

**THE HIGH COURT
JUDICIAL REVIEW**

2004 No. 717 J.R.

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

AUGHEY ENTERPRISES LIMITED AND BARRY AUGHEY

APPLICANTS

**AND
MONAGHAN COUNTY COUNCIL**

RESPONDENT

Judgment of Mr. Justice Garrett Sheehan delivered on the 4th day of June, 2008

1. This application for judicial review relates to a dispute between the applicants and the respondent concerning a roundabout on the Monaghan town by-pass in the vicinity of lands owned by the applicants.

2. In or about the month of April, 2000, the respondent initiated the public planning element of the proposed Monaghan Town by-pass scheme with the plans and particulars of the proposed by-pass scheme being made available for inspection at the respondent's offices. It was apparent from those plans and particulars that the respondent proposed to construct a new roundabout at the junction of the N2/N12 Armagh Road. The proposed junction was in the vicinity of lands owned by the applicants and clearly showed five spurs including a spur leading to the lands owned by the applicants. In January 2001, the applicants received correspondence from the respondent's agent enclosing maps showing the applicants property and the proposed land take.

3. On 11th April, 2001, the respondent made the Monaghan County Council compulsory purchase (roads) order No. 1 2001 realignment of N2 national primary route from Coolshannagh to Cortat. This authorised the respondent to acquire, *inter alia*, 0.055 hectares of the first named applicants lands and 0.296 hectares of the second named applicants lands.

4. Subsequent to the making of the said compulsory purchase order the applicants objected to the confirmation of the order by An Bord Pleanála. Prior to the oral hearing of the objections to the compulsory purchase order a meeting was held in the respondents offices on 22nd August, 2001, between representatives of the respondent and representatives of the applicants as well as the second named applicant, following which the applicants withdrew their objections.

5. When Macken J. granted leave to the applicants pursuant to s. 50 of the Planning and Development Act 2000 (as amended) she set out the background to this dispute and the arguments both parties relied on at that stage in a comprehensive judgment delivered on 15th June, 2005.

6. In the course of that judgment Macken J. stated in her conclusions what she believed the essence of the applicants' case to be:-

"1. That a roundabout was to be constructed in circumstances where provision was already made for the possible construction of a fifth spur and that maps presented in 2000 and 2001 clearly showed how the spur would look or where it would be located when constructed.

2. That a representation was made on behalf of the respondent that this spur road which I understand to be a limited piece of road emanating from the above mentioned roundabout but terminating quite a short distance from that roundabout would be constructed from the roundabout onto the applicants lands or lands abutting the applicants lands.

3. That on the basis of that representation the first named applicant who had opposed the compulsory purchase order in respect of its land take withdrew its objection to the compulsory purchase order relying on the alleged representation and did so to its detriment.

4. That a decision was subsequently taken by the respondent that the roundabout would continue to have provision for the possibility of such a spur, but that the spur would not be built, or at least not built as part of the approved by-pass scheme and therefore was no longer part of the construction of the roundabout itself and further might or might not be built in the future."

7. While he adopted the judgment of Macken J. in a careful and concise opening on behalf of the applicants Mr. Connaughton further limited the scope of his application. He stated that his case was that Mr. Barry Aughey who was the second named applicant and one of the beneficial owners of the first named applicant had a meeting with the representatives of the respondent on 22nd August, 2001, at which it was expressly represented to him on that date that on this particular roundabout which was adjoining lands owned by either or both of the applicants there would be a fifth spur or a fifth exit off that roundabout installed on the roundabout. He said that Mr. Aughey's case was that representation was made to him in the context that the applicants had made objections to the compulsory acquisition of certain of their lands and that this meeting was specifically arranged by agents of the respondent to try and see if some agreement could be reached through which those objections would be withdrawn. On foot of that meeting and what occurred at that meeting the applicants withdrew their objections and matters proceeded. However, the fifth spur was not built and Mr. Connaughton told the court that when it became apparent to his client that it was not to be built he then embarked upon correspondence with the respondent that resulted ultimately in the present application. Mr. Connaughton stated that the essential case he made on behalf of the applicants was that an assurance was given at that time that this spur or additional exit from this particular roundabout would be put in. He went on to say that as of this date it was not open to the respondent to change the position so as to excise from its plans this fifth spur without consulting and hearing any representations from the applicants, because the applicants had materially altered their position in the negotiations that culminated in what the applicants alleged was the deal on 22nd August, 2001, and that thereafter both parties were in effect bound into that. Namely the applicants not to proceed with any further objections to the compulsory acquisition of certain of their lands and the respondent to fulfil that commitment to having the fifth spur completed. Mr. Connaughton said that he conceded as a matter of law that it may have been open to the respondent subsequent to that date to change or alter its plans, but he says that it could not change or alter its plans ignoring the representations that had been made to the applicants and that at the very least he said the applicants had a legitimate expectation that the respondents would consult the applicants and afford them the opportunity of making representations if the respondents were to decide to change their plans so as to excise this fifth spur from the particular roundabout.

8. In commenting on the meeting of 22nd August, 2001, in the course of her judgment Macken J. stated:-

"According to the information available there is no doubt but that a meeting took place between the parties in August 2001. What precisely occurred at that meeting is a matter of considerable dispute between the parties and it is true that I will not be in a position to resolve those factual issues as to what was or was not agreed."

9. It is clear therefore that this case hinges on the meeting between the applicants and the respondent on 22nd August, 2001 and the first thing that I must do is to address the conflict between the parties concerning this meeting.

10. Paragraphs 9 to 13 inclusive of the affidavit sworn 10th August, 2004, by Mr. Barry Aughey to ground these proceedings are the critical paras. in relation to this dispute.

11. In para. 9 he refers to the meeting on 22nd August, 2001, and states who was there. I now quote in full paras. 10 to 13 of his affidavit:-

"10. Initially I had objected to the fifth spur (adjacent to my lands) at the proposed roundabout at the junction of the N2/N12 Armagh Road on the basis that Monaghan County Council would ultimately run a road directly through the centre of my lands with the effect that those lands could never be developed. In this respect I had come into possession of a drawing which showed a proposed road running directly through the middle of my lands. In this regard I beg to refer to a copy map showing a proposed route linking the proposed N54 link and proposed N2 by-pass upon which marked with the letters BA6 I have signed my name prior to the swearing hereof. Furthermore, the service station operated by the second named applicant and which is currently located on the existing N2 would not have access to the proposed N2 by-pass and would as a consequence almost certainly suffer a significant downturn in business.

11. However, at the meeting on 22nd August, 2001, the County Council's representatives persuaded our client that it was not the intention of Monaghan County Council to run a road directly through my lands and that any road which might be developed at a later stage would run through adjacent lands. Moreover, the County Council's representatives pointed out that Monaghan County Council had no plans to do anything with this fifth spur for at least ten years, and they also persuaded your deponent that the spur would be to my benefit as it would give access to my lands from the proposed N2 by-pass.

12. Having considered these representations I came to the conclusion that the petrol pumps on the lands owned by the second named applicant could be moved from their existing location to the portion of my lands adjacent to the proposed fifth spur on the new roundabout, thus affording access to the proposed N2 by-pass. I further considered that this proposal would secure the business of the service station once the by-pass was constructed and operational. Finally, it was made apparent to me that the remainder of my lands would also have direct access to the proposed N2 by-pass and it was indicated to me that such direct access would be to my benefit as I could then submit a planning application to develop the remainder of the land for commercial or retail use.

13. I say that on the basis of these express assurances and in particular the assurance in respect of the proposal to construct a fifth spur to the roundabout at the proposed junction at N2/N12 (Armagh Road), I agreed to withdraw the applicants objections to the making of the compulsory purchase order. In this regard I beg to refer to copy correspondence exchanged between your deponent and Monaghan County Council dated 29th, 30th and 31st August, 2001, upon which pinned together and marked with the letters BA7 I have signed my name prior to the swearing hereof."

I presume the second line of para. 11 of the applicant's affidavit is a typographical error and should read persuaded me and not persuaded our client.

12. The replying affidavit on behalf of Monaghan County Council was sworn by Patrick Johnson, an engineer with Monaghan County Council on 8th September, 2004. Paragraphs 12 to 18 inclusive of Mr. Johnson's affidavit are the critical paras. For the sake of completion I propose to set out here paras. 12 to 18 of Mr. Johnson's affidavit:-

"12. It was agreed at the outset of the meeting that it would not be minuted but that any decisions arrived at would be set out in subsequent letters. The concern of the second named applicant initially related to the potential construction of a spur road off the roundabout through his land and the impact it would have on his land. This was discussed at the meeting and I tried to persuade Mr. Aughey that such a road, if constructed and wherever constructed, would be beneficial to his lands but he was not having any of it. As to exhibit BA6 in Mr. Aughey's grounding affidavit I produced this drawing at the meeting.

13. Mr. Aughey persisted at the meeting with his view that the suggested road was detrimental to his property. I made it clear to him that there were no immediate proposals for the suggested road and that we would remove it. At this point, Frank Burke, engineer for the applicants intervened and stated that they would leave the question of the arm of the roundabout aside and we went on to discuss the impact which construction work would have on the applicants business and how it could be eliminated or alleviated. The second named applicant alleged in his affidavit that the respondent's representatives at the meeting discussed the relocation of his petrol pumps on the granting of a planning permission for an alteration. This was discussed in the context of a public road being constructed through his lands which as previously stated I tried to persuade him would be beneficial to him. There was no mention of relocating pumps other than in the context of a public road being built leading into the fifth spur, or of the respondent being favourably disposed to any application for planning permission in relation to such relocation. Furthermore, there was no commitment by the respondents representatives of the effect that any road which might be developed at a later stage would run through adjacent lands and not through the applicants' lands.

14. I reject the second applicants' version of events at the meeting of 22nd August, 2001, as outlined in paras. 11 and 12 of his affidavit. No promise was made by any of the representatives of the respondent to build a fifth spur to the roundabout as part of its initial development. We emphasised to the applicant that a new road, if and when developed would benefit the applicants lands but there was no promise of the sort which he suggests was made. We did not as he seems to suggest promise to put in a fifth spur to the roundabout at public expense so as to facilitate him in utilising a private access onto the roundabout.

15. I reject the suggestion at para. 12 of Mr. Aughey's affidavit that there was any basis on which the representatives led him to "the conclusion that the petrol pumps on the lands owned by the second named defendant could be moved from their existing location to the portion of my lands adjacent to the proposed fifth spur of the roundabout, thus affording access to the proposed N2 by-pass" in the absence of the suggested development road or that the remainder of

his lands to the south of the access were being provided with a private direct access to the proposed N2 by-pass on the roundabout.

16. Finally in connection with para. 12 of Mr. Aughey's affidavit I reject the suggestion that it was made apparent to him that the remainder of his lands would have direct access to the proposed N2 by-pass, or that the respondent would install the spur and thus enable him to apply for planning permission to develop the remainder of his lands for commercial or residential use. The basis on which the spur featured in the plan in the first place was to cater for the future development by Monaghan Town Council of a road and the second named applicant was being told that in the event that this road was developed his lands would get the benefit of access to this road, and the result would assist him in developing the remainder of his lands. If the applicants wish to develop their lands there is nothing to prevent them from submitting a planning application for any development they may propose to include an alteration to the layout of the roundabout so as to enable them to provide the infrastructure for the fifth spur at their own expense. In the event that such planning application is received Monaghan Town Council will have to consider same on its merits having regard to any relevant considerations such as the provisions of the County Development Plan and the Monaghan Town Council Development Plan relating to access from private property onto national primary routes and the views of a potentially interested party such as the National Roads Authority.

17. I believe that at the meeting of 22nd August, 2001, both the applicants and their advisers knew full well that the officials of the respondent who attended the meeting were not in a position to promise that the potential fifth spur to the roundabout would be provided to facilitate a private access road, and that they were not in a position to give any indication about whether any planning application might be favourably looked at. Furthermore, we were not in a position to make a commitment or promise that the respondent or Monaghan Town Council would not at a subsequent stage run a road through the applicants lands. We were not in a position to give any such assurances and there was no discussion about reduction of the size of the roundabout in the context of the applicants' complaint about the spur. What the second applicant was concerned about was the effect of any future road coming out of the spur.

18. The applicants are suggesting that the respondent agreed to provide them with the spur to the roundabout so as to enable them to connect up with the spur both for their petrol station and to give access to the remainder of the lands for commercial development. I believe that had there been any agreement of this sort (which there was not) it would have involved specific agreement on a number of points and these would have been reflected in the exchange of correspondence exhibited by the second named applicant at BA7 referred to in para. 13 of his affidavit. It can be seen from the correspondence that it is completely silent on these points and the reason for this is that there were no agreements or representations of the sort suggested by the second named applicant in his affidavit. The correspondence passing between the applicants and respondents speaks for itself and was not accompanied by any secret or oral protocols embodying agreements or representations of the sort which the applicants now rely on. The applicants withdrew their objection to the confirmation of the compulsory purchase order as a result of the assurances set out in that correspondence and on no other basis."

13. The court has been assisted in its resolution of this dispute about what happened at the meeting in August, 2001, by the evidence of Mr. Aughey, the second named applicant.

14. I did not find him to be a witness on whose evidence I could rely. In particular, he was shown under cross examination by Mr. Owens to have suffered a serious memory lapse concerning the content of plans his architect sister had prepared on his behalf in or about July, 1999 in relation to these lands.

15. When I come to consider his affidavit I do so in the light of this finding. In short, I prefer the evidence of Mr. Johnson. It is also significant that Mr. Aughey made no mention in his correspondence with the respondent following the August, 2001, meeting of the assurances he now alleges he was given at that meeting and which he stated in 2004, that he had relied on as the reason for withdrawing his objections to the compulsory purchase order. Preferring the evidence of Mr. Johnson, I hold that the applicants have not established that any of the assurances they now contend for and which are disputed by the respondent were in fact given. In view of this finding the question of legitimate expectation does not arise. Accordingly I refuse the reliefs sought.