Neutral Citation Number: [2006] IEHC 129

THE HIGH COURT

[2002 No. 1304P]

BETWEEN

TEMPLEVILLE DEVELOPMENTS LIMITED

PLAINTIFF

AND
THE LEOPARDSTOWN CLUB LIMITED
AND
THE COUNTY COUNCIL FOR THE COUNTY OF DUN LAOGHAIRE RATHDOWN

DEFENDANTS

Judgment of O'Sullivan J. delivered the 4th day of May, 2006

1. The background to this application is set out in my judgment of 10th December, 2003, and should be taken as read because I will not repeat it here.

2. For reasons stated at that time I granted an injunction preventing the construction of a ramp by the defendants which intruded on the plaintiff's rights described in that judgment.

3. For reasons stated by him, Murphy J. on 30th July, 2004, discharged that order. For the sake of consonance I would state that I would have done the same thing had I been in his position. This arises because my order was made pending the outcome of an arbitration then thought to be imminent, albeit that difficulties about formulation of the questions to be referred were foreseen (and I then arranged to determine them if such proved necessary).

4. These difficulties have proved insuperable and it is only now, some two and a half years later, that they have been brought to me for determination.

5. As stated in my earlier judgment a "new site" offer has been made by the first defendant and rejected by the plaintiff. This difference is agreed to be one that should be referred to the arbitrator.

6. In particular a key question, namely whether the "new site" should or should not include an area (five and a half acres or whatever) for car parking should be determined by him.

7. A major sticking point – and this, it is agreed, must be determined by the Court – is whether the arbitrator has jurisdiction himself to select and determine the "new site": the alternative being that his role is simply to determine the acceptability of any proposed new site in contest between the parties but not himself to select one.

8. This major question is to be answered by construing the relevant legal instruments. I accept that in doing this I should bear in mind the background between the parties and the purpose of the agreement between them. Both sides agree that the arbitration clause should be construed in a businesslike manner. They differ however as to what this means in the present case. The plaintiff says that it means that the arbitration must bring finality to the disputes which can only be achieved if the arbitrator can himself select a new site and impose it on the first defendant. The latter submits that in the present case there are already two fora engaged because of the plaintiff's choice to bring proceedings in the High Court. Furthermore, the first defendant says that no businessman in the present circumstances would have agreed to the imposition on him by a third party (the arbitrator) of a "new site" given the multiplicity of potentially conflicting interests involved at the Leopardstown complex generally of which the plaintiff's is only one.

9. The plaintiff submits that if the arbitrator does not have jurisdiction himself to select and impose the "new site" then this question and all of the other issues should be determined by the High Court. As a further alternative it says that the High Court should itself select and impose the new site and the arbitrator should deal only with any residual questions.

10. The foregoing is the background against which the relevant legal instruments must now be construed. The key provision, in the licence, is as follows:-

> "Any dispute relating to the location of the new site or the suitability of same shall be resolved between the parties by a single arbitrator in accordance with the provisions for arbitration hereinafter contained.

11. A further general arbitration clause (comprising, I think, the "provisions' referred to) provides as follows:-

> "If there is a dispute between the parties on any of the terms, provisions or conditions of the within agreement, then such dispute shall be referred to the decision of an arbitrator to be appointed mutually or in the event of the parties being unable to agree on the arbitrator to be nominated on the application of either party by the president for the time being of the society of chartered surveyors in Ireland and this shall be deemed to be a submission to arbitration within the Arbitration Act, 1954"

12. As Balcombe LJ. said (in *Ashville Investments v. Elmore Limited (CA)* [1989] 1 QB 488 at p. 503):-

> "As on any question of construction the issue is incapable of much elaboration: it is a matter of how the words strike the reader."

13. He went on to say that the Court's approach to an arbitration clause would be that it was intended to refer all the disputes arising out of the particular transaction to the arbitrator, and also that all would be determined finally.

14. This view is entirely consistent with the judgment of Kelly J. in *Doyle v. Irish National Insurance Company Plc.* [1998] 1 IR 89 and indeed with that of Keane CJ. in *Re Via Net Works (Ireland) Ltd.* [2002] 2 IR 47, not to mention the wide interpretation given to the phrase "in connection with" by the Court of Appeal in *Ashville Investments Ltd. v. Elmore Contractors Ltd.* [1989] 1 QB 488 (already referred to).

15. As a matter of first impression, therefore, and being informed not only by the relevant factual background (as set out in my earlier judgment and also, of course, as elaborated in the proceedings before me) and also informed by the relevant jurisprudence, my construction of the arbitration clause is that the phrase "any dispute" relating to the location or suitability of the new site being

"resolved" by a single arbitrator includes an agreement to confer upon him the power, if appropriate, himself to select the new site.

16. That first impression is reinforced, in my opinion, by the wide language of Clause 10 which includes a reference to the arbitrator of "a dispute on any of the provisions of the within agreement".

17. Given the foregoing first impression, however, it is necessary to weigh carefully the submissions made on behalf of the first defendant.

18. It is submitted that a businesslike interpretation of the arbitration clause could not include the view that the first defendant agreed to the imposition upon itself of a new site by a third party (the arbitrator) given the multiple potentially conflicting interests involved in the Leopardstown Racecourse area generally.

19. Secondly it is emphasised that clause 5 of the agreement expressly reserves to the licensor a right to nominate the new site and there is nothing in the agreement to suggest that the licensor agreed to have another party such as the arbitrator to take over this important right under the agreement.

20. It is also submitted that, contrary to what is asserted on behalf of the plaintiff, this interpretation of the arbitration agreement will in fact bring finality to the differences between the parties because the arbitrator will be able not only to reject (if that is his view) the current offer of the new site but he will also be able to determine whether or not the new site should contain an area for car parking and whether or not the area currently offered as sufficient to accommodate seven tennis courts is in fact so sufficient. As a consequence the plaintiff will be in a position to call upon the first defendant to provide a site which complies with the arbitrator's award and the plaintiff at that stage, it is submitted, will have a choice either to go back to the arbitrator if not satisfied with this second offer or alternatively to apply to the Court pursuant to s. 41 of the Arbitration Act, 1954 to enforce the arbitrator's award "… in the same manner as a judgment or order to the same effect". Thus it is submitted the Court will adopt the arbitrator's award as its own, and may hold the first defendant in contempt until it produces an offer in compliance with the award. In this way finality will be achieved and no violence will be done to the agreement reserving at all times to the first defendant the right to nominate the new site.

21. It was further submitted that the clause which refers to arbitration of "any dispute relating to the location of the new site or the suitability of same" refers to location in the sense of the location of the particular site offered and that this issue and this issue alone is the one which is referred to the arbitrator.

22. On behalf of the plaintiff it was submitted that it is clear from the jurisprudence that the courts will construe an arbitration clause so as to bring finality to the issues between the parties and that in the present case the only way of resolving an issue relating to the location of the new site in a way which would bring finality to the issue is to construe the clause as conferring upon the arbitrator, ultimately, a jurisdiction to himself if necessary select and determine the site.

23. In particular the suggestion that the arbitrator's jurisdiction is limited to considering the location of the site offered as distinct from the site to which the plaintiff is entitled runs counter to the definition of the phrase "the new site" in the licence agreement which, where relevant, provides "means a parcel or parcels of land situate adjacent to Dome No. 1 upon which the tenant's tennis facilities and car parking are to be relocated".

24. It is submitted that when the arbitration clause is read in light of this definition it is clear that the arbitrator has jurisdiction to resolve an issue relating to the location not only of an offered site (if inadequate) but also the site to which the plaintiff is entitled under the licence. Ultimately the only way to resolve an issue is for the arbitrator to select and determine the site himself.

25. In particular the suggested finality involving an application to the court raises more questions than answers because the award will merely condemn a particular offer and indicate whether or not that offer should include an area for car parking and whether or not, for example, whether the particular area indicated for seven tennis courts is sufficient. This award will not of itself be either certain enough or comprehensive enough to enable a court to, in effect, adopt it as the judgment of the court pursuant to s. 41 of the Arbitration Act. In this latter context the plaintiff relied on *Bula Limited & Ors. v. Tara Mines Limited* [1987] IR 494 where the Court refused to grant an injunction inter alia because it was in very general terms. The same, it is submitted, would apply to the scenario put forward by the defendant. Finally it is submitted that it is contrary to the essence of an arbitration agreement to give in effect a veto to one party in relation to "the new site": rather, it is the essence of such an agreement that the parties waive some of their entitlement under the contract in the event of dispute.

26. Notwithstanding my first impression, I have had of course carefully to consider the submissions of the first defendant. I am not persuaded, however, by the contention that reference to arbitration catches only a dispute relating to a particular "new site" on offer at any one time, as distinct from the new site to which the plaintiff's tennis and car parking facilities are to be relocated as defined in the definition section of the licence. Nor am I persuaded by the submission that the court procedure advanced on behalf of the defendant will resolve – in the sense of finally determine – any dispute relating to the location of the new site pursuant to the arbitration clause.

27. In my view, therefore, the arbitrator's jurisdiction includes jurisdiction himself to select and determine the new site.