Neutral Citation Number: [2007] IEHC 298

THE HIGH COURT

[2006 No. 5574 P]

BETWEEN

GLENKERRIN HOMES

PLAINTIFF

AND

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

DEFENDANT

Judgment of Mr. Justice Clarke delivered 26th April, 2007.

1. Introduction

1.1 These proceedings concern the legal entitlement, if any, of the defendant County Council ("Dun Laoghaire Rathdown") to alter the previously existing practice of issuing what have come to be called "letters of compliance" in relation to the payment of financial contributions required under a planning permission. Such letters of compliance are designed to satisfy purchasers of the fact that the financial contributions required under the Planning Permission concerned have been paid. It is, of course, possible that a developer might want a formal document from a local authority evidencing compliance with other conditions of a planning permission. However for the purposes of this judgment "letters of compliance" refers to letters evidencing compliance with financial contribution conditions. The issues which arise between the parties are also inextricably linked to the requirements placed upon many developers under Part V of the Planning and Development Act, 2000 ("the 2000 Act") (as amended) relating to the obligation of such developers to contribute to the provision for social and affordable housing. It will be necessary to set out the legislative framework within which such obligations arise in due course. However, and in general terms, the relevant legislation requires the insertion of a condition in certain planning permissions which condition, in turn, requires an agreement between the planning authority and the developer concerning the manner in which provision will be made for social and affordable housing. The legislation also provides for certain dispute resolution procedures.

1.2 The dispute between the parties in this case stems from the absence of an agreement between the plaintiff ("Glenkerrin") and Dun Laoghaire Rathdown as to how those obligations are to be met in this case. In turn Dun Laoghaire Rathdown maintains that, in the absence of such an agreement, it is under no obligation to provide letters of compliance. The issue which I have to decide is as to whether, in all the circumstances, Glenkerrin has a legal entitlement to the issue of letters of compliance.

1.3 While the principle behind the requirement of the legislation in respect of social and affordable housing is clear, it is much less clear that the precise way in which the obligations of a developer and the entitlements of the local authority are to be determined have been fully worked out. It seems to me that it can truly be said that in respect of schemes such as this, the devil is in the detail. Where that detail is not adequately worked out so as to give rise to clear and unambiguous legislation, then the practical operation of the scheme is highly likely to become embroiled in litigation. It should be said, of course, that neither Glenkerrin or Dun Laoghaire Rathdown are responsible for the legislation. Both, however, have to operate within it. While I note in the course of this judgment certain aspects of the facts for which the parties may be responsible (such as the fact that Glenkerrin were permitted by Dun Laoghaire Rathdown to substantially complete the development without either side bringing the issues which had arisen under the social and affordable housing requirement to a head) nonetheless I am sympathetic to the fact that both are attempting to operate new, and at least in certain respects, somewhat unclear legislation.

2. Procedural History

2.1 The action came on for hearing before me in late February. Having regard to the urgency of the issue, (the dispute had the potential to hold up the sale of a significant number of properties within the development concerned), I indicated to the parties that I would, on 9th March, set out my principal conclusions and indicate the form of order which I proposed to make. I further indicated that it was unlikely that I would be able, within that timeframe, to deliver a detailed reasoned judgment.

2.2 On the 9th March I set out my principal conclusions. Those conclusions are annexed to this judgment. The purpose of this judgment is to set out in full the reasons for coming to the conclusions which I had delivered on 9th March.

2.3 While the overall issue between the parties is a relatively net one, a number of separate questions of some complexity were canvassed in the course of the hearing before me. In the circumstances I propose to firstly set out the overall issues which have arisen between the parties.

3. The Issues

3.1 The first question which arises for consideration is as to whether there is any entitlement on the part of a developer to a letter of compliance in the first place. It is common case that there is no statutory entitlement. Glenkerrin maintains that it has a legitimate expectation to obtain letters of compliance. Obviously if there is no legal entitlement to obtain letters of compliance at all, then Glenkerrin's case must necessarily fail and this issue is, therefore, logically the first issue which needs to be addressed.

3.2 In the event that there is a legal entitlement, of some sort, to obtain letters of compliance, then a further issue arises as to whether there are any limitations on the obligation on Dun Laoghaire Rathdown to issue, and Glenkerrin to obtain, such letters of compliance. In particular the question arises as to whether Dun Laoghaire Rathdown are entitled to terminate or alter the practice of issuing letters of compliance and, if so, whether notice must be given. In addition Dun Laoghaire Rathdown argues that even if it is obliged, in general terms, to issue letters of compliance, it cannot be obliged so to do in circumstances where the issuing of such letters of compliance would facilitate the sale of any property where the property concerned might be required to be made available for the provision of social and affordable housing.

3.3 This latter question, in turn, raises a series of difficult issues concerning the operation of the legislation providing for social and affordable housing.

3.4 I propose dealing with the groups of issues in the order in which I have set them out. I therefore turn to the question of whether there is a legitimate expectation for the continuance of the practice of issuing letters of compliance. It is first necessary to consider the relevant facts which were not significantly disputed.

4. Letters of Compliance – The Facts

4.1 In the course of the hearing evidence was tendered on behalf of Glenkerrin from Ms. Orla Coyne, who is an experienced conveyancer and has been a member of the Conveyancing Committee of the Law Society for some time. That evidence establishes that as far back as 1984, the guidance notes issued by the Conveyancing Committee for the assistance of solicitors engaged in

conveyancing, noted the importance of obtaining letters from the relevant planning authority confirming compliance with financial contribution conditions. Ms. Coyne further stated that the practice, in all probability, predated those guidance notes.

4.2 Furthermore evidence was tendered of the standard form of certificate issued by architects certifying compliance with planning conditions generally. The standard form typically used provides for an express exclusion for certification in respect of financial contributions. There is also a blank portion of the standard form which permits the architect concerned to exclude any other planning conditions from his certificate.

4.3 Therefore, in general terms, it would appear that it is common practice for a developer's architect to certify compliance with most of the conditions specified in the planning permission. This is, of course, logical, as most of the conditions will be within the direct competence of the architect to so certify and will concern questions as to whether the physical construction of the development is in accordance with the planning permission, including any conditions which impact upon that physical construction. Therefore, for a very considerable period of time, compliance with all of the conditions and terms of the planning permission was likely to be capable of being certified by a combination of a certificate in the standard form from the developer's architect together with a certificate of compliance with the financial contribution obligations from the local authority concerned.

4.4 In those circumstances it is hardly surprising that certificates of compliance with financial contribution conditions came to hold a status akin to a document of title in conveyancing transactions. Such documents are not, of course, strictly speaking, documents of title in that they do not affect the ownership of a property involved in a conveyancing transaction. However it is clear that in more recent times, many of the matters (planning being one) which require to be explored in the course of a conveyancing transaction, are not matters that would, historically, have been regarded as matters of title as such. As such issues do, however, have the potential to affect the enjoyment of the property by the purchaser, it is not surprising that solicitors in conveyancing practice have been careful to devise practices to ensure, insofar as possible, that such matters are in order prior to the closing of a sale. In the case of new, or recent, developments, then it is obvious that a solicitor acting for a purchaser will require to be satisfied that the development has been constructed in accordance with the relevant planning permission or, at least, that any failure to so construct is not such as is, in practice, likely to lead to any adverse consequences for the purchaser.

4.5 Against that background I am satisfied that letters of compliance achieved a status that might be described as a quasi documents of title. It would appear to be common case that all local authorities have, as a matter of practice, issued such letters of compliance for a considerable number of years. I also accept the evidence of Ms. Coyne that letters of compliance have come to be regarded as quasi documents of title and that it is unlikely that a solicitor representing a purchaser in a conveyancing transaction in relation to a property which was built on foot of a planning permission which, in turn, provided for a financial contribution, would advise the purchaser to complete the sale without having a certificate of compliance. On the facts it seems clear to me, therefore, that the issuance of certificates of compliance has become a universal practice such that certificates of compliance have come to be regarded by conveyancers as an essential document to be passed over on the closing of a transaction involving a property to which the regime applies.

4.6 It is against that background that the contention on the part of Glenkerrin that it has a legitimate expectation to obtain letters of compliance needs to be judged. I should also note that it will be necessary, in due course, to address certain additional issues under this heading raised on behalf of Dun Laoghaire Rathdown County Council which draw attention to the fact that the 2000 Act has, in certain material respects, altered the status of different types of planning conditions. This is an issue to which I will return in due course.

5. Legitimate Expectation

5.1 Against the above factual background Glenkerrin maintains that it is entitled, as a matter of legitimate expectation, to the issuance of certificates of compliance.

5.2 In *Glencar Exploration plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84 Fennelly J., having reviewed the developing jurisprudence in respect of legitimate expectation, made the following remarks which he described as provisional:-

> "Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted upon the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements are extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However the proposition I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine".

5.3 Previously in *Abramson v. Law Society of Ireland* [1996] 1 I.R. 403 at 423 McCracken J. annunciated the following four propositions:-

> "1 It is now well established in our law that the courts will, as a general rule, strive to protect the interests of persons or bodies who have illegitimate expectations that a public body will act in a certain way.
>
> 2 In protecting those interests the court will ensure that where that expectation relates to a procedural matter, the expected procedures will be followed.
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> 3. Where the legitimate expectation is that a benefit will be secured, the courts will endeavour to obtain that benefit or to compensate the applicant whether by way of an order of mandamus or by an award of damages provided that to do so is lawful.
>
> 4. Where a Minister or public body is given by statute or statutory instrument a discretion or a power to make regulations for the good of the public or of a specified section of the public, the court will not interfere with the exercise of such discretion or power, as to do so would be tantamount to the court usurping that discretion or power itself and would be an undue interference by the court in the affairs of the persons or bodies to whom or to which such discretion or power was given by the legislature".

5.4 It is clear from the above two passages that amongst the first issues that need to be addressed is to determine the nature of the power or discretion which is in question in the proceedings. In this case the court is concerned with a discretion, if that be the correct term, to provide a certificate of compliance. It does not seem to me that the issuing or refusal to issue of such a certificate amounts, in reality, to a statutory discretion in the first place. The fact remains that the certificate amounts to little more than a confirmation that a certain event (i.e. the payment of the relevant contributions) has occurred. Where the payment has, in fact, been made, then there would seem to be little reason, in principle, why the local authority should not confirm that matter. Were it not for the complications which arise in this case relating to compliance with the relevant requirements in respect of social and affordable housing, I would have little difficulty in principle in declaring that a developer who has paid the relevant financial contributions is entitled to an appropriate form of certification of that fact from a local authority. The planning permission on foot of which the developer has operated is conditional upon making financial contributions. Therefore, the lawfulness or otherwise of the actions of the developer may, amongst other things, be dependent upon the making of the relevant payments. Where third parties (such as purchasers) have a legitimate interest in ascertaining whether the relevant payments have been made, then it seems to me that it follows that there is an obligation on the local authority to issue an appropriate confirmation that they have, in fact, been paid.

5.5 Having regard to the fact that Dun Laoghaire Rathdown together with, it would appear, all other local authorities in the country, have permitted a practice to evolve whereby certificates of compliance have come to be regarded as quasi documents of title in relation to newly built homes, I am satisfied that, in general terms, a legitimate expectation exists that that existing practice cannot be terminated without reasonable notice.

5.6 It is clear from the passage from *Glencar Exploration* referred to above that the promise or representation may be expressed or implied. I am satisfied that an implied representation can derive from the universal following of a particular practice for a prolonged period of time. It is, of course, important to note that the executive enjoys a constitutional entitlement to change policy. Furthermore bodies exercising a statutory role (such as Dun Laoghaire Rathdown in this case) also enjoy an entitlement to alter the policy within which they exercise their statutory functions subject only to the overall requirement that whatever policies are adopted must be consistent with their statutory role as defined. It is clear, therefore, that a legitimate expectation cannot arise to the effect that a policy will not be changed. Thus in *Hempenstall v. Minister for Environment* [1994] 2 I.R. 20, Costello J. determined that notwithstanding the fact that a new policy in respect of the issuing of taxi licences would have the effect of very significantly reducing the value of existing licences, nonetheless the overriding entitlement to change policy prevented a legitimate expectation arising. I should, therefore, emphasise that the existence of a longstanding practice does not give rise to any legitimate expectation that that practice will not change. However where third parties reasonably arrange their affairs by reference to such a practice it seems to me that such third parties are entitled to rely upon an expectation that the practice will not be changed without reasonable notice being given. The notice that would be required is such as would reasonably allow those who have conducted their affairs in accordance with the practice to consider and implement an alternative means for dealing with the issues arising. On the facts of this case a reasonable period would need to be given to enable those involved in conveyancing (and in particular the Conveyancing Committee of the Law Society) an opportunity to consider and make recommendations as to the manner in which conveyancing issues arising in relation to planning in respect of newly built homes should be dealt with in the absence of certificates of compliance.

5.7 In that context it is necessary to refer to the notice actually given in this case. It would appear that two separate decisions to limit the issuance of certificates of compliance were taken by Dun Laoghaire Rathdown. Both decisions are inextricably linked to the circumstances surrounding the dispute relating to social and affordable housing. I therefore propose dealing with those decisions in more detail in that context later in the course of this judgment. However for the purposes of determining the extent of the legitimate expectation which parties, such as Glenkerrin, might have, it is sufficient to note that there does not appear to have been any general publication of the intention to limit the practice of giving certificates of compliance in cases where Dun Laoghaire Rathdown was not satisfied that appropriate arrangements to satisfy the social and affordable housing requirements were in place.

5.8 As I have noted such certificates, to the knowledge of local authorities including Dun Laoghaire Rathdown, had achieved a status as a quasi document of title. In those circumstances it seems to me that it would be necessary, before introducing a significant variation in the practice, for Dun Laoghaire Rathdown (and indeed any other planning authority of like mind) to give a sufficient public notice to allow those intimately involved in the matter (such as developers and conveyancers) to work out a reasonable alternative means for providing satisfactory evidence of compliance with planning conditions on the closing of a sale.

5.9 I am, therefore, satisfied that Glenkerrin has a legitimate expectation, in general terms, that Dun Laoghaire Rathdown will issue certificates of compliance in accordance with the well established practise unless and until reasonable notice of a change in that practice has been given. I am not satisfied on the facts of this case that such reasonable notice has been given. The next question that arises is, however, as to the extent of any such legitimate expectation.

6. Limits of the Expectation

6.1 However I am also satisfied that the expectation of Glenkerrin is not an absolute one. Dun Laoghaire must remain entitled to refuse to give a certificate of compliance where there is a good reason for so doing. The purpose for the giving of a certificate of compliance in the first place is to enable the completion of sales of houses and apartments built on foot of the relevant planning permission to take place. For reasons which I will address in more detail later, one of the concerns of Dun Laoghaire Rathdown is that once a sale takes place of a particular house or apartment, that house or apartment becomes unavailable to meet the social and affordable housing obligations arising out of the development concerned. In those circumstances it seems to me that there is a clear nexus between questions concerning the issuing of certificates of compliance on the one hand and those social and affordable housing obligations on the other hand. It will be necessary, therefore, to turn in early course to the regime in respect of social and affordable housing and its application to the facts of this case. However before so doing it is also necessary to deal with one argument raised on behalf of Glenkerrin.

6.2 It was suggested on behalf of Glenkerrin that the use of a refusal to give a certificate of compliance as a means of enforcing obligations under the social and affordable housing terms of a planning permission, amounts to an impermissible form of collateral enforcement.

6.3 In that regard reliance is placed on *McDowell v. Roscommon County Council* (Unreported, High Court, December, 21st 2004, Finnegan P). In that case Roscommon County Council had purported to refuse to extend the life of a planning permission on the basis that development carried out to date was, as argued by the planning authority, unauthorised. Finnegan P. set aside the decision on the basis, inter alia, that the planning authority had improperly used the occasion of an application for an extension of the life of a planning permission, for the purposes of enforcement. In that context Finnegan P. said the following:-

> "It is not the planning authority's function pursuant to s. 42 of the Act of 2000 to inquire as to whether the development insofar as it had been completed was in compliance with planning permission and on the basis of its conclusion of that inquiry to decide on the application: rather it is confined to the matter specified in s. 42 in reaching its decision. The

> planning authority having reached a conclusion on compliance did not proceed to a consideration of the matters on which s. 42 requires it to be satisfied and indeed determined that its conclusion in relation to compliance precluded it from considering the matter further."

6.4 On that basis Finnegan P. determined that the planning authority had taken into account an improper consideration and the decision to refuse the extension of the planning permission was, therefore, quashed.

6.5 By analogy it is argued that Dun Laoghaire Rathdown, in this case, is using the grant or refusal of a certificate of compliance as a means of enforcement of what it contends is a failure on the part of the developer to comply with the conditions of the planning permission concerned relating to Glenkerrin's social and affordable housing obligations.

6.6 It does not seem to me, however, that an appropriate analogy can be drawn between the two cases. Firstly, and most importantly, the plaintiff in *McDowell* sought to exercise a statutory entitlement to have properly considered an application for an extension of a planning permission. The statute itself set out the matters which should be properly taken into account on such an application. The attempted collateral enforcement in that case was, therefore, in direct breach of the obligation on the planning authority concerned to decide the application under s. 42 on the basis of the criteria which the statute itself set out.

6.7 Here, the court is concerned with a non-statutory scheme (if it can even be elevated to the status of a scheme). The whole purpose of the issuance of certificates of compliance is to facilitate the closure of the sales of property. Where that closure would (or might) give rise to a situation where the local authority concerned would be precluded from obtaining a benefit which it is arguably entitled to, under the requirements in respect of social and affordable housing, then it seems to me that no legitimate expectation could extend so far as to entitle a developer, in those circumstances, to obtain a certificate of compliance.

6.8 If the effect of giving a certificate of compliance would be to permit the sale of a property to close and if that very sale were to put a property beyond the reaches of the local authority concerned in terms of its social and affordable housing entitlement and on the further assumption that there was a reasonable basis for suggesting that the relevant property might be required to satisfy that social and affordable housing requirement, then it seems to me that no legitimate expectation can be said to exist.

6.9 I am, therefore, satisfied that the legitimate expectation of a developer, such as Glenkerrin, is limited to circumstances where the closure of a sale effected on foot of a certificate of compliance (when regard is also had to all other properties within a development in respect of which certificates of compliance have already been issued) would not lead to a situation where there was a reasonable risk that the local authority concerned would not be able to achieve the proper benefits to which it is entitled in relation to he provision of social and affordable housing under the provisions of Part V of the 2000 Act. I now turn to the statutory regime in relation to social and affordable housing.

7. Social and Affordable Housing

7.1 For the reasons which I have sought to set out, the issues in this case concerning certificates of compliance are inextricably linked to the statutory regime in respect of social and affordable housing. It is, therefore, necessary to turn to that regime and then go on to consider how the regime has been applied on the facts of this case. Sections 96(2) and 96(3) of the 2000 Act (as inserted by the Planning and Development (Amendment) Act, 2002) provide for the regime by reference to which a local authority is entitled to the benefits of Part V in relation to obtaining lands, sites, houses or money connected with the provision of social and affordable housing.

7.2 The default position (under sub.s (2)) is that the local authority is entitled to a transfer of a proportion of the land the subject of the planning application concerned up to a percentage (not exceeding 20%) as specified in the housing strategy of that local authority and as, in turn, incorporated into the development plan of the authority. The relevant percentage in this case is 20%. The land is to be transferred at a price which, in practical terms, discounts any value attributable to the planning permission itself or, indeed, any other possible planning permission. Section 96(3) provides for a number of alternative methods by which effect can be given to the entitlements of the local authority under Part V. The first six alternatives provide for particular specific measures by which those entitlements can be met. The seventh and eight alternatives provide for compliance by means of a combination of measures. Four of the specific six alternatives involve the building and transfer of houses or the transfer of serviced sites on either the land which is the subject of the planning permission or other lands. In addition the transfer of other land itself is permitted and a financial payment is also contemplated.

7.3 Against that statutory background it is necessary to turn to the facts of this case.

8. Part V – The Facts

8.1 What s. 96(2) specifically does is to require that a planning permission contain a condition that the applicant (or other person with an interest in the land) "enter into an agreement under this section with the planning authority, providing, in accordance with this section, for the matters referred to in paragraph (a) or (b) of subs (3)". Such a requirement, in fact, was included in the planning permission in this case. A condition was included in the relevant planning permission, being condition 12, in the following terms:-

> "Within eight weeks of the date of this order, the developer shall enter into an agreement with the planning authority under s. 96 of the Planning and Development Act, 2000 (as amended) in relation to the provision of social and affordable housing in accordance with the requirements of the planning authority's housing strategy unless, before the expiry of that period, they shall have applied for and have been grant an exemption certificate under s. 97 of the Planning and Development Act, 2000."

8.2 The proviso in relation to an exemption certificate does not arise. It, therefore, follows that the planning permission was conditional upon an obligation to enter into an agreement, within eight weeks, in relation to the provision of social and affordable housing.

8.3 It would appear that little action was taken on either side in relation to reaching such an agreement within the timeframe specified in the condition.

8.4 It would also appear that Dun Laoghaire Rathdown did not actively pursue an agreement for the transfer of 20% of the lands (i.e. the default position under s. 96). At all times Dun Laoghaire Rathdown maintained a position that it wished, instead, to obtain 20% of the units as actually built. It will be recalled that the transfer of such units is one of the alternative forms of agreement permitted under sub. s(b). Glenkerrin maintained a position that it wished to provide half of its obligations (i.e. that part thought likely to be referable to affordable housing) in the form of such units. However it maintained that the overall development was not suitable for social housing and suggested that it should provide cash instead to make up for that portion of its obligations. In general terms social

housing is acquired by the local authority concerned with a view to enabling it to provide the units to persons to whom it has an obligation to supply accommodation. Affordable housing is transferred to an occupier at a reduced price either by a direct transfer by the developer to that person or by a sale onwards by the local authority. The scheme provides for the persons entitled to apply but it follows that they have to be in a position to fund the acquisition themselves albeit a reduced (or "affordable") price. The question of the transfer of land itself never appears to have been considered by either party in any event. Neither was there any significant progress in relation to the negotiations although there was some contact between nominees of both parties designed to consider questions that would be relevant to the valuation of such units as might be transferred. Although the detail of such matters is not relevant to this case, the statute provides for a means for the valuation of any property (be it land or units) which requires to be transferred on foot of an agreement under the section.

8.5 At the level of principle, however, the parties each maintained their basic position with Glenkerrin maintaining that its obligation should be met partly by units and partly in cash and Dun Laoghaire Rathdown maintaining a position that the entirety of the obligation should be met in units.

8.6 While the negotiations, such as they were, remained unresolved, the development has proceeded to a point where it is at a significant stage of completion. This clearly happened to the knowledge of Dun Laoghiare Rathdown. In practical terms it is now no longer possible to enter into an agreement for the transfer of land (or indeed serviced sites) as the development is now largely completed. In practical terms, therefore, the only means which remain for satisfying the social and affordable housing obligations of Glenkerrin in this case is by the provision of units or cash.

8.7 At or around the time when these proceedings were commenced Glenkerrin abandoned its contention that it should meet part of its obligations in cash and accepted that the entirety of its obligations would have to met by the provision of the units. It then purported to invoke one of the dispute resolution procedures provided for in s. 96. It will be necessary to turn, in some more detail, to those procedures in the course of this judgment. However it is now clear that it is accepted by both sides that the social and affordable housing obligations of Glenkerrin will be met by the provision of units. There are, however, significant disputes between the parties both as to how those obligations in terms of units should be met and, indeed, as to what is the appropriate dispute resolution mechanism. It should be noted that it is accepted on all sides that, even where units are to be provided, it may be necessary that there be a small financial contribution because the total amount of the economic benefit which the local authority is entitled to obtain under the provisions of s. 96 may not correlate to an exact number of units so that there may be a small difference representing a portion of a unit which will, in practice, have to met in cash.

8.8 As will be seen the current issues between the parties are, therefore, inextricably linked with the dispute resolution mechanisms provided for in s. 96 and I now turn to those procedures. Those procedures are relevant to these proceedings for it is argued, correctly in my view, by Glenkerrin that there would not be a good reason for refusing a certificate of compliance where all that remained outstanding was the resolution of a binding arbitration. While the agreement contemplated by the condition in the planning permission might not have been reached, a mechanism where such an agreement might be imposed in a binding fashion would be in place.

9. Social and Affordable Housing - Dispute Resolution

9.1 Section 96 provides for two different means of dispute resolution. The relevant provisions of the section are as follows:

Sub. s(5) provides that:-

> "In the case of a dispute in relation to any matter which may be the subject of an agreement under this section, other than a dispute relating to a matter that falls within sub. s(7), the matter may be referred by the planning authority or any perspective party to the agreement to the board for determination."

Sub s(7) provides as follows:-

> "(a) Subject to paragraph (b) a property arbitrator appointed under s. 2 of the Property Values (Arbitration and Appeals) Act, 1960, shall (in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919), in default of agreement, fix the following where appropriate:
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> (i) The number and price of houses to be transferred under sub. s(3)(b)(i), (iv), (vii) or (viii);
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> (ii) the number and price of sites to be transferred under sub. 3(b)(ii) (vii) or (viii);
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> (iii) the compensation payable under subs. (6) by a planning authority to the owner of land;
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> (iv) the payment of an amount to the planning authority under subs. (3)(b)(vi), (vii), or (viii); and
>
> (v) the allowance to be made under s. 99(3)(d)(i)."

9.2 In addition (subs. 8) provides as follows:-

> "Where it is a condition of the grant of permission that agreement be entered into in accordance with subs. (2) and, because of a dispute in respect of any matter relating to the terms of such an agreement, the agreement is not entered into before the expiration of eight weeks from the date of the grant of permission, the applicant or any person with an interest in the lands to which the application relates may –
>
> (a) if the dispute relates to a matter falling within subs. (5), refer the dispute under that subsection to the Board; or
>
> (b) if the dispute relates to a matter falling within subs. (7) refer the dispute under that subsection to the property arbitrator.
>
> and the Board or the property arbitrator, as maybe appropriate, shall determine the matter as soon as practicable."

9.3 It seems to me that the relevant provisions of s. 96 require that any issue concerning the terms of any agreement which may require to be reached under s. 96 can be referred, for dispute resolution, either to An Bord Pleanála ("The Board") or to the property

arbitrator. The matters which may be referred to the property arbitrator under subs. (7) include the "number and price of houses to be transferred". The section is silent as to whether there is conferred on the property arbitrator a jurisdiction to enable him to identify, in case of dispute, which units should, in fact, be transferred (in a case where there is a material difference between the individual units such as, in the case of apartments, as here, units of different size or of a different location by reference to floor or, indeed, by reference to any other factors such as entitlements to parking). I am satisfied, however, that the property arbitrator has such a jurisdiction. Where the units in a development are of different types, by reference to criteria such as those which I have just identified, then the question of the identification of the units to be transferred on foot of an agreement is so inextricably linked to the question of the number and price of the units to be so transferred, that it seems to me that a jurisdiction to determine those matters must necessarily be implied. If, as is argued on behalf of Dun Laoghaire Rathdown, such matters could only be the subject of an agreement with the local authority itself or, in the alternative, be determined by the Board, then there would be the potential for either stalemate, (if the matter could only be resolved by agreement) or a whole series of separate dispute resolution hearings with, indeed, a potential for circulatory (if the Board has a partial jurisdiction). It does not seem to me that the section contemplates a situation where a stalemate could arise.

9.4 Any issue of possible dispute as to the terms of the arrangements necessary to comply with Part V can, in my view, be refereed to one or other dispute resolution process. However it is not possible to fix a price until the type of unit is identified by reference to any factor that might be material in identifying the price. It may not, on the other hand, be possible to identify, with any precision, the precise types of units, or mix of units, to be transferred until such time as the relativity between the prices to be attributable to such units has itself been determined. Having regard to the clear statutory intent that all issues of detail should be resolved by either the Board or the property arbitrator as a matter of urgency, it seems to me that the construction contended for by Dun Laoghaire Rathdown would have quite the opposite effect. It is, therefore, a construction which I would only place upon the section if constrained by the clear wording of the section to construe it in that fashion.

9.5 It seems to me that where issues arise as to whether, at the level of general principle, the social and affordable housing obligations of the parties should be met by (say) the provision of cash, other land, serviced sites, a combination of those, or the like, then the Board is the only body which has jurisdiction to resolve such questions. However once the issue of principle as to the means by which the social and affordable housing obligations of the party concerned is to be met has been determined then it seems to me that questions of value (including the identification of the particular type of units to be transferred), can be determined by the property arbitrator. Such a construction has the merit of dividing any possible disputes requiring resolution into two relatively separate types of dispute with a logical sequence as and between them. The type of disputes which can be referred to the Board are, therefore, at the level of principle as to the precise manner in which the obligations are to be met on the facts of any individual case. Where no dispute arises as to those matters or where any dispute that does arise has been determined by the Board, then any further disputes concerning the precise means of implementing the obligation in principle which relate to the identification of types of units to be transferred, the price and number of such units and the like can then be determined by the property arbitrator. It, therefore, follows that in such circumstances (when the property arbitrator has determined the matters properly referred to him) all disputes would be resolved and the agreement as determined either in whole or in part by the parties, the Board or the property arbitrator, could be implemented.

9.6 It is also worth noting that the legislation does not require that a developer can be made to enter into an agreement for any of the alterative means for making provision for social and affordable housing. While the developer can, therefore, be obliged to give 20% of the land, he cannot be obliged to enter into an agreement to provide, instead of that land, developed sites, fully constructed units, cash or a combination of those. It should also be noted that the statute itself sets out the criteria to be met by the local authority in reaching agreement by it in relation to any alternative agreement that it might enter into. The criteria are set out in subs. (3)(c) and require the authority to consider, under a number of headings, whether an agreement which it might consider entering into will allow it, in the best way, to meet its obligations both as to housing and as to the prudent management of its resources.

9.7 In the context of both of those provisions it was necessary for me to consider whether an agreement in respect of the alternative means of meeting the social and affordable housing requirement could be imposed upon the parties at all. The fact that the legislation recognises that the developer cannot have such an agreement imposed upon him speaks for itself. The fact that the local authority has to give consideration to its own housing and financial requirements might tend to suggest that no third party could impose an obligation on the local authority in that regard. It is, amongst other things, the very fact that the legislation does not seem to have set out in anything remotely resembling clear terms, how those conflicting issues might be resolved that led me to make the comments at para. 1.3 above concerning the detail of these arrangements not having been properly worked out.

9.8 Despite those misgivings I did ultimately come to the conclusion that the legislation contemplated that all questions of dispute were capable of third party resolution. While it is clear that a developer cannot have an agreement to (say) provide built apartments imposed upon him, I am satisfied that where, without having reached an agreement as to how to meet the social and affordable housing obligations in respect of the planning permission concerned, the developer proceeds to complete the development, the developer, therefore, places itself in a position where the only means of complying with its obligations is to provide either such units or cash. While the developer concerned could not, therefore, have had an agreement in respect of units or cash imposed upon it at the beginning, it has exposed itself to that possibility by rendering any other means of meeting its obligations impossible. Likewise, while recognising that the local authority has to exercise, at least initially, a judgment as to its social and affordable housing requirements and the proper management of its financial resources, I am nonetheless satisfied that the legislation as a whole does not contemplate the possibility of the local authority being, in effect, given a veto over a planning permission by simply not entering into an appropriate agreement. While the legislation is by no means clear in this regard I was, therefore, satisfied that it contemplated some form of final determination by an appropriate resolution mechanism in all cases.

9.9 I should deal, in this context, with an argument raised on behalf of Dun Laoghaire Rathdown which made reference to the significant number of occasions when, in the course of s. 96, there is reference to "an agreement". On that basis it is suggested on behalf of Dun Laoghaire Rathdown that, in the absence of some form of agreement in principle between the parties as to the manner in which the social and affordable housing requirement is to be met, the dispute resolution mechanisms cannot be operated. It seems to me that that argument is inconsistent with the provisions of subs. (5) which makes it clear that "any matter" which may be the subject of an agreement can either be referred to the Board or the property arbitrator. It seems to me, therefore, that while the section speaks frequently of an "agreement", the term "agreement", as used in the section, must include an arrangement arrived at as a result of one or other or both of the dispute resolution mechanisms specified. The term "agreement", it seems to me, must, therefore, be taken in the context of subs. (5) and thus must be taken to include an arrangement determined by the appropriate dispute resolution mechanism. Where, therefore, it is clear (whether by agreement or because no other means of compliance with Part V is any longer available) that the obligations of the developer and the entitlements of the planning authority under Part V are to be met by the transfer of either units or sites then it seems to me that the property arbitrator has jurisdiction to resolve any dispute relating to the number, identity and price of such sites or units.

9.10 It is equally clear that the property arbitrator has no jurisdiction in relation to issues which might impose upon a local authority an obligation to accept a type of arrangement in principle which that local authority does not wish to accept. Thus, for example, a question of whether there should be a monetary payment, in whole or in part satisfaction of the developer's obligations, whether the local authority should take sites rather than units, questions as to the mix between one or more of the types of property or money that should be transferred, are all matters outside the remit of the property arbitrator. In the absence of agreement, such matters can only be resolved by the Board. However where such matters are no longer in, or capable of, dispute by virtue of either:-

(a) an agreement in principle between the parties,

(b) a determination by the Board; or

(c) the fact that other options are no longer, in practice, available;

then it seems to me that the remaining issues concerning the precise identity of the units to be transferred and as to the number and price thereof, are matters within the jurisdiction of the property arbitrator.

9.11 Applying those principles to the facts of this case I am satisfied that, given that the only means by which Part V can now, in practice, be satisfied, is by the transfer of units, the remaining issues in dispute are within the jurisdiction of the property arbitrator to determine.

10. The Policy of Dun Laoghaire Rathdown

10.1 In the light of those findings it is necessary to return to the basis upon which Dun Laoghaire Rathdown maintains that it is not obliged to make certificates of compliance available on the facts of this case. The evolution of the current policy of Dun Laoghaire Rathdown needs to be examined. Evidence was tendered on behalf of Dun Laoghaire Rathdown from Bernie O'Reilly, a senior official in the Housing Department. It would seem that the longstanding practice of issuing certificates of compliance changed in the course of 2006 in two stages. Firstly in May 2006 a decision was taken to issue only up to 80% of compliance letters for a development but to withhold the final 20% if, in the view of the local authority (in practice the Housing Department) a Part V condition had not been complied with. The logic of this position stemmed from the policy of Dun Laoghaire Rathdown in relation to compliance with Part V conditions.

10.2 That policy appears to have been in favour of obtaining units rather than land or money. The stated reason for that policy, which appears to me to be entirely reasonable, was that having regard to the needs of Dun Laoghaire Rathdown in respect of both social and affordable housing and having regard to the limited developable land available, those needs and obligations were more readily met by purchasing (at the beneficial price provided for in the legislation) units in each development. The housing policy of Dun Laoghaire Rathdown specifies that it would wish to purchase 20% of the units concerned. There may be issues as to whether it is entitled to demand that number of units. It seems to me that those issues are ones which are properly within the jurisdiction of those involved in the dispute resolution system and it is not, therefore, an issue upon which I should express any view at this stage. Such a matter would only become an issue for the court in the event that one or other of the dispute resolution bodies were to come to a determination which one or other of the parties suggested was not sustainable in law.

10.3 Be that as it may, the fact remains that Dun Laoghaire Rathdown contends that it is entitled to 20% of the units. This is disputed by Glenkerrin. However the policy of issuing certificates of compliance for up to 80% of a development stemmed from the need, as Dun Laoghaire Rathdown saw it, to ensure that at least 20% of the units were retained so as to meet what Dun Laoghaire Rathdown maintained was the obligation of Glenkerrin under the social and affordable housing requirement. In simple terms if certificates of compliance were withheld in 20% of the cases, then 20% of the sales could not complete. If Dun Laoghaire Rathdown were to establish an entitlement to 20% of the units then 20% of the units would be available to meet that obligation.

10.4 As I understand the evidence of Ms. O'Reilly, the Housing Department of Dun Laoghaire Rathdown had been pressing for a more stringent approach in respect of compliance with social and affordable housing obligations for some time. It seems to me that in that respect the Housing Department were acting reasonably. Dun Laoghaire Rathdown has a statutory obligation to provide both social and affordable housing. It is entirely reasonable for Dun Laoghaire Rathdown to take measures to ensure that its full entitlement under planning conditions designed to facilitate social and affordable housing is obtained, so that it can, in turn, meet its obligations to those persons who are in need of social and affordable housing. Indeed, in general terms, I could not see any difficulty with the policy adopted in May 2006 insofar as it was designed to ensure that, in the event that Dun Laoghaire Rathdown secured the maximum amount of units which it claimed, such a number of units would be available to meet its needs.

10.5 However a further change in policy appears to have occurred in or about October 2002 when the County Manager issued a direction in relation to compliance letters in the following terms:-

> "In case where there has been a failure by a developer to enter into an agreement in relation to Part V in accordance with the condition of the planning permission and solicitors acting on behalf of prospective purchasers request a letter of compliance with the planning permission or with selected conditions of the permission either no such letter should be issued by the Council or any letter that does issue should state that the development has not been completed in accordance with the planning permission".

10.6 It is clear that, as a result of the October policy change, no certificates of compliance will be issued where there is not in place an agreement under Part V. This will be so even though any sales affected by the issue of letters of compliance could not possibly interfere with the entitlements of the local authority to receive the maximum number and type of units under the social and affordable housing provisions.

10.7 The stated basis for this change in policy derives from a perceived inadequacy of the "80%" policy adopted the previous May. In evidence Ms. O'Reilly indicated that a difficulty with that policy was that it, in practice, allowed the developer to choose the 80% of units which would be disposed of, thus pre-empting the allocation of the remaining 20% to social and affordable housing. In other words if the developer was entitled to a letter of compliance until a point was reached where he has disposed of 80% of the units then, in the event that the local authority established an entitlement to the remaining 20%, its entitlement would be confined, in practice, to the 20% of units which were left. Obviously if all of the units are identical then this may make no difference. However, as Ms. O'Reilly pointed out, there are many cases where there will be practical differences between units which may affect their suitability for social and affordable housing. In the case of apartments, the size of the apartments themselves may be relevant. The requirements of the local authority may be directed towards apartments of a particular size. In addition the location of apartments by reference to the floor upon which they are located and the availability or otherwise of parking may be material considerations. All of these seem reasonable matters to be taken into account by Dun Laoghaire Rathdown in formulating a policy as to the type of units

which it would wish to obtain as a result of a Part V condition.

10.8 However what seems to me to be less justifiable is the adoption of a policy of issuing no certificates of compliance until a Part V agreement has been reached. It may well be that a local authority could reasonably conclude that issuing certificates in respect of any particular apartment might place it in a position where it could not achieve what it contended was its entitlement, even though less than 80% of the total number of apartments in the development had, at the relevant time, been sold. If, to take an example, a local authority claimed to be entitled to a specific number of three bedroom apartments for the purposes of satisfying the needs of those to whom it had obligations, and if the apartment in respect of which a certificate of compliance was requested would, if sold, reduce the stock of remaining three bedroom apartments below the level for which the local authority contended, then it might well be reasonable to refuse a certificate of compliance in respect of that apartment even though the 80% threshold had not been met.

10.9 Having regard to the fact that Dun Laoghaire Rathdown have adopted a policy of not issuing certificates of compliance at all (in the absence of a Part V agreement) it has not addressed itself (for obvious and understandable reasons) to the question of whether there exists a reasonable basis, on a case by case analysis, for refusing certificates of compliance in respect of individual apartments which are the subject of a request for such a certificate.

10.10 I am, therefore, satisfied that Dun Laoghaire Rathdown is obliged to provide Glenkerrin with certificates of compliance in relation to financial contributions, on the basis of the existing practice, unless there is, in respect of a certificate sought in relation to any particular unit, reasonable grounds for Dun Laoghaire Rathdown believing that there is a risk that the grant of such certificate (and the closure of a sale arising from its grant) will leave Dun Laoghaire Rathdown in a position where, at the high water mark of its case, it will not be in a position to secure the units to which it is entitled.

10.11 Because Dun Laoghaire Rathdown has adopted a policy of not supplying any certificates of compliance in the absence of an agreement under Part V, it has not had to consider the specifics of the grant or refusal of certificates in respect of individual units on that basis. For that reason it did not appear to me to be appropriate to make a mandatory order directed as against Dun Laoghaire Rathdown at this stage. I, therefore, proposed making a declaration to the effect that Dun Laoghaire Rathdown was obliged to make available certificates of compliance in respect of any unit within the development the subject matter of these proceedings unless Dun Laoghaire Rathdown had reasonable grounds for believing that the grant of such a certificate would facilitate a sale which would deprive Dun Laoghaire Rathdown of the opportunity to obtain the benefit of achieving the transfer of units in the development, under Part V, of a type and value consistent with the maximum case that it makes.

10.12 It, therefore, followed that the refusal to grant a certificate of compliance must be justified by reference to those criteria. The application of those criteria to the facts of any individual case may, of course, change, having regard to the position adopted by Dun Laoghaire Rathdown before the property arbitrator, or indeed any preliminary or binding rulings of the property arbitrator which may have the effect of reducing the issues between the parties and thus identifying the then maximum scale of any potential entitlement of Dun Loaghaire Rathdown.

10.13 I should also state that I am satisfied that all of the remaining issues which arise, in practice, under Part V, in respect of this development are now capable of being fully determined on a binding basis by the property arbitrator. In that context it is appropriate to refer to guidelines issued by the Minister in December 2006, in this area. Those guidelines are not binding upon local authorities but such authorities are required, under the provisions of the 2000 Act, to have regard to the guidelines in operating that legislation.

11. The Ministerial Guidelines

11.1 I should note in passing that there is very considerable merit in the suggestion made by the Minister in those guidelines that as many as possible of the issues which arise in relation to compliance with Part V should be resolved at or prior to the original grant of planning permission with only matters of detail or valuation left over. Indeed if such a practice became widespread then many of the difficult issues both of practice and of construction of the legislation with which I have had to deal would not arise. It may or may not have been the intention that the Act would work in this way. If it was then it has to be said that the Act does not make that clear. This is yet another example of how, it seems to me, the detailed working out of how these arrangements were to operate in practice in advance seems to have been less than might be desired. It is welcome that, at least belatedly, appropriate consideration seems to have been given to these matters of important detail. Clearly if such a practice had been adopted in this case, then it is unlikely that the difficult issues which have now arisen would be matters of controversy. However for better or worse the planning condition in this case did not do any more than require that there be an agreement in accordance with Part V. Furthermore, for the reasons which I have set out, the parties, in practice, allowed the development to continue to a stage approximating to completion without finalising the arrangements to be entered into.

11.2 However it also appears to me that there is considerable merit in the Minister's suggestion that where matters have been referred to binding arbitration, a certificate of compliance should issue. The fact is that whatever disputes there may be between the parties as to what issues should be determined by which arbitrator (the Board or the property arbitrator) and as to the merits of any such disputes, the result of the process will give rise to a binding obligation on the developer to meet whatever obligations are determined as a result of that dispute resolution process. It is only, therefore, to the extent that the closure of any sale might prevent the developer from being in a position to comply with whatever obligations might be determined, as a result of that process, that Dun Laoghaire Rathdown can make any reasonable case to the effect that the closure of the sale concerned could interfere with its entitlements under Part V. It is only, therefore, to that extent that a refusal to grant a certificate of compliance could be said to be directly connected with the purpose of the certificate of compliance itself. It is only in those circumstances that Dun Laoghaire Rathdown can, in my view, legitimately argue that the issue of the certificate of compliance would facilitate the closure of a sale which would have the potential to deprive Dun Laoghaire Rathdown of the opportunity to obtain a transfer of a property to which it might otherwise be entitled under Part V. Any wider refusal to issue certificates of compliance can only be seen as an attempt at collateral enforcement and, indeed, collateral enforcement in circumstances where there is in place a binding method of dispute resolution. Any such refusal would, therefore, in my view be in breach of the legitimate expectations of Glenkerrin.

12. Planning Status

12.1 Finally I should note that amongst the issues raised and argued at the hearing concerned the question of the planning status of the development as a whole in the light of the fact that there is not now in place a definitive or final agreement between the parties in relation to Part V. However there are in being other proceedings in which Dun Laoghaire Rathdown contends that the development is in beach of planning permission and, therefore, not authorised, on that very basis.

12.2 Whether or not, and if so to what extent, there is any question of unauthorised development by virtue of the Part V process having reached the stage which it has, in the time frame in which it has, is, in my view, a matter to be resolved in those proceedings and it does not seem to me to be appropriate to deal with such issues in this case.

13 Conclusion

13.1 I therefore proposed to make a declaration to the effect that Dun Laoghaire Rathdown is obliged to make available certificates of compliance in respect of any unit within the development, the subject matter of these proceedings, unless Dun Laoghaire Rathdown has reasonable grounds for believing that the grant of such a certificate would facilitate a sale which would deprive Dun Laoghaire Rathdown of the opportunity to obtain the benefit of obtaining units in the development under Part V of a type and value consistent with the maximum case that it makes.

13.2 I also gave liberty to apply in the event that it is contended that any specific refusal does not meet those criteria.