Neutral Citation Number: [2008] IEHC 224

THE HIGH COURT
COMMERCIAL

2008 No. 509 J.R.

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

BETWEEN

JOSEPH CONNOLLY

APPLICANT

AND
AN BORD PLEANÁLA
AND MEATH COUNTY COUNCIL

RESPONDENTS

AND
BERNADETTE BURKE, PERSONAL REPRESENTATIVE OF JOHN BURKE (DECEASED) AND MICHAEL RYAN TRADING AS THE RYBO PARTNERSHIP

NOTICE PARTY

Judgment of Ms. Justice Irvine delivered the 8th day of July, 2008

1. The applicant in these proceedings is a retired businessman who is the owner of certain lands at Donacarney House, Mornington, Co. Meath. The respondents to the action are An Bord Pleanála and Meath County Council. The within litigation was instituted as a result of a decision of An Bord Pleanála (hereafter "the Board") dated 5th March, 2008, to grant to the notice party planning permission in respect of a site comprising 20 hectares/ 50 acres of land which is situated 5km south east of Drogheda Town Centre and 300m to the north of the centre of Donacarney Village. The lands the subject matter of the planning permission were sold by the applicant to The Notice Party by contract for sale dated 28th October, 2003 (hereafter "the Contract") for a sum of €14,250,000.00. At the time of the said sale the applicant retained for his own use some 7.6 hectares/17 acres of land upon which Donacarney House is located. The purchasers formed a partnership (hereafter "the Rybo Partnership") (the Notice Party) for the purposes of developing the said lands and Michael Ryan, of the Notice party herein is now the beneficial owner of all of the assets of the Rybo Partnership.

2. The within proceedings were instituted by the applicant on 28th April, 2008 and the affidavit seeking leave to apply for judicial review is one sworn by the applicant on that date. Given that the intended judicial review proceedings seek to impugn the decision of the Board to grant planning permission to the Notice Party, that partnership is the notice party to the within proceedings.

3. The statement required to ground the application for judicial review makes it clear that the applicant wishes to challenge the decision of the Board to grant planning permission for the development of some 713 dwellings on the lands purchased under the Contract. The basis for the potential challenge to the validity of the decision of the Board relates to the alleged failure on the part of the Board, at the time of making its decision, to take into account the effect of Variation 2 of the Meath County Development Plan dated the 4th February, 2008. This variation, according to the applicant, had the effect of restricting the number of units that might be developed upon certain lands which included those of the parties hereto and also introduced a requirement that any such development would occur on a phased basis. The applicant maintains that had this variation been taken into account by the Board that it would have been forced to conclude that the notice party's proposed development for the lands in question was in material contravention of the Development Plan.

4. If the present judicial review proceedings are successful the Board will be obliged to reconsider its earlier decision and on the applicant's account of events this might result in the Boards refusal to grant the planning permission sought by the notice party. If this were to occur, the applicant would have an opportunity to submit an application for planning permission for his own lands, something he cannot do at the moment as the potential development of his lands has been rendered, according to the applicant, sterile by reason of the manner in which the notice party approached its application for planning permission.

5. The applicant is aggrieved at what has occurred since the execution of the Contract in October, 2003 in circumstances where he states it was the clear intention of both parties that they would proceed to develop their relevant holdings at a future date. He states that if the present decision of the Board stands he will be precluded from developing his lands during the life span of the Meath County Development Plan until at least the year 2011.

6. The within proceedings were admitted to the Commercial Court by order of Kelly J. on 26th May, 2008. On that date the learned judge granted liberty to the notice party to return a motion before the court on 24th June, 2008 for the purposes of applying to dismiss or strike out the within proceedings on the grounds that they were not maintainable by reason of Special Condition 13 of the Contract. It is this application which is the subject matter of the present judgment.

7. In this motion of the notice party Michael Ryan, who is now the owner of the assets of the notice party, seeks an order dismissing the within proceedings on the grounds that they cannot be properly maintained by reason of the Contract made between the applicant and the notice party on 28th October, 2003. The notice party asks the court to invoke its inherent jurisdiction and contends that the proceedings are an abuse of the process of the court.

8. The application of the notice party was heard by the High Court on 24th June, 2008 in the course of which the court heard oral submissions and received written submissions on behalf of the notice party and also on behalf of the applicant. The respondents to the proceedings, namely the Board and the Planning Authority, did not participate in the hearing and agreed to abide by the determination of the court.

9. In response to the present application the applicant has made a number of arguments which can be conveniently be summarised as follows:-

> 1. That the procedure adopted by the notice party for the purposes of seeking to dismiss these judicial review proceedings is irregular and thus fundamentally flawed.
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> 2. That even if the procedure adopted by the notice party is considered regular by the court that the notice party has not discharged the required burden of proof to have the proceedings discharge in limine. This latter objection was supported by a number of legal arguments which contended that, notwithstanding the express terms of the Contract entered into between the parties, the applicant has a statable case to the effect that he is entitled to maintain the within judicial review proceedings and for this reason that the same should not be dismissed at this time as an abuse of

process. These arguments are considered later in this judgment.

10. Prior to embarking upon the decision on the substantive motion I believe it is relevant to set out a number of the special conditions provided for in the contract and also a brief resume of the planning history pertinent to the lands in question as of the date of the Contract and over the subsequent period.

Relevant Contractual Conditions

> "13. The Vendor undertakes that he will not object directly and/or indirectly to any planning application to be made by the purchaser in respect of the Lands in Sale.
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> 14. The Purchaser undertakes that he will not directly and/or indirectly object to any application to be made by the Vendor in respect of the lands as retained by the Vendor. The Purchaser further undertakes to likewise bind any subsequent purchaser of sold land as one plot or in the event of the Purchaser selling sites on the sold land to builders insofar as such a covenant or undertaking can so bind such parties. The Purchaser shall not be bound however to insert a covenant or condition in the sale of individual houses.
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> 16. The Purchaser undertakes not to construct any dwelling on the sold land within 9 meters of the boundary of the retained lands and which boundary is delineated on the map annexed hereto and marked with the letters A, B, C, D with the exception of dwelling houses whose gable walls only, overlook the said boundary provided however the said gable walls have no windows overlooking the retained lands.
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> 17. The parties hereby acknowledge that this agreement embodies the entire agreement and understanding between the parties and supersedes all prior statements, agreements, representations and understandings (if any) relating to the subject matter hereof."

Relevant Planning Facts

11. At the time of the purchase by the notice party of their lands from the applicant, the lands purchased and those retained by the applicant were zoned as:

> A 1. To provide for new residential and the protection and improvement of the amenities of established residential areas or;
>
> A 2. To provide for low density residential development and public open space.

12. Subsequently, under the East Meath Local Area Plan 2005 to 2011 the lands of the third parties and those of the applicant were zoned as:-

> "A 3. To conserve and protect the character and setting of heritage buildings in residential development and redevelopment proposals in accordance with approved framework plans and subject to necessary physical infrastructure."

13. The notice party, as was required of it under the aforementioned Development plan, when it applied for planning permission in July, 2006, submitted to the local authority a framework plan which did not address in any way the applicant's lands notwithstanding the zoning objectives set out above. The applicant contends that the framework plan was accordingly fundamentally flawed and that it did not correlate with the lands use Zoning Objectives A3 as set out in the East Meath Local Area Plan 2005 to 2011.

14. By observation dated the 1st September, 2006, the applicant brought to the attention of the Planning Authority his objection to the proposed planning permission based on his stated belief that the framework plan was fundamentally flawed. The applicant maintained that the framework plan submitted should have included his own 7.6 hectares/ 17 acres of land.

15. Subsequently, the application for planning permission was refused by the Planning Authority but not on the basis that the framework plan was fundamentally flawed. Notwithstanding the apparent contractual restriction on the right of the applicant to maintain any objection to an application made by the notice party for planning permission the applicant once again, but this time using the expertise of the planning consultants Tíros Ltd, lodged a lengthy observation with the Board at the time of the appeal by the notice party against the refusal of the local authority to grant planning permission. In that observation delivered on 14th November, 2006, the applicant urged the Board to conclude that the planning application was premature unless a composite framework plan was submitted and approved for all of the lands with an A3 zoning objective (including his own lands) and identified in the East Meath Local Area Plan adopted in November, 2005. The observation complained that the framework plan was incomplete when adopted by the Planning Authority in July, 2006 notwithstanding the fact that the plan was entitled "framework plans for lands at Donacarney House" as the plans did not refer to Donacarney House or the immediately surrounding lands. The Board was also told of the fact that the Planning Authority, through its planning department, had advised the applicant that it would not accept a separate framework plan from him as they could only deal with one comprehensive plan for the entirety of the lands with the A3 zoning objective. Without such a comprehensive plan it was urged on the Board that the remaining lands adjoining Donacarney House were effectively incapable of development. The Board was urged to conclude firstly that the application for planning permission was premature in advance of a composite framework plan being submitted which would cover all of the lands with the A3 zoning objective and secondly that to permit of the proposed development, absent the existence of such a plan, would not be in the interests of proper planning and sustainable development.

16. By letter dated 23rd November, 2006 the solicitors acting on behalf of the applicant wrote to the notice party enclosing a copy of the observation which had been lodged with the Board and requesting the notice party to withdraw their appeal to the Board and join together for the purposes of submitting a new composite framework plan for the entire lands the subject matter of the A3 zoning objective. In response, Messrs BCM Hanby Wallace, solicitors acting on behalf of the notice party, by letter dated 30th November, 2006, advised the applicant's solicitors that their client's observation was in breach of the covenant contained in Special Condition 13 of the contract and advised the applicant that there would be no withdrawal of the pending appeal.

17. On 4th February, 2008, Variation 2 (order of priority) Meath County Development plan 2007 to 2013 was introduced. This variation introduced an order of priority for all lands zoned residential in the county, the net effect of which was to restrict the number of units that might be developed in the Mornington area and also to ensure that such development as was permitted would be introduced on a phased basis.

18. By decision of the Board dated 5th March, 2008, the Board granted planning permission for the notice party's proposed development subject to various conditions based on the reasons and considerations set out therein. Whilst the inspector, in his report to the Board, advised the Board as to the applicant's observations and had himself advised the Board that it would be appropriate that any framework plan would incorporate all of the lands with the A3 zoning objective, the Board nonetheless granted the planning permission sought.

The Present Application
19. By notice of motion dated 3rd June, 2008 the named notice party seeks an order dismissing the within proceedings on the grounds that they cannot be properly maintained by reason of the provisions of the Contract dated 28th October, 2003 and in particular by reason of Special Condition 13 thereof. This relief is grounded upon the affidavit of Michael Ryan dated 3rd June, 2008 and the exhibits therein referred to.

20. The within motion has been brought in response to the application on the part of the Applicant pursuant to s. 50 of the Planning and Development Act 2000, as amended by the Planning and Development (Amendment Act) 2002 for leave to institute judicial review proceedings seeking the relief set out in the statement of grounds. In the same notice of motion he sought a stay pursuant to O.84 r. 20 (7)(a) of the Rules of the Superior Courts or in the alternative an injunction restraining the notice party from taking any steps on foot of the decision of the Board made on the 5th March, 2008.

21. The High Court has an inherent jurisdiction to dismiss any proceedings where such proceedings amount to an abuse of the process of the court. This jurisdiction exists separately from the right of the court to dismiss or stay any proceedings under the provisions of O. 19 r. 28 of the Rules of the Superior Courts. That is a procedure which is available to a defendant who can establish that the pleadings disclose no reasonable cause of action against a defendant or that they are frivolous or vexatious.

22. In the present case there is no suggestion made by the named notice party that the applicant may not have a statable case in law to seek an order of *certiorari* against the respondents to the proceedings on the grounds that the decision of the Board was made without apparent regard to variation 2. Rather, the notice party maintains that the intended proceedings constitute an abuse of the process of the court by reason of the Contract entered with the applicant and in particular by reason of Special Condition 13 of the Contract which the notice party contends precludes the applicant from seeking to engage the court in judicial review proceedings.

23. The inherent jurisdiction of the court to dismiss proceedings has been the subject matter of very many decisions of the court including those in *Barry v. Buckley* [1981] I.R. 306 and *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425 to mention but two. The court exercises its inherent jurisdiction in order to ensure that wholly unmeritorious claims which have no prospect of success are not allowed to proceed to a full trial with the consequential onerous burden that such proceedings will place upon the party who contends they are the subject matter of unwarranted litigation.

24. The present application requires the Court to answer two questions namely:

> 1. Is the application brought by the notice party irregular in terms of the procedure adopted such as to justify the Court dismissing the application on that basis?
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> 2. If the procedure adopted by the notice party is not irregular, has he discharged the burden of proof, having regard to the facts deposed to on affidavit and the legal principles to be applied, to justify the Court invoking its inherent jurisdiction to dismiss the applicant's judicial review proceedings as an abuse of the court's process?

The Procedure
25. The applicant has submitted that the procedure adopted by the notice party in this current application is irregular. Consequently he contends that the court does not enjoy the requisite jurisdiction to dismiss these judicial review proceedings. The applicant asserted that the proper procedure was for the notice party to institute plenary proceedings seeking a permanent injunction restraining the applicant from pursuing this action. Counsel submitted that within such plenary proceedings the notice party could apply for an interlocutory injunction restraining the maintenance of the judicial review proceedings pending the full hearing of his own plenary proceedings.

26. The Court rejects the applicant's submission that the procedure adopted by the notice party is irregular. It does not accept that the notice party was required to issue separate plenary proceedings claiming an injunction when the same relief as might be obtained on an application for an interlocutory injunction in plenary proceedings can just as easily and in a more efficient and cost effective manner be obtained under the present procedure.

27. The argument made by counsel in support of this submission was predicated upon the supposition that such injunction proceedings would commence by plenary summons, would be followed up with an application for an interlocutory injunction and thereafter a full hearing on oral evidence. Counsel relied upon the fact that if proceedings were pursued in such manner and if an interlocutory injunction was granted by the court that the court would have required the plaintiff to give an undertaking as to damages as a term of his injunction. In such an event, if the plaintiff failed in his claim at the full hearing, the applicant would be in a position to execute on foot of the undertaking as to damages.

28. The Court rejects the logic of this argument. Whilst the notice party has every right to proceed by way of injunction, the high likelihood is that if such proceedings had been instituted the judge dealing with the application for an interlocutory injunction would have decided to treat the hearing of the interlocutory injunction as the full hearing of the action. There is nothing in the affidavits filed on the present motion to convince this Court that any such injunction proceedings as might have been commenced by the notice party would have been dealt with on oral evidence or that the case would not have been disposed at the interlocutory hearing on the basis of the affidavits and the Contract documents. Hence, any argument based upon the availability of a possible undertaking as to damages is somewhat artificial.

29. The applicant's submission on this very issue points to yet another reason why the Court should deal with the notice party's application to dismiss the judicial review proceedings by motion in the same proceedings. To do so by the procedure invoked avoids the very delay that leads to the type of losses which the applicant states needs to be protected by an undertaking as to damages in plenary proceedings. It is in the interest of all parties that proceedings be disposed of before the Court in an efficient manner and the Court sees no merit in the submission made by the applicant which, if adopted, would put all parties to substantial additional litigation costs, would cause unnecessary delay and would potentially generate unnecessary losses for the litigants that might or might not be

ultimately recovered.

30. Strong support for the procedure adopted by the notice party on this motion is to be found in the decision of Clarke J. in *Ryanair Ltd v. An Bord Pleanála* [2008] IEHC 1. Not only is that decision supportive of the procedure adopted in this case but it is also clear authority in favour of the court's right to dismiss proceedings where it can be established on the evidence before the court that there is a contractual agreement which precludes the maintenance of such an action.

31. The brief facts of that case were that in May, 2005 the government decided that a second terminal should be constructed at Dublin Airport. The same was to be commissioned and constructed by the Dublin Airport Authority ("DAA"). The decision also included a proposal to select the operator for the second terminal ("T2") by open competition. In July, 2005 Ryanair instituted proceedings challenging the decision aforementioned and joined as defendants to the proceedings An Taoiseach, the Minister for Transport, the DAA, Ireland and the Attorney General. These proceedings were settled on terms which included Ryanair agreeing to withdraw its challenge to the validity of the government decision. The agreement included the following term:-

> "2. Ryanair confirms and agrees with the Defendants not to bring any further challenges against or arising out of or connected with the Government's Decision of the 18th of May, 2005 concerning T2 or in respect of any implementation in whole or in part of the Medium Term Masterplan for infrastructural facilities prepared by Pascal and Watson in September 2005 (including the plan for the new Terminal and associated pier facilities) (Pier E) which the DAA may decide to effect."

32. Notwithstanding the settlement of its litigation in the above terms Ryanair subsequently sought to challenge a decision of An Bord Pleanála referable to the proposed second terminal. The applicant in those judicial review proceedings was Ryanair and the respondent was An Bord Pleanála. There were four notice parties to the proceedings namely the DAA, Fingal County Council, the Portmarnock Community Association and An Taisce.

33. The DAA brought an application seeking an order pursuant to the inherent jurisdiction of the court dismissing or striking out the proceedings on the grounds that they were not maintainable by reason of the agreement cited above. The learned High Court judge, for the reasons set out in his judgment, concluded on the preliminary application that by reason of the settlement of the previous proceedings and the terms of that settlement that Ryanair was precluded from maintaining the challenge to the Boards decision.

34. The decision of Clarke J. in *Ryanair Ltd* is good authority in support of the procedure adopted by the notice party in the within proceedings. In the present application the notice party is in precisely the same position as the DAA was in the Ryanair action. Similarly, Mr. Connolly, the applicant in these judicial review proceedings is in the same position as *Ryanair* was in its judicial review proceedings.

35. Whilst the applicant in the present motion relies on the fact that the parties to the application to dismiss the *Ryanair* proceedings did not challenge the procedure and contends that this Court should therefore not consider that decision as an authority as to the validity of the procedure adopted in the present case, I find the very fact that *Ryanair* did not raise the procedural issue at all as a strong indication that there simply was no legitimate basis for a complaint to be made regarding the procedure adopted by the DAA.

36. Whilst applications which are brought seeking to invoke the court's inherent jurisdiction are normally brought by a defendant in the context of plenary proceedings issued by a plaintiff, there is no reason to believe that this fact in any way precludes a court considering a motion such as the present one brought by the notice party to dismiss judicial review proceedings which he states are an abuse of the courts jurisdiction having regard to the Contract concluded between him and the applicant in October, 2003.

37. Finally, in respect of the procedural objection raised on behalf of the applicant, the Court does not accept that any injustice arises to the applicant which can be ascribed to the court engaging its inherent jurisdiction under the present procedure.

The Principles to be Applied and the Proof to be Established

38. Having decided that the Court has jurisdiction to consider the notice party's application to dismiss these proceedings in limine under the courts inherent jurisdiction, it must now decide, as a matter of law, whether in all of the circumstances it should exercise such jurisdiction. Accordingly, the next matter to be considered are the principles that it should apply and the proof that should be established by the moving party who seeks to dismiss a claim as being an abuse of process.

39. Almost all of the decisions of the court, save for that of Clarke J. in *Ryanair*, are cases which relate to applications made by defendants to dismiss proceedings where they allege the pleadings fail to disclose a cause of action, that the action is unstatable on the facts pleaded or that the proceedings otherwise constitute an abuse of process. This is somewhat different to the facts that pertain in the present case where there is no doubt but that the applicant has a statable case to make against the Board regarding its alleged failure to take into account, at the time of its decision, Variation 2 to the local development plan. Hence, there are no pleadings for the notice party to challenge. The court recognises that in such circumstances it must be careful that it does not too readily invoke an inherent jurisdiction which will have the effect of denying the applicant an opportunity to pursue an otherwise statable claim.

40. For the aforementioned reasons the court considers that it should approach this motion applying the same standard of proof and principles that it would apply if it were dealing with an action brought by the applicant wherein he claimed a declaration that he was entitled to maintain judicial review proceedings against the Board. By approaching the present application in this way, the principles to be applied by the Court and the proof that must be established by the notice party to have the present proceedings dismissed becomes much clearer.

41. For guidance the court has had regard to the decisions of the court in *Sun Fat Chan v. Osseous Ltd* [1992] I.R. 425*, Barry v. Buckley* [1981] 1 I.R. 306*, Olympia Productions ltd v. Mackintosh* [1992] I.L.R.M. 204 and *O'Neill v. Ryan (No 1)* [1993] I.L.R.M. 557. The principles which emerge may conveniently be summarised as follows:-

> (a) That the jurisdiction of the court to dismiss an action under O. 19 r. 28 of the Rules of the Superior Courts or on foot of its inherent jurisdiction should be exercised sparingly.
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> (b) The court must be satisfied at the interlocutory hearing that there is nothing that might emerge thereafter, if the action were been permitted to proceed to trial, which might vary the facts so as to render the claim statable. If there is a doubt of this nature the relief sought should be refused.
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> (c) That even if an application to dismiss proceedings appears meritorious on the basis of the pleadings as presented, the court should permit any amendment to the pleadings which will have the effect of rendering the claim statable. In such

circumstances the court will then permit the action proceed to trial.

(d) That proceedings which concern the interpretation of a contract are more amenable to the exercise of the court's jurisdiction to dismiss proceedings as an abuse of process than cases where the extent of the evidence that might be available at the trial is less clear. In particular McCarthy J. in *Sun Fat Chan* was supportive of the court's ability to dismiss a claim particularly where the facts are not in dispute and the court concludes that it has all of the evidence it needs to determine the issue before it in the same manner as it might when dealing with the same issue at a full trial.

42. The question as to whether or not the applicant's judicial review proceedings amount to an abuse of process must be considered having regard to the aforementioned principles. Further, for the purposes of reaching its decision on the present application the Court will fully accept the sworn testimony of the applicant regarding his intentions to develop his lands as is deposed to by him in his grounding affidavit. Accordingly, the court will now focus its attention on the Contract and its special conditions which are set out earlier in this judgment against the backdrop of the relevant legal principles.

Construction of the Contract

43. The parties to the present application do not fundamentally disagree as to how the Court should approach the question of interpreting a Contract such as one the subject matter of this claim. Both parties accept the statement made by Clarke J. in *Ryanair Ltd v. An Bord Pleanála* where he stated (at papas. 5.5 and 5.6) as follows:-

> " In addition notwithstanding the recent evolution and the principles applicable to the construction of written agreements intended to have legal effect, to which I refer in BNY Trust, the starting point for any construction issue remains the text of the agreement itself. The reasons for this are obvious. The fifth principle identified by Lord Hoffman *in Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR and approved by Geoghegan J., speaking for the Supreme Court, in *Analogue Devices v. Zurich Insurance* [2005] 2 ILRM 131, notes that the reasons why words should be given their 'natural and ordinary meaning' stems from the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. This is all the more so when the written form is agreed with the benefit of expert advice on all sides. The logic of this position is clear. Whatever may have been in the minds of parties as they approached an agreement, they choose to give effect to their agreement by putting it in writing in a specific form.
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> It would be to entirely and inappropriately devalue the written form into which the parties have chosen to put their agreement, not to pay significant attention to the way in which the agreement is expressed in the document under consideration. It would, in my view, be to put the cart before the horse to start with the consideration of what the parties were trying to do and only then to apply ones mind to what they in fact did by entering into an agreement in the terms of the written document under consideration. Rather one should start with the document but using, as an aid to its construction, the context in which it was entered into by reference to any material background facts which would bear upon the way in which a reasonable and informed person would have interpreted the document in question."

44. In relation to how this Court should construe the relevant Contract the Court does not accept the submission made on behalf of the applicant in these proceedings that it should give consideration to the *contra proferentum* cannon of construction. The court views this doctrine or canon of construction as one which should only be used where there is ambiguity in relation to a particular clause and in respect of a clause which contains what might be considered to be a one-sided or exempting provision. Special Condition 13 of the Contract in the instant case is not one-sided and is not, in the Court's opinion, ambiguous. Indeed, many of the authorities suggest that if there is any ambiguity in the context of the conditions of sale of property that the Court should in fact construe all such clauses against the vendor and in favour of the purchaser given that it is an almost invariable fact that it is the vendor or his solicitor who has drawn up the conditions of sale.

45. Applying the law in relation to the construction of a contract for the sale of land, this Court has no difficulty in concluding that it ought to exercise it's inherent jurisdiction to dismiss the within judicial review proceedings as an abuse of process. This decision is based upon its construction of Special Condition 13 in the context of all of the other provisions in the Contract and in particular Special Condition 17 which provides that the written agreement embodies the entire agreement and understanding between the parties.

46. It is accepted by the parties that this commercial contract of 28th October, 2003 was entered into by both parties with the benefit of legal advice. Indeed, it may well be that both the vendor and the purchaser had planning advice at the time they entered into the agreement particularly as the applicant has sworn an affidavit to the effect that he had previously applied for planning permission in respect of the lands the subject matter of this dispute. If he did not have such planning advice regarding how he should best protect his lands with a view to his potential ability to develop the same this is not a matter that should now be visited upon the notice party.

47. The applicant received €14,250,000.00 for the lands he sold to the notice party. At the time of entering into the Contract he bargained with the purchasers to obtain certain rights for himself. Those rights included the agreement by the notice party that they would not object directly or indirectly to any future application for planning permission that he might make in respect of his retained lands and that they would not seek to build within 9m of the boundary wall between the two properties.

48. At the time of negotiating the terms of the Contract, the applicant could have sought further restrictions on the rights of the purchaser and depending upon what those terms were the purchaser might or might not have been willing to accept the terms offered. However, the Contract price was struck on the basis of the bargain set out therein. As vendor, the applicant could have tried to restrict the nature of any proposed development by the purchaser. He might have sought to restrict the purchaser as to the number of units he could build or seek to limit his right to apply for planning permission to a design specification agreed and appended to the Contract. Alternatively, the applicant, might have tried to include a special condition that the purchaser would co-operate with him in the event of any alteration in the zoning of their joint lands or he might have sought to confine the restriction placed on him by Special Condition 13 to a particular period of time or to the currency of any zoning or regional development plan. The applicant did none of these things and now wishes the Court to rewrite the Contract because his potential to develop his lands has been effected by the subsequent rezoning of the relevant lands, the alternation in the regional development plan and the method whereby the purchaser submitted his application for planning permission.

49. The applicant in his affidavits, fails to acknowledge the fact that at the time he entered into the Contract which yielded him some €14,250,000.00 that both parties knew that they were about to become rival developers in relation to the lands. Each party well knew that the first application for planning permission would inevitably to some extent effect the prospects for any subsequent application for planning permission on the adjacent lands. Depending upon the zoning attaching to the lands in question or the

governing development plan, the first successful application for planning permission could potentially compromise or even eradicate the ability of the adjacent land owner to develop their lands. Special Conditions 13 and 14 recognise the fact that as rival developers, in the absence of such clauses, it would be highly likely that the other party would object to the proposed development on the neighbouring site for these very reasons.

50. The court has no option but to conclude that in agreeing to sell his lands subject to Special Condition 13, that the applicant was in effect buying into the planning process with all of its inherent risks and limited safeguards knowing full well that he was waiving his right to object directly or indirectly to the purchaser's pursuit of planning permission. The fact that risks have emerged which had not been anticipated by the applicant does not entitle him to disengage from his contractual obligations and to rewrite Special Condition 13 so as to permit him the right to object to the purchaser's application for planning permission in the changed circumstances in which he finds himself.

51. The court further rejects the submission made by counsel on behalf of the applicant that the court can imply into the Contract a term which disentitles the notice party to rely upon the restriction provided for in Special Condition 13 if he does anything by his actions to defeat or frustrate the common intention of both parties which in the present case was the future development by both parties of their respective lands.

52. In relation to this point it is clear that it was implicit from the Contract that both parties hoped to be able to develop their lands subsequent to the Contract. However, there is no condition in the Contract specifying that either party must refrain from any actions which might negatively impact or extinguish the other party's prospects of developing their lands. In the absence of such a specific special condition in the Contract the Court concludes that the decision of the Court of Appeal in *Lyttelton Times Company, Limited v. Warners Limited* [1907] A.C. 476 is not applicable.

53. In concluding that the within judicial review proceedings amount to an abuse of process, the court rejects the alternative submission made by counsel on behalf of the applicant that on a true construction of Special Condition 13 that the applicant is not precluded from maintaining judicial review proceedings even though such proceedings have the effect of interfering with the purchasers planning permission.

54. The Court rejects this submission for a number of reasons namely:-

> 1. In the applicant's written submissions the applicant appears to concede that the restriction provided for in Special Condition 13 relates to the right of his client to object to planning permission in the course of the "statutory process". In this respect the "statutory process" clearly includes judicial review proceedings by reason of the provisions of s. 50 of the Planning and Development Act 2000 as amended by the Planning and Development (Amendment) Act 2002.
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> 2. In interpreting Special Condition 13 in the manner advised by Clarke J. in *Ryanair* the Court can only conclude that a reasonable and informed person appraised of the facts at the time would believe the clause to be one that precluded both parties from issuing judicial review proceedings which might interfere with the others planning permission. The Court does not accept that such a reasonable or informed person would believe that the parties agreed to preclude each other from objecting to the others planning permission but were nonetheless agreed that at the latest possible stage in the planning process that either could embark upon judicial review proceedings to undercut the very planning permission to which they had agreed to raise no objection.
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> 3. The applicant's locus standi to maintain these judicial review proceedings arises from the fact that he lodged an observation with the Board in the course of the planning appeal process. (See Macken J. in *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388). If the applicant was contractually precluded from lodging an observation with the Board it follows that such restriction would, de facto, preclude the right of that party to maintain a challenge to any decision of the Board in subsequent judicial review proceedings.
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> 4. The Court rejects the applicant's submission that the use of the word "indirectly" in Special Condition 13 was designed solely to ensure that the parties did not procure a third party to object on their behalf to any application for planning permission. The Court accepts that the word "indirectly" in Special Condition 13 creates a restriction on the issue of judicial review proceedings which relates to any planning permission obtained by a party to the contract. The Court does not accept the distinction which counsel on behalf of the applicant sought to make between the terms of the restriction as set out in Special Condition 13 of the Contract and the terms of settlement in the *Ryanair* case. The Court is quite satisfied that the chosen words as provided for in Special Condition 13 were not only intended to capture a restriction on potential judicial review proceedings but is also confident that the absence of the use of the word "challenge" as used in the settlement of the *Ryanair* action in no way diminishes the effectiveness of the clause for such purpose.

55. The Court recognises that the applicant is unhappy with the manner in which the notice party prepared the framework plan at the time of its application for planning permission and is further aggrieved that the Planning Authority, for whatever reason, has decided that they will not accept from him a separate framework plan for zoned lands. Nonetheless, these facts do not entitle him to ignore Special Condition 13 of the Contract prepared by his own solicitors nor do they entitle him to seek to have the court imply into a commercial contract a vague and nebulous implied term to permit him to derogate from the restriction of that clause.

56. The time for a vendor to seek to retain a right to object to planning permission in respect of lands he sells to his neighbour is at the time he negotiates the terms of the Contract for sale as was advised by the court in *Fulham Football v. Cabra Estates* [1994] 1 B.C.L.C. 363. In that case the court was dealing with a covenant by a party to a commercial transaction involving the disposition of land wherein an undertaking was given to refrain from opposing certain planning permission and compulsory purchase orders. In that case the contracting party sought, on grounds which included those of public policy, to renege upon such a covenant and Neill L.J. at p. 390 advised as follows:-

> "On the other hand we can see no valid objection on grounds of public policy to a covenant whereby a party to a commercial transaction involving the disposition of land undertakes to support, and to refrain from opposing, planning applications by the other party for the development of the land. Such covenants are common place. In the course of the argument we were referred to precedents in the *Encyclopaedia of Forms and Precedents* which include clauses designed to secure the support of, for example, the vendor of land. Such clauses have been in use at least since the fourth edition of the encyclopaedia was published in 1969. In addition, evidence was put before the court in the form of information supplied by firms of solicitors in the city of London and elsewhere which showed that covenants of the kind set out in para. (r)(ii)(d) were regarded as a necessary form of protection for those acquiring land for development."

57. For all of the aforementioned reasons the Court will exercise its inherent jurisdiction and dismiss the within judicial review proceedings.