Neutral Citation Number: [2011] IEHC 440

THE HIGH COURT

2010 769 JR

BETWEEN

O'MALLEY CONSTRUCTION COMPANY LIMITED

APPLICANT

AND

GALWAY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 15th day of September, 2011

1. In these judicial review proceedings the applicant seeks repayment from Galway County Council ("the Council") of a planning contribution in the sum of €1,100,456 on the basis that certain works in respect of which the contribution was given do not, in fact, facilitate the development in question.

2. The background to this application can be stated in summary as follows. In 2001, the applicant applied for planning permission for some 91 houses on an eighteen acre site immediately to the north of the main street in Barna, County Galway. This application was initially refused by the Council and, on appeal, by An Bord Pleanála in May, 2001. That letter from the Board nonetheless invited the applicant to make revised planning application. Planning permission was ultimately granted to the applicant permitting it to construct 148 dwellings on the site, subject to extensive conditions. It may be convenient at this point to say something about the dimensions of the site because the contribution condition which gives rise to the present proceedings cannot be otherwise readily understood.

3. The site itself is roughly in the shape of a parallelogram to the south of which lie Barna Village and Barna Main Street. Two minor roads lie to the east and west which both separately connect with the main road going through Barna. To the north of the site lay the route of the proposed Barne by-pass. It quickly became clear that vehicular access to the site would be crucial so far as the grant of planning permission was concerned. There was understandable concern on the part of the planners that Barna Main Street would be overloaded with traffic if the only egress from the site was on to that street. Indeed, it was with this in mind that the original plans proposed by the developer envisaged vehicular access from different parts of the site, including access from the two minor side roads.

4. These problems could have been solved – almost at one stroke – if a Barna bypass were to be constructed. This would serve to relieve Barna Main Street of the traffic coming from Connamara and West Galway generally through Barna and thereafter on to Galway City. In that scenario, many of the concerns about vehicular access in respect of the applicant's development would have been eased, given that, with the advent of such a by-pass, Barna Main Street would then have been capable of taking the traffic from the southern entrance onto the street. I should digress at this point to note that it was originally envisaged by the applicant that there would have been access from the northern end of the proposed development onto the bypass itself. Indeed, the applicant had an option to purchase .75 acres of land from one Mr. and Mrs. Faherty in order to facilitate the construction of a roundabout for the bypass route.

5. Returning now to the actual grant of planning permission, a key feature of the present case is that condition 2 of the permission modified the original vehicular access plan by preventing access from the north of the development onto the proposed bypass. This condition specified that the proposed access road from the development onto the bypass should, in fact, terminate at what was described as "a hammerhead turning area" within the area of the site and, accordingly, that there would be no vehicular access on to the proposed bypass route located at the north of the site.

6. Other conditions specified the development contributions to be paid by the applicant. The critical condition so far as these proceedings are concerned is condition No.19. This condition provided that:-

> "The developer should pay a sum of money to the planning authority as a contribution towards expenditure that is proposed to be incurred by the planning authority in respect of the construction of the Barna bypass route. The amount of the contribution and arrangements for payment shall be agreed between the developer and the planning authority, or, in default of agreement, shall be determined by An Bord Pleanála. In the case of expenditure that is proposed to be incurred, the requirement to pay this contribution is subject to the provisions of s. 26(2)(h) of the Local Government (Planning and Development) Act 1963, generally, and, in particular, the specified period for the purposes of para. (h) shall be the period of seven years from the date of this order.
>
> **Reason:**
>
> It is considered reasonable that the developer should contribute towards the expenditure that was, and/or that is proposed to be incurred by the planning authority in respect of works facilitating the proposed development."

7. I should note here that although the Local Government (Planning and Development) Act 1963 ("the 1963 Act") has long since been repealed by the provisions of the Planning and Development Act 2000 ("the 2000 Act"), the validity of the condition in this present case is nonetheless governed by the terms of the former Act, given that the initial application for planning permission was made before the 2000 Act came into force.

8. In the two years that followed there was extensive correspondence and exchanges between the applicant and the Council in respect of the amount of the planning contribution. Ultimately the matter was referred back to An Bord Pleanála. In his report for the Board in July, 2005, the Board's Inspector recommended that 416 metres of the proposed bypass should be apportioned between the applicant and another developer by reference to the number of units for which they respectively had permission. The Inspector observed:-

> "It would appear that the bypass is to be constructed as a route (a) to serve as a bypass the existing village centre for traffic travelling to and from the west and (b) to open up lands to the north of the existing village for future development. As such, the bypass is a dual role in (a) producing existing congestion in the village which facilitate the objectives of the planning authority and (b) facilitate lands for development which would in turn benefit the interest of property developers. I therefore consider that the costs of the development of the bypass should be shared between the interested parties."

9. The Inspector also went to state:-

> "Another issue which the Board may consider taking into consideration in assessing the appropriate amount payable is the fact that the proposed development does not incorporate an access road directly onto the Barna bypass. All traffic from the proposed development appears to access Barna Main Street. That is not to say, however, that the proposed development will not benefit from this bypass, traffic volumes on Barna Main Street will be significantly reduced as a result of the bypass and this will benefit the development in question."

10. These views appear to have been adopted by the Board's decision of the 19th August, 2005. Ms. Angela Tunney, a member of the Board prepared what was described as "a note on the determination of contribution" which was effectively incorporated into the official direction of the Board. This note stated that:-

> "The cost being apportioned to O'Malley and McEvaddy [another developer developing immediately adjacent lands] at €1.524.814.9 represents the full cost of the 460m length between minor road junctions. This was then further apportioned as between the two developers requiring a contribution of €1,100, 456 towards the construction of the 460m length of the Barna bypass."

11. As December, 2005 approached the applicant had completed a substantial number of residential units. There was, however, a difficulty in completing sale due to lack of confirmation by the Council of compliance with condition No.19. To that end the applicant and the Council entered into negotiations which ultimately resulted in an agreement whereby the applicant agreed to transfer 0.75 of an acre of certain land which it owned to the Council at a value of €235,000. This sum, in turn, was to be deducted from the contribution of €1,100,456. The applicant then paid the sum of €975,456 by way of development contribution. It also agreed to pay the Council the sum of €100,000 of what was described as a "goodwill gesture" in order to obtain a document from the Council confirming that it had complied with condition No. 19. As Clarke J. pointed out in *Glenkerrin Homes Ltd. v. Dun Laoghaire Corporation* [2007] IEHC 298 it had by this stage become necessary for developers to secure such letters of confirmation from local authorities, since the solicitors for prospective purchasers were not prepared to proceed with the purchase in the absence of such correspondence. Indeed, as the evidence showed in *Glenkerrin Homes*, these documents had acquired the status of quasi-title documents. I will return further to this issue towards the conclusion of this judgment.

12. Following receipt of these monies, the Council wrote to the applicant on the 14th December, 2005, confirming compliance with condition No.19. By November, 2006 the development – now known as An Creagán – was complete. It was subsequently taken in charge by the Council.

13. The seven year period contemplated in condition No.19 expired in January, 2010. At that point the only portion of the Barna bypass which had in fact been completed was the 460m stretch of the roadway to the north of the development which connects the two secondary roads which run to the east and west of An Creagán. On the 25th January, 2010, the applicant's solicitors wrote to the Council noting this state of affairs. They sought the return of the monies which had been paid over by reason of the fact that such payment was contingent on the completion of the entire bypass, whereas only a portion of it -which they contended was in fact 17% - had actually been built. When the Council refused to return the sums in question, this gave rise to the present proceedings.

Statutory provisions in relation to contribution payments

14. Before proceeding further it is necessary to set out the relevant provisions of the 1963 Act. Section 26(2)(h) of the 1963 Act provides that the planning authority may impose:-

> "Conditions for requiring contribution (either in one sum or by instalments) towards any expenditure (including expenditure on the acquisition of land) that is proposed to be incurred by any local authority in respect of works…facilitating the proposed development, subject to stipulations providing for –
>
> > (i) where the proposed works are, within a specified period, not commenced the return of the contribution with the instalments thereof paid during that period (as may be appropriate),
> >
> > (ii) where the proposed works are, within the said period, carried out in part only or in such manner as to facilitate the proposed development to a lesser extent, the return of a proportion of the contribution or the instalments thereof paid during that period (as may be appropriate), and
> >
> > (iii) payment of interest on the contribution or any instalments thereof that have been paid (as may be appropriate) as long as and insofar as is or they are retained unexpended by the local authority."

15. Section 14(4) of the Local Government (Planning and Development) Act 1992 further provides that, in default of agreement as between the applicant for permission and the relevant planning authority in relation to the amount of contribution, this can now be determined by An Bord Pleanála.

16. The total length of the proposed by-pass was 2.7km. The Council places some emphasis on the fact that the length of the proposed carriageway was 1.7km, with the extra 1km made up of roundabouts and slip roads. On this view of matters, it follows that 27% of the 1.7km of by-pass has actually been constructed, whereas this figure falls to just over 17% if account is also taken of the roundabouts and slip roads. I am prepared to accept that the Council's presentation of these figures is the correct one, but in view of the conclusions I am about to reach, I consider that it has no real bearing on the question before me.

17. The Council also point to the fact that the applicant was aware that the completion of the project would be contingent on other development in the vicinity and, specifically, the capacity of the Council to impose other contribution levies on other developers seeking to develop lands to the east and west of An Creagán. While this may well be true, it is really beside the point. The applicant has, of course, no responsibility for planning in the area and it cannot be at the mercy of other potential developers or the size of planning contributions which might be exacted from them. There was, in any event, a possibility that Government funding would be forthcoming to assist in the completion of the by-pass. In that regard, the evidence is that as recently as November, 2008 the Council applied to the Department of the Environment for funding for completion of the project, but this was not forthcoming. Had the

decision been otherwise, then, of course, the project could have been completed without the necessity for further planning contributions from other developers.

18. None of this, however, can take from the fact that the Council's basic vires to impose contributions of this kind is contingent on it being shown objectively that such contributions actually facilitated the development within the meaning of s. 26(h) of the 1963 Act. The Council cannot, of course, extend its substantive powers in relation to planning matters by means of estoppel: see, e.g., *Re Greendale Properties Ltd*. [1977] I.R. 256 at 263-264 per Henchy J. and *Dublin Corporation v. McGrath* [1978] I.L.R.M. 208 at 210, per McMahon J.

19. As matters stand, therefore, the only portion of the Barna by-pass which has been constructed is the 460m stretch of carriageway between the two secondary roads. As we have noted, the secondary roads run roughly parallel to the applicant's development of An Creagán and the 460m stretch of road is laid out in an arc immediately due north of this development. Condition 19 of the grant of permission stipulated that, for the purposes of s. 26(2)(h)(ii), the works must be completed within a period of seven years. That time period expired in January, 2010 and there is no realistic prospect that the remainder of the by-pass could be completed without development contributions from other developers applying for planning permission in respect of lands adjacent to the route or funding from the Department of the Environment. Given the present economic climate, it must be accepted that, for the foreseeable future at any rate, the completion of the by-pass remains a most unlikely prospect.

20. As we have already noted, the planning permission granted by An Bord Pleanála required the internal road servicing An Creagan to terminate in what is described as a hammer head formation. In other words, there is no vehicular access due north from An Creagán to the 460m stretch of the by-pass, but such traffic must rather exit in the opposite direction directly on to Barna Main Street. It is nevertheless not disputed but that the development would have benefited from the completion of the entire by-pass as, in the words of the Board's inspector in a report prepared in July, 2005, "traffic volumes on Barna Main Street will be significantly reduced as a result of the by-pass and this will benefit the development in question."

21. This brings us to the nub of the case. While the development would have benefited from the completion of the *entire* by-pass by relieving the volume of traffic coming through Barna Main Street, it is hard to discern any possible benefit to the development in circumstances where only some 460m of carriage way has been completed to the north and in respect of which there is no vehicular access from An Creagán. It would, of course, have been very different had the project been completed or where this was on the point of happening. As the Board's inspector noted, even without such direct access to the north of the site, the relief of the Barna main street to the south would have assisted the vehicular traffic from An Creagán and the development would thus have benefited as a result.

22. What, then, is the position where the developer has been required to make a significant financial contribution in respect of works which do not actually facilitate the development? The intention of the Oireachtas as manifested in s. 26(h)(i) is that the financial contribution is to be returned where the proposed works were not commenced. Section 26(h)(ii) further envisages that where the proposed works have been commenced, but either carried out in part only or "in such manner as to facilitate the proposed development to a lesser extent", then the sub-section provides for the return of a proportionate part of the contribution.

23. It is true that the Oireachtas has not quite provided for the unusual scenario which has to pass here, namely, circumstances where works have actually been commenced and finished, but where by reason of the incomplete nature of those works, *no benefit* actually ensues to the development. The present case falls somewhere between the interstices of the two categories actually specified in s. 26(2)(h)(i) and s. 26(2)(h)(ii). It is nonetheless clear that this Court is entitled to reason by analogy and conclude that the contribution should nonetheless be returned. In light of the clear purposes and objectives of the sub-section, I do not think that it would be doing excessive violence to the language of these statutory sub-paragraphs if one was to interpret them as precluding the Council retaining a planning contribution which, in the event, did not actually benefit the development..

24. It is axiomatic that a local authority does not enjoy an autonomous power to impose statutory levies - such as a planning contribution - in the absence of express statutory authority. Article 28A.2 of the Constitution stipulates that the powers and functions of local authorities "shall be exercised and performed in accordance with law". The Council is not entitled to require that a developer make a contribution to works which do not benefit the development. If that were the law, then it would be tantamount to saying that the Council enjoyed a taxation power.

Conclusions regarding the planning contribution

25. For these reasons, I am coerced to the conclusion that the planning contribution requirement was *ultra vires* s. 26(2)(h) insofar as it required the developer to make a substantial payment in respect of works which, in the ultimate event, did not benefit the development. The Council had seven years within which to build the by-pass (and not simply a section of it) and thus benefit the development. Once that did not happen by that date, then condition no. 19 was rendered *ultra vires* s. 26(2)(h) and the Council was obliged to return the planning contribution (namely, €1,100,456) in question. It follows that, in line with s. 26(2)(h)(iii), interest is payable as from January, 2010 in respect of this sum. I will discuss further with counsel the appropriate rate of interest and the quantification of the amount of that interest.

The €100,000 "goodwill gesture"

26. It remains to consider the position with regard to the €100,000 "goodwill" gesture. The starting point here is that the courts must be assiduous to ensure that public bodies do not make monetary demands for which there is no proper legal basis. It would be intolerable if such bodies were to seek out such payments *colore officii* in return for the efficient discharge of their statutory functions. If this were the situation in the present case, then the applicant would have been entitled - more or less as a matter of right - to have sought restitution of this payment: see, e.g., the comments of Lord Goff in *Woolwich Building Society v. Inland Revenue Commissioners* [1993] 1 A.C. 1, 177.

27. In the present case I recognise the force of the applicant's contentions that the €100,000 payment was made under duress, not least given that by this stage for them the production by the Council of the letter of compliance was now an economic imperative for all the reasons identified in respect of such cases by Clarke J. in *Glenkrrein Homes*. The applicant was, in the words of a former director of the applicant, Frank Burke, "desperate to secure evidence of compliance with condition No. 19 from the Planning Authority": see para. 21 of his affidavit of 10th January, 2011. Nevertheless, I find myself concluding that the payment was made in the course of an overall settlement of the outstanding issues remaining as between the parties. In these circumstances, I feel that I must reject the contention that the payment was made under duress.

28. The nature of that settlement is evidenced by the Mr. Burke's own letter of 13th December, 2005, which recites:-

> "Following our meeting on the 13th December, 2005, we now propose to deduct this sum of €225,000 from the overall

> contribution of €1,100,456 and to transfer ownership of the 0.75 acre site to Galway County Council. We are satisfied that this discharges O'Malley Construction Co. Ltd. entire obligations under condition No. 19 as determined by An Bord Pleanála and that no further contribution is due under this condition Furthermore, we are satisfied that there is no obligation on O'Malley Construction under the terms [of the planning permission] and, in particular, condition No. 19 as determined by An Bord Pleanála to make any further lands available to Galway County Council or to pay a contribution in lieu of any lands outside of our ownership in this area. However, as a gesture to Galway County Council *towards the cost of acquiring the remaining portion of land for the purposes of completing this section of the by-pass road*, we are making a further contribution to Galway County Council. We wish to make it clear that this is outside of our obligations under Condition No. 19 and *is merely a gesture of goodwill towards the Council in your endeavours to complete this section of the by-pass route*."

29. As the italicised passages here demonstrate, this payment was made to assist the Council to acquire further lands necessary for the construction of this particular section of the by-pass. As it happens, the evidence of Mr. Kevin Kelly, the Council's Director of Planning, is that the €100,000 was used to acquire certain land from Mr. and Mrs. Faherty "which was necessary for the purpose of the completion of the section of the roadway between the two minor roads", i.e., the 460m of carriageway which was actually built.

30. In this respect, therefore, this payment is, therefore, different from the payment made pursuant to condition No. 19, given what I feel driven to conclude (albeit not without some hesitation) was the voluntary nature of the former. Whereas by law the Council is not entitled to exact such a payment by means of a planning contribution where there is no benefit to the developer from the proposed works, the same is not true in respect of a purely voluntary payment.

31. Given that the payment was received and expended in good faith on land acquisition in order to complete this section of the by-pass, it cannot be said that the consideration for the voluntary payment ultimately failed such as would bring this case within the classic parameters of unjust enrichment: see, e.g., *Fibrosa Spolka Akcjna v. Fairbairn Lawson Combe Barbour Ltd*. [1943] A.C. 32, 61, per Lord Atkin.

32. In any event, even if there were to have been unjust enrichment, the Council is entitled to rely on the defence of change of position, namely, that it has expended the money. This is, of course, a well established defence to such claims, especially in cases of laches or acquiescence: see, e.g., *Murphy v. Attorney General* [1982] I.R. 241 at 319-320, per Henchy J. In that case Henchy J. held that the State was entitled (with some very limited exceptions) to rely on such a defence to defeat the generality of claims for the repayment of taxes illegally collected from married couples following the invalidation of the relevant provisions of the Income Tax Act 1967. As Henchy J. put it:-

> "…it is beyond question that the State in its executive capacity received the moneys in good faith, in reliance on the presumption that the now-condemned section were favoured with constitutionality. In every tax year from the enactment of the Income Tax Act 1967, until the institution of these proceedings in March 1978, the State justifiably altered its position by spending the taxes thus collected and by arranging its fiscal and taxation policies and programmes accordingly."

33. That defence is clearly available to the Council, not least given the applicant must have known that the money was to be spent in the fashion indicated and that it was so spent.

Conclusions

34. In the event, therefore, the applicant is not entitled to the return of the payment of the €100,000. Unlike the planning contribution, this was a voluntary payment earmarked for a specific purpose (i.e., land acquisition in the context of the construction of the 460m section of carriageway) and the monies were expended accordingly.

35. As we have seen, it is otherwise with regard to the planning contribution. This was not a voluntary payment and by law it could only have been exacted in circumstances where the Council completed works which actually were of benefit to the development. When this did not occur by January, 2010, the applicant then became entitled to the return of €1,100,456, together with interest as from that date.