Neutral Citation Number: [2005] IEHC 171

THE HIGH COURT
Record Number: 2004 No. 46 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING ACT 2000

AND IN THE MATTER OF AN APPLICATION

BETWEEN:

MOUNTBROOK HOMES LIMITED
Applicant

AND

OLDCOURT DEVELOPMENTS LIMITED
Respondent

Judgment of Mr Justice Michael Peart delivered on the 22nd day of April 2005:

By Notice of Motion herein dated 12th November 2004, the applicant herein seeks certain orders pursuant to s. 160 of the Planning and Development Act, 2000 ("the 2000 Act") to direct the respondent company to comply with conditions 2,4,5,6,7 and 8 of a planning permission granted to it for the development of its land, and/or to carry out that development in conformity with the planning permission, as well as an injunction to restrain further road development works until the said numbered conditions have been complied with.

The application concerns principally road development works between Ballycullen Road and Stocking Lane in south County Dublin, whereby the respondent is in the course of constructing a distributor road (2.5km in length) which will connect the Ballycullen Road in the west with Stocking Lane in the east.

The applicant, through one of its directors, Peter Halpenny, has averred that it is a development company which has carried out a number of developments in and around
County Dublin in the last number of years, and that it intends to do so again on lands which are situated immediately south of the respondent's lands on which this distributor road is being constructed. There are a number of junctions to be placed in this distributor road, according to the planning permission granted to the respondent, but the one of major concern to the applicant is that referred to in Condition 6 of the permission, as it is this junction from which the respondent is required to construct another road which ultimately would enable the applicant's own development on its lands in the future to connect with the distributor road the subject of the planning permission. Condition 6 of the planning permission states as follows:

"6. Prior to commencement of development, revised drawings shall be submitted for the written agreement of the planning authority, which indicate the road, shown at CH.093.117/2100.00 on drawing number 013017-277B, extended from the roundabout, south to the boundary of site H as shown in the Ballycullen-Oldcourt Action Area Plan 2000.

Reason: *To ensure the achievement of the objectives of the current Development Plan for the area and the Ballycullen-Oldcourt Area Plan in relation to the development of these lands in a coherent manner and in the interest of proper planning and sustainable development."*

Site H referred to is immediately to the north of the applicant's lands which are referred to on the Action Area Plan as site J. Clearly, the existence of a road leading from the distributor road to the southern boundary of site H (which abuts the north boundary of site J) is essential if the applicant's lands at J are not to be landlocked. Counsel for the applicant has referred the Court to Item 11 contained in the "Record of Executive Business and Manager's Orders dated 14th February 2003 which states:

"The applicant states in the cover latter that 'it has always been the intention…to avoid any situation, subject to agreement, where a landholder of lands within the Action Area, would find themselves landlocked'. It is agreed that this is an issue of concern to the Planning Authority. The applicant has shown indicative road linkages to the proposed distribution road in drawings 229 and 230. It is noted that these linkages would be subject to future detailed design and dependent on planning approval of housing layouts. The Planning Authority is not satisfied that this proposal provides sufficient certainty to ensure that land parcels noted as Nos. J & K in the Ballycullen – Oldcourt Action Area Plan, can access the proposed public road network. To ensure that coherent and orderly development of these zoned lands occurs a condition to address this issue is recommended……"

This paragraph is clearly the genesis of Condition 6. The applicant has averred that these revised drawings showing the road referred to in Condition 6 have not been submitted. It is alleged that while some revised drawings have been submitted, each shows the extension road terminating short of the boundary with the applicant's lands, thereby depriving it of access to the distributor road. The respondent disputes this.

Behind this application is an apprehension, to put it no more strongly for the moment, that the respondent will not be timely in meeting its obligations in this regard, and that the applicant will be thereby disadvantaged in its own development plans for its own lands in the future by becoming landlocked, without any access to the distributor road. The applicant also fears that its own proposed application for planning permission will be hampered if this connecting road to the distributor road is not in place by the time it makes its own application for permission to develop its lands.

The applicant claims that it is clear from the terms of the planning permission granted to the respondents that it was granted in the context of the overall plan for the Ballycullen/Oldcourt Action Area Plan. Mr Halpenny refers to the Action Area Plan and says that it was expressly stated in the plan that a key component of then plan was that there would be an east-west link (the distributor road) through the entire area, which would tie the whole area together, and that the permission which the respondent obtained was intended also to facilitate the development of other lands in the area, and in this regard he refers to the fact that under Condition 2 of the planning permission the respondent was required to construct the distributor road on foot of one single contract from Ballycullen Road to Stocking Lane.

It is also averred on behalf of the applicant that the applicant's lands are clearly identified in the Ballycullen/Oldcourt Action Area Plan as lands to be developed for residential purposes, and that the extension of the distributor road to these lands is essential if the objectives of the Plan are to be achieved. For this reason the applicant contends that it has a sufficient interest for the purpose of this application, in order to ensure that the respondent complies with the terms of the permission granted to it.

Mr Halpenny points out a further concern on the part of the applicants. That concern is that another company, Elier Limited which is a member of the consortium which makes up the respondent company, has submitted a planning application which is inconsistent with the road layout envisaged in the Action Area Plan. Specifically, it is alleged that this application excludes the roundabout which is located at the point on the distributor road from which the extension road would travel southwards to the boundary of the applicant's lands, and that this roundabout is an essential pre-requisite to compliance with Condition 6 of the respondent's planning permission.

Mr Halpenny avers that in view of these concerns the applicant's Consultant Architect, Mr Feargall Kenny wrote on the applicant's behalf to the Planning Enforcement Section of the South Dublin County Council by letter dated 3rd September 2004. That letter enclosed a Planning Enforcement Complaint Sheet which sets out the nature of the complaint as:

"Works commenced without compliance with conditions requiring compliance before commencement (conditions Nos. 4-8 inclusive of planning permission granted by Bord Pleanala on 9/10/03."

Condition 4 required the submission of *"a detailed **landscape plan**, including specific details of boundary treatments, with full works specification (including timescale for implementation and bill of quantities) for the treatment of the roadside strips/margins……."*

Condition 5 deals with water and drainage arrangements, and states that *"details for the protection of watermains during construction shall be agreed with Dublin City Council and South Dublin County Council in writing prior to commencement of development on site. **Reason:** On the interest of public health and to ensure a proper standard of development and protection of watermains."*

Condition 6 I have already set forth dealing with the revised drawings indicating the extension road from the roundabout of concern to the applicant.

Condition 7 concerns the submission prior to commencement of plans relating to gateway features on Oldcourt Road, Ballycullen Road and Stocking Lane, and the **reason** given is *"to ensure that the road is constructed in compliance with the Ballycullen-Oldcourt Action Area Plan 2000".*

Condition 8 requires the developer to facilitate the planning authority in the **archaeological appraisal** of the site and in preserving and recording or otherwise protecting archaeological materials or features which may exist within the site. In connection with this condition, the developer is required to *"(a) notify the planning authority in writing at least four weeks prior to the commencement of any site operation (including hydrological and geotechnical investigations) relating to the proposed development, and (b) employ a suitably qualified archaeologist prior to commencement of development. The archaeologist shall assess the site and monitor all site development works."* This condition went on to specify that an

archaeologist must assess the site and, prior to commencement of works, a report containing the results of that assessment must be lodged with the planning authority. The reason given for this condition is stated to be *"in order to conserve the archaeological heritage of the site and to secure the preservation of any remains which may exist within the site."*

In addition to enclosing the Complaint Form, Mr Kenny stated that his clients had instructed him to request the Council to commence enforcement action against the development immediately, and indicated that if this was not done, his client would be forced to take injunction proceedings against the developer and the Council and that the costs involved in so doing would be sought from both parties. The letter also stated that it was believed that no commencement notice had been submitted by the developer in connection with the works.

The Council responded by letter dated 14th September 2004 by saying that it would carry out an examination and it would inform Mr Kenny in due course of the result of that examination. By letter dated 20th October 2004 the Council wrote again to Mr Kenny informing him, inter alia, that a warning letter had issued to the owner/occupier and that there was a period of four weeks from the date of service thereof for submissions or observations to be made in response.

By letter of the same date, the 20th October 2004, the applicant's solicitors wrote to the respondent outlining their client's concerns in relation to the alleged commencement of works in the absence of compliance with conditions 4 – 8 which required compliance prior to the commencement of development, and called upon them to immediately cease development and desist from further development until such time as the terms of the planning permission had been properly complied with. Injunction proceedings were threatened in the absence of written confirmation that this request would be met.

Solicitors replied on behalf of the respondent by letter dated 27th October 2004. That letter expressed surprise that their clients would receive a letter such as that dated 20th October 2004, some five months after the works on the site had commenced on the distributor road. This letter also pointed out that the Council had already written to their clients about the matter and that a response to that letter would be made before the time limited for reply, namely the 18th November 2004. It went on to say that their client and their client's architects and planning consultants were satisfied that they were in substantial compliance with the planning permission granted, and that they had not acted in any way which was inconsistent with the Ballycullen/Oldcourt Area Action Plan and/or the Development Plan, as was suggested in the letter received by their clients. Specifically in relation to Condition 2 of the Planning Permission, the solicitors stated that the distributor road was being constructed pursuant to a single contract, and that there could be no question of any breach of that condition. In the circumstances, these solicitors expressed the view that an application which the applicants might make under s. 160 of the 2000 Act would be unnecessary and inappropriate.

The applicant's solicitors responded by letter dated the 3rd November 2004 stating that this response failed to deal with the substance of their letter dated 20th October 2004, and in particular the number of breaches of the planning permission identified in that letter. They also referred to the fact that the concerns of their clients had by then been heightened by the service of the statutory warning notice by the Council. They also denied that their clients were guilty of any delay, since the fact of commencement of works had not come to their client's attention until August 2004. It was again indicated that the applicant intended to commence proceedings.

The respondent's solicitors responded by letter dated 10th November 2004 stating that they would accept service of any such proceedings, but also that they were at a loss to understand the logic of such a step in circumstances which they set out as follows:

"As is perfectly normal in such circumstances conditions attaching to the aforementioned planning permission have been agreed with the various departments in South Dublin County Council and these agreements are now finalised with the Planning department. Our clients have, as you know, and as indicated in our last correspondence, to revert to the planners by 18 November 2004 in respect of various matters in connection with this planning permission." They also indicated that they would supply the applicant's solicitors with a copy of this response to the planning authority, if requested to do so."

The applicant's solicitors replied to that letter on the 11 November 2004 maintaining their client's position that the terms of the conditions attaching to the planning permission remained not complied with, and that the applicant was entitled to bring an application under s. 160 of the 2000 Act.

This application was commenced on the following day by notice of Motion dated 12th November 2004, grounded on the affidavit of Peter Halpenny sworn on the same date and to which I have already referred, and on an affidavit sworn on the 10th November 2004 by an archaeologist, Edward O'Donovan. Having already set out the substance of Mr Halpenny's affidavit, I will set forth that of Edward O'Donovan.

Affidavit of Edward O'Donovan – Archaeologist:
He makes reference to the Condition 8 which deals with the archaeological aspects of the site. He carried out an inspection

of the site on the 19th October 2004 when he saw work being carried out by *"large tract (sic) excavators and dump trucks."*

He went on to say that the work being done would involve a significant disturbance to the existing ground across the site and that this would have archaeological implications for the site. He then states at paragraph 5:

"although there are no recorded archaeological monuments located within the proposed development site, I say and believe that the archaeological potential of the foothills of the Dublin mountains and the rural fringes of the city is well demonstrated. Many new important prehistoric archaeological sites have been discovered on similar terrain in advance of, and during the construction of gas pipeline schemes, road schemes, housing and commercial/industrial development."

He gives some examples of such finds, and states that since no Environmental Impact Statement was required in respect of this particular development site, the condition imposed at Condition 8 of the Planning permission was to ensure that all archaeological structures and features of importance were identified in advance of or during construction, as well as allowing for the preservation in situ of potential new sites. He expresses the view that the works which he saw being carried out on the date of his inspection present a very real risk of irreparable damage being done to any such materials ands features, and that such damage could not be later remedied.

First replying affidavit of Paul Forde:

Mr Forde is a member of the firm of Consulting Engineers retained by the respondent in connection with this road development. He states that at all material times the Council was aware of the commencement of construction at the site, and that in fact a commencement notice was served on the Council on the 29th June 2004 and he exhibits a copy of that notice. He then deals with compliance with the various conditions about which the applicant complains.

In relation to **Condition 2** (one single contract), he states that this has been fully complied with.

In relation to **Condition 4** (detailed landscape plan) he states that on the 9th July 2004 the Council were "notified and updated" in relation to compliance with this condition. He states that this letter confirmed that consultants had been retained to draw up a detailed landscape plan and *"that details would be submitted for agreement in due course."* He goes on to refer to the fact that on or about the 17th November 2004 a firm of Landscape architects submitted plans in relation to compliance with this condition.

In relation to **Condition 5** (water supply and drainage), he states that all these arrangements comply with the requirements of the planning authority and that consulting engineers retained by the Council have formally approved these arrangements.

In relation to **Condition 6** (extension of distributor road), he states that consulting engineers on behalf of the applicants submitted revised drawings in relation to extension of the distributor road southwards on the 9th July 2004, and that this is therefore in compliance within the requirement to so submit revised drawings prior to commencement.

In relation to **Condition 7** (location of gateway features), he states that as part of a Compliance Submission dated 10th November 2004 furnished by the applicant's planning consultants, plans to address this condition were furnished to the Council.

In relation to **Condition 8** (archaeological matters), he states that the requirement to notify the Council at least four weeks in advance of works commencing was complied with, and in this regard he refers to the Commencement Notice already referred to and which is dated 29th June 2004 (which indicated an intention to commence works on the 12th July 2004), as was the requirement to appoint an archaeologist, and in that regard he refers to an affidavit sworn on behalf of the respondent by Goorik Deheane, which I shall refer to in due course. But Mr Forde sets out some detail from that affidavit also. He refers to correspondence between his firm (DBFL) and the Council in relation to compliance with these conditions.

He concludes by stating that there was very substantial compliance with the requirements of the Council, and that in sofar as there may have been certain matters which may have not been furnished, these had no material impact in relation to the archaeological investigations and/or assessment that was to be carried out. He emphasises also that DBFL were in constant contact with the Council representatives and that he believed as of the date of swearing of that affidavit that a formal compliance letter would issue from the Council "in early course". Counsel for the applicant pointed out to the Court that in fact as of the date on which this application was heard by this Court in February 2005, same had not issued.

Replying affidavit of Goorik Deheane – Archaeologist:

He states that his firm was retained by the respondent in January 2004 in order to ensure compliance with Condition 8 of the planning permission. He says that what was done in this case was in line with common practice, namely that the assessment was carried out on two stages. Firstly, what he describes as a desk-top study was carried out together with a

walkover of the site. Secondly, field testing was carried out. He goes on to state that the results of the first stage were compiled in a document called "Archaeological Impact Assessment" dated 8th April 2004 which was submitted to the Department of the Environment and Local Government and to DBFL (the respondent's consulting engineers) on the 21st April 2004, and he exhibits a copy of this document. He applied to the Department for an excavation licence on or about 21st June 2004, and this was duly granted. He goes on at paragraph 9 of his affidavit to describe as follows what was done thereafter:

"It is common practice when carrying out field assessment to excavate trenches at locations within a development which will identify, as far as possible, the nature and extent of archaeological material present within the site and therefore at risk from development. Following discussion and agreement with Mr Chris Corlett of the Department of the Environment and Local Government it was agreed that in this particular instance the entire route could be archaeologically assessed through the excavation of a large test trench encompassing the entire length and width of the route. This methodology would facilitate a more comprehensive assessment of the route than less (sic) a less intensive (but more common) trenching programme. This assessment commenced on or about the 13th July 2004 using machinery provided by the contractors, Liffey Developments (Dublin) Limited. The assessment was conducted through the removal of topsoil along the entire width and length of the route under constant archaeological supervision and direction. This programme of work has only just been completed. Report writing is currently ongoing."

He expresses the view then that having regard to the very comprehensive and thorough field investigation carried out in advance of the construction works, no further field monitoring of the construction works was or is necessary or appropriate given the great unlikelihood that any material of archaeological significance would be uncovered or damaged in the course of construction.

He wrote to the Planning Department of the Council by letter dated 16th August 2004 in which he described the work which had been done. This letter states that work had concentrated on an area which is portion of what is described as Area A, and that work remains to be carried out in respect of the remainder of Area A and all of Area B shown on the drawings supplied to the Council. These drawings indicate that except for two small areas in Area A which could not be investigated because of some overhead cables, the remainder of that Area has been assessed. Area A seems to comprise over 50% of the combination of Area A and Area B.

He says that on the 30th August 2004 he received an e-mail from the Department to the effect that it was satisfied that construction could commence on that portion of the lands that had been resolved. He exhibits a copy of that e-mail which states:

"*Further to your letter concerning permission for your client to proceed with construction in those areas resolved at Oldcourt/Ballycullen Road/Stocking lane Link Road, Co. Dublin, I wish to confirm that this office is satisfied that development may proceed in those areas specified."*

Mr Deheane then states that it is important to emphasise that the assessment was carried out prior to the commencement of any construction works and that no such works were carried out until such time as the archaeological assessment of that portion had been completed, and that this assessment was facilitated by the respondent by the provision of excavation machinery in advance of construction works.

Replying affidavit of Chris Jones – director of respondent company:

Mr Jones states that in 2000 and 2001 there were in fact discussions between the applicant company and the respondent company, particularly in relation to access to the distributor road the subject of this application. He goes on at paragraph 6 to state that these proceedings are motivated by a desire on the part of the applicant to advance its own commercial interests by stopping this development and creating financial hardship for the applicant company. He says that the applicant does not have a bona fide interest in the enforcement of the planning code, and that this collateral motive on the part of the applicant is a relevant factor that should be taken into account by this Court in deciding whether to grant the relief sought by the applicant. He says that the applicant's lands do not adjoin the distributor road to be constructed, and that if a proposal had been made by the applicant in relation to access to it, same would have been considered.

Having made that preliminary point in his affidavit, Mr Jones then deals with the various matters raised by the applicant. There is no need to set out everything he has stated as some of what he says is consistent with what has been said by Mr Forde and Mr Deheane. However in relation to the alleged breach of Condition 6, he refers to the fact that a company associated with the respondent, namely Elier Developments Limited, has lodged an application for planning permission for a substantial residential development, which includes a revision of the roundabout junction on the distributor road now being constructed, and he notes that the applicant company has lodged an objection to that application. He states that Mr Halpenny is not correct when he states, as already referred to, that this application has excluded the roundabout of concern to the applicant, and Mr Jones states that on or about the 27th August 2004, a drawing was submitted which clearly shows

this roundabout.

He also states that while there may have been some failure on the part of the respondent to make a formal compliance submission to the planning authority, agents of the respondent were in constant communication with relevant officials of the South Dublin County Council *"who were kept fully informed in relation to the works proposed to be and actually carried out on behalf of the Respondent",* and that any such failure was technical only and de minimis and not such as would justify the Court in making the order sought. He also makes an allegation that the applicant has delayed in commencing this application in view of the fact that works commenced in August 2004, and in addition that the respondent company has by the date of swearing of his affidavit on the 26th November 2004 expended a sum certified in the sum of approximately €2.6 million, and that by the end of November the sum certified will have become €3.5 million.

Second affidavit of Peter Halpenny on behalf of applicant:

Mr Halpenny states that he has considered the replying affidavits filed by the respondent, and that he is of the view that the respondent ahs therein conceded that the express terms of the planning permission have not been complied with. For example, he refers to the fact that not only had the respondent not obtained the written agreement of the planning authority prior to the commencement, but that it had not even made a formal compliance submission until 10th November 2004, and even though work had commenced in August 2004. He reiterates that compliance withy Condition 6 (the extension down to site J) is essential to the objectives of the Ballyowen/Oldcourt Action Area Plan, and that the failure to comply with the conditions of the planning permission renders the work carried out an authorised development. Specifically in relation to Condition 6 he states that the respondent has failed to make a compliance submission in time, still less to obtain the written agreement of the planning authority prior to the commencement of the development. He also states that he has been advised that under the Planning Act it is not possible to make a compliance submission retrospectively, and that the development should therefore cease immediately and a new application for permission should be made.

Mr Halpenny rejects any mala fides on the part of the applicant in this matter, and states that the applicant has an interest in ensuring that distributor road is constructed in accordance with the Ballycullen/Oldcourt Action Area Plan. He also states his view that it is a cause for further concern on the part of the applicant that Mr Jones in his replying affidavit should state that the applicant's lands do not adjoin the distributor road, when he is aware that it is a Condition of the respondent's planning permission that the road be extended down to the boundary of site H. he expresses his view that the respondent does not intend to fulfil its obligations in this regard. He feels reinforced in this view by the fact that the revised drawing submitted to the planning authority which is referred to at Exhibit PF5 in the replying affidavit of Mr Forde, in fact shows the extension of the distributor road falling short of the boundary of Site H as required by Condition 6, and that the respondent is trying to avoid having to construct that portion of the extension to the boundary, as required. He refers to a further revised drawing of this extension which, he states, was submitted to the planning authority on the 10th November 2004 (well past the date of commencement of development) and he says that even this drawing shows the extension stopping some four metres short of the boundary to Site H.

Mr Halpenny also makes reference to the application for planning permission by Elier Developments Limited, a company, he says, which is 50% owned by Mr Jones. This comprises an application to build 228 houses on lands comprising Site G and Site H. This application was refused but the refusal was appealed to An Bord Pleanala. The applicant in these proceedings lodged a Third Party appeal in relation to the appeal by Elier, since it was unhappy with the reasons for the refusal of permission which it regarded as somewhat weak, and it sought an expansion of the reasons given for the refusal. Their main concern is that in this application, access to Site G is to be accessed from the Ballycullen Road rather than from the distributor road, and they are of the view that an effect of this proposal, if permitted, would be to delay the completion of the extension down to the boundary of Site H, thereby delay the provision of access to Site H and thereby thwarting the objective and purpose of Condition 6, ands would be in contravention of the objective of the Development Plan for the area.

Without going into the details of the responses made by the respondent to the planning authority in response to statutory notices served on them by the planning authority, the applicant in these proceedings is of the view that the responses made and the application made in the first instance involves the elimination of the roundabout originally proposed, and which would serve as a junction from which the extension from the distributor road down to the boundary with Site H would commence. The applicant states that the Elier application envisages an alternative roundabout situated some 90 metres east from its original location, and would render the applicant's lands to be landlocked.

It is averred by Mr Halpenny that the proposal to relocate this roundabout was made only in response to the statutory notices under ss. 132 and 137 of the Planning and Development Act, 2000, and submits that it is not possible to change an application in this way or to effectively re-write another permission, and he maintains that it is clear that the respondent is clearly anxious to avoid its obligations in relation to Condition 6 referred to, and that the applicant will be adversely affected.

Mr Halpenny refers to the fact that in the replying affidavits filed in these proceedings by way of defence to the application

sought, the respondent failed to refer to a letter dated 27th August 2004 written to the planning authority by the respondent in connection with the application by Elier. This letter consents to the roundabout proposal contained in Elier's application and states also:

"we understand that if this is accepted by An Bord Pleanala and that if this is conformed in a planning permission, that the effect of this proposal will be to amend and to supercede the road layout as had already been approved by An Bord Pleanala in its order dated 9th October 2003 in respect for planning permission under register reference no. SD 02A/0426; and we also hereby confirm our agreement to and acceptance of same as regards superceding and amending the said planning permission under register reference no. SD 02A/0426."

Mr Halpenny makes complaint that this letter was not exhibited by the respondent and says that it represents an attempt by the respondent to avoid its responsibilities, and further points out that were it not for the fact that An Bord Pleanala served notices under ss.132 and 137 as referred to, the letter neither the applicant nor the Court would have been aware of the existence of same. He states that in addition to this omission, the respondent failed to disclose the fact that the planning authority had proposed to take enforcement action against the respondent in respect for the breach of planning permission.

In relation to the question of whether a single contract has been entered into for the development of the distributor road as required by Condition 2, Mr Halpenny states that the Contract with Liffey Developments Limited which was exhibited by Mr Jones is not executed by either named party and therefore does not represent compliance with the condition. He also complains that this supposed contract, as exhibited, contains nothing which indicates the scope of the works to be carried out; and furthermore that there is a specific notation which states: *"For tendering purposes only which does not form part of the Contract Documents"*.

Mr Halpenny also refers to the responses made by the respondent in relation to the archaeological assessment point. He expresses the view that on the evidence provided by the affidavit of Mr Deheane Condition 8 was clearly not complied with since it is accepted that no prior written agreement was obtained prior to the commencement of development, and that by the date of swearing of his affidavit, the 26th November 2004, the writing of the report was still ongoing, and that the respondent proceeded with the archaeological assessment prior to the issue of a licence from the Department. The licence was applied for by application dated 21st June 2004, and granted on 21st July 2004, whereas Mr Deheane says that assessment work commenced on site on the 13th July 2004. Mr Halpenny makes other complaints in relation to the archaeological work, but there is no need to detail these matters any further.

Mr Halpenny also is of the view that no adequate opportunity was given to the planning authority to consider the archaeological assessment prior to the commencement of development works on the 3rd August 2004. He refers to the fact that the commencement notice actually given did not provide the required four weeks notice to the planning authority, and refers to the fax from DBFL dated 20th July 2004 which refers to the fact that works were already in progress, and he says that the commencement notice itself is undated and unsigned, unaccompanied by any fee, and unacknowledged by the planning authority.

In relation to the purported compliance with Conditions 4 and 5, Mr Halpenny states that in relation to Condition 4, full compliance has not been made since no bill of quantities was included and no timescale for completion was included. In relation to Condition 5 (the Boherboy watermain) Mr Halpenny states that only incomplete documentation was exhibited.

In response to these matters, Mr Forde has sworn a further affidavit on the 23rd December 2004 in which he reiterates that in his view there has been no failure to comply with the planning permission, since the Council were at all times aware of the commencement of construction and that DBFL were in constant contact with officials from the Council. He goes on to state that members of his staff did not believe that formal submissions were required in circumstances where the Council was aware of and had agreed the various matters required to be agreed, and he rejects any notion that the respondent has deliberately or consciously breached the conditions of its planning permission or that there has been any blatant disregard thereof.

In relation to compliance with Condition 6, Mr Forde states that the drawing provided by the respondent to the planning authority with its formal compliance submission complies with the requirements of Condition 6.

Mr Forde states also that construction works did not commence until the 16th August 2004, and that prior to that some preliminary investigation work was necessary in order to establish the location of services on the site, but that these investigations were done in conjunction with inspectors from the Council who attended meetings on site to agree locations to that thereafter the site compound could be put in place. In relation to the defects alleged to exist in the commencement notice, Mr Forde says that where the development relates to the construction of infrastructure, no fee is required, and that there is no requirement that it be dated signed or acknowledged.

He states also that in relation to Condition 4 (landscaping) that a detailed landscape plan was submitted, extensive

discussions have taken place with the Council, and that a detailed Bill of Quantities is being prepared following discussions with the Council, and that the Council are satisfied with that approach.

Mr Deheane has sworn a further affidavit in which he rejects the criticisms made by Mr Halpenny in his second affidavit, and refers to the fact that when no licence had been received from the Department by the 12th July 2004 he telephoned the Department who informed him that it had in fact issued and he was given the number of the licence over the telephone. He believes that the fact that it bears the date the 21st July 2004 is simply a clerical error. He says it is not correct to say that the archaeological assessment commenced ahead of the licence issuing. He also reiterates that the methodology of the assessment was one agreed with the Department, and that in all respects the requirements of Condition 8 and its objectives have been carried out and achieved.

Mr Jones has sworn a further affidavit rejecting the criticisms made by Mr Halpenny in his second affidavit and says that all matters were agreed with the Council. He goes on to state that, contrary to what is stated by Mr Halpenny that the failure to comply with the terms of Conditions 2,4,5,6, and 8 of the permission the terms of Condition 6 are "of direct and vital concern to the applicant", it is only in respect of Condition 6 that Mr Halpenny *"can even articulate a basis for contending that compliance is a matter of direct concern to the Applicant".* But even in relation to Condition 6 he states that compliance cannot be of direct concern to the applicant, since the wording of the condition requires simply the submission of revised drawings and that these have been submitted. He goes on in paragraph 6 to state:

"6 ... I believe it is important to point out that any future design or construction of this spur to the southern boundary of "H" will no doubt have to take into account the layout of any developments (including those on lands at "H") which the said proposed spur may ultimately be designed and constructed to access. Further, the contours of the land in the area will be a relevant consideration in its future design and construction. Therefore, the ultimate location of any such proposed spur may well vary in the future."

He reiterates his belief that far from the respondent wishing to hold the applicant to ransom, which is denied, the opposite is the case, and he believes that the applicant in these proceedings is using these proceedings for a collateral and improper purpose, namely to stop the respondent's development which is almost 75% complete and which would cause significant losses and delay to the respondent.

Mr Jones rejects Mr Halpenny's suggestion that he had given an inaccurate or misleading account in his first affidavit in relation to the application for permission by Elier Developments Limited. He states that there is nothing to prevent any applicant from seeking to alter an existing permission, and that the applicant in these proceedings has the entitlement to participate in that process, and that in any event it is a matter for An Bord Pleanala to determine in due course. He also rejects Mr Halpenny's technical objections in relation to the single contract for the construction of the distributor road, saying that there is no requirement that any such contract be in writing or signed by parties; but that even if there were such an obligation, there has been a letter of appointment signed by the respondent which is dated 21st June 2004 and he exhibits a copy thereof.

There is a third affidavit from Mr Paul Forde also which I the main deals with an e-mail from the Council dated 22nd December 2004 and which was not referred to in the replying affidavits sworn on the 23rd December 2004. One will recall that Mr Forde in his affidavit had stated that the Council had no difficulty with what the respondent was doing. Mr Deheane had said much the same thing in his second affidavit, as had Mr Jones.

This e-mail is directed to Mr Chris Jones from an official in Dublin County Council. It makes observations relevant to compliance with Conditions 4 (landscape), 5 (water and drainage), 6 (extension of road to boundary of Site H), 7 (gateway features), and 8 (archaeological). The e-mail certainly suggests that there are matters yet to be finally agreed with the Council. Specifically in relation to Condition 6 this e-mail states:

"Condition 6
The Roads department report does not accept that the road is shown constructed to the boundary of site "H", as shown on the Action Area Plan Map. Therefore a manager's order would 'disapprove' of this submission."

Hugh O'Neill S.C. on behalf of the applicant has pointed to the fact that Mr Jones has not explained in any affidavit how it is that he did not refer to this e-mail in his affidavit sworn on the 23rd December 2004, and has on behalf of the applicant expressed suspicion as to the motive behind this omission, and that the omission demonstrates a lack of candour in the matter.

On the other hand, Mr Paul Forde of DBFL Consulting Engineers who also swore an affidavit on the same date, has stated that when he swore his affidavit on the 23rd December 2004 he had not seen this e-mail and he goes on: "… I am informed and so believe that at the time of swearing neither of the other deponents who swore affidavits on that day on behalf of the respondent had seen this e-mail." That would be a reference to Mr Deheane and Mr Jones. Mr Forde goes on to state that

following the receipt of this e-mail a further revised drawing was submitted to the Council in relation to Condition 6, and he exhibits a letter from him dated 18th January 2005 in which he deals with the various matters raised in the e-mail, including Condition 6 in respect of which he states:

"In regard to this issue we enclose herewith DBFL Drawing No 013017/234/Rev F, which has been updated to extend the road boundary up to the boundary of Site "H", as shown on the Action Area Plan Map, as requested." (emphasis added)

Mr O'Neill has submitted that the wording of this response amounts to an acceptance that the previous drawings, contrary to what has been asserted by the respondent, did not go as far as the boundary in compliance with the requirement that it should. He has also pointed out that the Drawing actually exhibited is not Drawing No 013017/234/Rev F, but rather Drawing No 013017/234/Rev G. This would seem to refer to a yet later revision. However, this latter Drawing seems on its face to show the road reaching the boundary of Site H.

Mr O'Neill has submitted that his clients are clearly affected by the failure to comply with the conditions and in particular Condition 6. He also submits that the omissions and failures to comply cannot be categorised as being "de minimis", and that the development is therefore an unauthorised development, and that in the event of an application for retention being made by the respondent, the applicant would be entitled to participate in that process.

It is on the other hand accepted that the Council would have a discretion to say that it has no objection to what has happened or is continuing to happen, but that in the absence of any such acknowledgment issuing from the Council, this Court ought to restrain the development until such time as conditions are complied with.

Respondent's legal submissions:

Declan McGrath BL, on behalf of the respondent submits first of all that there appears to be no issue outstanding concerning compliance with Condition 2, namely the single contract, and that in relation to Conditions 4,5,6, 7 and 8 there has been substantial compliance, and there has been extensive discussions and contact with the Council on an ongoing basis. In relation to Condition 8 (archaeological) he submits that in fact there has been full achievement of the objective of that condition and a full resolution of all archaeological issues.

Onus of Proof:

Mr McGrath has submitted that it is clear that the onus is upon the applicant not only to satisfy the Court that there has been unauthorised development, but that the Court should exercise its discretion to make an order as set forth in s. 160(1) of the 2000 Act. That section provides as follows:

"160 — (1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of the planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject."

The respondent submits that it is not the case, as is submitted by the applicant, that a pre-commencement condition can be complied with only prior to the commencement of works, and that a belated compliance is not possible. It is submitted that the Court will adopt a balanced approach and that the Court, under the section, can require belated compliance with a pre-commencement condition, and refers to the fact that such was the approach adopted by Finnegan J., as he then was, in **O'Connell v. Dungarvan Energy Limited, High Court, 27th February 2000.** At page 9 of this judgment, that learned judge stated as follows:

"Further the granting or withholding of injunctive relief is a matter of discretion to be exercised in accordance with established legal principles. Even if satisfied that there had been non-compliance with the planning permission on the basis of the demolition and replacement of the steel structure I would not be prepared to grant an injunction in the circumstances of this case. The circumstances relevant to such refusal are the following:

1. The variation in the context of the completed development is of trifling materiality;
2. The variation is necessary to satisfy the concerns of the Environmental Protection Agency reflected in condition 8 of the Integrated Pollution Control Licence,
3. The respondent acted in good faith and consulted the planning Authority in relation to the proposed variation,
4. The attitude of the Planning Authority to the variation as appears from their letter exhibit AJ 8 to the Affidavit of Alistair Jessop sworn on the 21st January 2001,
5. The variation will have no effect upon the Applicant and other residents of the area,
6. The serious consequences of delay for the respondent."

It is further submitted on behalf of the respondent in relation to any possible non-compliance with the pre-commencement conditions, i.e. Conditions 4 (landscaping), 5 (protection of watermains during construction), 6 (the road extension south to the boundary of site H), 7 (gateway features) and 8 (archaeological assessment) that it does not follow that the entire development is thereafter an unlawful development, and Counsel has relied upon the judgement of Barr J. in Eircell Ltd v. Bernstoff, unreported, High Court, 18th February 2000 in which the learned judge rejected the submission that these pre-commencement conditions should be strictly interpreted and that subsequent compliance could not make lawful what was unlawful. In this regard the learned judge stated as follows:

"It was argued on behalf of the applicants that as the requirements in question were conditions precedent to the commencement of development, they should be strictly interpreted and subsequent compliance does not render legal what was already an unlawful development.
I am satisfied that in all the circumstances I should follow the decision of McCracken J. in holding that the conditions in question have been complied with. Even if he had made no such order it is abundantly clear on the facts that the relief sought under section 27 should not be granted. No court should make an order which is potentially futile. If the mast were declared to be an unlawful development, no doubt application would be made to the planning authority for a retention order and inn the circumstances that would be granted for the asking. "

Counsel has also referred to the judgment of Blayney J. (Hamilton CJ and O'Flaherty J. concurring) in **White v. McInerney Construction Ltd [1995] 1 ILRM 374** in which the learned judge approved of a flexible approach taken by Lardiner J. in the High Court saying in that regard at p.380:

" ...The learned trial judge found that there had not been a literal compliance with the conditions but that it would be unreasonable to bring the development to a halt when the planning authority had agreed to it, and in the exercise of his discretion he refused to grant the injunction sought by the applicant."

He went on to quote a passage from a judgment of Barrington J. in Avenue Properties Ltd v. Farrell Homes Ltd [1982] ILRM 21 at p. 26 where Barrington J. states the following in relation to the scope of the jurisdiction of the Court under the old section 27 of the 1976 Act:

"... the jurisdiction under s. 27 is peculiar in that the applicant need have no interest in the land the subject matter of the application and, it would appear, need have suffered no damage beyond such damage as all citizens suffer when the Planning Act is broken and public amenities impaired. From the foregoing it would appear that the applicants under s. 27 could range from a crank or busybody with no interest in the matter at one end of the scale to on the other end of the scale, to persons who have suffered real damage through the unauthorised development or who, though they have suffered no damage peculiar to themselves, bring to the attention of the court outrageous breaches of the Planning Act which ought to be restrained in the public interest. In these circumstances it appears to me all the more important that the court should have a wide discretion as to when it should and when it should not intervene."

Mr McGrath has submitted that in the present case the Court should not exercise its undoubted discretion for the following reasons which he has helpfully listed as follows in his written submissions:

(a) the trivial and/or technical nature of the breaches;
(b) the lack of any prejudice to the applicant;
(c) the delay on the part of the applicant;
(d) the bona fides of the respondent;
(e) the hardship to the respondent;
(f) the public interest in the completion of the development;
(g) the attitude of the planning authority.

In relation to each of these matters, Counsel has referred to the material contained in the affidavits filed and has referred also to a number of authorities in which the Court in particular situations has refused to exercise its discretion to grant relief, even in the case of an admitted breach. I do not propose to detail these submissions or that affidavit material further than I have, except to perhaps outline in some more detail what Mr McGrath submits in relation to the important question of

whether the applicant has made out a sufficient case that it will suffer prejudice in the event of no order being granted.

Prejudice to the applicant:

He has referred to authority to the effect that the establishment of prejudice by an applicant is an important factor, such as **O'Connell v. Dungarvan Energy Ltd [supra], Grimes v. Punchestown Developments Company Ltd [2002] 1 ILRM. 409,** and **Leen v. Aer Rianta [2003] IR. 394.**

Essentially the respondent argues that most of the complaints made by the applicant in respect of non-compliance are in the nature of technical or trivial breaches and not such as to justify the Court in intervening in any way. Mr McGrath submits that the applicant has failed to show any prejudice from the fact that the applicant may not have furnished in a timely fashion the drawing showing the extension or spur road reaching down to the boundary of Site H. Mr McGrath submits that in fact compliance with this Condition 6 cannot confer any direct any direct benefit to the applicant because the condition merely requires the submission of a drawing. He also has submitted that what he suggests as the real motive of the applicant, namely the collateral motive of delaying the respondent's development, is demonstrated by the fact that the applicant has proceeded with this application even though the respondent has by now lodged the required Drawing showing the spur reaching as far as the south boundary of Site H.

Delay:

Mr McGrath has also made submissions relating to what he alleges was an unexplained and unreasonable and unnecessary delay on the part of the applicant in bringing this application, and he submits that on this ground alone the Court should refuse to grant the relief sought. He submits that the reasons given by the applicant for the fact that the application was not commenced until November 2004 whereas the work had commenced in August 2004 are insufficient by way of justification. In particular he points to the fact that while the applicant has stated on affidavit that it was awaiting the response from the planning authority before launching its application. In this regard, he refers to the fact that after the Council issued the Warning letter on 20th October 2004 and that under the relevant statutory provisions the respondent has a period of 4 weeks within which to respond to same, yet the applicant did not wait until after the expiration of that period before commencing this application, and that this contradicts the applicant's assertion that the reason for the delay was that it was awaiting the response from the Council as to whether they would take enforcement action.

Bona fides of the respondent:

Further submissions were made on the basis that the Court should find that at all times the respondent had acted in a bona fide manner in its dealings with the Council, and Mr McGrath has referred in this regard to a passage from the judgment of Keane J. as he then was, in Dublin Corporation v. McGowan [1993] 1 IR 405 at p.412 where the learned judge stated that it would be *"manifestly unjust to have the draconian machinery of the section brought into force against a person who behaved in good faith throughout."* Mr McGrath submits that the evidence in the present case points to the fact that the respondent did not deliberately disregard its obligations under its planning permission, and that at all times it was in discussion with officials of the Council, and that they were at all times aware of what was being done by the respondent.

Hardship to the respondent:
The respondent has made other submissions in relation to the hardship which would be caused to the respondent if the development were to be ceased by order of the Court, and has highlighted the extent of work already undertaken and the large sums of money expended.

The public interest:

In addition the Court has heard submissions that the development of this distributor road is not simply a matter of private concern to the respondent party but also to the public at large, and that this Court is entitled to have regard to that matter in deciding how to exercise its discretion. Indeed, the applicant has also highlighted the public importance of this distributor road to the development of the area generally.

Attitude of the Planning authority:

Mr McGrath submits that it is significant and something which the Court can take into account, that while a warning letter was issued, the Council has not taken any enforcement proceedings at any date since. He refers again to the judgment in **White v. McInerney Construction Ltd** already referred to, wherein Lardiner J. (upheld on appeal) decided that it would be unreasonable to bring the development to a halt in circumstances where the planning authority had agreed to what was happening. In this regard, Mr McGrath recalls again the fact that the respondent has at all times been in contact with the

officials of the Council in relation to compliance with the conditions. In relation to the fact that a warning letter was issued, the respondent submits that this is simply an administrative step which must be taken by the Council once it receives a complaint which is not a frivolous or vexatious one, and that it does not denote any decision on its part to take any enforcement action, or that it would be appropriate to do so. In this regard, Mr McGrath has referred to the terms of s. 152(1) of the 2000 Act which provide as follows:

"152. – (1) Where

(a) a representation in writing is made to a planning authority by any person that unauthorised development may have been, is being or may be carried out, and it appears to the planning authority that the representation is not vexatious, frivolous or without substance or foundation, or

(b) it otherwise appears to the authority that unauthorised development may have been, is being or may be carried out,

the authority shall issue a warning letter to the owner, the occupier or any other person carrying out the development and may give a copy, at that time or thereafter, to any other person who in its opinion may be concerned with the matters to which the latter relates."

Respondent's responses:

From the respondent's responses to the applicant's submissions I have formed the clear view that the concern of the applicant is very much centred around a distrust of the respondent and a fear or apprehension that inspite of the existence of Condition 6 in the planning permission and the eventual delayed submission of a revised drawing indicating the extension road down to the boundary of Site H, the respondent will nevertheless attempt to avoid actually constructing that extension road. Mr O'Neill has laid considerable emphasis on the fact that it was only after several revised drawings showing this proposed extension road, were submitted that one eventually showed it apparently reaching the boundary with Site H. he submits that this apparent reluctance to submit a correct drawing in compliance with Condition 6 demonstrates a reluctance on the part of the respondent to comply with this condition. He submits also, of course, that it is clear that until the eventual submission of the final revised drawing that the development in progress up to that point was an unauthorised development, being one in respect of which compliance with one or more conditions of the planning permission concerned had not been complied with.

Mr O'Neill has expressed on behalf of the applicant serious concerns about the bona fides of the respondent, as demonstrated, in his submission, by the fact that the affidavits filed in response to this application have adopted the approach that the respondent is in substantial compliance with the planning permission, when this demonstrably has been shown not to be the case. Particular emphasis is placed in this respect on the failure by Mr Chris Jones in his final affidavit, to deal with the fact that an e-mail sent to him on the 22nd December 2004 and in which the Council indicated that in several respects there were matters unresolved between the respondent and the Council, was not referred to in his affidavit sworn on the 23rd December 2004, and in which said affidavit he averred that all conditions had been complied with (e.g. para. 14 thereof)

Mr O'Neill has also submitted that if, as is submitted by the respondent, the Council is completely happy that this development is being carried on in an authorised way and in compliance with the conditions imposed in the planning permission, it ought to be an easy matter for the respondent to obtain a letter or other confirmation from the Council, indicating that they are so satisfied, and he points to the fact that no such indication has been obtained.

Conclusions:

I am satisfied first of all, and indeed it is more or less conceded by the respondent, as it must be on the facts established, that they have not in some respects complied with the Conditions of the planning permission which was granted to them for the construction of this distributor road, or at least that they had not as of the date of these proceedings being commenced in early November 2004.

Some of these respects, while in some circumstances being capable of being regarded as more serious than trivial, are nonetheless in the present case approaching being trivial in nature in my opinion, such as the failure to strictly comply with the requirement to submit landscaping plans in a complete form, or the location of gateway features. Certainly they are matters which cannot in any real sense be prejudicial to the applicant, and if the applicant's complaints were confined to these matters, the Council may well have been justified in regarding them as coming within the category of "vexatious, frivolous or without foundation or substance", and therefore being complaints which would not require the Council to issue a warning letter under s. 152(1) of the 2000 Act.

In a similar category is the complaint made about the single contract being undated, unsigned and unacknowledged. The complaint made in relation to Condition 8, namely in relation to the archaeological assessment is in a completely different category, and if the Court was satisfied that the respondent was deliberately attempting to avoid or minimise its responsibilities in the manner in which it carried out its obligations to assess and report in relation to the archaeology of the area being developed, the Council and the Court would I am sure have to intervene. In such a situation, I have little doubt that the Court would intervene on the application of an applicant, even if the Council did not appear to be taking its own steps in the matter.

But in the present case, having considered the affidavits filed on behalf of the applicant and those sworn by Mr Deheane, I am satisfied that any non-compliance with Condition 8 is more apparent than real. I am satisfied that very full consultation took place with the Council, and while there may have been some delay in certain respects, these are of a minor nature and not such as to endanger or put at risk in any way the purpose and objective of Condition 8.

Bearing in mind what I consider to be the reality of the applicant's concerns, namely that there be no equivocation by the respondent in the matter of the construction of the spur road down from the distributor road to the southern boundary of Site H, so that the applicant's own development might become landlocked with no access to the distributor road, I am of the view that it is to some extent at least disingenuous on the part of the applicant to have homed in to the extent that it did on matters complained of in relation to Condition 8. That is not in any way to indicate that matters of archaeological assessment prior to the commencement of development are not of great importance, and in some circumstances it is absolutely to be desired and commended that members of the public, not involved in any way with a development, would take it upon themselves to act as the watchdogs of the common good, as well as protecting their own interests, in ensuring that developers comply with the obligations imposed upon them by a planning authority in order to protect and safeguard the archaeological heritage of the State.

But the Court is entitled to at least wonder, whether, in the present case, if the applicant had no concerns about whether the respondent intended to comply with Condition 6, or if Condition 6 did not exist at all, it would have brought this application for an order under s.160 of the 2000 Act out of a sense of civic spirit. I am inclined to think that it would be unlikely.

It is really Condition 6 which must receive the closest attention from the Court in its consideration firstly as to whether there has been such a non-compliance with that Condition as to justify the exercising of the Court's discretion to make an order under s. 160 of the Act. I have no doubt whatsoever that Condition 6 and its fulfilment to the letter is a matter which the Council, for its own purposes and objectives, and separately from the ambitions and concerns of the applicant, would scrutinise and ensure compliance of, in the interests of the wider objectives contained in the Ballycullen/Oldtown Action Area Plan 2000. This distributor road is seen as being of great importance to the proper development of a wide area of South Dublin, and one from which numerous developments of houses by different landowners in that area will be serviced by way of access. This plan states in its Summary section under the heading 'Roads' the following:

"The Action Area Plan proposes a new distributor road network to serve the area.

The key component of this network is an east-west link through the entire area that will 'tie' the whole area together, combined with an improved and re-aligned Ballycullen Road, linking residential areas, both existing and proposed with community facilities and adjoining areas……./."

The Record of Executive Business and Manager's Orders exhibited in the applicant's grounding affidavit sets out the full history of the consideration of the application for permission to construct this distributor road. It refers to a number of concerns raised to the plans lodged, including one at Item 11 therein which is related to the central importance of this road to the "early and orderly development of the entire Action Area Plan lands". Those lands include the applicant's own lands on Site J. This document notes the responses given by the respondent to these different concerns of objectors, including in relation to Item 11 which I have already set out towards the commencement of this judgment and which reads as follows:

"The applicant states in the cover latter that 'it has always been the intention…to avoid any situation, subject to agreement, where a landholder of lands within the Action Area, would find themselves landlocked'. It is agreed that this is an issue of concern to the Planning Authority. The applicant has shown indicative road linkages to the proposed distribution road in drawings 229 and 230. It is noted that these linkages would be subject to future detailed design and dependent on planning approval of housing layouts. The Planning Authority is not satisfied that this proposal provides sufficient certainty to ensure that land parcels noted as Nos. J & K in the Ballycullen – Oldcourt Action Area Plan, can access the proposed public road network. To ensure that coherent and orderly development of these zoned lands occurs a condition to address this issue is recommended……."

The Report of the Inspector to An Bord Pleanala dated 26th August 2003 recommended upholding the decision of the Council, but subject to a number of Conditions all of which appeared in the permission granted.

I am of the view that it was reasonable for the applicant to have concerns about the drawings lodged in purported compliance with Condition 6, but at the end of the day I am also of the view that the compliance with Condition 6 (forgetting for the moment the fact that it was to be complied with in this respect prior to commencement of development) was to be made by the submission of revised drawings. If those revised drawings had been lodged in a timely manner, that condition would have been complied with and the applicant would have had no remaining complaint, and yet would still have no assurance, beyond the existence of the Condition, that this extension would be built as intended by the Council, and as hoped for by the applicant. In that event, the applicant would have to await further events in order to see whether the extension road to the boundary of Site H was in fact put in place, and if it was not so constructed by a time that seemed reasonable given the overall road construction taking place, the applicant would have to pursue an appropriate remedy at that stage. But what he would not have been able to do is to complain that the development was unauthorised on account of the failure to lodge revised drawings in accordance with Condition 6 of the planning permission.

The applicant has a specific concern arising from the nature of an application by Elier Developments Limited, a company which owns Site H and which is a related company to the respondent. The applicant states that the plans lodged by Elier in relation to their application for permission to develop its lands contains proposals which, if granted, would mean that access to Site H from the distributor road would be via a new road some 90 meters to the east of the extension now required, and in a position which would not benefit the applicant herein, thereby rendering the applicant's Site J landlocked. The applicant's fear in this regard may or may not be justified. Mr Jones, on behalf of the respondent has stated in his first replying affidavit that the applicant has engaged in that planning application process by lodging an objection on the basis that the drawings show the elimination of the roundabout on the distributor road which would serve the extension down to the boundary of Site H. But Mr Jones has stated in his affidavit sworn on the 26th November 2004 that in fact in compliance with a request for further information by An Bord Pleanala a drawing was submitted on or about the 27th August 2004 which "clearly shows the said roundabout." But Mr Forde has countered this submission in his second affidavit at paragraphs 14 – 25 thereof, and has referred to correspondence between the Council and Elier's representatives, and to documentation which, he submits, indicates clearly that Elier aims to obtain a permission based on a proposal which would leave the applicant's land without access to the distributor road. Mr Jones in reply states in his affidavit of the 23rd December 2004:

"It is clearly open to the respondent or any other person, with its consent, to seek planning permission for an alteration to an already permitted development. The applicant of course has an entitlement (which, as is clear from its exhibits, it has exercised) to participate in any such planning process. In any event, this matter is pending before An Bord Pleanala and is therefore a matter for An Bord Pleanala to determine as it sees fit."

In my view the application by Elier is not something which this Court can have any regard to. Elier is a separate legal entity to the respondent, even if there is some commonality in the shareholdings of each. Clearly, Elier is entitled to make its own application, and this will be considered under the normal procedures in which the applicant in these proceedings can participate, and indeed has done so by way of objection. Its objections have included the impact that a decision which permits the moving or elimination of the roundabout will have on the potential to develop its own lands at Site J, and that to so permit would be in contravention of the overall Development Plan for the area.

While I am of the view that the applicant in these proceedings is entitled to be concerned in relation to whether the extension down to the boundary of Site H will ever come to pass, and I am of the view on the materials before me, that there is some justification for these concerns for reasons which I hope are apparent from my summary of the affidavits filed, nevertheless I do not consider that at this point in time it is appropriate for the Court to intervene by way of making an order to cease the development under the provisions of s.160 of the 2000 Act. The applicant's concerns in relation to compliance with Condition 6 have in my view been addressed by the submission of the latest drawings which show the extension proceeding down to the boundary with Site H. That condition, though belatedly, has been complied with. Compliance with that Condition will in due course depend on the actual construction of the extension of the road. The fact that it is not yet constructed cannot be deemed to be in breach of the Conditions of the Planning Permission. That will have to await further events, as I have already stated.

As of the present moment, and in the absence of any indirect alteration to Condition 6 by virtue of anything contained in any permission which may be granted to Elier Developments Limited, it would still be, as far as I am aware, a requirement of the Council, in pursuit of its overall stated objectives for the area, that all lands in the area which are capable of housing development, such as Site J, shall be accessible from the distributor road and not become landlocked.

The applicant has a legitimate collateral motive in ensuring as far as it can that the distributor road is constructed strictly in accordance with its permission. The Council has its own responsibilities also to ensure that development takes place within its area of responsibility in accordance with the terms of permissions granted and which pursue the objectives of the overall development plan for that area. For the Council not to do so, would be a serious breach of its statutory obligation. The applicant has an entitlement to pursue its concerns by way of an application under s. 160 of the 2000 Act. It clearly has an interest in the development for the reasons appearing. But the Court has a discretion in the matter and this is clear from the

authorities to which the Court has been referred. The exercise of that discretion must be informed by the individual circumstances of each case coming before the Court. In the present case, while there was in my view a failure to comply in a timely manner with the requirement to do certain things prior to commencement, that alone would not justify this Court in making a draconian order putting a stop to the development. The balance of convenience would clearly be against so doing.

I have already described some of the alleged failures by the respondent to comply with conditions as nearing the trivial end of the default spectrum. That is not to minimise the requirement that all conditions of planning permissions be complied with. But it is Condition 6 with which I am principally concerned for the reasons which I have already set out. It would not be a proper exercise of my discretion to put a stop to the construction of this important distributor road now, particularly in circumstances where the Condition appears to me to have been eventually complied wit. There must be a balanced approach to the invoking of what are undoubtedly extensive powers vested in the Court. The purpose of s. 160, like its predecessor s.27 of the 1976 Act, is to ensure in the public interest that development is carried out in a proper manner in accordance with permission duly granted, and it also provides every citizen, regardless of whether he/she has an 'interest' in the lands, to make complaint to the Court in relation to unauthorised development.

The applicant in the present case is a part of that 'public interest' even though it may have its own essentially private interest to protect. But the applicant, now that there has been compliance with Condition 6, cannot claim to be prejudiced by any non-compliance. Its fears remain for the future, but in my view it is inappropriate to anticipate that the respondent will act in breach of its permission in the future based on anything which has happened to date.

The Court ought not to be concerned to punish the respondent by way of an order under s. 160, for what it may consider to have been a delay in proper compliance with that Condition. As stated by Keane J. (as he then was) in **Dublin Corporation v. McGowan [1993] 1 I.R. 405 at p. 411** the section (at that time s. 27 of the 1976 Act) was *"intended to ensure that a development is completed in accordance with the planning permission……..It is intended as a 'fire brigade' section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act."*

I do not consider, at this stage, that an order is required to be made to ensure that the development is completed in accordance with the planning permission granted. On balance I am of the view that the respondent has acted in good faith, although I have some reservations in relation to its bona fides in these proceedings, based on what I perceive to have been a willingness to make averments that all was in accordance with discussions and agreements had with officials from the Council, when perhaps they ought not have gone that far, particularly given that by the 22nd December 2004, the Council still had concerns as set out in the e-mail to which the Court was referred. I believe that Mr Jones at the least ought to have been aware of the existence of that e-mail, and in any event should have sworn a further affidavit immediately it came to his notice in order to deal with it in the light of what he had earlier sworn.

But I believe that in its dealings with the Council the respondent has been dealing in an honest and straightforward way, and not in a way which has sought to deceive, or circumvent its obligations. The respondent, perhaps rightly, considered that provided that the Council were kept informed at all relevant times, of what the respondent was doing by way of commencement of works, that strict compliance with the latter of each condition ahead of commencement was not an absolute requirement.

I can understand the applicant's concerns that its interests in the future development of its lands at Site J would not be uppermost in the minds of the respondent or its related company, Elier Developments Limited. Such is the reality of commercial life, I suppose, where two companies are in competition in the same area. But to impute mala fides on the part of the respondent in its dealings with the Court is another matter altogether, and I do not believe that the respondent's actions can be shown to have gone that far.

The respondent has countered with an allegation that the applicant has been guilty of delay in bringing this application. I do not believe that it has been in all the circumstances. I believe that the affidavits show that they acted with reasonable dispatch.

It has not in my view been necessary to consider the significance of the attitude of the planning authority in the decision which I have reached. It has been urged by the respondent that it is apparent from the fact that it has not followed up on the warning letter which it issued under s. 152 of the 2000 Act, that it cannot have any outstanding concerns about the manner in which the respondent is conducting itself. Undoubtedly, in many cases, this might be something to assist the Court in determining in what manner to exercise its discretion under s. 160 of the 2000 Act, but in the present case I have been able to reach my conclusions without that assistance. I would just add that it might be understandable in some circumstances that a planning authority would be reluctant to provide a letter setting out its satisfaction with the manner in which a developer has complied with conditions in a planning permission, and for the Court to read something into the failure of the respondent to produce such a letter could result in an unfair or unwarranted inference being drawn from its absence. The planning authority has its own powers to intervene in cases where planning conditions are not complied with, and may not wish to become embroiled in an application by an outside party under s.160 of that Act, lest it might be seen to be partial in some

way, or indeed lest it might prejudice any steps which it might wish to pursue itself at some later stage. In the present case I have drawn no inference from the fact that the respondent has not sought or obtained such a letter or other form of communication which might indicate the attitude of the Council to the present application.

I therefore refuse the relief sought.