

THE HIGH COURT

[2005 No. 193COS]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000
AND IN THE MATTER OF AN APPLICATION

BETWEEN

ALTARA DEVELOPMENTS LIMITED AND PETER CROSSAN

APPLICANT

AND
VENTOLA LIMITED

RESPONDENT

Judgment of O'Sullivan J. delivered the 6th October, 2005.

The Parties

1. The first applicant is a development company of which the second is a director. The applicants seek to halt the construction by the respondent, itself a development company, of a residential development comprising 255 houses at Delgany Woods which is between Delgany and Killincarrig Greystones Co. Wicklow. The first applicant has completed a residential development in the immediate vicinity of the respondent's and says that the latter is being conducted in breach of a condition imposed by An Bord Pleanála which, it says, is intended to ensure that the road network in the immediate area is completed before the last 130 houses are constructed.

2. There is a background of acrimony between the parties relating to a failed attempt by them to link the internal traffic systems of their respective developments. The proceedings before me were conducted on the basis that this matter would not be ventilated. I agreed because I heard the case on the last two working days of the legal year and the matter seemed urgent. On balance I thought it better to hear the matter there and then rather than postpone it to the new year when further affidavits could be available.

The Issue

3. The sole issue, therefore, concerns the meaning of a planning condition imposing a phasing of construction in tandem with nearby roadworks.

4. The condition is as follows:-

"2.(1) No house construction shall commence until the planning authority has confirmed in writing that it is satisfied that road improvement works on route R 762 from the site to Killincarrig Crossroads have reached a stage where site construction traffic can safely use this road.

(2) Subject to the requirements of 2(1) above only 50 houses shall be constructed until the planning authority is satisfied that work is in progress on the Greystones Southern Access Route

(3) Subject to the requirements of 2(2) above, only 125 houses in total shall be constructed until the Delgany By Pass Road (R 762, via Road 1, to the Black Line Road) has been commissioned.

Reason: in the interest of traffic safety and orderly development".

5. An Bord Pleanála granted the permission on 9th June, 2000 and by condition 3 provided that it should last for 10 years.

6. The application originally sought a lifetime of seven years for the permission and it is reasonable, I think, to infer that An Bord Pleanála extended this timeframe having regard to the imposition of phasing of the work in tandem with the development of the road network servicing the area.

The planning authority's role

7. On 1st October, 2003 Wicklow County Council served an enforcement notice requiring the respondent to cease unauthorised works which were not in compliance with the permission. Specifically the notice said "Cease all works immediately at Delgany Wood on houses over 125 number pending compliance with condition 2(3)." Prior to that the respondent had taken advice from a senior counsel specialising in planning law, an architect and an engineer specialising in planning and environment and all three had advised that the respondent had complied fully with condition 2(3) and was entitled to construct the final 130 houses. Clearly at that time Wicklow County Council had a different opinion.

8. The road referred to in condition 2(3) is a local distributor road linking Delgany village to the Black Line Road. Approximately three quarters of the road runs through the respondent's development and has been already constructed and I infer was constructed at the time of the service of the enforcement notice. The remaining quarter, however, runs through lands then and still in the ownership of third parties.

9. Following the service of the enforcement notice intensive discussions took place between the respondent and Wicklow County Council which resulted in an agreement the salient terms of which were

(a) the respondent would design and provide specifications for the remainder of the road, same to be submitted to and agreed by the council's engineer

(b) the council would obtain all necessary consents for the construction of this road;

(c) the council would enter discussions with adjoining land owners and if necessary after 12 months set in train a compulsory acquisition process for the necessary lands;

(d) the respondent would hand over to the council the portion of the road on its lands;

(e) provision was made for the respondent to construct the road if appointed by the council;

(f) the respondent would pay all outstanding contributions due or to become due under the permission to assist the

purchase of the adjoining lands for the proposed roadway;

(g) the respondent would further lend any land acquisition costs exceeding such contributions if requested by the council, such loan to be repaid within four years;

(h) on receipt of contributions the council agreed to confirm in writing to the developer its acceptance of the developer's proposal for compliance with condition 2 (and 24) of the planning permission.

10. In addition by clause 9 of the agreement it was provided that in the event that the council had not acquired the adjoining lands and constructed the roadway within a period of four years from the date of the agreement (26th November 2004) then the agreement should be at an end and the obligations of either party to one another should forthwith cease save that the loan money should be repaid if still outstanding.

11. The situation contemplated by clause 9 is anomalous: if the council have not managed to purchase the adjoining lands and construct the roadway within four years from the date of the agreement (that is by 25th November 2008) then the agreement is at an end. The agreement, however, includes the basis for the acceptance by the county council of the respondent's proposal for compliance with condition 2 of the planning permission. If the agreement ceases to have effect what is the status of this acceptance?

12. This seems less than satisfactory. The respondent is obliged and bound by condition 2 of the planning permission for the entire lifetime of the permission itself that is up to the 8th June, 2010. The planning authority's acknowledgment of compliance with this condition is made to depend on compliance by the respondent with the terms of an agreement with the planning authority which contemplates the possibility that the agreement itself will come to an end and have no effect during the currency of the permission.

13. Furthermore, depending on the true meaning of the condition itself (a matter of disagreement between the parties) it could also mean that compliance with the condition, so far as the planning authority by its agreement is concerned, can be watered down to compliance with the terms of the agreement, that is to a bona fide attempt by the planning authority and the respondent to acquire whether by agreement or compulsorily the necessary lands and construct the last quarter of the by pass road within four years of 26th November 2004.

The submissions

14. Reference has been made to the opinions furnished to the respondent by distinguished professionals specialising in the planning area. I have not been furnished with these advices and in these circumstances clearly they are of little or no relevance to the central issue in the case which is what the meaning of the word "commission" as used in condition 2(3).

15. I have been furnished with an affidavit from a planning consultant on behalf of the respondent who says that it means "authorised or ordered such that steps have been taken to put in train the construction of the road and to ensure that it will be constructed", and with an affidavit sworn by a chartered civil engineer on behalf of the applicant which says that it means "operational".

16. Whatever about the position before 26th November 2004 it is argued by the respondent that under the agreement between the respondent and the county council of that date the road has been authorised or ordered such that steps have been taken to put in train its construction and to ensure that it will be constructed. The agreement with the county council is clearly a bona fide attempt to ensure that the road will be built but it is nonetheless clear that the road construction is not guaranteed under the agreement and so much is acknowledged in clause 9. In my opinion, however, it is questionable, even on the respondent's case, whether the road has been "commissioned", because the steps which have been put in train cannot be said to "ensure" that the road will be constructed. The case put forward by the planning consultant on behalf of the respondent, however, appears to acknowledge that such an assurance is required if the road can be said to be commissioned.

17. An entirely different meaning is put forward by the applicant. The applicant says that the road is not commissioned unless it is operational. In support of this interpretation it is submitted that if the condition merely requires that the road be contracted for then such a condition offers no adequate solution to the traffic problem which would be generated as soon as the houses as occupied. It makes the condition meaningless.

The Meaning of Condition 2(3)

18. The instant planning permission was preceded by a number of applications for development on the site which were granted by Wicklow County Council but refused on appeal by An Bord Pleanála. The critical issue was the inadequate road infrastructure. The respondent modified its application and ultimately the present planning permission was granted subject to condition 2.

19. This condition deals with the concerns about traffic safety and orderly development by creating three barriers to construction work on the houses.

20. The first barrier is that no house construction can commence until the planning authority is satisfied that road improvement works from the site to Killincarrig crossroads have reached a stage where construction traffic can safely use the road.

21. Once this has happened only 50 (out of 255) houses can be constructed. If the developer wants to construct more than 50 houses this can only happen once the planning authority is satisfied that work is in progress on a further instalment (the Greystones Southern Access Route) of the road network in the area. If this barrier is overcome then the developer can build between 50 and 125 houses.

22. But there he must stop because he comes up against a third barrier which is that he cannot continue until the Delgany By Pass Road has been "commissioned". Only after this road has been commissioned can he proceed to build the last 130 houses.

23. To my mind condition 2 is concerned with ensuring that additional traffic generated by the proposed development will not cause hazard and can move safely and in an orderly fashion. It requires works to be done which will facilitate this. So much is clear from sub-conditions (1) and (2). It would be highly anomalous, I think, if sub-condition (3) were to depart from the philosophy of relating the phasing of the development to the actual works on the ground in favour, merely, of the putting in place of legal and contractual arrangements for the provision of the by pass road no matter how unqualified. Such arrangements can notoriously take time measured in years rather than months and it is highly unlikely in my opinion that it was within the contemplation of An Bord Pleanála that houses could be constructed and occupied during the period of time which can elapse between the setting up of the legal arrangements for the construction of a public road over third party lands and the day on which such a road becomes operational.

24. Nonetheless this is the meaning contended for by the respondent who was advised even prior to the making of the agreement with the County Council that whatever arrangements were then in place constituted compliance with this condition. I have not seen these advices. I do not know whether they were unqualified and indeed upon what factual basis they were proffered. At the hearing before me the factual basis upon which it was contended that the respondents had complied with condition 2(3) was in effect the reaching of the agreement with the county council which was arrived at after the service of the warning notice the salient features of which I have summarised above.

25. In my view, for the reasons given above, the word "commissioned" in condition 2(3) means "has become operational". If I am incorrect, however, and it means only that the legal and contractual arrangements must have been put in place so as to ensure that the road will be constructed in the future then in my further opinion the agreement with the county council is at least questionable (again for the reasons given above) as an appropriate instrument producing such an effect.

26. It was submitted on behalf of the respondent that where the meaning of a condition is ambiguous it must be construed *contra proferentem*. Reliance is placed on the decision of Finnegan J. (as he then was) in *Cork County Council v. Clifton Hall Limited and Others* (Unreported, 6th April, 2001) where he said

"In any event insofar as the planning permission is ambiguous it should be construed *contra proferentem* i.e. against the applicant."

27. The applicant in that case was the same planning authority as had drafted the condition which it sought to construe against the developer in a way with which the learned trial judge disagreed. In that context it was certainly fair that the planning authority should not be seen to advance an incorrect interpretation of the condition which it had drafted to the disadvantage of the developer.

28. I do not understand the learned trial judge in that case however in any way to have sought to qualify the long established canon of construction of planning permissions laid down in the Supreme Court per Henchy J. in *Readymix (Eire) v. Dublin County Council* (which was not even mentioned in *Clifton Hall Ltd.*) where he said

"Since the permission notified to an applicant and entered in the register is a public document, it must be construed objectively as such, and not in the light of subjective considerations special to the applicant or those responsible for the grant of permission. Because the permission is an appendage to the title to the property, it may possibly not arise for interpretation until the property has passed into the hands of those who have no knowledge of any special circumstances in which it was granted."

29. In any event, I do not accept in the present case that there is ambiguity about the word "commissioned" as it appears in condition 2(3).

30. Nor do I consider that there is any principle of law which proposes that the proper interpretation of a planning condition is the one which is the least onerous to the developer by reference to a principle of *contra proferentem* or any extension thereof.

Discretion

31. On behalf of the respondent it was submitted that this application is governed by an improper motive on the part of the applicant who is a competitor of the respondent and with whom discussions aimed at the provision of access to the respondent through the applicant's lands broke down acrimoniously and were followed by further disputes in relation to rights of way and so on.

32. Because of the arrangement described at the outset of this judgment I consider that it would not be correct for me to give weight to this submission because I do not think it has been adequately ventilated before the court.

33. Somewhat more troubling is the point made that the impression was sought to be conveyed that the second applicant was a local resident whereas in fact he appears to live in Stillorgan. I am unhappy, to put it no more strongly, that it was left to the respondent to clarify this.

34. A further point was made that the application was only brought after undue delay. In reply it is said that the application could only be brought after the development was well underway because of the provisions of conditions 2(1) and (2).

35. The respondent also points out that considerable hardship has already being caused to it by the existence of these proceedings and considerably more hardship will arise in the event that an order is made curtailing the development. The respondent was due to close sales on 13 houses in July and August and a further 13 were due in the September/October period. The value of these 26 sales exceeds €11 million. Sales with a value of in excess of €20 million were due in the six months from the beginning of July 2005. The loss (or protraction) of these sales would greatly damage the respondent company's cash flow and put at risk the employment of 33 persons working on site. It would also cause great hardship it is said to third parties being the buyers involved in these sales many of whom it is suggested would already have entered into agreements for the sale of their existing homes in anticipation of closing sales with the respondent.

36. For the reasons indicated I am not taking into account the position of the applicant as competitor of the respondent. I am however taking into account the fact that the application was presented on the basis that the second applicant was a local resident who lives in the immediate vicinity of the site. This has proved incorrect.

37. I am also taking into account the fact that a number of third parties will sustain disruption and damage if an order is made curtailing the respondent's work on this site.

38. Most of all I am taking into account that the respondent has proceeded with caution and care in dealing with this development. It had been advised that it was in compliance condition 2(3) even before the serving of the warning notice by the county council and in response to the service of that warning notice entered negotiations with the local authority.

39. This is not a case of a developer pushing ahead regardless. On the contrary it has proceeded since November 2004 with the active support and blessing of the planning authority and in the reasonably held opinion that it was not in breach of the planning permission.

40. In the circumstances I decline to make any order curtailing the respondent's construction works as requested by the applicant.

