Neutral Citation Number: [2007] IEHC 241

THE HIGH COURT

COMMERCIAL

[2007 No. 315 JR]
[2007 No. 55 COM]

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND
JOHN SHACKELTON

RESPONDENT

AND
MURPHY CONSTRUCTION (CARRIGTWOHILL) LIMITED

NOTICE PARTY

AND

THE HIGH COURT

[2007 No. 637 P]

BETWEEN

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

PLAINTIFF

AND
GLENKERRIN HOMES

DEFENDANT

Judgment of Mr. Justice Clarke delivered 19th July, 2007.

1. Introduction

1.1 These two cases were heard together because they both have, at their heart, difficult questions concerning the interpretation of the social and affordable housing requirements imposed by s. 96 of the Planning and Development Act, 2000 ("S. 96", "the Act") as amended. I have already delivered a judgment in a connected matter between Glenkerrin Homes ("Glenkerrin") and Dun Laoghaire Rathdown County Council ("Dun Laoghaire Rathdown") (Unreported, High Court, Clarke J., 26th April, 2007) ("the letters of compliance proceedings"). As appears from that judgment those proceedings were concerned with the entitlements of Glenkerrin to obtain "letters of compliance" with planning conditions from Dun Laoghaire Rathdown in circumstances where issues relating to compliance with the social and affordable housing obligations of Glenkerrin in respect of the development concerned remained outstanding. As I pointed out in the course of that judgment the devil is in the detail in respect of legislation such as this.

1.2 At para. 1.3 of the judgment I said the following:-

> "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." While those comments were specifically directed to questions concerning the intricacies of the dispute resolution mechanisms provided for in the legislation, it is, unfortunately, the case, that those comments apply, if anything, with even greater force to the issue which is at the heart of both of these proceedings.

1.3 In form the two separate proceedings are quite different in character. In the first set of proceedings the applicant ("Cork") seeks to set aside a determination of the respondent who is a property arbitrator appointed to conduct an arbitration under s. 96 ("the property arbitrator") in relation to the social and affordable housing obligations of the notice party ("Murphy Construction") arising out of a development by it of 186 dwellings at Fernwood, Ballinglanna, Glanmire in County Cork. I will refer to those proceedings as the "Cork proceedings". The property arbitrator, as is in accordance with normal practice, did not participate in the proceedings.

1.4 In the second proceedings Dun Laoghaire Rathdown, as plaintiff, seeks a number of declarations designed to establish the obligations of Glenkerrin under its social and affordable housing requirements deriving from a development conducted by it at Ballintyre Hall, Ballintyre in Co. Dublin which development, in its final and relevant form, consisted of the construction of 149 housing units of various sizes. ("the Dun Laoghaire Rathdown proceedings").

1.5 In both proceedings the proper interpretation of s. 96 is crucial. While the facts of the two separate cases are, to some extent, different, it is that core issue which led to both proceedings being heard together and which must be determined in respect of both of them. There are, of course, some additional issues which arise in the Cork proceedings by virtue of the fact that those proceedings are a challenge to a decision of an arbitrator and issues, therefore, arise as to the extent to which it is open to the court to interfere with such a decision. There are also some factual complexities present in the Dun Laoghaire Rathdown case which do not arise in the Cork case.

1.6 It is, however, clear that the proper construction of s. 96, lies at the heart of both proceedings. I propose, therefore, to turn shortly to that question. I should, however, briefly outline some key facts in the respective proceedings which are the backdrop against which the construction issues arise. I propose to turn, therefore, to some of the undisputed facts which, in my view, determine the manner in which s. 96 can apply to the facts of these cases. I turn firstly to the Cork proceedings.

2. The Cork Proceedings – The Facts

2.1 It is, firstly, necessary to note at this stage that an agreement was reached between Cork and Murphy Construction to the effect that the entirety of the social and affordable housing obligations to be complied with by Murphy Construction in favour of Cork, arising out of the development under consideration, would be met by the provision of built housing units from the development concerned. As will become apparent there are a number of different methods by which, either by agreement or as a result of an appropriate arbitration, the social and affordable housing obligations of a developer can be met. The parties to the Cork proceedings did, however, agree that only one of those methods would be applied in this case, that is to say the method, permitted by s. 96, of providing built housing units. This latter point is subject to one caveat which it will be necessary to address briefly in due course. For reasons which will become apparent in the course of the discussion of the provisions of s. 96, it will rarely be the case that the precise obligations of

a developer will be met by the provision of an exact number of housing units. In those circumstances all parties accept that a small balancing payment may require to be made, in practice, in virtually all cases, so that either the developer will be required to provide one additional unit but receive a balancing payment back or alternatively, may be permitted to provide one less unit but make a balancing payment to the local authority concerned.

2.2 In any event having reached such an agreement in principle, the matter was referred to arbitration before the property arbitrator. It will be necessary to return to certain aspects of the findings of the property arbitrator in due course. However for these purposes it is sufficient to note that Cork and Murphy Construction put forward to the property arbitrator a significantly different approach to the proper interpretation of s. 96. One striking feature of the case as it ultimately developed before the property arbitrator was that, prior to the end of the hearing before him, all questions of technical valuation, relative to the determination of the number of housing units to be provided, had been agreed, so that, in practice, the only issue which remained for decision was as to the approach to be adopted, in principle, to the determination of the number of units to be transferred. That question, in turn, was dependent on the proper construction of s. 96. It is clear that the arbitrator accepted the interpretation put forward on behalf of Murphy Construction (subject to one, relatively minor, technical error in calculation to which it will be necessary to turn when dealing specifically dealing with the arbitration aspects of the Cork proceedings).

2.3 In the events that happened, the arbitration, therefore, turned solely on the arbitrator's view as to the competing contentions of the parties concerning the proper approach to be adopted to the calculation of the number of housing units to be transferred and, thus, to the proper interpretation of s. 96 in the context of an agreement in principle having been reached between the parties that the entire obligations (subject to a balancing payment) of Murphy Construction were to be met by the provision of built housing units. I now turn to the facts of the Dun Laoghaire Rathdown proceedings.

3. The Dun Laoghaire Proceedings – The Facts

3.1 For the reasons which I analysed in some detail in the letters of compliance judgment (see for example para. 8.6), the development under consideration was largely completed without the parties having reached an agreement as to how the social and affordable housing obligations of Glenkerrin were to be met. In those circumstances I came to the conclusion that:-

> "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".

3.2 Having noted that neither side any longer suggested that cash was an appropriate means of dealing with those obligations (save again for a small balancing amount needed to make up for the lack of absolute divisibility of the social and affordable housing obligations into an exact number of units) it was clear that the only means by which those obligations could, therefore, be met was by the provision of built housing units. While not, strictly speaking, deriving, therefore, from an express agreement in principle between the parties, the practical situation in the Dun Laoghaire Rathdown proceedings is, therefore, the same as in the Cork proceedings. In the events that have happened it is only by means of the provision of built housing units that the social and affordable housing obligations concerned can be met.

3.3 The issues which have arisen between Dun Laoghaire Rathdown and Glenkerrin have not, as yet, been the subject of a determination by the property arbitrator, although, as pointed out in the letters of compliance judgment, there has been a reference to the property arbitrary by Glenkerrin of issues concerning the number of units to be transferred. As is clear from that judgment, amongst the matters in controversy between Dun Laoghaire Rathdown and Glenkerrin was the question of the proper dispute resolution mechanism with Dun Laoghaire Rathdown maintaining that at least some of the issues which remained for debate between the parties should be referred to An Bord Pleanála while Glenkerrin maintained that all of the remaining issues could properly be referred to the property arbitrator. On that issue, as appears from the letters of compliance judgment, I accepted that Glenkerrin's position was correct.

3.4 The declarations which Dun Laoghaire seek are, therefore, concerned with the proper approach that should be adopted to the determination, in accordance with s. 96, of the amount of units that should be transferred. That issue is, in substance, the same as the issue which arises in the Cork proceedings.

3.5 In those circumstances it seems to me to be appropriate to turn to s. 96 but in so doing I should note that the section does deal with a wider range of possible solutions to the manner in which the social and affordable housing obligations of developers can be met. It is important not to lose sight of that fact. It happens that the options are limited in both of these cases. The options are limited in the Cork proceedings because of the agreement in principle reached between the parties. The options are limited in the Dun Laoghaire Rathdown proceedings because events have progressed to a stage where there is, in practice, only one method of meeting the obligations concerned. In both cases, therefore, the only means of meeting the relevant obligations is by the provision of built housing units. However it is important to remember that the legislation as a whole needs to be construed against the general background fact of there being a range of possible options provided for by the section. The fact that the options are more limited in the two cases with which I am concerned, for the reasons which I have identified, should not divert attention from the need to construe the legislation as a whole against the background of there being, potentially, a wider range of measures which can be agreed or adopted for the purposes of securing compliance with the relevant obligations. Having noted that matter it is appropriate to turn to s. 96 itself.

4. Section 96

4.1 Part V of the Planning and Development Act 2000 introduced new and significant measures under the general heading "Housing Supply". As originally enacted s. 96 of the 2000 Act provides that, where a development plan of a relevant local authority contains an objective that requires a specified percentage (up to 20%) of any land zoned solely for residential use should be made available for social and affordable housing, then the provisions of s. 96 are to apply.

4.2 There follows a requirement that any grant of planning permission (whether by the planning authority concerned or by An Bord Pleanála ("The Board") on appeal) to which the section applies should require by condition that an agreement be entered into. Subsection 3 provides that the relevant agreement be either for the transfer of the relevant proportion of the lands concerned or the building and transfer, on completion, of a specified number and description of houses or sites. The section also contained additional consequential provisions.

4.3 Section 96 needs to be seen in the context of Part V as a whole which requires the local authority, as part of its development plan process, to identify its housing needs generally, together with the needs of those persons who may require either social or affordable housing. The detail of the distinction between social and affordable housing is not material to the issues with which I am concerned. However in simple terms, as I understand it, social housing stems from the obligation of the local authority to provide rented accommodation to persons in need of housing in accordance with its statutory obligations. On the other hand affordable

housing is a mechanism whereby qualifying persons may become entitled to purchase property at a reduced price.

4.4 In the course of the enactment of the then Planning and Development Bill 1999, and having been passed by both Houses of the Oireachtas, Part V of the Bill was referred to the Supreme Court by the President under the provisions of Article 26 of Bunreacht na hÉireann. The Supreme Court determined that Part V was not repugnant to the provisions of the Constitution. The key finding, in my view, was that the imposition of a condition of obtaining planning permission for the development of land for residential purposes, whereby the owner was required to cede some part of the enhanced value of the land, derived from its zoning for residential purposes and the grant of planning permission, in order to meet desirable housing needs, was a measure designed to achieve an objective of sufficient importance to warrant interference with a constitutionally protected right and, on the facts of the case, impaired that right as little as possible so as to be proportionate to the objective. It should also be noted that the court did not consider the scheme as being arbitrary, unfair or based on irrational considerations. It was also noted that the general policy of Part V of the Bill was to provide affordable housing to eligible persons.

4.5 Thereafter, the Bill was signed into law by the President. Subsequently s. 96 was amended by s. 3 of the Planning and Development (Amendment) Act 2002 which substituted a re-written s. 96 for that originally contained in the Act. The principal alteration, brought about by the amendment, had the effect of significantly extending the number of alternative options for compliance, so that, in addition to the transfer of the relevant percentage of the land concerned or the provisions of built housing units or serviced sites (as originally provided), further options such as the provision of cash, land outside the development or built housing units or sites outside the housing development were also included as possibilities. Express provision was also made for allowing the relevant obligations to be met by a combination of the various methods identified.

4.6 At an overall level, therefore, the approach of s. 96 is clear enough. Both Dun Laoghaire Rathdown and Cork have, respectively, adopted development plans which provide that 20% of relevant land is to be reserved for social and affordable housing. In passing I should note that there are certain other provisions in the Dun Laoghaire Rathdown development plan to which it will be necessary to refer in due course. There is no doubt, therefore, but that the primary obligation of both developers in these proceedings, and the *prima facie* entitlement of both Councils, was to receive 20% of the land the subject of the respective planning permissions. However for the reasons which I have already analysed that "default" position is no longer available in either case. Against that background it is necessary to turn to the relevant provisions of s. 96 in its amended form.

4.7 The relevant provisions of the section are as follows:

> "96.—(1) Subject to subsection (13) and section 97, where a development plan objective requires that a specified percentage of any land zoned solely for residential use, or for a mixture of residential and other uses, be made available for housing referred to in section 94(4)(a), the provisions of this section shall apply to an application for permission for the development of houses on land to which such an objective applies, or where an application relates to a mixture of developments, to that part of the application which relates to the development of houses on such land, in addition to the provisions of section 34.
>
> (2) A planning authority, or the Board on appeal, shall require as a condition of a grant of permission that the applicant, or any other person with an interest in the land to which the application relates, 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 subsection (3).
>
> (3) (a) Subject to paragraph (b), an agreement under this section shall provide for the transfer to the planning authority of the ownership of such part or parts of the land which is subject to the application for permission as is or are specified by the agreement as being part or parts required to be reserved for the provision of housing referred to in section 94(4)(a)
>
> (b) Instead of the transfer of land referred to in paragraph (a) and subject to paragraph (c) and the other provisions of this section, an agreement under this section may provide for—
>
> (i) the building and transfer, on completion, to the ownership of the planning authority, or to the ownership of persons nominated by the authority in accordance with this Part, of houses on the land which is subject to the application for permission of such number and description as may be specified in the agreement,
>
> (ii) the transfer of such number of fully or partially serviced sites on the land which is subject to the application for permission as the agreement may specify to the ownership of the planning authority, or to the ownership of persons nominated by the authority in accordance with this Part,
>
> (iii) the transfer to the planning authority of the ownership of any other land within the functional area of the planning authority,
>
> (iv) the building and transfer, on completion, to the ownership of the planning authority, or to the ownership of persons nominated by the authority in accordance with this Part, of houses on land to which subparagraph (iii) applies of such number and description as may be specified in the agreement,
>
> (v) the transfer of such number of fully or partially serviced sites on land to which subparagraph (iii) applies as the agreement may specify to the ownership of the planning authority, or to the ownership of persons nominated by the authority in accordance with this Part,
>
> (vi) a payment of such an amount as specified in the agreement to the planning authority,
>
> (vii) a combination of a transfer of land referred to in paragraph (a) (but involving a lesser amount of such land than if the agreement solely provided for a transfer under that paragraph) and the doing of one or more of the things referred to in the preceding subparagraphs,
>
> (viii) a combination of the doing of 2 or more of the things referred to in subparagraphs (i) to (vi),
>
> but, subject, in every case, to the provision that is made under this paragraph resulting in the aggregate monetary value of the property or amounts or both, as the case may be, transferred or paid by virtue of the agreement being

equivalent to the monetary value of the land that the planning authority would receive if the agreement solely provided for a transfer of land under paragraph (a).

(c) In considering whether to enter into an agreement under paragraph (b), the planning authority shall consider each of the following:

(i) whether such an agreement will contribute effectively and efficiently to the achievement of the objectives of the housing strategy;

(ii) whether such an agreement will constitute the best use of the resources available to it to ensure an adequate supply of housing and any financial implications of the agreement for its functions as a housing authority;

(iii) the need to counteract undue segregation in housing between persons of different social background in the area of the authority;

(iv) whether such an agreement is in accordance with the provisions of the development plan;

(v) the time within which housing referred to in section 94(4)(a) is likely to be provided as a consequence of the agreement.

(d) Where houses or sites are to be transferred to the planning authority in accordance with an agreement under paragraph (b), the price of such houses or sites shall be determined on the basis of—

(i) the site cost of the houses or the cost of the sites (calculated in accordance with subsection (6)), and

(ii) the building and attributable development costs as agreed between the authority and the developer, including profit on the costs.

(e) …

(f) In so far as it is known at the time of the agreement, the planning authority shall indicate to the applicant its intention in relation to the provision of housing, including a description of the proposed houses, on the land or sites to be transferred in accordance with paragraph (a) or (b).

(g) Nothing in this subsection shall be construed as requiring the applicant or any other person (other than the planning authority) to enter into an agreement under paragraph (b) instead of an agreement under paragraph (a).

(h) For the purposes of an agreement under this subsection, the planning authority shall consider—

(i) the proper planning and sustainable development of the area to which the application relates,

(ii) the housing strategy and the specific objectives of the development plan which relate to the implementation of the strategy,

(iii) the need to ensure the overall coherence of the development to which the application relates, where appropriate, and

(iv) the views of the applicant in relation to the impact of the agreement on the development.

(4) …

(5) …

(6) Where ownership of the land is transferred to a planning authority pursuant to subsection (3), the planning authority shall, by way of compensation, pay to the owner of the land a sum equal to-

(b) the value of the land calculated by reference to its existing use on the date of the transfer of ownership to the land to the planning authority concerned o the basis that on the date it would have been, and would thereafter have continued to be, unlawful to carry out any development in relation to that land other than exempted development.

(11) Notwithstanding any provision of this or any other enactment, if a planning authority becomes satisfied that land, a site or a house transferred to it under subsection (3) is no longer required for the purposes specified in subsection (9) or (10), it may use the land, site or house for another purpose connected with its functions or sell it for the best price reasonably obtainable and, in either case, it shall pay an amount equal to the market value of the land, site or house or the proceeds of the sale, as the case may be, into separate account referred to in subsection (12).

4.8 I have not set out the dispute resolution provisions of the section as these have already been interpreted by me in the certificate of compliance proceedings. It is, however, important to note a number of key provisions of the section.

4.9 Firstly the mechanism adopted for enforcing an obligation in relation to social and affordable housing is to require that a condition be included in any relevant planning permission which condition, in turn, requires that an agreement be entered into. The section does not, therefore, say (as one might have suspected that it might say) that in the event that a person avails of a relevant planning

permission, that person has an obligation to meet certain specified social and affordable housing obligations. Rather the obligation is imposed through the mechanism of an agreement which is required to be entered into by virtue of a planning permission condition. An appropriate condition was imposed in both of the cases under consideration.

4.10 Secondly it would appear that the transfer of the relevant proportion of land under subs. (3)(a) is the default provision. Subsection (3)(a) provides that the agreement concerned is to be for the transfer of land "subject to paragraph (b)." Subsection (3)(b) refers to the various options set out at (i) to (viii) as being "instead of the transfer of land". It should also be noted that each of those alternative forms of agreement ("an alternative agreement") are subject to the proviso that appears immediately after s. 96(3)(b)(viii), which is a provision to which I will have to return in some detail in early course.

4.11 Next it is important to note that the planning authority is required (under subs. (3)(c), to give consideration to the matters set out at sub paras. (i) to (v) in deciding whether to enter into an alternative agreement. It would be fair to say that the criteria which the local authority are required, as planning authority, to take into account, are concerned with ensuring that any such alternative agreement meets the planning and housing obligations of that authority under both the legislation as a whole, and its development plan incorporating its housing strategy in particular. Similar considerations are also required to be taken into account by virtue of subs. (3)(h).

4.12 In addition it is important to note the provisions of subs. 3(g) which make clear that a developer cannot be obliged to enter into an alternative agreement but is entitled, if it should wish, to insist on the relevant obligations being met simply by transferring 20% of the land.

4.13 In that context it is important to note the dispute resolution mechanisms which I have already dealt with in the certificate of compliance proceedings. For the reasons set out in that judgment I am satisfied that any matter that can be the subject of an agreement under s. 96 can also be the subject of a dispute resolution determination by either the Board or the property arbitrator. It thus follows that the local authority can have an alternative agreement imposed on it even though the developer cannot. However for the reasons which I set out in the certificates of compliance judgment, the question of whether a planning authority can, in general terms, have an alternative agreement imposed upon it, and the terms of any such agreement, are matters to be determined by the Board either in the grant of the original planning permission or in a reference by any party to the Board under subs. (5).

4.14 While the Act does not say so in terms it does not seem to me that the Board could be at large in determining what form of alternative agreement ought to be imposed upon a planning authority. A planning authority is required to consider the housing and planning requirements of its development plan, under both subs. (3)(c) and subs. (3)(h), before deciding on whether to enter into an alternative agreement. It seems to me that it necessarily follows that the Board must be required to consider the same matters before it could impose upon a planning authority an obligation to accept an alternative agreement. Thus, in my view, in determining whether to impose such an agreement, the Board would require to be satisfied that a proper consideration of the matters set out in subs. 3 (c) and (h) would suggest that it was appropriate to enter into any agreement which it proposed to impose.

4.15 It should finally be noted that the scheme of the Act contemplates that land to be transferred should be valued by reference to its existing use as precisely defined in subs. (6). On the facts of this case the relevant provision is to be found in subs. (6)(b). As is clear from that subsection, the valuation is required to be on the basis that it would continue to be unlawful to carry out any development on the land, other than exempted development. It is, reasonably accurately, described as a section which is designed to prevent there being included in the value of any such land, any "hope value". It is, of course, the case that land in respect of which it might be anticipated that more beneficial zoning or planning permission might be obtained (but where such zoning or permission has not yet been obtained) can have anything from a marginal to a quite significant enhancement to its value by reference to the expectation of the marketplace that the land may be capable of more beneficial development in the future. It is clear that the intention of subs. (6) was to exclude any such enhanced value in the relevant calculation. While that much is clear, the precise application of that subsection to the calculation of the value of housing units to be transferred under subs. (3)(d) is a matter of some difficulty to which I will shortly have to turn.

4.16 The one thing that is not clear from the provisions of the section to which I have referred or from the brief overall analysis in which I have engaged, is the basis upon which the number of housing units to be transferred, in a case where all (or virtually all) of the obligation is to met in that way, is to be calculated. It is, of course, the case that the section, to an extent, presupposes an agreement. In that context the number of units to be transferred would be found in the agreement itself. Where the units are not fully homogenous then a description of the precise types of units to be transferred, by reference to any relevant criteria, would also be expected to be found in the agreement itself.

4.17 However the problem that emerges in these proceedings is as to what is to happen when there is not, in fact, an agreement as to those details and where the dispute resolution mechanisms are required to be brought into play. It is for that reason that I have emphasised, earlier in this judgment, the slightly unusual circumstances of the two cases before me where, for somewhat different reasons, it is clear that the only means for complying with the relevant obligations in these cases is the provision of housing units.

4.18 A constant theme in the case made by both planning authorities is that the method of calculation urged by the respective developers (to which I will shortly turn) does not give them sufficient units to meet their social and affordable housing needs. Thus, they argue, the calculation which they propose (which would provide a significantly greater number of units but on the payment of a significant price by them) is to be preferred because it would allow them to meet their obligations. There is, however, a sense in which that argument does, to some extent, beg the question. It is at least arguable that the time at which those issues should have been raised was at a time when other means of meeting the relevant social and affordable housing obligations were available. As I have emphasised, it is not appropriate to construe this legislation against the narrow backdrop of the facts of these cases where only one method of compliance remains, in practice, possible.

4.19 Against that general analysis of the section it is necessary to turn to the specific issues of construction which arise. In that context I turn first to the arguments put forward on behalf of the parties.

5. The Competing Constructions

5.1 I should start by emphasising that, while the general approach adopted respectively by Cork and Dun Laoghaire Rathdown, was the same, there were some differences of detail. In that context it is important to note that there was one practical difference between the relevant factual circumstances of the development with which Cork were concerned which made it different from the development with which Dun Laoghaire Rathdown were concerned. It would appear that all of the housing units in the Cork development were homogenous for all practical purposes. In those circumstances questions concerning how one might deal with difficulties arising from a development consisting of housing units of different size did not, in fact, arise in the Cork case. However there are, undoubtedly, units of different size involved in the development with which Dun Laoghaire Rathdown are concerned. To

that extent certain additional issues arise in that case. Largely for that reason the submissions made by Dun Laoghaire Rathdown cover a wider range of possibilities than those addressed on behalf of Cork. The fact, therefore, that there were some differences between the precise position adopted by the two local authorities concerned does not, it seems to me, reflect any difference of opinion between them. Rather it stems from the fact that the factual circumstances with which each had to deal were, in the manner which I have indicated, different.

5.2 I propose dealing with the arguments raised in the Cork case first. Cork draws attention to certain provisions of the Cork Joint Housing Strategy (which is a joint strategy entered into together with other Cork local authorities). Paragraph 1.3 of the strategy states that "The Cork Local Authorities will require 20% of all land zoned for residential uses (or for a mix of residential and other uses) to be reserved for the purposes of social and affordable housing. "Paragraph 6.3.4 is in similar vein, while the provisions of the Cork development plan note an objective "on lands zoned for residential/zoning or lands zoned for a mixture of residential/housing and other uses, to require 20% of all new residential developments to be reserved for social and affordable housing in accordance with principles, policies, and programmes for action set out in the Joint Housing Strategy".

5.3 It was common case between the experienced counsel who appeared for each of the parties in the two cases that there are many difficulties in interpreting s. 96. There is little doubt but that they are right. Courts are sometimes criticised for adopting interpretations of legislation which critics may regard as going against the "spirit" of the legislation concerned. Whatever may, or may not, be the merits of any such criticism, it seems to me that the other side of that coin applies in this case. While the broad drift of the intention of the social and affordable housing provisions of Part V of the Act may be well clear (and has been identified by the Supreme Court), the reality is that it is very difficult to tell, with even a reasonable degree of certainty, as to how the Oireachtas intended that the legislation should work in practice. The devil is, indeed, in the detail. Without that detail there are no practical measures to benefit those who might need social or affordable housing. It has to be said that it is regrettable that the legislation does not appear to have received the level of detailed consideration in advance which it warranted. In such circumstances the courts are left with attempting to do their best with a legislative scheme that gives rise to very significant difficulties of interpretation at almost every turn.

5.4 In that context Cork suggests that any ambiguity in the legislation (and it is accepted that there is quite an amount) should be resolved in favour of an interpretation which, it is argued, is consistent with the overall purpose of the Act. To understand the implications of this argument it is necessary to set out in brief terms the competing arguments that were put before the property arbitrator by Cork on the one hand and Murphy Construction on the other hand. For this purpose I have ignored the slight error of calculation that, it is common case, crept into the arbitrator's award and which I will require to address later in the course of this judgment.

5.5 It should be remembered that the figures, as figures, were not, by the time the arbitrator came to issue his determination, any longer in dispute.

5.6 It was agreed that the open market value of the relevant land was €21 million as at April 2005 while the open market value at June 2006 was agreed to be €26 million. The existing use value of the property was agreed at €25,000 per acre and the construction cost per unit calculated in accordance with the statutory regime was agreed at €152,750. It was also agreed that the total number of units was 223 dwellings.

5.7 The case made by Murphy Construction to the arbitrator had, as its starting point, the calculation of what is sometimes referred to as the "planning gain". This sum represents 20% of the difference between the open market value and the existing use value. The default provision would have allowed Cork to acquire 20% of the land at its existing use value. The benefit to Cork by such a transaction would, therefore, be 20% of the difference. On the basis of using an April 2005 valuation, that planning gain was calculated at €4,090,000.

5.8 In addition the price of a house to be transferred was calculated by adding the agreed construction costs to the open market value of a site to arrive at a price per house in the sum of €244,454.04. On that basis it was suggested that either 17 completed houses should be transferred to Cork with Cork Council paying a balancing sum of €65,718.61 to Murphy Construction or alternatively that 16 completed houses should be transferred, with Cork paying a balancing sum of Murphy Construction of €178,735.43. Either calculation came to €4,090,000. There was a dispute between the parties as to the appropriate date by reference to which the open market value of lands should be calculated. That is an issue to which I will return. However for the purposes of exploring the fundamental difference in construction which arises in both of these proceedings, I propose to use those figures for the purposes of illustration.

5.9 It will be noted that the net effect of the method of calculation proposed by Murphy Construction was that it would transfer approximately 7% of the total number of built housing units and would receive no money in return other than the possibility of a balancing payment as identified.

5.10 In contrast the submission of Cork suggested that the appropriate valuation date should be June 2006. If that be correct it would, of course, affect the figures. However the more important difference between the parties concerned the approach that should apply, irrespective of the appropriate valuation date. Cork suggested that the appropriate means for determining the number of units to be transferred was to calculate the net planning gain per site. This was done by dividing the difference between the open market value and existing use value by the total number of sites. The exact figure produced is, of course, dependent on the valuation date as that effects the open market value per site.

5.11 Be that as it may Cork then suggested that the net planning gain per site should be divided into the total of the planning gain for the development as a whole to give a number of units. It is clear that, as a matter of mathematics, and in a case where all of the units are homogenous, such a calculation will always come out at 20%. The following calculation demonstrates why. Cork's suggested formula starts by dividing the total planning gain by the planning gain per site.

$$\frac{T}{S} = \frac{OMV - EUV}{5} \div \frac{OMV - EUV}{N}$$

$$= \frac{OMV - EUV}{OMV - EUV} \times \frac{N}{5}$$

$$= 20\% \text{ of } N$$

Where

T = Total Planning Gain

S = Planning Gain Per Site

OMV = Open Market Value

EUV = Existing Use Value

N = Number of sites

5.12 That equation will hold true in all cases unless the sites on which the housing units are built differ to a material extent. If they do differ then the planning gain per site will itself differ and thus the total of the planning gain from any given number of sites will not, necessarily, bear the same relationship to the total planning gain from the development as a whole as the number of sites to be acquired bears to the number of sites in the development as a whole.

5.13 However, for the purposes of the Cork case, each of the sites and units were homogenous and no such complication arose. It is clear, therefore, that on the basis of the calculation proposed by Cork, 20% of the built housing units ought to have been transferred. If that argument be correct, Cork would also have been required to make a compensating payment for the construction of the houses and related development costs and profit on costs together with a payment, on the basis of existing use value, for the sites on which each house was built.

5.14 Cork argued that its competing interpretation was financially neutral in that, while Cork obtained a significantly greater number of units (20% as opposed to 7%), it had to pay the going rate (as defined by the legislation) for the building of those units, so that the benefit obtained was the same as if land only was taken. Cork argued that the result of its calculations was, therefore, entirely consistent with the legislative scheme and was to be preferred because it enabled the overall purposes of the legalisation (i.e. the provision of sufficient appropriate housing) to be enhanced.

5.15 In the course of its submissions Dun Laoghaire Rathdown put forward three possible methods for calculating the number of units. It will be recalled that Dun Laoghaire Rathdown had to grapple with the additional difficulty that the units with which it was concerned were not, as in the Cork case, homogenous. The first (and Dun Laoghaire Rathdown 's preferred) suggestion was that 20% of the gross residential floor area of the development should be acquired. It was suggested that this method dealt with difficulties which might arise by reason of different sizes of units within the development. In all other respects the method proposed was the same as that proposed by Cork to the property arbitrator and would, if correct, have resulted in 20% of the floor area of the relevant development as a whole being transferred to Dun Laoghaire Rathdown. Obviously the precise number of units to be transferred might vary somewhat from 20% depending on whether the average size of the units to be acquired was greater than or less than the overall average of the units within the development as a whole.

5.16 A second proposal was that 20% of the units should be transferred irrespective of size. The third method proposed was an exact replication of that which had been proposed by Cork to the property arbitrator.

5.17 If one leaves aside the complication arising from the difference in size of the units in the Dun Laoghaire Rathdown development there is not, therefore, in substance, any great difference between the arguments put forward by the respective local authorities. Both involve a transfer of either 20% of the units or something approximating thereto (by reference to floor area) and the payment of a significant sum of money to cover the building and development costs and profit thereon as calculated in accordance with the provisions of s. 96(3) together with the existing use value of the sites concerned.

5.19 It should also be noted that Glenkerrin adopted a position not significantly different, at the level of principle, from the position adopted by Murphy Construction.

5.20 While there are other issues of detail to which it will be necessary to turn in due course, it is clear, therefore, that the key and fundamental difference between the parties in both sets of proceedings concerns the broad approach to the proper calculation of the number of units to be transferred. Both local authorities argue that that number should be 20% of the total (or an approximation thereto in the case of these being a lack of uniformity in the sites). They agree that they should make a monetary payment in order to obtain such a number of units.

5.21 On the other hand both developers suggest that no payment should be made and that a, by definition smaller, number of units should be transferred free of charge. It would seem that in both cases the number of units to be transferred free of charge under the method submitted on behalf of the developers was of the order of 6 to 7 %. Its seems that the reason why this figure was more or less the same in both cases is that it reflects the proportionality between the overall value of a typical unit and the planning gain attributable to the site on which that unit is built. On the figures in both cases there is a rough proportion of one to three in those figures. For those reasons one would expect the total number of units which would result from the developer's calculation to be of the order of one third of the total number of units which results from the planning authority's calculation.

5.22 Having identified the major issue of principled difference between the parties, it seems to me that it is appropriate to address that question first. I now turn to that issue.

6. Section 96-The Broad Approach

6.1 Each of the parties in both proceedings argued, correctly so far as it goes, that the overall approach to the resolution of the contested issues of construction with which I am concerned, requires s. 96 to be seen in the context of Part V as a whole.

6.2 However it does seem to me that the appropriate starting point has to be text of the section itself. A number of key provisions seem to me to be relevant. Firstly there is the proviso to s. 96(3). That proviso is stated to apply to every case in which an alternative agreement is to be entered into. It specifies that "the aggregate monetary value of the property or amounts or both" to be transferred on foot of any alternative agreement is to be equivalent to "the monetary value of the land that the planning authority would receive" in the event that the default provision applied.

6.3 Unfortunately the terms "monetary value" or, indeed, "aggregate monetary value" are not defined. The first question which arises is as to whether those terms are intended to refer to net or gross values. The text of the Act itself does not give any great assistance as to which approach is to be preferred. On one view it might be said that a reference to the monetary value of a thing must be taken to refer to its gross value independent of what it paid for it. On that basis it might be suggested that monetary value simply means, where appropriate, the amount of a cash sum or the actual gross value of property which is to be transferred.

6.4 However there are, it seems to me, grave difficulties with that approach. It will be recalled that one of the means by which the

social and affordable housing obligations of a developer can be met is by the payment of a cash sum. There can be little doubt as to what the aggregate monetary value of a cash sum is. It is the amount of the sum concerned. In a case where, therefore, only cash is taken by the local authority (and it is clear that the Act contemplates such a possibility) then the aggregate monetary value of the "property or amounts" concerned is the value of that cash sum.

6.5 That cash sum must, therefore, be equivalent to the monetary value of the land that the planning authority would have received under the default provision. In other words it must be equivalent to the "monetary value" of 20% of the land. If that latter requirement is not to be considered to relate to 20% of the net value of the land (that is the open market value less the cash that would have to be paid for the land based on its existing use value) then an irrational and potentially discriminatory result would arise. An example will illustrate.

6.6 Consider two separate cases where, in one case, the land under development already has a reasonably beneficial existing use, so that its existing use value is €250,000 per acre. In the alterative case the existing use value might be based on agricultural use or the like and might, as in the Cork case, be put at €25,000 per acre. I will also assume that, in both cases, the open market value of the land at the relevant date (of which more later) was €1 million per acre. In the first case, therefore, the planning gain is €750,000 per acre while in the second case it is €975,000 per acre. If I further assume that both developments are of five acres, then 20% of the planning gain will, in fact, be the planning gain from one acre and will thus be, respectively, €750,000 or €975,000. If the term "monetary value" as applied to the land that the planning authority would receive under the default provision, is to be taken as the gross value of the land converted into money then it would, of course, be €1 million in both cases. If an alternative agreement for the payment of cash was to be applied, then a cash sum of €1 million would need, on that basis, to be paid. Apart from the fact that this would give the local authority, in either case, more cash than the value which they would obtain by receiving €1 million worth of land for either €25,000 or €250,000, it would also create an unjustifiable distinction between the two cases. The developer who held land with an existing use value of €250,000 would have to pay €250,000 more than the planning gain as a cash payment while the other developer, with an identically beneficial planning permission, would only have to pay €25,000 more than the planning gain.

6.7 This is not a construction which should find favour unless the clear wording of the Act compelled only such a view to be taken. In my view the term monetary value is ambiguous as to whether it represents a gross value or a net value.

6.8 For the reasons for which I have just set out it seems to me that to interpret monetary value as representing a gross value would give rise to significant inequalities and absurdities in the construction of the section and, for those reasons, it seems to me that I should prefer the construction which defines monetary value as being the net benefit, converted into money where necessary, to be obtained by the local authority.

6.9 Having taken that view of the phrase "monetary value", it seems to me that it would be wholly irrational to assume that the term "aggregate monetary value" as used earlier in the same proviso could have a different meaning. It follows, therefore, it seems to me, that both the terms "aggregate monetary value" and "monetary value" represent the net benefit, converted where appropriate into money, to the local authority concerned.

6.10 Viewed in that way the proviso simply requires that the net benefit of an alternative agreement should be the same as the net benefit of the default agreement. As the net benefit of the default agreement is the so called planning gain, then the proviso simply requires that the net benefit of any alternative agreement must be the same, in money or money terms, as the planning gain.

6.11 The next issue which arises concerning the text derives from subs. (3)(d). That subsection provides for the method by which the price of, amongst other things, houses to be transferred in accordance with an alternative agreement are to be calculated. The price is based on two components. The first is the "site cost" of the house which is to be "calculated in accordance with the subs. (6)". The second is the building and development costs including profit on those costs.

6.12 The first difficulty concerns element one of the calculation. It provides that of the site cost is to be calculated in accordance with subs. (6). That subsection is principally directed towards valuing land to be transferred. It provides that the value of the land is to be calculated on the basis of its existing use without any hope value. So far so good. One might, intuitively, therefore guess, that the intention of subs. (3)(d) was to ensure that the site cost element of the price of any house which was to be transferred was to be calculated on the existing use with no hope value basis. There would certainly be a considerable logic in the overall scheme of the section if that was to be the case. However, unfortunately, and yet again, this legislation gets more difficult to construe the more one looks at it. The problem on this occasion seems to me to stem from the unfortunately too frequent tendency of legislators to legislate by reference. In other words a section or subsection drafted for one purpose is deemed, by the legislation itself, to apply in other circumstances. However the precise way in which the provision might have to work in those other circumstances is, unfortunately, not always fully thought through.

6.13 The problem stems from the fact that s. 6(b) refers to the existing use "on the date of the transfer of ownership of the land to the planning authority concerned". That works perfectly well in the default case where undeveloped land is what is being transferred. The land is transferred before any building takes place. Its existing use on that date (without any hope value) is, therefore, the use without the benefit of the planning permission in question or the hope of that or any other planning permission. The problem that arises, of course, is that by the time any built housing unit is transferred, the use of the land will have changed. It will now be in use as a house, apartment or the like. What then is the existing use value of the site upon which the house has been built.

6.14 There may have been a logic in picking the date of transfer as the valuation date for a default transfer of land. Even in that case, the picking of the date of transfer does give rise to some difficulties, as canvassed in the argument before me, relating to situations where an agreement is reached today for the transfer of land at some stage in the future. On what basis is the land then to be valued. Even existing use values may change over time. However that problem is not for this case. Whatever, therefore, may be the merits of picking the date of transfer as the appropriate valuation date in a straightforward undeveloped land transfer, it raises significant difficulties of interpretation when parachuted into the valuation of the site component of a built housing unit which is to be transferred on foot of an alternative agreement.

6.15 Counsel for the local authorities suggest that subs. (6)(b) should be interpreted in a way in which, when applied to "site value" for the purposes of s. (3)(d), leads to a site being valued on the basis that it is just a site and not in use as a housing unit. I am mindful of the fact that taking that view might be said to be adopting a somewhat strained construction of the combined effects of subs. (3)(d) and (6)(b). However I feel that the use of the term "site" in s. (3)(d) allows for the possibility of a construction which concentrates on the site value prior to development rather than the value of land on which on housing unit has been built. I will return to this issue later but will, for the moment, accept that the proper view of the combined effects of subs. (3)(d) and (6)(b) is as argued on behalf of the local authorities.

6.16 It is now necessary to turn to the interaction between subs. (3)(d) and the proviso which I have already analysed. On the assumption that the site value element of the price of a house to be transferred in accordance with an alternative agreement is to be calculated on a pre-development use value then it is clear that the total price to be paid represents that pre-development site value together with construction and development costs and profit on those costs. The precise way in which the construction and development costs together with profit are to be calculated is, in itself, a matter of some controversy. However for the purposes of this argument I will assume that it amounts to the price at which the local authority could have arranged for the construction of the housing unit concerned by a separate builder in the marketplace, including any appropriate share of common development works and the profit which such a builder would be likely to command in the marketplace generally. I will return to the question of whether that is an appropriate approach in due course.

6.17 On that assumption that those costs (which I will loosely term "building costs") are, it seems to me, natural in the overall equation. If the planning authority acquires 20% of the land, and develops it itself, then it will incur those costs. If it acquires built units from the developer then it must pay him the same costs together with the site value which would have to have been paid to the developer for the acquisition of the land had the default provision been availed of. Thus, in either eventuality, the cost to the local authority is the same. It pays the existing use site value to the developer. It either spends what I have described as the building costs on constructing or arranging to have constructed suitable housing units itself or it pays the same sum to the developer to construct units for it and transfer those units to it when constructed.

6.18 If that is an appropriate way of looking at subs. (3)(d), then it follows that the only means by which the local authority can obtain an equivalent monetary benefit (as required by the proviso) is if the total value of the sites attributable to the built housing units transferred, represents 20% of the planning gain. The reason why this is so stems from the fact that the payment of what I have described as the building costs is neutral. The price at which built housing units must be transferred is required, by subs. (3)(d), to be as defined in that subsection. On the basis of the interpretation which I have provisionally put upon that subsection, the benefit to the local authority of acquiring a built housing unit at that price is exactly the same as the planning gain on the site for that built housing unit. Therefore the monetary value of such a unit when transferred is exactly the same as the monetary value of the site upon which it is built because the price paid to the developer for building it is the same as the price which the local authority itself would have incurred in building or arranging for the unit concerned to be built. The only gain is, therefore, the planning gain.

6.19 I indicated earlier that I would return to the question of whether the interpretation which I had provisionally put on subs. (3)(d) was correct. It is clear from the above analysis that an even greater degree of difficulty in achieving a harmonious interpretation of the provisions of s. 96 as a whole would occur if the site value element of the price at which a built housing unit was to be transferred was to be fixed at the value of the site allowing for the fact that it could be used for housing purposes. In that eventuality the price that would have to be paid for a built housing unit would be greater than the combined price that would have to have been paid had the default provision been availed of. In the latter case the site element of the price would have been based on pre-development use. That would, undoubtedly, be less than the value that would be attributed to a site if it is to be valued on the basis that houses can be built on it. As the building and other associated costs and profits would be the same in both cases, it follows that a local authority would be at a loss if it were to pay a price for a built housing unit on foot of an alternative agreement in accordance with that interpretation as compared to the position that would have obtained had the local authority simply acquired the land at existing use value and incurred the same building development and profit costs in constructing the same unit on the site. It does not seem to me that such a view could have been intended and for that reason it seems to me that it follows that the interpretation which I have provisionally placed upon the combined effect of s. 3(d) and subs. (6)(b), though somewhat strained, is correct.

6.20 On that basis the only way in which the local authority can achieve the same monetary value from an alternative agreement, as it would have had it employed the default provision, (and the proviso requires it to obtain such equivalence) is if the total value of the planning gain attributable to the sites to be transferred, with the built housing units on them, amounts to 20% of the planning gain attributable to the site as a whole. This is, in effect, the Cork position.

6.21 It is clear, therefore, that there are a set of interlocking interpretations which can be placed on the key provisions of the section which allow the section to operate in an orderly fashion in accordance with the Cork formula. It is clear that some of those constructions arise in circumstances of ambiguity and may indeed, to some extent, in certain cases, be strained. However that approach does have the very considerable benefit of providing a harmonious overall construction of the section which can work.

6.22 Against that it is necessary to consider how the interpretation offered on behalf of the developers would work. As I have noted earlier, in essence the method suggested on behalf of the developers was that the planning gain should be calculated and should be "spent" in acquiring housing units. No actual payment (other than a balancing payment), would arise. In reality this approach is not dependent on the issue which I have already addressed concerning the valuation of the site cost for the purposes of subs. (3)(d). Whatever may be the proper way of calculating the value of a built housing unit for the purposes of subs. (3)(d), such a value can be calculated. It can, in turn, be divided into the planning gain and an appropriate number of units can, therefore, be calculated. The difficulty with this argument is, however, concerned with the use of the word "price" in subs. (3)(d). What that subsection requires is that "the price of such houses" is to be determined in the manner set out. Counsel for the local authorities argue that the use of the term "price" implies that that sum, is in fact, to be paid by the local authority rather than be notionally included in a calculation of the number of units to be transferred. While far from decisive I am satisfied that there is some weight in that argument. There is also weight in the suggestion that the proviso seems, in its language, to be designed to ensure no loss of value to the local authority rather than to represent the basis for calculating the number of units to be transferred in default of agreement.

6.23 However, it seems to me that a more substantial difficulty with the argument put forward on behalf of the developers is that it places the number of units to be transferred into a state of complete uncertainty. On the basis of the approach of the developers there are, in reality, an infinite number of possible ways of determining the number of units to be transferred. While the developers have concentrated on their own preferred solution, which involves no payment other than, perhaps, the minimum balancing payment, there would, under the interpretation put forward by the developers, be no reason why a whole range of intermediate positions could not be adopted. Why not have a payment of a relatively modest sum and some extra units or perhaps a payment of a more significant sum and the transfer of more units. I can see nothing in the wording of the legislation, even if construed in the way in which the developers suggest, which would confine the "solution" to the one case where no (or only a small) balancing payment is made. It could apply equally to a whole range of cases up to and including the position that would pertain by the adoption of the Cork formula.

6.24 I should note in passing that it would not be possible for any more units that those proposed by the Cork formula to be transferred. The reason for this is straightforward. Applying the price mandated by subs. (3)(d), in the manner in which I have interpreted it, gives rise to a monetary gain per site. When 20% of the units (or an approximation thereto) are transferred, then the local authority obtains the full value of the planning gain that would be achieved under the default agreement. Were the local authority to acquire in excess of 20% of the units (or an appropriate approximation thereto) then its monetary gain would exceed that

which would have applied under the default provision. Such an arrangement would, in reality, be inconsistent with the proviso. The limit, on any view, of the local authorities' entitlement must, therefore, be at or about the number of units defined by the Cork proposal.

6.25 However, it seems to me that there are very weighty reasons indeed for leaning against an interpretation which would leave the question of the number of units to be transferred in the state of uncertainty which would arise if the section is interpreted in the manner suggested by Murphy Construction and Glenkerrin. Under the developers proposal, and on the broad facts of either of these cases, a transfer of anything between 7% and 20% of the units will meet both the proviso and the requirements of subs. (3)(d). It would be met by a zero payment (other than a balancing figure) at 7%, or a very substantial payment at 20% or by a sliding scale in between. But which point on that spectrum is to be chosen? By whom is it to be chosen? Most importantly by reference to what criteria? Obviously if the parties reach an actual agreement which meets the statutory obligations of the local authority concerned, and complies with the equivalence requirements of the proviso, then they can agree whatever number of units they like. However, where it is necessary to impose the terms of an agreement by an appropriate dispute resolution mechanism, it seems to me that the arbitrator could not be left at large without any statutory guidance as to the basis upon which the decision was to be made. There is, in my view, no such statutory guidance. The interpretation urged on behalf of the developers does, therefore, in my view, give rise to a very grave difficulty indeed in that it seems to allow the property arbitrator to pick, for no good statutory reason, any one of a wide range of numbers of units as the possible solution.

6.26 For those reasons it seems to me that the construction which does least damage to the language of the section is the construction advanced on behalf of Cork.

Against that background it is appropriate to turn, briefly, to the principles of construction of statutes.

7. Statutory Construction
7.1 There was no significant difference between the submissions of the various parties concerning the proper approach to statutory construction that I should adopt. It is common case that in more recent times the courts have moved towards a more teleological approach to the interpretation of statutes. In *D.P.P. (Ivors) v. Murphy* [1999] 1 I.R. 98 Denham J. quoted with approval from the judgment of *Griffiths LJ in Pepper v. Harte* (1993) AC 593 to the following effect:-

> "The days have long since passed when the courts adopted a strict constructionalist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purpositive approach which seeks to give effect to the true purpose of the legislation".

It should also be noted that the application of that principle in this jurisdiction is subject to the caveat entered by Denham J. in *Ivors* to the following effect:-

> "No method of interpretation may be such as to encroach on the constitutional role of the Oireachtas as the legislative organ of the State. The rules are applied to interpret the Act passed by the legislature and in so doing afford the respect appropriate from the judicial organ of Government to the legislature.
>
> The rules of construction are part of the tools of the court. The literal should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without re-writing the section then that is the appropriate interpretation for the court to take".

7.2 For the reasons which I have sought to analyse in the previous section of this judgment, I have come to the view that the interpretation which most accords with the literal wording of the legislation is that advanced on behalf of Cork. However it is clear that, in coming to that conclusion, it was, nonetheless, necessary to deal with a whole series of ambiguities and other difficulties of construction. It is, therefore, necessary, before reaching a final conclusion as to the proper construction, to deal with a variety of arguments that were raised on all sides as to the overall intent and purpose of the legislation and the effect that such intent and purpose might have on the proper construction.

7.3 I should firstly deal with an argument made on behalf of both developers which suggested that the construction contended for by the local authorities was one which interfered to a greater extent than was necessary with the property rights of those developers and was not, therefore, a construction which should find favour in the event of an ambiguity. The argument was based upon the apparent fact that it was likely that the price that could be obtained by a developer for a property on the open market would exceeded the price calculated by reference to the full site value (i.e. the portion of the open market value of the land as a whole attributable to the site concerned) and the building development and profit costs which would also have to be paid to the developer in the event of an alternative agreement being put in place. It was accepted, of course, by the developers, that the price which they would, in fact, receive would be less, reflecting the existing use price value of the site. However that reduction represented the basic reduction in value which, in the words of the Supreme Court, is the proportionate price that has to be paid for the benefit of the planning permission.

7.4 However, it is said that by requiring the developer to transfer the built housing units at a price calculated in accordance with the provisions of subs. (3)(d), the developer is forced to take a further burden by having to transfer the built housing units concerned at a price which, even making an appropriate allowance for the planning gain attributable to the unit concerned, is still significantly below the market value. The factual basis for this argument was not disputed. However it was, in my view, completely answered by the point made by counsel on behalf of Cork. As he, in my view correctly, pointed out, the appropriate comparator is with what would have happened had the default provision been implemented. In that case the developer would not have had the opportunity to develop 20% of the land at all. It would be developed by the local authority itself or by a builder contracted by the local authority to construct the units concerned.

7.5 Therefore, the basic operation of the default scheme within the Act would deprive the developer of any opportunity to make a profit from the construction of approximately 20% of the units. The fact that he may, by agreement, be enabled to actually develop that 20% of the site and, indeed make some profit on it (as subs. (3)(d) contemplates) is, in fact, looked at in that way, a bonus for the developer rather than a further burden. I am not, therefore, satisfied that the interpretation sought to be placed on s. 96 on behalf of the local authorities operates as an additional burden on the developer. The argument on behalf of the developer presupposes that the developer retains a right to develop the full site and is being deprived of the profit on part of the development. However the developer lost the right to develop that 20% of the site when availing of the planning permission. In those circumstances any benefit from that portion of the site is, properly analysed, a bonus and not a detriment. It should also be borne in mind, in this context, that the developer could not have been required to build units on 20% of the land in any event. He could, as I have pointed out, have insisted on the default provision. The fact that he agrees to build on the remaining 20% of the site does not, it seems to

me, entitle him to anything more than the statutory price for carrying out that work.

7.6 Secondly both local authorities suggest that the construction which they contend for is more consistent with the overall scheme of Part V in that it delivers more built housing units to be used for the purposes of housing those to whom the local authority concerned has obligations. I am not satisfied that this argument is one upon which any great weight can be placed. As I have already pointed out the principal issue to which that argument might relate is as to whether there should be an agreement for the transfer of built housing units at all.

7.7 As was, in my view, correctly pointed out for counsel for Glenkerrin, the Act contemplates the possibility that the entirety of the obligation of a developer can be met by the payment of cash. It is manifestly clear that the total number of built housing units that could be secured by a local authority (presumably on some other lands to which it had access) by the expenditure of money paid over by a developer would be a fraction (probably of the order of one third for the reasons which I have already analysed) of the figure represented by approximately 20% of the units on the site. Therefore, the acceptance of a cash payment necessarily implies that the net benefit in terms of housing units from the planning permission will be significantly less than 20% and probably of the order of 6 to 7%. Given that the Act contemplates such a possibility, it seems to me that it cannot be said that the Act necessarily implies that local authorities are going to get, under each of the alternative arrangements, something approximating to 20% of the units concerned.

7.8 These issues are, in my view, matters which should be addressed by a local authority before it enters into an agreement in principle or, as in the case of Dun Laoghaire Rathdown, allows events to evolve where no other means of meeting the social and affordable housing obligation of the developer concerned exists. In addition it is clear that issues of that sort, in a case of dispute, are more properly a matter to be considered by An Bord Pleanála, rather than the property arbitrator and it is, for that reason, that I also disagree with the submission of counsel for Cork to the effect that the property arbitrator in this case ought have taken into account such considerations in arriving at his conclusions.

7.9 Finally I should deal with the specific argument raised on behalf of Dun Laoghaire Rathdown to the effect that 20% of the floor area should, in all cases, be transferred. I can see no basis in the text for such an interpretation of the section. What the relevant provision requires is that the planning gain from the sites attributable to the built housing units to be transferred must be the same as 20% of the planning gain from the development as a whole. The section deals with site values and not with floor areas. It is for that reason that I prefer the construction put forward on behalf of Cork.

7.10 It should be noted that s. 7 of Appendix A of Dun Laoghaire Rathdown's housing strategy, which forms part of the relevant development plan, provides in relation to social and affordable housing that:-

> "Where the developer/applicant proposes to accord with this requirement by the provision of units the following should be taken as a guide to the developer/applicant. 20% of the gross residential floor area of the proposed development is considered the proportion of the development to be under negotiation for the purpose of social and affordable housing".

As a statement of the preferred position of Dun Laoghaire Rathdown, this is wholly unobjectionable. However it cannot alter the legal position of the entitlements and obligations arising under Part V. Where, as in this case, Dun Laoghaire Rathdown has allowed a situation to evolve where the only means for compliance with Glenkerrin's social and affordable housing obligations is by the provision of built housing units, then the number of such units to be transferred must be determined by the arbitrator in accordance with the legislation. It does not seem to me, therefore, that the inclusion of the provision which I have just quoted in the housing strategy can affect the proper criteria by reference to which the arbitrator is to determine the number of units to be transferred. To the extent, therefore, that a calculation based on 20% of the gross floor area might differ from a calculation based on the Cork formula, it seems to me, that for the reasons which I have set out, the Cork formula must be followed.

7.11 That construction does, however, lead to one complication concerning the practical way in which a calculation based on site value is to apply in cases where there are different size units and, in particular, where the sites for the respective units are, themselves, of different size. In addition there are complications arising from the question of how a site value is to be determined in the case of multi storey separate occupation properties such as apartments, duplexes and the like. This later issue may give rise to a consideration of floor area but only in that limited context. I now propose to turn briefly to those issues.

7.12 For the reasons which I have already analysed, I am satisfied that the appropriate basis for calculating the number of units to be transferred in circumstances such as those which pertain in the two cases under consideration, is the value of the sites referable to the housing units to be transferred. In the case of a homogenous development, such as that with which Cork is involved, no difference in practice emerges between a calculation based on that criteria and a simple exercise of transferring 20% of the actual housing units with either a balancing up or balancing down payment.

7.13 The first complication which may, of course, arise, derives from circumstances where the sites upon which the built housing units concerned are constructed are not homogenous. In those circumstances it may well be anticipated that the planning gain to be derived from the sites into which the development as a whole is divided, may not be the same in each case. For the reasons which I have set out, I am satisfied that the total number of units must be such that the aggregate planning gain attributable to the total of the sites concerned is equal to 20% of the planning gain (or as near thereto as possible) calculated in respect of the development as a whole.

7.14 Where the sites are not homogenous it seems to me that the property arbitrator must do the best that he can (in the absence of agreement) to identify a set of housing units for transfer where the aggregate of the planning gain attributable to the site on which each of those units has been built approximates to 20% of the total planning gain on the development as a whole, subject only to a balancing payment. In selecting which types of sites and units require to be included in such an arrangement, the property arbitrator should give all due weight to the reasonable requirements of the planning authority involved as to the type of accommodation which they need to supply for the purposes of social or affordable housing or both.

7.15 A second complication arises in the context of common areas, which complication is brought into even greater relief in the context of apartments. Subsection (3)(d) speaks of "site value". What is the "site value" of an apartment where, in a sense, two or more such apartments may be said to occupy the same "site". Again the legislation gives no assistance as to the proper approach. In the absence of any such assistance it seems to me that the appropriate approach is to divide the entirety of a site occupied by a block of apartments, by the number of apartments in that block, weighted for the size of such apartments. Thus, for example, in a block containing eight apartments, four of which are of 40 sq metres and four others of which are of 60 sq metres the total size of the apartment block will be 400 sq metres.

7.16 The site attributable to any individual apartment should then be proportionate to its size so that a single 40 sq metre apartment might be taken to represent 10% of the entire site upon which that block was developed whereas a single 60 sq metre apartment might be taken to be 15% of the same site. This is not an approach which is expressly mandated by the section. However the legislation contemplates that alternative agreements can relate to apartments. It follows that the price at which at an apartment is to be acquired requires that the site value of that apartment, calculated in accordance with subs. (3)(d), must be capable of calculation. There does not seem to be any other way, in the absence of an express statutory provision, than the method which I have just identified. Therefore, and for that reason, is the case of apartments, and only apartments, floor area may be a relevant consideration.

7.17 Finally, whether in the case of apartments or, indeed, in the case of housing estates, there will always be areas which do not formally form part of the "site" of a built housing unit itself. The roads and open areas of a housing estate qualify under that heading. More complex questions arise in relation to the built common areas frequently found within individual apartment blocks. In the absence of specific evidence in relation to an individual case, it seems to me that it would be wrong to attempt to be prescriptive as to how the property arbitrator should approach such matters. All that can be said at this stage is that the arbitrator should pay appropriate regard to such matters in attempting to do the best calculation he can.

8. The Dun Laoghaire Rathdown Proceedings

8.1 For the reasons which I have indicated it seems to me that the proper approach to the calculation of the number of units to which Dun Laoghaire Rathdown are entitled is in accordance with the analysis which I have just conducted. In those circumstances it seems to me that an appropriate declaration should be granted which broadly follows the formula urged by Cork. It may also be appropriate to include a form of declaration which reflects the conclusions which I have reached in relation to the proper approach to be adopted where not all units are of the same size. In addition a declaration concerning the method by which the price at which units are to be acquired seems appropriate.

8.2 I propose giving the parties to the Dun Laoghaire Rathdown proceedings an opportunity to consider this judgment and, hopefully, agree on the precise forms of declarations which ought to be granted to reflect the findings which I have made. I propose hearing counsel further in relation to this matter. As indicated earlier additional issues arise in the Cork proceedings to which I now turn.

9. The Cork Arbitration

9.1 As pointed out earlier the Cork proceedings involve a challenge to the determination of the arbitrator in which the arbitrator came down broadly in favour of the contention put forward by Murphy Construction.

9.2 For the reasons which I have set out, I am satisfied that, on a proper construction of the provisions of s. 96, the method for determining the number of units to be transferred argued on behalf of Murphy Construction before the arbitrator was legally incorrect. In those circumstances it seems to me that it follows that the arbitrator committed an error of law in adopting that approach.

9.3 The arbitrator did not give a reasoned determination. It is common case that the established jurisprudence does not require him so to do. However the only inference which can be drawn from the determination of the arbitrator is that he accepted that the proper construction of s. 96 was as had been urged upon him by Murphy Construction. I should record that I have the utmost sympathy for the arbitrator. For the reasons which I have set out, in perhaps too much detail, the questions of construction which arise in relation to s. 96 are close to impenetrable. The arbitrator was faced with a very great difficulty in choosing between the competing arguments put forward. However I am satisfied that, at the end of the day, the arbitrator was wrong and that the basis for that error was an incorrect interpretation of s. 96.

9.4 In those circumstances it is necessary to consider whether the decision of the arbitrator requires to be quashed and that the matter should be referred back to the arbitrator to conduct an exercise compatible with the provisions of s. 96 in the manner in which that section has been interpreted in this judgment.

9.5 Argument was addressed in the course of the hearing before me concerning the extent to which it would be inappropriate for the court to interfere with the decision of the arbitrator in this case. It was accepted that a decision of an arbitrator in a case such as this was open to judicial review. It should be recalled that a property arbitrator exercising the powers of such an arbitrator under statute is carrying out a public law function. The court should, of course, exercise significant deference to the decisions of such an arbitrator. However it seems to me that it follows from the fact that a property arbitrator is carrying out a public law function and is thus amenable to judicial review, that the ordinary rules of judicial review apply.

9.6 In *Radio Limerick One Limited v. Irish Radio and Television Commission* [1997] 2 I.R. 291 Keane J. said the following:-

> "Apart from those considerations, it would seem self evident that, if the exercise of the statutory discretion is grounded on an erroneous view of the law, it should not normally be allowed to stand. Thus, in the present case, if the only ground on which the Commission terminated the applicants contract was the carrying out of the outside broadcasts and they were wrong in law in treating as they did, those broadcasts as advertisement within the meaning of the Act, it is difficult how the decision could be described as "reasonable" either in the *Wednesbury* sense or on the application of the criteria proposed by Henchy J. in *Keegan*".

9.7 It seems to me to follow that, where there has been a significant error in the interpretation of a material statutory provision leading to a decision of the property arbitrator being wrong in law, any such decision should, *prima facie*, be quashed.

9.8 Reliance was placed upon the jurisprudence of the courts which suggests that where an issue of law is specifically referred to an arbitrator, then the parties are bound by the decision of the arbitrator as to the matter of law concerned even if it be wrong. While it is true to state that, as the issues before the arbitrator developed, the only question which remained for determination at the end of the day turned on the competing constructions put forward in relation to s. 96, it does not seem to me that this case can be characterised as one in which an issue of law was specifically referred to the arbitrator.

9.9 What the arbitrator was asked to do was to determine the number of units to be transferred. That overall issue would have required, amongst other things, a determination of the open market value of the property, the existing use value, the appropriate building and development cost together with profit and other matters. The fact that those issues came to be agreed between the parties does not alter the fundamental fact that those issues formed part of the questions referred to the arbitrator.

9.10 It should also be noted that the overall approach mandated by s. 96 is, in my view, a fundamental legal question. An error, if an understandable one, in adopting an inaccurate construction of the section is, therefore, in my view a sufficiently fundamental matter which should lead to the quashing of the arbitrator's determination.

9.11 Finally it is necessary to consider the argument put forward on behalf of Murphy Construction to the effect that I should exercise my discretion against quashing the arbitrator's award even if, contrary to the arguments which they put forward, I was satisfied that, *prima facie*, the award should be quashed. That argument was based on the availability of a case stated procedure. In substance it was pointed out, correctly so far as it goes, that the issues between the parties had boiled down to one of statutory construction by the time the hearing before the arbitrator ended and the arbitrator commenced considering the appropriate award to make. In those circumstances, it was suggested that it would have been open to Cork to seek to have a case stated to the High Court on the point in question. It was also noted that it had been suggested to Cork that this might be an appropriate way of dealing with the issue. There is no doubt that the issue which I have had to decide, as to the proper construction of s. 96, could have been referred to this court by means of a case stated.

9.12 However it does not seem to me that this would necessarily have been a more expeditious or, indeed, more appropriate means of dealing with the issue concerned. It was, in my view, a reasonable judgment for Cork to take to allow the arbitration to take its course and to permit the property arbitrator to reach his conclusion. Whatever may, or may not, be the merits of having adopted that course of action, it does not seem to me that it should, in all the circumstances of the case, debar Cork from an order of certiorari which, for the reasons which I have analysed, I am satisfied they would otherwise be entitled to. In the circumstances it seems to me that the decision of the arbitrator must be quashed and that the question of the proper calculation of the number of units to be transferred should be referred back to him.

10. Other Issues

10.1 Finally, as the matter must go back to the arbitrator, I should touch upon a small number of issues which will remain for consideration and which were the subject of debate at the hearing before me.

10.2 The first issue concerns the proper method of valuing the building and development costs together with profit. For the reasons which I have set out earlier it seems to me that a harmonious construction of the section is assisted by viewing those costs as being the equivalent of the costs that would be incurred had the local authority "bought in" an independent builder to do the work for it. The reason for such a view is that that is precisely what would happen in the event that the default provision was to apply. The whole structure of s. 96 requires that alternative agreements should be financially neutral relative to the default position. The appropriate measure of the building and development costs and the profits to be obtained on such building and development costs should be by reference to what, in the marketplace, would be such costs, were the local authority to have gone into the marketplace to secure the services of an independent builder to do the work for it. While it is, of course, appropriate for any local authority to have proper regard to any ministerial guidelines in relation to such matters, ultimately it seems to me that, in the case of dispute, the arbitrator must determine those matters on the basis of what is implied in the legislation. For those reasons such building and development costs and profit should be determined by the arbitrator, by reference to what he is satisfied would be the open market rate for those matters at the relevant time and in the relevant locality.

10.3 The other matter which arises concerns the timing of the relevant valuations. The planning gain is the benchmark by which the reference to which the monetary value of any alternative agreement needs to be determined. The planning gain is by reference to a default agreement. A default agreement is by reference to a transfer of land. However the transfer of land could occur at any time which the parties might agree.

10.4 However, it is clear that the valuation of the existing use value of the property concerned is to be conducted as of the date of transfer. On that basis it seems to me that the open market value of the property to be used for the purposes of calculating the planning gain should be as of the same date. In those circumstances it seems to me that the arbitrator should do the best he can to estimate what the open market value would be as of the likely date of transfer on the basis of whatever evidence may be available to assist him in determining when that date might be.

10.5 Where land is to be transferred on foot of a default agreement then, in the absence of an agreement in principle that the land should be transferred at any other time, it seems almost certain that the land will be transferred as soon as the price is agreed or fixed by the arbitrator. For all practical purposes, therefore, the valuation of the land should be as of the date of the arbitration. Similarly where, in the context of an alternative agreement for the transfer of built housing units, the housing units concerned have already been built, or are near completion, then it should be anticipated that a transfer will occur almost immediately. In those circumstances, equally, the valuation of the open market value of the land for the purposes of valuing the planning gain should, to all practical intents and purposes, be as of the date of the arbitration. If, however, there are special circumstances from which it can properly be inferred that the relevant default transfer (hypothetically), and the relevant alternative agreement to transfer (in practice) would be at some significantly removed period of time from the arbitration, then that is factor which the arbitrator can properly take into account in his calculations.