

**THE HIGH COURT
JUDICIAL REVIEW**

[Record No. 2004 717JR]

BETWEEN**AUGHEY ENTERPRISES LIMITED AND BARRY AUGHEY****APPLICANTS****AND****THE COUNTY COUNCIL OF THE COUNTY OF MONAGHAN****RESPONDENT****Judgment delivered by Macken J. on the 15th day of June, 2005**

1. This is an application for leave to issue judicial review proceedings brought pursuant to s. 50 of the Planning and Development Act, 2000 as amended by the Planning and Development (Amendment) Act, 2002 and pursuant to order 84 Rule 20(7)(a) of the Rules of the Superior Courts.

2. Insofar as the relief sought pursuant to s. 50 is concerned this is in respect of the following:-

1. An order of *certiorari* quashing the respondent's decision made under register reference number 04/8025, notice of which was sent to the applicants on 17th June, 2004 in respect of certain amendments to the N2 Monaghan Town bypass in the townlands of Tullyherim and Annahagh, Co. Monaghan.
2. An order of *mandamus* directing the respondent to consider and determine in accordance with law any amendments to the said N2 Monaghan Town bypass so as to provide for a fifth spur from the proposed N2/N12 (Armagh Road) Junction to the applicants' land.
3. A declaration that the said decision made under register reference number 04/8025 in respect of certain amendments to the N2 Monaghan Town bypass in the aforesaid lands is a nullity.
4. Damages.
5. An order pursuant to Order 84, staying the implementation of the said decision until the determination of the within application for judicial review.
6. An order for discovery of all documents which are or have been in the possession, power or procurement of the respondent and which are relevant to the issues in these proceedings.
7. Further ancillary relief was also sought.

3. The originating notice of motion was accompanied, as necessary, by the statement required to ground such an application for judicial review.

4. As to the grounds upon which the relief is sought, these are divided between the several reliefs as follows:-

(A) As to *certiorari*

- (1) The respondent, as the planning authority for the functional area of the council of the county of Monaghan erred in law by deciding, under the aforesaid register reference number, to amend the N2 Monaghan Town bypass in the town lands of Tullyherim and Annahagh so as excise the fifth spur at the proposed N2/N12 (Armagh Road) Junction.
- (2) The respondent erred in law by failing to honour a specific representation given by its servants or agents to the applicants on or about 22nd August, 2001, to the effect that the proposed bypass and in particular the proposed N2/N12 (Armagh Road) Junction would comprise a fifth spur from the material roundabout to the lands owned by the second named applicant.
- (3) The respondent erred in law in making a decision under s. 179 of the Planning and Development Act, 2000 in relation to the proposed development to amend the Monaghan Town bypass scheme in a manner which failed to secure for the applicants the benefit of the retention of the fifth spur aforesaid.
- (4) The respondent acted in breach of the rules of natural and constitutional justice and procedural fairness in failing to specifically notify the applicants of its proposal to excise the fifth spur from the proposed N2/N12 (Armagh Road) Junction to the applicants' lands.
- (5) The respondent in the circumstances acted unreasonably, irrationally and arbitrarily and in particular in deciding that "the current proposal does not amend the details for the roundabout located at the junction of the N2 and N12 national primary routes".
- (6) The decision of the respondent to improve the proposed development amending the aforesaid town bypass scheme made under register reference number 04/8025 is accordingly *ultra vires*, irrational and a nullity.

(B) As to *mandamus*

- (1) In its capacity as a planning authority and having given a lawful assurance to the applicants that the proposed N2/N12 Junction would comprise a fifth spur to the lands of the applicants, the respondent is required to consider a proposed development amending the aforesaid Monaghan Town bypass scheme in accordance with the said lawful assurances.
- (2) The respondent purported to make a decision under s. 179 of the Planning and Development Act, 2000 to

approve proposed development amending the aforesaid Monaghan Town bypass scheme. Notice of the said decision was sent to the applicants on 17th June, 2004. By reason of the grounds particularised under the aforesaid *certiorari* claim the said decision is *ultra vires* and void.

(3) In the circumstances the applicant is entitled to an order directing the respondent to consider and determine the approval of the proposed development amending the Monaghan Town bypass scheme in accordance with law, and in particular to consider and determine the approval of the proposed development amending the Monaghan Town bypass scheme in accordance with law, and in particular that the applicant is entitled to an order directing the respondent to consider and determine the approval of the said development amending the Monaghan Town bypass scheme in accordance with and in order to give effect to the lawful assurances given by the respondent to the applicants that the proposed N2/N12 (Armagh Road) Junction would comprise a fifth spur to the lands of the applicants.

(C) As to declarations and a stay

(1) The grounds in respect of which the declaratory relief and the stay is sought are those grounds which are also indicated in respect of the *certiorari* relief.

(D) Damages

(1) Insofar as damages are concerned the applicants ground their claim for damages on the basis that the respondent has deprived the applicants from directly accessing the proposed Monaghan Town bypass and in the circumstances the service station operated by the first named applicant is precluded from having direct access to the realigned N2 national primary route.

(2) Further without such access to the realigned N2 national primary route, commercial and retail development proposals envisaged for the second named applicants' lands cannot access the proposed Monaghan Town bypass.

(3) In consequence of these the applicants have each sustained loss, damage, inconvenience and expense.

Facts

5. Exchanges of detailed affidavits took place. Essentially, in this application, the applicant says that a process commenced in the year 2000 when Monaghan County Council initiated the public planning element of a proposed Monaghan Town bypass. This was published in the usual way and the plans and particulars were made available for inspection, also in the usual way. The applicants through the second named applicant who swore the affidavits in these proceedings, says that it became clear that Monaghan County Council proposed to construct a new roundabout at the junction of the N2/N12 (Armagh Road). This proposed junction was in the vicinity of the lands owned by the applicants and clearly showed five spurs, including a spur leading directly to the lands owned by the second named applicant and adjacent to the lands owned by the first named applicant. In fact these lands abut each other.

6. Subsequently the applicants received correspondence from a consultant to the respondent enclosing maps which showed the applicants' property and the proposed "land take", which in turn indicated that a total land take of 0.05 acres would come from the first named applicant's lands and that another drawing indicated a proposed land take of 0.296 acres would come from the second named applicant's lands.

7. In April, 2001, the respondent made what is called the "Monaghan County Council Compulsory Purchase (Roads) Order No. 12201, realignment of N2 national primary route from Coolshannagh to Corlat", which Order permitted the respondent to acquire the aforementioned lands from the applicants. Mr. Aughey says that after the making of the Compulsory Purchase Order he objected to this on behalf of the first named applicant, and that prior to the oral hearing of the objections to the making of the Compulsory Purchase Order a meeting was held on 22nd August, 2001, at the request of the respondent. This meeting was attended by him and by a Mr. Burke, an engineer acting on behalf of the applicants, and by a Mr. Hanly and a Mr. Johnson on behalf of the respondent, together with representatives of a company called M.C. O'Sullivan and Co. Limited.

8. Mr. Aughey averred that the original objection concerning the take for the spur and the proposed roundabout was based on the problem that the respondent was seeking to construct a road directly through the centre of his lands with the effect that the lands in question could not be developed. He had come into possession of a drawing which showed the proposed road running directly through the middle of his lands, and this was exhibited. He had discovered that the service station operated by him and currently located on the existing N2 road would have no access to the proposed N2 bypass and would, in consequence, suffer a significant downturn in business.

9. At the meeting while there is a dispute as to what occurred Mr. Aughey says that he expressed the concerns of both parties as the plans proposed would affect both of them. He says he was informed at that meeting that no road would go through his lands, but that provision would be made for the fifth spur to be built when the roundabout was being built and that the road, when constructed, would skirt around the lands.

10. Mr. Aughey said that this was an extremely important matter because the arrangement proposed would actually improve the first applicants' access and would enhance the chances of his developing his own lands. His intention was to move the site of the service station from its existing lands, being his lands, to the adjoining lands owned by the first named applicant, subject to planning permission, which he avers he was informed would be favourable considered. This would have as its consequence that the station would have access to the new bypass via the spur and the junction.

11. According to Mr. Aughey, while the correspondence exchanged between the parties, and specifically the correspondence arising out of the meeting on 22nd August did not specifically refer to the issue of the fifth spur from the roundabout, he says that the existence of such a spur was expressly referred to at that meeting and was at all times referred to in the plans and particulars displayed by Monaghan County Council in relation to the bypass scheme.

12. The version of the meeting contended for by the applicants is hotly disputed by the respondent. Mr. Johnson, in his affidavit says firstly that it was agreed that no minutes would be taken during the course of the meeting, and second that any decision reached would be communicated after the meeting. There was, he says, no agreement whatsoever on the construction of a fifth spur, and that the respondent through the personnel at the meeting, could not have made any representation concerning the construction of

the fifth spur.

13. There was a short exchange of correspondence between the parties subsequent to this meeting but this correspondence does not disclose anything in relation to this particular issue. The first named applicant withdrew its objection to the making of the compulsory purchase order, allowing matters to proceed, and the applicants claim that this was done directly on foot of the representations made concerning the construction of the fifth spur at the meeting of 22nd August. Formal orders in respect of the compulsory purchase of the lands thereafter served in October, 2001.

14. In May, 2004 Mr. Aughey averred that his wife had attended the offices of the respondent concerning compensation in respect of the lands, and during the course of that was shown a drawing of the lands in question, including the aforesaid roundabout but with no provision for the fifth spur. She immediately informed Mr. Aughey and he commenced what became an exchange of correspondence in the course of which Mr. Aughey expressed surprise at the preparation of a new scheme which had omitted this spur from the roundabout to the lands in question and objecting to that proposal. On 17th June, 2004, it was confirmed by the respondent that no fifth spur was being constructed, that no final decision had been made not to construct the spur, and that such a spur could be constructed in the future.

15. Mr. Aughey says that when he received that letter this was the first occasion on which he discovered that the development to amend the N2 Monaghan Town bypass would be carried out as recommended in the managers report dated 31st May, 2004. That report, insofar as it concerns the issues, included the following comment:-

"The current proposal does not amend the details of the roundabout located at the Junction of N2 and N12 national primary routes which was considered by Council under Part X on 3rd July, 2003. The development does not exclude the fifth arm of the roundabout being constructed in the future."

16. Further correspondence took place in July and in the beginning of August, but this did not resolve matters and an application for leave to issue these proceedings were filed on 10th August, 2004.

17. Arising from the exchanges between the parties, the meeting, the alleged representations made and the withdrawal by the applicants of objection to the Compulsory Purchase Order, the applicants claim that they had a legitimate expectation that the fifth spur would be constructed, in circumstances where a benefit would have accrued to the applicants and in the circumstances the applicants are entitled to be compensated for the denial of that benefit.

18. Since this is an application for leave to issue judicial review proceedings, and in such circumstances the respondent does not file any notice of opposition, it is appropriate that I should set out what is said by the respondent through the affidavit of Patrick Johnson, Engineer, sworn on behalf of the respondent on 28th September, 2004. In his affidavit he says that the applicants seek to challenge variations to the plan for the N2 Monaghan Town bypass embodied in the report of the County Manager to the respondent dated 31st May, 2004, as subsequently presented to the members of the respondent council at their meeting of 8th June, 2004.

19. Further he says the applicants challenge the validity of the procedure undertaken by the respondent under s. 179 of the Act of 2000. While much of the content of the affidavit is argument, it sets out the respondent's view on the facts they contend for. On that view, he says the applicants do not seek to challenge the validity of the many other matters dealt with in the proposed variation to the Monaghan bypass project. These include important changes to the Monaghan bypass scheme as originally considered being the inclusion of an extra roundabout on the bypass itself and the provision of a special bridge carrying the bypass over the, currently, disused Ulster canal.

20. Mr. Johnson avers that, having regard to the fact that the validity of the development is only being contested by the applicants in respect of one small detail relating to an isolated point, the applicants have not demonstrated any basis on which they would be entitled to have an injunction restraining the respondent from carrying out the development of the Monaghan Town bypass scheme in accordance with the plans initially submitted and approved under Part X of the 1994 Regulations as varied. He contends that the general challenge by the applicants to the implementation by the respondent of the bypass scheme, save in its original form, is not maintainable. Rather it is vexatious, being in substance a claim that there should be no Monaghan bypass in its revised form unless the respondent provides an additional spur to the proposed junction roundabout of the N2/N12 (Armagh Road) which would give potential access to the lands of the applicants, and in respect of which the applicants seek a form of interlocutory relief to secure this private commercial objective.

21. In countering the general merits of the applicants' case the respondent through Mr. Johnson avers as follows:-

(a) The existing national primary route N2 from Dublin to Derry goes through the middle of the town of Monaghan. North of the town the road joins up with national primary route N12 which carries on to Armagh.

(b) A plan was formulated in conjunction with the National Roads Authority for the upgrading of national primary route N2, the proposed Monaghan bypass being a major national infrastructure project and a very important part of the upgrading of that route.

(c) The works, when completed, will improve the town of Monaghan by relieving a major source of traffic congestion.

(d) That construction of the bypass is not at a contract stage and the respondent is concerned to ensure that it is not delayed or rendered more expensive as a result of a legal challenge.

(e) Tenderers were asked to tender for the construction of the bypass on the basis that it included the amendments in the Part 8 decision. And the scheme at that date was projected to cost in excess of €7,000,000.

(f) The inclusion of the new roundabout will facilitate the development of large tracts of hitherto inaccessible lands and the bridge over the Ulster canal will prevent disruption and delay to road users if works are undertaken in the future to re-open that canal.

(g) Even if the scheme as envisaged on the Part X permission were implemented, which it would not be, the fifth spur would not be constructed unless a public road is constructed to facilitate the development of the lands between the old N2 and the new bypass.

(h) The funding for the project is coming from Central Government and European Community Funds through the National

Roads Authority which funds were then available. In the event the respondent did not enter into a contract at that time for the construction of the bypass as tendered for there was a strong possibility that the scheme could be delayed for a number of years with the inevitable consequence that the cost of construction would be increased.

(i) As to the actual scheme as originally envisaged the plans and particulars were made available for inspection by the respondent in public in April, 2000. The respondent then went through the procedure required by s. 78 (1) of the Local Government (Planning and Development) Act, 1963 as amended and Part X of the 1994 Regulations. A report was prepared in accordance with Article 134 of the Regulations of 1994 and was duly submitted to members of the respondent. It was submitted and approved by the members at the meeting of 3rd July, 2000.

(j) The plans and particulars included a document described as "Local and Government (Planning and Development) Regulations Part X Monaghan County Council N2 Emmyvale to Monaghan Town road realignment phase 1 Coolshannagh to Corlat proposed development description". This document referred to several plans and maps. The plans stated "the north roundabout will initially be a four arm roundabout connecting the new N2 Monaghan bypass with the existing N2 north, the N12 (Armagh Road) and the existing N2 into Monaghan Town. Allowance has been made for a fifth arm into the presently undeveloped land adjacent to the roundabout...". One of the drawings, EM/PR/PL1-3-1 Revision A, dated April, 2000, showed a potential spur off the roundabout at this location.

(k) It was clear from the description of the scheme that the roundabout was being created to a size which would "allow for" the construction of a spur into the "presently undeveloped" lands to the south and the map referred to by Mr. Aughey is no more than an illustration of that point. This spur together with another item was inserted into the plans to illustrate the points being made at paras. 3.2 and 3.5 of the proposed development description.

(l) This documentation made clear to the public that in constructing the roundabout they would make it large enough to provide for a fifth arm which would facilitate access to the undeveloped lands, but the construction of a road or other infrastructure leading to this fifth arm was not part of the bypass scheme. Neither the respondent nor Monaghan Town Council had any immediate plans at the time of the Part X procedure or at the time of making of the CPO for the construction of such road. It was however important that the roundabout be sufficiently large to accommodate potential future development within Monaghan Town. This was also material used for the purposes of determining the extent of the area sought by the respondent in order to build the roundabout under the CPO procedures.

(m) As to the meeting in August 2001, it was agreed at the outset that the meeting would not be minuted but that any decision arrived at during the meeting would be set out in subsequent correspondence. He agrees that the concern of the second applicant initially related to the potential construction of a road off the roundabout and through his lands and the impact this would have on his lands. Mr. Johnson avers that he sought to persuade the second named applicant that such a road, if constructed and wherever constructed, would be beneficial to the lands, but the second applicant did not agree. He also says he made it clear that there were no immediate proposals for the suggested road and that it would be removed from the plans, but the engineer for the applicants intervened and stated that they would leave the question of the spur of the roundabout aside. Then the impact which the construction work would have on the applicants' business was discussed.

(n) While agreeing that was a discussion about planning permission, Mr. Johnson avers that it was discussed in a different context to that suggested by Mr. Aughey in his affidavit, namely, in the context of a public road being constructed through his lands. There was no mention of relocating pumps other than in the context of a public road being built leading into the fifth spur, or of the respondent being favourably disposed to an application for planning permission in relation to the same. He says that no promise was made to construct the spur to the roundabout at public expense so as to facilitate the second applicant in utilising a private access onto the roundabout. If there were any promises made or any agreements reached at that meeting of the type contended for by the applicants, they would have been the subject of considerable exchanges at the meeting itself, and in particular would have been reflected, but were not, in the exchange of correspondence which the second named applicant has exhibited.

(o) It is true that during 2003 the respondent decided that some alterations to the original scheme for the bypass should be made. These primarily involved the inclusion of a further roundabout south of the proposed roundabout at the junction N2/N12 (Armagh Road), and the construction of a bridge over the old Ulster canal. In 2004 these proposed changes to the bypass scheme were the subject of the statutory procedure relating to "own development" under s. 179 of the Regulations of 2001. The documents furnished to the public as part of the notification and consultation process included the original scheme as approved under Part X of the 1994 Regulations as well as the primary amendments to it. These documents are totally silent as to the elimination of the possible fifth spur one way or the other.

(p) According to Mr. Johnson, therefore, the current position is that while the fifth spur does appear on one of the plans which form part of those documents, no decision has been made as to when it will be constructed one way or another. The construction of the fifth spur of the roundabout will not take place during the construction of the bypass. The respondent contends it is specifically authorised to construct it under the terms of the Part X proceedings which took place in 2000. No commitment has been made for its actual construction either immediately or in the future, and the position remains as it was.

22. Against that background, which is reasonably complex, the applicants argue primarily along the following grounds. Their major complaint is that the respondent made amendments to the Monaghan Town bypass in or around June, 2004, without regard for the specific assurances given to the applicant at the meeting which took place on 22nd August, 2001, and on foot of which the first named applicant withdrew an objection to a compulsory purchase order of its lands. The assurance that had been given was that a roundabout at the junction of the N2/N12 Armagh Road in the bypass scheme would contain a spur allowing access to the plaintiff's lands, but that the revised layout makes no such provisions. The applicant submits that in reliance on these representations and arrangements made between them and the respondent the first applicant altered its position to its detriment by withdrawing the aforesaid objection, and the compulsory purchase orders were then confirmed. The applicants therefore had and still have a legitimate expectation based on the representations made, and in support of this they rely on the decision in *Glencar v. Mayo County Council* [2002] 1 I.R. 84.

23. The applicants submit that the issues which they have raised are sufficient to meet the applicable standard for liberty to proceed with a judicial review application pursuant to the provisions of s. 50 of the Planning and Development Act, 2000. They rely in that regard on the decision in *McNamara v. An Bord Pleanála* (1) [1995] 2 I.L.R.M. 125.

24. They argue that their case is straightforward and grounded on their legitimate expectation that if at any stage the development proposals in relation to the agreement reached was to be altered, the respondent would give proper consideration to the representations made to the applicant at the meeting in August 2001. Further the respondents, having benefited from the first named applicant's withdrawal of its objection to the compulsory purchase order on foot of the representations made, had decided unilaterally to amend the original plan submitted in relation to the junction. In particular the applicants say the respondent has decided not to construct the fifth spur, contrary to the agreement reached, or to their legitimate expectation in that regard.

25. According to counsel for the applicants, the principles established in the *Glencar Exploration, supra.* case are such as to encompass the present case because:-

1. The circumstances of the meeting in August 2001, came at the request of the respondent declaring an interest in seeing whether or not any issues arising under the compulsory purchase order process could be resolved.
2. While the meeting might not be a contractual meeting both parties came with something to offer. While the respondent could not do something which was in anyway illegal or unlawful it could legitimately do something in accordance with the plans which issued at that time and that in fact it did something which it could do, namely provide for the construction of fifth spur at the roundabout in question as part of the bypass scheme.
3. While the applicants accept that the National Road Authority might not approve all issues, that bald statement cannot be taken out of context. The case here is different because the respondent had already considered the possibility of building a fifth spur at the roundabout and indeed provided that the roundabout would be built precisely in such a way as to facilitate the construction of the fifth spur. At a meeting on 8th January, 2001, Mr. Johnson had already produced a map showing the spur on the land itself.
4. Thereafter the applicants operated in the belief that an agreement had been concluded and while it is accepted that the letters are not conclusive in that regard, that is not to say that such an agreement was not concluded at the meeting. Acting on the basis of that agreement, the first applicant withdrew its objection and subsequently the applicants were unaware of any changes until the coincidental discovery of the changes in May 2004. There was no incentive, for the first named applicant to withdraw its objection to the compulsory purchase order, apart from the agreement contended for by the applicants.

26. Counsel for the applicant argued that whatever phrases are used as to the position arising as at 17th June, 2004, the substance of the respondent's position is that, yes a spur could have been constructed but the respondent has decided not to construct a spur at present.

27. The applicants submit that it is clear from the present case that communication takes place between a local authority and affected parties, both in relation to compulsory purchase orders and in relation to planning based decisions. It is submitted by counsel on behalf of the applicants that this is a normal and indeed an integral part of the respective processes and if it were not so even further delay and expense would be incurred. However, as a result of this practice the respondent must accept that if it enters into such a style of negotiation it must also be prepared to maintain the integrity of the practice as being the one which most suited it. Counsel for the applicant argued that when the legitimate expectation which had arisen as a result of the meeting of 22nd August, 2001, was not going to be met, the applicants were entitled to be heard in that regard, citing in relation to this an extract from the decision in the *CCSU v. Minister for Civil Service (The GCHQ case)* [1985] 1 A.C. 284 in which Lord Frasier stated:-

"Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

28. Counsel for the applicant submits that having regard to the criteria established in respect of an entitlement to move pursuant to s. 50 of the Act of 2000 the applicants are entitled to the reliefs sought.

29. For the respondent Mr. Galligan submits that Part 8 of the Act of 2000 covers the "own land" procedure which requires the following:-

- (a) display of the scheme
- (b) submissions made
- (c) the manager's report
- (d) the manager's recommendation to the council.

30. The old part X procedure of the 1994 regulations has been replaced in essence by s. 179 of the Act of 2000 and the regulations of 2001. There is no decision, as such, but rather under s. 179 the preparation of a report for the Council.

31. According to Mr. Galligan the applicants have made out no substantial grounds for contending that the decision which they challenge is in anyway invalid. They challenge the validity of a deemed decision of the respondent under s. 179 of the Act of 2000 suggesting that this made changes to the scheme for the development of the bypass as previously approved by the respondent including in particular the elimination of the proposed fifth spur referred to above.

32. Apart from contesting the existence of any agreement whatsoever, or the ability of any person at the meeting to make any representation on its behalf, the respondent claims that the s. 179 procedure carried out in 2004 did not, in fact, involve any alteration to the status quo which had existed as a result of the earlier decision. The roundabout will still initially be a four-arm roundabout and allowance is still being made for the possible construction of a fifth spur into the undeveloped land adjacent to the roundabout. The applicants' approach to the factual position is simply misconceived.

33. The respondent was never asked to consider the construction of a fifth spur as part of the proposed development, and certainly not on the basis that it would be installed immediately, under either the Part X procedure or under the s. 179 procedure. If such a proposal were to come before the elected members of the respondent, however, they would be obliged to have regard to whether it would be consistent with proper planning and sustainable development of the area. Mr. Galligan argues that the respondent is precluded from taking into account any alleged agreement of this nature between the applicants and employees of the respondent.

34. According to the respondent, what the applicants are really seeking is in effect a mandatory order obliging the respondent to install the fifth spur on the roundabout at the time the bypass is being built even though no approval exists. The applicants are not therefore seeking *mandamus* for the purposes of obliging the respondent to carry out a public obligation, but rather are seeking to enforce an alleged private agreement by means of *mandamus* which is not permitted in law. Further the applicants' claim that the entire s. 179 procedure of 2004 relating to the Monaghan bypass is a nullity, a case which cannot in law be advanced by the applicants since their challenge is to a discreet element where the applicants say there has been a change. In the circumstances any judicial review must be limited to that element of the s. 179 procedure which relates specifically to the construction of the fifth spur on the roundabout.

35. In response Mr. Keeling on behalf of the applicants contended that although the respondent submits that there has been no change, a simple examination of the maps in question indicate that they are different in that, in the first case the existence of a spur is clearly indicated, and in the second case that spur has disappeared. What is being sought here, he argued, and despite all the complications being put forward on behalf of the respondent, is a determination of an issue surrounding the non existence or elimination of the spur. In these circumstances, the level of damages which the respondent might suffer, are quite slim. Given that the applicants do not seek to rely on a stay in the matter the respondents can now proceed with the entire of the development. There has been no serious case made against the applicants' contention that there has been in fact a real change and alteration to the scheme as originally proposed in circumstances where the applicants had no opportunity of being heard.

Conclusions

36. It seems to me that having regard to the fact that the application for a stay was withdrawn by the applicants, in the course of the hearing, the questions which arise for consideration on this application and the consequences, are of a more limited nature.

37. Notwithstanding the complicated factual matters which have been raised and the procedural schemes which operate or did operate under planning legislation affecting a local authority, which is itself complex, the real nub of the applicants' case against the respondent is actually quite straightforward.

38. For the purposes of this judgment I do not have to decide whether or not an agreement of the type contended for by the applicants took place at the meeting of 22nd August, 2001. What is clear is that such a meeting took place, a scheme had been proposed, in respect of that scheme certain compulsory purchase orders issued including those in respect of the applicants' lands. The first named applicant had formally opposed the compulsory purchase order. For the purpose of endeavouring to discover, quite correctly, whether issues surrounding the compulsory purchase of the applicants' land might be resolved, a meeting took place between the applicants at which the second applicant and his professional advisor was in attendance, and the respondent at which Mr. Johnson and others were in attendance. No issue has been raised before me at this stage in the proceedings as the distinction, if any, between the first and the second named applicants, and this judgment does not seek to do so.

39. According to the information available, there is no doubt but that a meeting took place between the parties in August, 2001. What precisely occurred at that meeting is a matter of considerable dispute between the parties, and it is true that I will not be in a position to resolve those factual issues as to what was or was not agreed. According to the applicant not only was the Compulsory Purchase Procedure concluded because of the representations made and the legitimate expectation formed, the respondent still had to go through the s. 179 public Consultation Procedure and it was only, relying on the existence of the agreement which the applicants said is still in place, that on receipt of a letter from the respondent relating to the compensation pursuant to the compulsory purchase order made, the second named applicants' wife discovered the aforesaid maps.

40. It is also quite true that insofar as the correspondence following on from that arrangement is concerned, no specific mention is found in the exchange of letters covering the representation contended for by the applicants. The content of the exchanges, the arrangements made and the subsequent correspondence and their meaning or limitations are all in dispute between the parties.

41. The essence however of the applicants' case is as follows:

1. That a roundabout was to be constructed in circumstances where provision was already made for the possible construction of a fifth spur, and that maps presented in 2000 and 2001 clearly showed how that spur would look or where it would be located when constructed.
2. That a representation was made on behalf of the respondent that this spur road which I understand to be a limited piece of road emanating from the above mentioned roundabout but terminating quite a short distance from that roundabout, would be constructed from the roundabout onto the applicants' lands or lands abutting the applicants' lands.
3. That on the basis of that representation the first named applicant who had opposed the compulsory purchase order in respect of its land take, withdrew its objection to the compulsory purchase order, relying on the alleged representation and did so to its detriment.
4. That a decision was subsequently taken by the respondent that the roundabout would continue to have provision for the possibility of such a spur but that the spur would not be built or at least not built as part of the approved bypass scheme, and therefore was no longer part of the construction of the roundabout itself, and further might or might not be built in the future.

42. According to the applicants the representation was made in the following context. The spur appeared in some maps and plans which were extant as part of the Part X procedure referred to in the body of this judgment. The respondent also presented a map which apparently showed that a full road was going to go through part of their lands, and in the course of the meeting held in August 2001, a map was discussed which indicated quite clearly the line of that road through the applicants' lands. It is of course the case that the respondent states that this marking of the road on a map of the applicants' lands was only indicative of the possibility of how a road might look if the fifth spur were to be constructed onto such a road.

43. The applicants say on the contrary that the possibility that a road might go through their lands was a matter of very considerable disquiet, but that the resolution of that matter was the representation that a spur would be constructed as part of the bypass scheme, and that when the eventual road would be constructed it would not go through the centre of the applicants' lands but rather would skirt the applicants' lands in some way. The representation contended for by the applicants that the spur road would be constructed was such as to persuade them that they would be in a position to take certain steps including for example seeking planning permission and moving an existing petrol pumps facility so that it would abut the spur, and therefore have an access up to the roundabout when completed.

44. The scope of legitimate expectation has been well considered in the jurisprudence and it seems to me that the applicants' claim based on legitimate expectation on the present averments falls within the criteria set forth in *Glencar Exploration Plc. v. Mayo County Council* (2) [2002] 1 I.R. 84.

45. But the respondent says that the position in 2000 was not altered in any way by the s. 179 mechanism which took place a few years later when considering changes to the scheme. It seems to me that this must depend upon a close examination of the maps provided in the course of the public consultation process both under the Part X mechanism and under the s. 179 mechanism, as well as a close consideration of what precisely was covered by the manager's report, the correct interpretation of the manager's report, and even what the public, but especially the applicants, might reasonably have understood from the maps and plans and the manager's report. And of course there must be a resolution of what occurred at the meeting in August, 2001. On all these aspects of the matter, the respondent contends for one interpretation and the applicants for another interpretation but it is not possible, in light of the absolute conflict involved, to come to a definitive view, at this stage, as to whether the respondent or the applicant is correct.

46. What I have to decide is whether, at this stage, the applicants' case falls within the provisions of s. 50 of the Act. The criteria to be applied to an application under s. 50 is well established and the decision of Carroll J. in *McNamara v. An Bord Pleanála* (1) [1995] 2 I.L.R.M. 125 is the definition which is most often cited namely:-

"What I have to consider is whether any grounds advanced by the appellant are substantial grounds for contending that the Board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with what the eventual results would be. I believe I should go no further than to satisfy myself that the grounds are 'substantial'."

47. I am satisfied that in the present case the applicant gets over that hurdle in relation to this matter and that they do so both in relation to the application for *certiorari* and in relation to the application for *mandamus*, as well as in respect of the damages claim. As to the question of substantial grounds, it is clear from the foregoing matters, upon which there is such a dispute, that the issues and the legal arguments adduced on behalf of both parties are all of a serious nature. In particular the grounds, which include invoking legitimate expectation as well as an arrangement or agreement, even if the latter is not contractual, as well as the right to be heard in the event of a change from the agreed (even if contested) arrangements made, are also very serious. The consequences contended for by the applicants are equally serious. I do not think therefore it could be said, on any basis, that the grounds are not reasonable, or not arguable, or are trivial or tenuous. On the contrary, whether one agrees with the contentions or not, they are weighty.

48. Whereas I would not hesitate to reject the invocation of an order of *mandamus* in circumstances where a public duty is not being sought to be enforced against the respondent, the *mandamus* in the present case is really directed towards the plea that the respondent failed to afford to the applicants, in accordance with the rules of natural justice, and contrary to legitimate expectation, the appropriate right and entitlement to be consulted on, and the opportunity to contest, the alleged altered decision of the respondent to eliminate the construction of the fifth spur as part of the Monaghan Town bypass scheme, thereby altering the position previously existing between the parties without the applicant being heard. And this, in circumstances where there was in existence a practice adopted by the respondent of arranging meetings of the type held in August 2001 with the specific purpose of seeking the resolution of disputes between it and, for example, the applicants, even if on the compulsory purchase side. According to the authority opened to me, and not challenged, this is a valid basis upon which to seek and order of *mandamus*.

49. In view of the fact that the applicants withdrew the application for a stay in the course of the hearing, and the scheme as contended for by the respondent, including the construction of a junction which allows for the possible future construction of a fifth spur, may be completed precisely as envisaged by it, the orders to be made must necessarily be limited to those essential to the resolution of the dispute concerning the decision to eliminate or not to construct, as part of the bypass scheme, the fifth spur.

50. In the circumstances I will make an order granting the applicants liberty to apply for relief by way of judicial review in the terms of paragraph 1 of the notice of motion, in respect of the reliefs sought at D (i) (i) (iii) and (iv) of the statement required to ground an application for judicial review, subject to certain amendments arising from the following matter. It should be understood that the relief which is sought by way of *certiorari* and that which is sought by way of declaratory relief is limited to the decision to eliminate the construction of or not to construct, the fifth spur off the roundabout at the junction known as N2/N12 (Armagh Road), as part of the extant Monaghan bypass scheme. I will hear counsel on the precise form of order to be made in that regard, including any appropriate consequential amendments to the order for *mandamus* sought. The grounds upon which the said relief is to be granted, subject to any amendments arising from the foregoing, are firstly, as to *certiorari* those at (e) (i) 1, 2, 3, 4, 5 and 7 of the statement required to ground the application for judicial review, secondly, as to *mandamus* those at e (ii) 1, 2, 3 and 4 of the said statement, thirdly as to the declaratory relief those at e (i) 1 – 5 and 7 and e (ii) 1 – 4 of the said statement, all applied mutatis mutandis, and finally as to damages, those at (iv) 1, 2 and 3 of the said statement .

51. I will also hear the parties, if necessary, on the question of discovery.