands could allow the western boundary to be adjusted if desired. He had shared his proposal with representatives of the appellant and understood as a result of a letter on 4 October 2012 that they were agreeable. He lodged a planning application S/2013/044/F on 30 January 2013 and approval was given for the development on the respondent's land including the proposed road on 12 September 2014.

[9] The appellant did not proceed to lay out the road as contemplated in the letter of 30 May 2012 but in February 2016 lodged a new planning application LA05/2016/0174/F proposing a revised access road broadly along the line set out in the map attached to the letter of 30 May 2012 but not identical to that line. The respondents objected to the application which was recommended for approval by the planning officers and was eventually approved on 3 October 2017. The respondents point out, however, that the planners indicated that the route proposed by Mr Hutcheson was preferred.

[10] In the course of his judgement the learned trial judge highlighted a number of answers given by Mr Hutcheson in cross-examination:

(i) It was not his primary duty to see if the route attached to the map would work;

(ii) His starting point was to determine the intended development of the plaintiffs. He concluded that the proposed route appended to the May 2012 agreement was not suitable to serve the respondent's development;

(iii) He considered that it was reasonably necessary to take the route of the respondent's road because this, unlike the appellant's road, was

suitable to serve the respondents' development. He gave convincing reasons for this. Those reasons were not challenged by the appellant; and

(iv) He considered the route of the appellant's road did not properly serve the intended development of the respondents and accordingly it was not a question of preferring one route to another. He said in giving his evidence that this was not "a judgment on which (route was) more suitable to deliver the same outcome. One road served Dugans' development; the other did not".

The decision of the learned trial judge

[11] At first instance the appellants essentially made three arguments. The first was that Mr Hutcheson relied on the views of planning service in order to select his route. The learned trial judge rejected that contention and it does not form part of the appeal.

[12] The second submission was that it was a condition precedent of the agreement that the respondents would make an application for planning permission along the route exhibited to the May agreement and if planning permission were granted then that must be the route to be used. Horner J rejected that submission stating that the natural and ordinary meaning of the May agreement was that the respondents had a choice which could only be exercised if Mr Hutcheson exercised his discretion in favour of the respondent in accordance with the agreement.

[13] The third submission was that the agreement gave primacy to the Private Access Road as attached in diagrammatic form to the May agreement. The learned trial judge rejected this interpretation on the basis that if that had been the intention the agreement would have required the respondents to make an application for planning permission and only if that was not successful could they explore another route through sites 11 and 12. Instead the agreement provided that alternative route could be selected where Mr Hutcheson considered it "reasonably necessary to make the Private Access Road suitable".

Consideration

[14] There was no material dispute between the parties about the legal principles applicable to the interpretation of the agreement. The learned trial judge relied on the summary by Gross LJ in Al Sanea v Saad Investments Co Limited [2012] EWCA Civ 313:

> "(i) The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would

reasonably have been available to the parties in the situation in which they were at the time of the contract.

(ii) The court has to start somewhere and the starting point is the wording used by the parties in the contract.

(iii) It is not for the court to rewrite the parties' bargain. If the language is unambiguous, the court must apply it.

(iv) Where a term of a contract is open to more than one interpretation, it is generally appropriate for the court to adopt the interpretation which is most consistent with business common sense. A court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.

(v) The contract is to be read as a whole an iterative process is called for:

… involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences."

[15] It was also common case that in order to construe the agreement between the parties it was necessary to give effect to each part of the document. In this case that included the diagrammatic representation of the proposed road attached to the letter of 30 May 2012. It was also agreed that the opinion as to suitability held by Mr Hutcheson had to be rational, genuine and held in good faith.

[16] Horner J held that the words "reasonably necessary" should be construed as simply imposing a test of necessity. He accepted the submission to that effect based on the judgment of Wynn Parry J in Re Naylor Benzon Mining Co Ltd [1950] Ch 567. It is apparent from the judgment, however, that the test of necessity is dependent upon context. In Harris v London and South Western Railway Company (1889) 60 LT 392 Kekewich J had to interpret the phrase "necessary and convenient for passenger and goods traffic" in a conveyance. He concluded in that context that it was quite obvious that "necessary" cannot mean that without which the passenger and goods traffic cannot be carried on.

> "It must mean that which is reasonably necessary for passenger and goods traffic carried on a railway of this kind, and as from time to time required. When you have got that meaning for "necessary" it seems to me that there is no occasion to consider what "convenient" means."

That would support the view that "reasonably necessary" has a certain elasticity to it depending upon the context within which it is used.

[17] We accept that the map attached to the agreement identified a proposed route and also identified the area comprising sites 11 and 12 through which any alternative route would have to travel. We accept that the proposed route had primacy in the sense that there could only be departure from it if:

(a) the route required amendment because in the reasonable opinion of Mr Hutcheson it was reasonably necessary to make the Private Access Road suitable to serve the intended development on the respondent's land, or

(b) the route required amendment to satisfy the statutory authorities.

The respondent's case is entirely dependent upon the condition set out at (a) being satisfied.

[18] We consider that the phrase "suitable to serve the intended development" sets the context within which the issue of suitability should be assessed. We reject the submission that suitability in this context should be confined to physical issues of practicality. In this context suitability includes physical issues of practicality but also includes visual amenity, environmental impact, cost and economic viability.

[19] It is common case that in his cross-examination Mr Hutcheson indicated that he determined that the map attached to the agreement was not suitable to serve the intended development for his client's land. The summary of the factors influencing that conclusion are broadly set out at paragraph [6] above. These were all factors that Mr Hutcheson was entitled to take into account. We accept that it was necessary for Mr Hutcheson to make such a determination before he was entitled to consider an amended route through sites 11 and 12.

[20] Much of the appeal was concerned with seeking to undermine the reliability of Mr Hutcheson's statement that he had considered the original road line unsuitable. He was cross examined about his failure to refer to the map at various points in correspondence and in particular an assertion that the road could be anywhere in sites 11 and 12 as reasonably necessary in his opinion. We consider, however, that unlike the learned trial judge we do not have the opportunity to see and hear the witness and the transcript does not remove that disadvantage. There was plenty of material to justify the conclusion reached by the learned trial judge on

the reliability of Mr Hutcheson and there is no proper basis for us to reject that assessment.

[21] It was submitted on behalf of the appellant that Mr Hutcheson had engaged in a comparative exercise preferring his route to the agreement route. We accept that the matters set out at paragraphs [7] and [8] above demonstrate the advantages of the route proposed by Mr Hutcheson but that does not undermine his reasonable opinion that the proposed route, for the reasons given by him, was unsuitable.

Conclusion

[22] For the reasons given we are satisfied that Mr Hutcheson acted in accordance with the agreement in determining that the map attached to the agreement was not suitable to serve the intended development on the respondents' land and that he thereafter proceeded to determine a suitable route through sites 11 and 12 in accordance with the agreement.

[23] The appeal is dismissed.