

THE HIGH COURT**COMMERCIAL****[2010 No. 2720 P]****[2010 No. 92 COM]****BETWEEN****DARLINGTON PROPERTIES LIMITED****PLAINTIFF****AND****MEATH COUNTY COUNCIL****DEFENDANT****JUDGMENT of Mr. Justice Kelly delivered on the 8th day of March, 2011****Introduction**

This case arises out of bungling and ineptitude of a high order on the part of the defendant (the County Council). Such shortcomings resulted in legal wrongs being done to the plaintiff (Darlington) for which it is entitled to redress. This is the tale.

The Land

In 2006, the County Council owned a piece of land in Ashbourne, Co. Meath. It decided to sell it. It commissioned John Ryan, Auctioneer, to advertise the sale of the land by tender. He produced a brochure in respect of the land which contained a number of maps.

The Brochure

The brochure pointed out that the land was a development site of 0.662 hectares. The land was zoned C1 in the 2001 Meath County Development Plan which meant that it could be used *"to provide for and facilitate mixed residential and business uses in existing mixed use central business area"*.

The site was an L-shaped one which was said to have an "immense development potential in a proven selling area". It was described as being "situated between Dunnes Stores and the Credit Union, adjacent to the Ashbourne New Town Center (sic) retail and residential development". The land was stated to be located "only c. 12 miles from Dublin City Center (sic) on the N2 Dublin Derry road. M50 – Ashbourne bypass opening fully in June 2006".

Of particular significance was the statement contained in the brochure that the land consisted of a "zoned site with frontage onto three roads". Two of those roads were in existence at that time. One of them was known as Killeglad Road. The frontage onto that road was about 55m in length. However, the Killeglad Road was a cul-de-sac and so had little to offer in terms of development. The second road frontage was onto Frederick Street and was only 15m in length. There was no third road (the distributor road) then in existence. The distributor road was yet to be built. On the final page of the brochure it was made clear that the distributor road was to be built within the confines of the site which was being offered for sale. The last sketch map in the brochure demonstrated the approximate route of the distributor road. It was to provide frontage onto the site and to connect to the main street of the Ashbourne Town Centre.

The Tender

Tenders had to be submitted by 5pm on Thursday, 6th April, 2006. Darlington was one of four tenderers.

The County Council accepts that the tender documents represented the distributor road as an objective of its County Development Plan 2001. They also accept that the map which formed part of the tender documents demonstrated an indicative alignment for the distributor road across the lands in sale.

The distributor road was represented in the tender documents as providing a link with the new Town Centre in Ashbourne. Its exact location and route was to be determined by future planning applications to develop the land in sale.

Accompanying the tender documents was a letter dated 22nd February, 2006, from the County Council which stated that the distributor road was an objective of the current plan and would provide access to the Town Centre.

The tender documents included a draft contract which provided at Condition No. 5 as follows:-

"The purchaser acknowledges that it is an objective of the current Meath County Council Development Plan that the distributor road referred to in the letter from the vendor dated 22nd February, 2006, listed at No. 3 of the document schedule be provided in respect of the property in sale."

On 23rd March, 2006, Darlington's then solicitors wrote to the County Council solicitors and, *inter alia*, asked the following question:-

"Is it intended that the owner of the site will have to pay the full cost of constructing the distributor road or will there be (sic) contributions made to it via levies or some other way from Meath County Council?"

The answer to this query was unequivocal. It stated that the County Council would not be making any contribution financial or otherwise to the building of the distributor road.

From the above, it is clear that the County Council's then current development plan, its sales brochure and the pre-contract correspondence provided for the building of the distributor road within the curtilage of the site in sale. That road was to link up with the Ashbourne Town Centre development. The distributor road was not merely an objective of the then current development plan but was, pursuant to condition No. 5 of the draft contract, to be built by the purchaser of the lands with no contribution forthcoming from the County Council.

The Distributor Road

As will appear later, the distributor road was of major importance for Darlington but it also figured prominently in the thinking of the planners in Meath County Council.

On 27th January, 2006, Ms. Joanna Kelly, an Executive Planner sent an email to Mr. Alan Rodgers, Area Administrator in connection with the land. This was prior to it being offered for a sale. In the course of her email she said *"there is also an indicative road to the south of the site which will have to be provided so as to ensure access to the Town Centre development"*.

On 3rd February, 2006, Mr. Rodgers wrote to the County Council's solicitors concerning the site in the course of which he said *"there is also an indicative road to the south of the site which will have to be provided so as to ensure access to the Town Centre development"*.

On 16th February, 2006, Ms. Kelly sent a further email to Mr. Rodgers concerning the land. This email concerned itself almost exclusively with the question of the distributor road. It read:-

"Alan,

I have looked at the urban detail map for Ashbourne and there is an objective to provide a distributor road to the west of the site in question.

The location of same is considered to be indicative. However, having regard to the extent of Town Centre development/redevelopment which has occurred and to facilitate a more qualitative standard of development which is compatible with permitted developments, it is my opinion that this road will have to be provided to the same standard as permitted roads in the new Town Centre (with footpaths and public lighting).

The provision of the road provides a community gain in terms of enhancing permeability to and from the site and also ensure adequate access to the Town Centre for all. In the absence of providing such a road, I consider that the potential for developing the site will be greatly reduced. (My emphasis)

Regards

Joanna."

In an attendance note which was admitted, the County Council's solicitors noted Mr. Rodgers as telling them on 21st February, 2006, that the indicative road would enhance the property.

"It will open the development which will be mixed office and residential development to both the Town Centre and to the public road. It will be a more integrated development."

The next day, 22nd February, 2006, Mr. Rodgers wrote to the County Council's solicitors in which he said:-

"It is also an objective of the current Meath County Council Development Plan that a distributor road be provided to the west of the lands in sale and which will also provide access to the Town Centre development. Whilst the exact location and route of same will be determined by future planning applications to develop the lands, the approximate route of same is indicated on the map coloured green on the attached map."

Thus it can be seen that the distributor road had a considerable importance for officials in the planning department of the County Council and they were fully alive as to the necessity to provide it.

The Tenderers

Darlington submitted its tender in the sum of €4,510,000. It was the highest tender and was accepted by the County Council. There were three other parties who tendered. One offered €4,205,000. Another offered €4,100,000. The fourth tender, submitted by a company called Naus Developments Limited (Naus), was for €2,225,876.43. The significance of Naus and the amount offered by it, which was much lower than any of the others, will become apparent later in this judgment.

Completion

The contract was completed on 13th June, 2006. Prior to that date but after Darlington's successful tender the County Council's solicitor sent to Darlington's solicitor a letter dated 22nd February, 2006, from the County Council and signed by the Project Engineer confirming that the distributor road *"will be constructed fully within the boundary of this site"*.

Darlington

Darlington is a construction and development company and a subsidiary of a company called Woodgreen Builders Limited (Woodgreen). Woodgreen has been involved in the development of residential developments since about 1996. Those developments were for the most part based in Dublin, Kildare and Meath.

The Decision to Tender

Mr. Joe Collins has been the Technical Building Director of Darlington since 2002. He is a Civil Engineer with extensive experience in

both the public and private sector. Amongst other things he worked for a number of local authorities and as a Consultant Engineer for the Department of Foreign Affairs and the World Bank.

He first became aware that the lands in suit were being offered for sale as a result of a newspaper advertisement which had been placed by John Ryan, the Auctioneer. That was in February 2006. Darlington had developed a neighbouring site known as Seagrave Square and so Mr. Collins had local knowledge of the area. The Seagrave Square was a mixed residential and retail development.

He obtained a copy of Mr. Ryan's brochure and the tender contract. He saw that both the brochure and the contract referred to the distributor road as being an objective of the Meath County Development Plan 2001. He also reviewed the urban detail map pertaining to the Development Plan which he downloaded from the County Council's website. This confirmed to him that the distributor road was an objective of the County Council's Development Plan.

Darlington's then solicitors received the tender documents and these were examined by Mr. Collins. He saw the letter of 22nd February, 2006, from the County Council reiterating the objective of the distributor road and further stating that the road would provide access to the Ashbourne Town Centre development. He was also aware of special condition No. 5 which I have already referred to.

As part of the pre-contract process, Darlington's then solicitors raised the pre-contract enquiries to which I have already referred and which resulted in the County Council indicating that it would not be making any contribution to the building of the distributor road.

Mr. Collins also visited the site. He could see from a physical examination that the neighbouring site to the east of the land in sale had a physical connection or link road between that site and the Town Centre.

He gave evidence of Darlington holding a directors meeting after reviewing all of the tender documentation. The development potential of the site was not discussed at that meeting but was discussed informally between the directors on a day-to-day basis.

On 23rd March, 2006, as part of Darlington's pre-tender evaluation of the site an approach was made to the owners of an adjoining site namely the St. Declan's Credit Union with a view to seeking its cooperation in submitting a joint tender proposal. That approach came to nothing.

Darlington engaged Mr. Kevin Woods, an Architect with the firm Sheridan Woods, to conduct a feasibility study on the various development options available for the land in suit. This occurred in March 2006.

Four options were suggested by Mr. Woods. It is not necessary to consider these options in detail save to note that the existence of the distributor road was an integral part of each of them. The distributor road provided a crucial link to the Ashbourne Town Centre which the plaintiff considered important for the retail element of the site to be feasible. Without the distributor road, the land only had road frontage as already described in this judgment which was not satisfactory and gave no connection to the Town Centre.

Prior to the submission of the tender an approach was made to Ulster Bank with a view to obtaining funds from it. This aspect of the matter was looked after by Mr. Sebastian Devlin who is both the Chief Executive and a director of Darlington. He is, by profession, an accountant. Mr. Devlin was successful in obtaining funding from Ulster Bank.

Once sanction had been received from the bank, the directors of Darlington considered the appropriate tender level. For that purpose, they considered the development options prepared by Mr. Woods and the feasibility study and used their own knowledge and experience of the values attributable to development sites in the area in question.

Prior to the tender, Mr. Collins made contact with the senior engineer for sanitary services and infrastructure of the County Council. He did so by email on 30th March, 2006, with a view to ensuring availability of services to the site which would include water supply and waste water. He was responded to on 31st March, 2006, confirming that the services would be provided.

Armed with all of this information, Darlington decided that it would adopt the first of the four options suggested by Mr. Woods. It was the most conservative, did not require the cooperation of the Credit Union or indeed any other third party and avoided any issues which might arise concerning the foul sewer running through the lands because it would be left in its current alignment.

The next question which Darlington had to consider was the price which it was prepared to offer for the land. The evidence satisfies me that that figure was carefully thought out. It was arrived at by considering all of the material which I have already described and by seeking to project the financial return which could be obtained from the development of the land. Darlington arrived at a purchase price which it felt would give a reasonable profit on the transaction.

Of particular importance to this case, I am satisfied on the evidence that the decision to bid for the lands and the tender price which was offered were rooted in the distributor road providing direct access to Ashbourne Town Centre being part of the enterprise.

Mr. Collins gave the following evidence at Q. 12, (day one):-

"Q. Was that purchase price based on the distributor road going through the land?"

A. Yes. All of the options that we looked at included the distributor road going through our site. We never considered for one moment that the distributor road couldn't be built because all of the information that we were provided with, clearly, from the brochure, the contract documents, the Meath County Council Development Plan, even from a visit to the site, which I did before we submitted our tender, I could actually visibly see a road there, albeit a temporary road, but you could see the alignment of a road linking the site to the Town Centre. All of these things, in my own head, led me to believe that this was an important point to the site and we relied on it."

Later the witness said this:-

"Q21 If the site had been advertised but without any reference to the distributor road, no reference to the fact that there was any road frontage possible, other than the Frederick Street and Killegland Road, what would have been the level of interest in Darlington Properties in following up on that advertisement?"

A. We wouldn't have been interested in the site in the first instance, if that were the case.

Q23 Would you have bid anything for the site?

A. No.

Q24 And why was that?

A. It was because we were interested in the commercial development and return that that would provide. Looking at the site and all the information that was being provided, it appeared that the commercial return was very good and that was essentially the reason that we went for it.

Q.26 If the distributor road was not part of the site, if it was simply the site without the distributor road, as you subsequently discovered it to be, would a commercial development have been economic?

A. No. I don't believe it would have been economic. No."

Furthermore the witness said in his witness statement which he adopted as his evidence:-

"Without the distributor road it would have been very difficult to justify the development of the site in accordance with the C1 zoning and to achieve a profitable return. Accordingly, if it had been known by Darlington that the distributor road could not be constructed we would not have tendered for the site."

In his evidence, Mr. Devlin said at Q.316, (day two):-

"Q. In deciding to tender for this site, was the fact that the site was described as having the benefit of this distributor road a material consideration?"

A. Yes.

Q317. Would you have bid for this site without the distributor road being there?

A. No."

I accept this testimony.

Events Post Closing

In August 2006, Darlington attempted once again to persuade the directors of the Credit Union to cooperate in a joint development of the site. This came to nothing.

On 28th November, 2006, what was described as a "pre-planning meeting" was held with Ms. Joanna Kelly, the County Council Executive Planner. The meeting was attended by Mr. Collins who was accompanied by Mr. Woods, the Architect and his associate, Andrew Malone. A note of the meeting was put in evidence before me.

The purpose of this meeting was to introduce the County Council to the development which Darlington was proposing for the lands. It is not necessary to refer in detail to what took place at that meeting save to record that it considered a whole series of issues concerning the proposed development. Mr. Collins, during the course of the meeting, referred to the distributor road as an objective of the Development Plan and Mr. Woods emphasised the access to the Town Centre from the lands by means of the distributor road.

Two possible options for development were discussed at the meeting each of which included the distributor road as part of the site layout. Nothing was said by Ms. Kelly to suggest that there was or would be any problem in constructing the distributor road.

The note of the meeting records that it was considered to have been a positive one and gave good direction to the further development of the project. Mr. Collins was entitled to form that view given the way the meeting went. No hint was given by Ms. Kelly of any difficulty concerning the distributor road.

The First Discovery

At the end of May 2007, Mr. Collins visited the land. In the course of his visit he noticed construction work going on in the adjoining site in the area where he expected the alignment of the distributor road to be. He saw columns and slabs for an underground car park. His reaction was tellingly described in his evidence. He said (Q. 38, day one):-

"Immediate alarm bells went off in my head as to what is this? Is this real or what am I seeing? It didn't tie in with what I had expected."

On that day he sent an email to Mr. Woods enclosing a map of the lands in sale with the words "under construction" in a hatched off area marking the development which he saw taking place on the site. In the email, he pointed out to Mr. Woods that there was considerable construction work in progress at the south east corner of the site and that it looked like the "road/wayleave" was being built over and blocked off. He asked Mr. Woods to get copies of planning drawings for the development.

In addition to this, he contacted the contractor on the adjoining site. It was Naus. He identified himself as Naus's neighbour and asked them to send copies of the plans elevations and sections of the development because Darlington was trying to prepare a design that would tie in with that development.

A few days later he received the drawings and it was quite clear that the Naus development would block the distributor road so that it could no longer be constructed. Mr. Collins also made a search of the County Council's planning website and printed out a list of planning permission applications for Naus which ran to about four or five pages but he was unable to access maps or layouts to establish the element of the Town Centre to which they related.

By 6th June, 2007, all of the necessary planning drawings had been obtained and were reviewed by Mr. Collins and his colleagues. It was apparent that the County Council in granting planning permission for Phase 5 of the Naus development had done so in such a way as to make the building of the distributor road impossible. This caused Darlington to look at the development of the site in a completely different light because this dramatically altered the potential use and design of the land.

Darlington considered the possibility of pursuing legal action against the County Council on the basis as he said that it *"had sold the site with the promise of a road linking the site to the Town Centre which was now no longer possible"*.

Legal action was something that Darlington did not wish for. After much consideration it concluded that the County Council must have granted the planning permission for the construction of Phase 5 of the Naus development subsequent to the sale of the land to Darlington. Mr. Collins and his fellow directors at that stage could not conceive that the County Council would have granted the Naus permission prior to selling the land to Darlington. Thus Darlington decided not to sue but to do the best that it could in these changed circumstances.

Some criticism was made of Darlington for this approach but I do not think that it was justified. It did not seek a copy of the Naus planning permission although it was supplied with the layout plans. A presumption was made that the planning permission granted to Naus had been granted subsequent to the contract in suit. That, in my view, was a reasonable approach to take particularly having regard to the fact that prior to the sale in suit a planning search had been carried out by Darlington's then solicitors.

The defence delivered by the County Council made an allegation of contributory negligence under four different headings. One of those headings was an alleged failure on the part of Darlington to arrange for an appropriate planning search to be carried out in advance of tendering and/or executing a contract for the purchase of the site. This was withdrawn by the County Council prior to trial. No case was sought to be made against Darlington by reference to the planning search carried out on its behalf prior to its purchase of the land.

A second allegation of contributory negligence was that Darlington failed to have regard to the grant of planning permission in respect of the land adjoining the site. This was also withdrawn prior to trial. Thus, it is not open to the County Council to make such a case.

Even if the matter were otherwise, I am satisfied that no legitimate complaint can be made in this regard. That is particularly so when one remembers that nothing was said by Ms. Kelly of the County Council at the November 2006 meeting to suggest the slightest problem with the building of the distributor road.

The New Development Plan

In March 2007, a new County Development Plan for County Meath came into effect. This maintained the C1 zoning on the lands in suit but prescribed a minimum of 30% commercial and up to 70% residential development on lands so zoned. This, of course, further complicated the position from Darlington's point of view. Despite that, it decided to attempt to mitigate its loss and set in train the making of an application for planning permission.

Steps Taken

Although Darlington did not consider the level of commercial usage permitted under the 2007 Development Plan to be profitable in circumstances where the only access to the land was the existing two roads (one of which was a cul-de-sac), it decided to proceed to attempt to obtain a planning permission.

It instructed Mr. Woods to modify its plans and sought a pre-planning meeting with the County Council.

In late August, 2007, Mr. Collins accompanied by Messrs. Woods and Sheridan met with Mr. Colm McCoy, a planner with the County Council.

At that meeting, the Darlington side presented modified proposals for the development of the site though obviously without the possibility of a direct link to the Town Centre. In the course of that meeting, Mr. Woods pointed out to Mr. McCoy that the distributor road, although an objective of the Development Plan, was no longer possible due to the development of the Naus site adjoining the land. Mr. McCoy was unfamiliar with the distributor road but indicated that he would discuss its absence with Mr. Bernard Greene, a senior planner with the County Council. He also indicated that having consulted with Mr. Greene, he would contact Darlington's architects. He never did so.

As I have already noted under the 2007 Development Plan, 30% of a given site zoned C1 would have to contain commercial non-retail development. Mr. Woods pointed out to Mr. McCoy that the Darlington proposal provided 22% of the site area for commercial use. This included retail, crèche and car parking. 10% of the area was earmarked for car parking thus leaving approximately 12% of the site for commercial development. Again, Mr. McCoy indicated that he would discuss this element of the matter with Mr. Greene.

The proposal which was being outlined by Darlington and which involved less than the stipulated 30% commercial development was made because such a high requirement was not viable given the absence of the distributor road giving direct access into the Ashbourne Town Centre. The matter was put succinctly during the course of the County Council's cross examination of Mr. Collins. Question 237 (day one)

"Q. What you are really saying, was, look, give us a break here. The road is blocked. We won't be able to sell all the commercial, will you give us more residential? Is that right?"

A. Yes that's right.

Q238 That's the net content of the conversation?

A. Yes

Q239 And you say you asked the person there who was at the meeting to talk to some other person in the planning department to see if they would do that?

A. He said he would have to discuss it with his superior.

Q240 And the fact is you never got a reply to your request?

A. We never got a reply to our request."

Not having heard anything from the County Council, on 8th November, 2007, Mr. Woods sent an email to Mr. McCoy of the County Council. It read:-

"Dear Colm,

Further to our meeting on 22nd August we would like to arrange a meeting with regard to the proposed development at Killegland, Ashbourne, the site adjacent to the Credit Union in order to discuss our developed design proposal. Looking forward to hearing from you at your earliest convenience."

No reply was received to this email.

On 14th November, 2007, Mr. Woods sent a second email in the same terms. No response was received from Mr. McCoy.

On 22nd November, 2007, Mr. Woods sent a further email again requesting a meeting to discuss the proposed development. This email indicated Darlington's anxiety to discuss its design with Mr. McCoy but yet again no response was received to this request.

By early December 2007, Mr. Woods had managed to make telephone contact with Mr. McCoy. As a result of it he wrote him a long letter on 11th December, 2007. The letter enclosed a site plan, plans, sections and elevations together with three dimensional views of the development and urban analysis drawings to illustrate it. It requested Mr. McCoy to review these documents and the contents of the letter. The letter dealt, *inter alia*, with details of the proposed development, the road alignment, the building form and height, the residential density and to the extent of commercial development in the proposal. In this regard, the letter read:-

"We note that the Development Plan requires 30% of the site area to comprise commercial development (non retail). Meath County Development Plan 2007 indicates that 'to encourage mixed use development and for this reason it will be a requirement to include at least 30% of a given site area for commercial (non-retail) development on C1 zoned lands'.

The site area is 6741sqm. The proposed development is required to provide 30% (2020sqm) of the area of the site for commercial development (non-retail). The proposed development provides 8% (577sqm) of the site area for commercial development (office and crèche).

We note that the context of the site (sic). The road objective originally envisaged by Meath County Council, would have opened the site up significantly for economically viable commercial activity. We respectfully submit that by permitting the adjoining development that effectively omits the potential to implement a through road connection seriously undermines the commercial potential of the site. In this context we submit that 8% of the site area for commercial activity accords with proper planning and development. The commercial activity on the site is located on the principal roads bounding the site, and the crèche is centrally located.

We also note that the greatest potential for commercial activity will be on the Credit Union site. It is probable that the extent of commercial activity achievable on that site will balance with the extent of commercial activity proposed on our client's lands."

The letter concluded by inviting Mr. McCoy to indicate if he had any issues with any of the letter's contents. It also pointed out that it was Darlington's intention to make an application at the end of that week.

Yet again no response was received from the County Council.

Darlington was now in a quandary. It had endeavoured to obtain some recognition from the County Council that because of its blunders concerning the distributor road, a 30% requirement for commercial development in any planning application rendered such a development uneconomical from Darlington's point of view. Despite the meetings, emails and letter, there was nothing but silence from the County Council.

Faced with this situation, Darlington decided to apply for planning permission. In so doing it hoped that with such an application pending at least officials of the County Council would be prepared to meet with its directors and advisors to discuss its problems with the land. It was a vain hope.

The Planning Application

Darlington submitted its planning application on 11th January, 2008. It provided for an 8% commercial usage and 92% residential. Permission was refused in March of that year. Darlington considered the refusal unfair because its inability to comply with the 30% commercial development requirement of the 2007 Development Plan was as a result of the County Council's action in precluding the building of the distributor road with direct access to the Ashbourne Town Centre.

In cross examination, Mr. Collins was asked the following (Question 217, day 1):-

"Q. But did you not think, whatever about as a planner, as an engineer that an application which went from 70% to 92% residential never had a prospect of getting through? Did you not accept that?

A. No. We believed that in the circumstances that we had to try and make this site work and we knew that by putting in a higher amount of commercial development that it would be just a complete waste because you could build it but you could never sell it or you could never rent it so we had to try and develop the site in such a way that we could get some kind of economic return from it."

Darlington decided to appeal and did so. The appeal was decided in November 2008 and met with no greater success. Two reasons were given for the refusal of the appeal. The first was that the proposal did not provide the required level of commercial floor space and would materially contravene the development objective set out in the development plan. The second was that the proposed development would result in over development of the site.

A good deal of criticism was directed both in cross examination and in closing submission against Darlington by reference to certain matters which occurred during the appeal process.

The appeal proceeded on the basis of the original application with the 8% commercial and 92% residential content.

However, an alternative proposition was made by Darlington. That entailed the commercial component being increased from 8% to

29% with a commensurate reduction in the residential element to 71%. This proposal did not find favour with the Planning Board either. Its inspector expressed the view that it was not appropriate that the proposed development be redesigned in this piecemeal fashion particularly when the various changes would have a knock on effect on other elements of the proposal.

It was argued by the County Council that when one considers the inspector's report, it was clear that if another planning application were made by Darlington in compliance with the 70/30 mix, there was a high probability if not certainty that planning permission would be granted. Darlington's failure to pursue this course is, it is suggested, a failure on its part to mitigate its loss.

I do not accept that this criticism has any validity. First, there was little point in Darlington seeking to obtain a planning permission in conformity with the 70/30 requirement in circumstances where it was firmly of the view that in the absence of the distributor road there was no commercial reality to such a proposition. Such a permission, if granted, could only be regarded as an enhancement of the value of the land if the development could be sold or rented. Darlington could see no such prospect and in my opinion that was a reasonable view to take. Second, the making of a further application for planning permission is time consuming and expensive. I do not accept that Darlington could be required to embark on such a process again with no guarantee of success and where even if a permission were obtained it would have little meaning in economic terms.

Events Post Appeal

While Darlington's appeal was pending before An Bord Pleanála, the County Council invited submissions from the public in advance of its preparation of the draft Ashbourne Local Area Plan for 2009 – 2013. Mr. Collins regarded this as an opportunity to once again try and address the problems concerning the zoning of the lands with the Council given that the distributor road was no longer possible. Mr. Woods was engaged to prepare formal submissions on behalf of Darlington. He did so. The County Council's draft Local Area Plan was published in February 2009. It dropped the objective of the distributor road from the Town Centre through the lands in suit.

Another opportunity arose in April 2009 to submit additional proposals in respect of the draft Local Area Plan. Darlington made a submission requesting that the zoning for the area change to A4 zoning. Such a zoning would provide for a greater flexibility between residential and retail development and was not as prescriptive as the C1 zoning. If Darlington had been successful in its submission it would have been possible to increase the amount of residential development on the land. Unfortunately for it, its submission was not adopted.

The directors of Darlington now realised that there was no prospect of developing the site as long as it was subject to the C1 zoning.

In late 2008, Darlington sought legal advice from its then solicitors as to the possibility of pursuing an action against the defendant for mis-representation. At this stage it is important to remember that the directors still believed that the planning permission granted to Naus post-dated the sale of the lands to Darlington. Legal opinion was obtained in February 2009. It was pessimistic as to Darlington's chances of success.

Despite this advice it is clear from the evidence I heard that the directors of Darlington felt that they had been treated very unfairly by the County Council. They decided to seek a second opinion and went to their current solicitors Byrne Wallace.

The Second Discovery

Byrne Wallace advised Darlington that it should commission a detailed planning search covering the history of the grants of planning permission in respect of the Ashbourne Town Centre development from its inception in 1997 and in particular, the permissions that were granted in Phase 5. This advice was taken and again the firm of Sheridan Woods was instructed to examine the planning permissions for the area. That firm furnished a written report to Darlington on 25th November, 2009 which was put in evidence before me. This report revealed to Darlington for the first time that the planning permission in respect of Phase 5 of the Ashbourne Town Centre under which the building of the distributor road was rendered an impossibility had been granted in June 2005, many months prior to the County Council offering the lands in suit for sale. Not merely that but, of course, the permission granted in respect of Phase 5 contravened the objective for the distributor road provided for in the County Council's own Development Plan.

This revelation as to the timing of the permission came as a complete surprise to Darlington. Up to now it had always assumed that the County Council had granted the permission under which Naus was developing the lands adjacent to those in suit subsequent to Darlington's purchase.

Armed with this new information, further advice was taken and these legal proceedings ensued. Criticism was directed against Darlington for not finding out the true position concerning this permission prior to 2009. This is not an attractive proposition coming from a defendant that has been guilty of a catalogue of errors which misled Darlington, failed to inform it of the errors and assumed an ostrich like stance in respect of them. To now seek to criticise Darlington for not finding out these errors before 2009 is not merely an unattractive line but it is also, in my view, an unjustified one.

I have already pointed out that the plea of contributory negligence concerning the original planning search that was carried out has been withdrawn. Moreover, I heard evidence from Mr. Gavin Lawlor, a Planning Consultant, that the planning inquiries carried out by Darlington prior to purchase were ones that any reasonable developer would have completed. There was no reason to suspect that the building of the distributor road had been compromised particularly having regard to the fact that the County Council was adamant in including specific reference to its provision in the tender documents. Equally, he told me that having regard to fact that the vendor was a local authority and had a legal obligation to give effect to the objectives of its Development Plan, there was no obvious reason to conduct a planning search of the adjoining property from a road access perspective. In seeking the first opinion which it did, Darlington was not behaving unreasonably in not commissioning the more comprehensive search which it ultimately did on advice from its current solicitors.

I do not accept that there was any culpable failure on the part of Darlington in failing to carry out this more comprehensive search prior to the time when it did.

Conclusions on Misrepresentations

Despite the fact that liability was kept in issue throughout the trial, not a single witness from the County Council was called to give evidence on that topic. Thus, all of the testimony which I heard from Darlington's witnesses as to fact and the documents which were admitted in evidence dealing with, *inter alia*, the state of knowledge of the County Council are uncontroverted.

I hold that Darlington was induced to enter into the purchase of the land on foot of representations made by the County Council in the brochure, tender documents and conditions of contract. Those representations were misrepresentations insofar as the distributor road was concerned. There is neither evidence nor suggestion that those representations were made fraudulently. But it is impossible to conclude that they were not made negligently. The County Council ought to have known when making these representations that

it itself had granted planning permission for Phase 5 of the Ashbourne Town Centre which made it impossible to construct the distributor road. There was a clear obligation on the part of the County Council to ensure what they were telling Darlington and indeed requiring it to do concerning the distributor road was accurate. This was because the representations were made with the intention and knowledge that they would be relied upon.

I also hold that were it not for the distributor road, Darlington would have had no interest in the site and would not have tendered for it. The distributor road was crucial to its decision to tender for the land.

I am also satisfied that without the distributor road commercial development of the type that was mandated as a result of the lands being zoned C1 was not a feasible proposition. No reasonable prospect of an economic return to a developer was possible

Duty of Care

I am quite satisfied that in making its misrepresentations, the County Council owed a duty of care to the plaintiff.

In *Hedley Byrne v. Heller and Partners* [1964] A.C. 465, Lord Reid stated that a duty of care would arise in

"all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."

That statement of the law has been reaffirmed in numerous cases in this jurisdiction and abroad. (See, for example, *Doran v. Delaney* [1998] 2 I.R. 61 and *Donnellan v. Dungoyne* [1995] ILRM 388.)

In *McAnarney v. Hanrahan* [1993] 3 I.R. 492, Costello J. (as he then was) held an auctioneer liable in respect of negligent information which he gave to prospective purchasers in a successful attempt to induce them to enter into a contract. In the course of his judgment, he cited with approval a passage from the speech of Lord Morris in *Hedley Byrne* as follows:-

"if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

The duty of care is not confined to professional persons expressing opinions or giving information. For example, a vendor has a duty to take reasonable care so as to ensure that statements he makes in seeking to induce a sale are true (see *Doran v. Delaney* [1998] 2 I.R. 61). In *Gran Gelato Limited v. Richcliff (Group) Limited* [1992] Ch. 560, it was common ground that the vendor owed a duty of care to a prospective purchaser and it was said that in the light of authorities such as *Esso Petroleum Company Limited v. Mardon* [1976] Q.B. 801, the contrary could not seriously be argued.

I am satisfied that a vendor, regardless of any other special relationship, is under a duty to take reasonable care to ensure that any representations made by him with a view to inducing contract are accurate.

In the present case, of course, the County Council was not any vendor.

It had a particular status and a particular means of knowledge. It was, after all, the planning authority. It itself granted the planning permission which rendered the building of the distributor road impossible. Yet it chose to market and offer the land for sale with explicit reference to the need for the distributor road to be built. Thus, even if it were necessary to show a special relationship (which it is not), I am satisfied that such special relationship existed having regard to the particular status of the County Council.

It follows that a duty of care situation arose as between the County Council and Darlington. That duty of care was breached in circumstances where the misrepresentations could not but have been made negligently.

Darlington was induced to enter into the contract as a result of those negligent misrepresentations made to it by the County Council. It suffered loss as a result.

I must consider the remedy for such a wrong.

Rescission

Any contract which is entered into as a result of misrepresentation be it innocent, negligent or fraudulent has a possibility of being rescinded. The ability to obtain rescission is, however, limited.

In the present case, rescission is the first relief which the plaintiff seeks. If granted, it would result in the land being returned to the County Council and the purchase monies being refunded to Darlington.

It is to be noted that Darlington does not seek to recover by way of damages any consequential losses which may have been sustained as a result of loss of business opportunity or loss of profits.

The claim for rescission is resisted strongly by the County Council.

The principal authority relied upon by the County Council is the decision in *Seddon v. North Eastern Salt* [1905] 1 Ch. 326. This case has given its name to the so called "Rule in *Seddon's case*". The head note to the case reads:-

"The Court will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation."

In order for the plaintiff to succeed in such a case fraud must be proved."

It is to be noted, of course, that *Seddon's case* was decided long before the law on negligent misrepresentation developed. It does not address negligent misrepresentation at all. One might ask what justification is there for excluding the possibility of rescission for negligent misrepresentation?

It is accepted that the rule in *Seddon's case* was removed by statute (s. 44 of the Sale of Goods and Supply of Services Act 1990) in

respect of contracts covered by that enactment. That Act does not, of course, extend to contracts for the sale of land. Thus, the intervention of the legislature does not seem to have altered the rule in cases of this type.

Whilst I am of the view that it may well be open to argument that the rule in *Seddon's* case ought not to apply in the case of a negligent misrepresentation, I do not propose to address that issue in this judgment. My reason for adopting this course is because of Darlington's counsel's acceptance that there would be little practical difference between a remedy in damages and rescission in certain circumstances which in my view apply here.

For the sake of completeness, I ought to record that counsel for Darlington was unable to refer me to any authority where rescission of a contract performed by conveyance had been granted for innocent or negligent misrepresentation. That fact, of course, is not determinative of the question but for the reason which I have indicated, it is not necessary that I address the topic here.

I leave to another day and another case the interesting topic of whether the remedy of rescission is available in cases of contracts induced by negligent misrepresentation.

Measure of Damages

Whether one regards the County Council as having been guilty of negligent misrepresentation or breach of warranty, (special condition No. 5), matters not when it comes to measuring the damages to which Darlington is entitled.

In *Esso Petroleum Company Limited v. Mardon* [1976] 1 Q.B. 801, the Court of Appeal held that the measure of damages for breach of warranty and for negligent statement was the same whether the action was founded in contract or in tort. There, the damages recoverable were computed by reference to the amount lost by being induced to enter into the contract. That is the yardstick by which I will measure damages here.

Darlington urges that the measure of its loss ought to be the purchase money paid for the land less its current value. The County Council suggests that the measure ought to be the difference between the actual value of the land at the time of its purchase excluding the distributor road and what was paid.

The normal rule is that damages are assessed at the date of the breach. If that rule were to apply then Darlington would be entitled to damages assessed on the basis of the difference between the true value of the land in 2006 and the amount actually paid.

Having regard to my findings that Darlington would not have entered into this contract at all but for the misrepresentation, I am not convinced that justice would be done by assessing damages on that basis.

Rather, I propose to assess damages by reference to a different date of assessment, namely today.

In *Golden Strait Corporation v. Nippon* [2007] 2 A.C. 353, the House of Lords held that a person deprived of a contractual benefit was entitled to damages representing the value of the benefit lost and that that might require assessment at a date other than the date of breach. Their Lordships held that the principle that damages should be assessed as at the date of breach was not inflexible and that damages awarded should represent no more than the value of the contractual benefits in respect of which the claimant had been deprived.

In this jurisdiction, in *Duffy v. Ridley Properties Limited* [2008] 4 I.R. 282, the Supreme Court held that while the general rule as to damages for breach of contract was that they should be assessed as of the date of the breach, it was open to a court in awarding damages in lieu of specific performance to fix a date other than the date of breach or the date of judgment. In that case, the trial judge was held to have been correct in choosing to assess the damages by reference to the value of the lands at the date of judgment which was the earliest date at which the plaintiff could be said to have lost his purchase.

Whilst that was, of course, a case that was dealing with damages in lieu of specific performance, it does not appear to me that that distinction makes any real difference in assessing damages in a case such as the present where the contract would never have been entered into were it not for the misrepresentation.

The basic principle is that an award of damages should put the plaintiff in the position it would have been in if the representation had not been made to it. (See the judgment of Waller J. in *Naughton v. O'Callaghan* [1990] 3 All E.R. 191.) In the instant case, Darlington would not have borrowed and expended the monies on buying the land had it known the true state of affairs.

In these circumstances, I am of the view that damages should be awarded on the basis of the monies actually expended by Darlington less credit being given for the value of the lands retained.

Evidence on Value

Mr. Robert McNamara gave valuation evidence in respect of the lands on behalf of Darlington and Mr. Ross Shorten gave valuation evidence on behalf of the County Council.

In accordance with normal Commercial Court procedures, I directed the valuers to meet so as to identify the areas of dispute between them. In truth, there was very little save in one respect. The market value of the lands as of April 2006 with the distributor road available was put at €4.51m by Darlington's valuer and at €4.5m by the County Council's valuer.

There was a very substantial difference between them as to the market value as at April 2006 without the potential for the distributor road. Darlington's valuer placed a value of €2.31m on the land as of then. The County Council's valuer put the sum at €4m.

The market value as at the time of the valuations in November 2010 was put at €0.5m by Darlington's valuer and at €1m by the County Council's valuer.

As is clear from the above, there was nothing between the valuers as to the market value in April 2006.

There was a gulf between them as to the value to be attributed to the land without potential for the distributor road as of April 2006. Insofar as that conflict is concerned, I have no hesitation in preferring the view of Mr. McNamara. It will be remembered that the fourth tender for the land was submitted by Naus. It offered €2.225m. At the time that it made that offer, Naus must have known that the building of the distributor road was an impossibility. It knew that because it was the recipient of the planning permission which made the building of the distributor road with access to the Town Centre impossible. It was developing on foot of that permission and therefore it had knowledge which was not available to the other tenderers and thus it made a much more realistic bid.

In these circumstances, I prefer the valuation evidence of Mr. McNamara since it more closely accords with the actual offer made by Naus, an informed tenderer. Thus, if I were assessing damages by reference to the date of breach, I would award the difference between €2.31m and the €4.51m actually paid. That amounts to €2.2m.

However, as I am of the view that that would not give rise to a just result in circumstances where Darlington would never have bought this property but for the misrepresentation, the true measure of their entitlement is the difference between €4.51m and the current value of the lands. Again, in this instance, I prefer the evidence of Mr. McNamara who fixed that at €0.5m as of November 2010. By the trial date he said that had reduced by a further €50,000. Overall, in any event, I prefer his evidence to that of Mr. Shorten and I conclude that the current value of the lands is €450,000. The measure of damages is therefore €4,060,000.

Laches

There was quite a lot of criticism of Darlington for allegedly delaying in discovering the true position concerning the distributor road. I have already dealt with some aspects of that criticism. I believe it to be unjustified.

In my view, Darlington behaved reasonably throughout and is not to be faulted for not finding out the true position earlier that it did. Indeed, it is ironic that such criticism should come from a body which having made spectacular errors was, and continues to be, so coy in respect of them.

I also reject the suggestion that Darlington has been opportunistic in brining this claim. It is indeed true that land values have collapsed throughout the country. Darlington is not responsible for that. I do not believe that had it discovered the true position any earlier, the attitude of the County Council would have been any different.

If the County Council had been more reasonable the case might well have been dealt with long before now and at a time when land values were not so depressed.

Concluding Comments

This is an extraordinary tale of error after error being made by the County Council. In evidence, witnesses for Darlington accepted that officials in the County Council's planning department were at the relevant times working under great pressure. That circumstance might be regarded as providing an explanation as to how the errors occurred. No witness was called from the County Council to give any such explanation, however. When these errors must have become known, nobody from the County Council was prepared to admit to them or even to meet with Darlington's representatives. That ostrich-like approach has been dealt with in the course of the judgment and it continued up to and throughout the trial.

What is very difficult to accept is the decision to keep liability in issue in this action. Counsel who had to stand over that approach was placed in an impossible position. It is not without significance that not merely were no witnesses on liability called to give evidence on behalf of the County Council but in closing it's counsel was unable to make any submission on the question of liability.

This is a case which, if dealt with honourably by the County Council, might not have resulted in litigation at all. Instead the indefensible was sought to be defended giving rise to a large judgment and the costs of a three day trial all to be borne by the public purse. Much of that could have been avoided.

The conduct of the County Council throughout was not impressive.

There will be judgment for €4,060,000.