

Neutral Citation No: [2018] NICH 24

Ref: HOR10813

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

Delivered: 20/12/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

SEYMOUR DUGAN AND DORA DUGAN

Plaintiffs;

-and-

PORTER PROPERTY LIMITED

Defendant.

HORNER J

**Introduction**

[1] Since giving my judgment in the action between the plaintiffs and the defendant on 26 October 2018 about the access which the plaintiffs should be permitted over the defendant's development and in particular over sites 11 and 12, a new problem has emerged. The plaintiffs say that the defendant is responsible for designing the private access road which will access the defendant's development. The defendant says that it is the responsibility of the plaintiffs to design the private road. Once again the parties are unable to resolve their differences and the court has had to determine who is correct.

[2] I have heard evidence on this issue from Ms McShane, the defendant's road engineer who says in her professional opinion a portion of the road which accesses the plaintiff's development is dangerous. She claimed it does not comply with the relevant standards for the design of a private road. She says she is not prepared to take the risk to both her insurance policy and her reputation by designing a road as per the detailed planning approval.

[3] Mr Hutcheson for the plaintiffs says that it is not his responsibility to design the road. His role is necessarily one of supervision and the fact that the work is being carried out to his reasonable satisfaction means that he is precluded from carrying out any design work.

## Discussion

[4] A3 of the agreement contained in a letter of 30 May 2012 from the defendant's solicitors' records:

"Within a period of six months upon receipt of notification that planning approval has been duly granted to your clients, our clients will at their 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)."

[5] It is worth recording that in the agreement at paragraph A1 the defendant agrees "it will not object to an application by your client for detail planning approval on your clients' retained land with access taken through sites 11 and 12 of our client's 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 clients understand your client's advisor Mr Hutcheson will submit your client's application for planning approval as soon as practicable."

So there can be no doubt who is responsible for making the planning application to achieve detailed planning approval. In fact this has been done by the plaintiffs. There is also no dispute as to who is responsible for laying out and making up the Private Access Road as it is expressly stated that this will be carried out by the defendant at its expense: see A3. There is however no express provision as to who bears responsibility for the road design. There is also confusion as to what is the standard by which the road design is to be measured because there is no such thing as a "private road standard".

[6] I have already considered briefly in my original judgment the proper role for the court to adopt in interpreting a contract. I would therefore propose simply to add the following additional comments to emphasise the nature of the exercise to be taken by this court. First of all the court has to interpret the contract objectively. In Sirius International Insurance Co v FAI General Insurance Limited [2004] 1 WLR 3251 Lord Steyn said:

"The aim of the enquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The enquiry is objective: the question is

what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to the question is to be gathered from the text under consideration and its relevant contextual scene.”

Secondly a court should be cautious about adopting a particular interpretation which does not accord with commercial common sense. In Mannai Investment Company Limited v Eagle Star Life Assurance Co Limited [1997] AC 749 at 771 Lord Steyn said:

“In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.”

Thirdly, in looking at the purpose of a commercial transaction it is important to take into account the purpose of both parties and not just one: see Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Limited [1990] QB 818 at 870.

Fourthly, the context in which the words are spoken is very important. In Kirin Amgen Inc v Hoechst Rion Roussel Limited [2005] RCP 169 at para [64] Lord Hoffman said:

“No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.”

The importance of context is captured by the Latin maxim *noscitur a sociis*.

Leggatt J said in Zhoushan Jinhaiwan Shipyard Co Limited v Golden Exquisite Inc [2014] EWHC 4050 (Comm):

“Identifying the meaning of the words used, however, and the shared purposes and values which the parties may be taken to have had are not two separate inquiries. The meaning of all language

depends on its context. To paraphrase a philosopher of language, a sentence is never not in a context. Contracting parties are never not in a situation. A contract is never not read in the light of some purpose. Interpretive assumptions are always in force. A sentence that seems to need no interpretation is already the product of one. At the same time the main source from which the shared purposes and values of the parties can be ascertained is the contract they have made. It is for these reasons that it is a fundamental principle of the interpretation of contracts that the contractual document must be read as a whole.”

[7] An application designed to obtain detailed planning approval for a housing development necessarily involves design work and that can often include the design of the private road or roads necessary to service that development. The views of the Road Service as to the suitable nature of the road design will be critical in determining whether full planning permission is granted. However I do accept that there may be some further design work required after full planning approval before the road can be “laid out” and “made up”.

[8] In Taylor v Metropolitan Board of Works [1867] LR 2 QB 213 the court had to consider the meaning of “lay out” as it appears in the statute. Blackburn J said at page 221:

“The next question is, when may the owner be said to have begun to lay out the road for that purpose? I do not think that if a person merely puts up a boarding, or leaves the way without any fence, or leaves the old fence untouched while he is building, he can be said to have laid out the road; but as soon as he begins to put up fences, marks out the boundary which he intends to be the permanent boundary between his building and the road, then he may be said to have begun to laid out the road for the forming of the street within the meaning of the Act; and this is also a question of fact for the magistrate.”

Mr Orr helpfully referred to Article 3(1) of the Private Streets (Northern Ireland) Order 1980 which provides:

“Where the development of land for which planning permission is required under Part 3 of the Planning Act consists of or includes or appears to require the laying out or construction of streets, the Department

shall determine the width, position and arrangement of the streets ...”

It seems to me from reading the whole agreement, from the words used, from the commercial sense, from the documentary and factual context that the parties intended that it should be the plaintiffs who would carry out **all of the design work** of the development including, in particular, the Private Access Road serving the development. It was their responsibility to acquire the detailed planning permission which necessarily involved the design of the development including the Private Access Road. It was also the intention of the parties I find that the plaintiffs would be responsible for any additional design work that might be required to construct the Private Access Road.

But it was the defendant who would be responsible for all the aspects of the construction of that road according to the design for which the plaintiffs had obtained planning approval. It was against that background that Mr Hutcheson’s responsibility arose to reasonably satisfy himself that the Private Access Road had been constructed by the defendant “to requisite private road standard,” which I consider in this context must mean in compliance with the Private Streets (Construction) Regulations (NI) (“the Regulations”). The author of the letter of 30 May 2012 was, I conclude, using road and street interchangeably.

## Conclusions

[9] For the reasons which I have set out above, I consider that:

- (a) It is the responsibility of the plaintiffs to design the Private Access Road servicing their development. The identity of who performs this role is a matter for the plaintiffs. The design standard is that contained in the Regulations.
- (b) It is the responsibility of the defendant to lay out and make up the road, that is construct the Private Access Road to the plaintiffs’ design.
- (c) It is the responsibility of Mr Hutcheson to be reasonably satisfied that the road has been so **constructed** to “requisite private road standard”, namely that set out in the Regulations.

[10] I will hear the parties on the issues of costs when they have had an opportunity to consider this judgment.