Neutral Citation No. [2005] IEHC 209

THE HIGH COURT

[Record No. 2003 1329SS]

BETWEEN

ABBEYDRIVE DEVELOPMENTS LIMITED

CLAIMANT

AND
KILDARE COUNTY COUNCIL

RESPONDENT

Judgment delivered by Mrs. Justice Macken on the 17th day of June, 2005

1. This is a special case stated by John R. Shackleton, as arbitrator, for an opinion of the High Court on two questions arising out of a claim for compensation which the complainant seeks from the respondent arising from a refusal by An Bord Pleanála to grant planning permission to the claimant in respect of certain lands in County Kildare.

2. The arbitrator was duly nominated by the Land Values Reference Committee on 11th January, 2002, on the application of the claimant, according to the case stated.

Agreed Facts

3. The following facts are, according to the case stated, agreed between the claimant and the respondent:

> 1. On 15th March, 2000, Abbeydrive Developments Limited lodged an application for planning permission with Kildare County Council for a development comprising 187 Residential units on lands at Broadleas Commons and Ballymore Eustace, County Kildare, Planning Reference No. 00/419.
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> 2. A revised proposal for 176 houses dated 31st July, 2000, was lodged with the above Council on 1st August, 2000. By order dated 6th November, 2000, Kildare County Council decided to grant planning permission for 149 housing units subject to 77 conditions which were attached to its order.
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> 3. The decision of Kildare County Council was appealed to An Bord Pleanála.
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> 4. By Board Direction dated 21st May, 2001, and by a decision dated 22nd May, 2001 An Board Pleanála refused permission for the development sought for the reasons set out in the schedule attached to the decision. The reasons for the decision are referred to in the case stated and will be set out in detail in the course of this judgment.
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> 5. By letter dated 11th July, 2001, John C. Reidy of Reidy Stafford, solicitors on behalf of the claimant, lodged a claim for compensation to Kildare County Council in the sum of €28,127,238 (equivalent to IR£22,152,000), this being the reduction in value of the claimant's interest in the subject lands by reason of the decision of An Bord Pleanála.
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> 6. By letter dated 31st July, 2001, Brown & McCann, solicitors for Kildare County Council, wrote to Reidy Stafford, solicitors for the claimant, in the terms set out in the case stated.
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> 7. On 17th September, 2001, the claimant complied with the said request of Kildare County Council.

Additional Facts

4. The arbitrator, in the case stated, has also informed the Court of the following additional facts, the meaning or consequences of all of which are not agreed between the parties, and in respect of which the questions posed arise:

> 1) By notice dated 13th December, 2001, Kildare County Council served a notice pursuant to s. 13(1) of the Local Government (Planning and Development) Act, 1990, notifying the claimant that notwithstanding the refusal by An Bord Pleanála to grant permission to develop the lands referred to in the said notice "the planning authority is of the opinion that having regard to all the circumstances of the case, the said lands are capable of other development for which permission under Part IV of the Local Government (Planning and Development) Act, 1963 as amended and extended ought to be granted" This notice specified the lands to which the notice referred and the nature and extent of the development which, in the opinion of Kildare County Council, ought to be granted.
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> 2) The claimant, having failed to reach agreement on the amount of compensation, if any, to be paid by the Planning Authority to it, applied to the Land Values Reference Committee to nominate an arbitrator to determine such compensation.
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> 3) On the basis of the agreed facts set forth above the respondent submitted that compensation was not payable on the applicant's claim made under s. 11, since the notice served by the respondent pursuant to s. 13 of the Act of 1990 was in force in relation to that claim. The claimant however, submitted that the notice was served out of time, namely after the expiry of three months from the date of receipt of the claim, and was therefore invalid and of no effect.
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> 4) Further or in the alternative the respondent submitted that the reason or reasons for refusal of planning permission set out in the decision of An Bord Pleanála of 22nd May, 2001 constituted reasons for refusal that came within the meaning and intent of s. 12(1)(b) of the Act of 1990, being reasons set out in the third schedule at reasons 1, 3, 8 and/or 11 of the said Act. The claimant disputed this and said that none of the reasons for refusal could properly be construed as coming within the true meaning and intent of the said reasons in the third schedule or any of them.

5. Arising from the foregoing, and at the request of Kildare County Council, as respondent, the arbitrator has submitted the following two questions for the opinion of the High Court:

> A. Is the notice of 13th December, 2001, served on the claimant by the Planning Authority pursuant to s. 13 of the Local Government (Planning and Development) Act, 1990 valid?
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> B. If not, are the reasons for the refusal of the planning permission by An Bord Pleanála recited at para. 4 of the case

stated such as to exclude the payment of compensation for the refusal of permission pursuant to s. 12(1)(b) of the Local Government (Planning and Development) Act, 1990 by reason of some or all of them coming within the terms of the third schedule to the said Act?

6. The sequence of events leading up to service of the S. 13 notice are not really in dispute between the parties. Both parties filed legal submissions on the law governing the two questions.

The First Question
7. The first question concerns the correct interpretation of certain provisions of the Act of 1990 and the regulations made thereunder, specifically the Local Government (Planning and Development) Regulations, 1994, as well as a decision as to whether the letter of 31st 2001 from the solicitors for the respondent to the solicitors for the claimant, falls to be considered as having issued under Article 109 of the said regulations.

8. The Local Government (Planning and Development) Act, 1990 effected certain changes in relation to the granting or otherwise of compensation to the owners of lands in respect of which planning permission has been refused. The relevant sections of the Act of 1990 so far as this case stated is concerned, are ss. 6, 11, 12 and 13.

9. Section 11 of the said Act, which is entitled 'Right to Compensation', reads as follows:

> "11. If, on a claim made to the planning authority, it is shown that, as a result of a decision under Part IV of The Principal Act involving a refusal of permission to develop land or a grant of such permission subject to conditions, the value of an interest of any person existing in the land to which the decision relates at the time of the decision is reduced, that person shall, subject to the provisions of this Part, be entitled to be paid by the planning authority by way of compensation –
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> (a) such amount, representing the reduction in value, as may be agreed,
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> (b) in the absence of agreement, the amount of such reduction in value, determined in accordance with the First Schedule, and
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> (c) in the case of the occupier of the land, the damage (if any) to his trade, business or profession carried out on the land."

10. This is not really different to the provisions which always operated under the legislative schemes applicable to planning applications and refusals, and their consequences. However, even thought a claim may be lodged pursuant to s. 11, a local authority may nevertheless, pursuant to s. 13 of the Act of 1990, serve a notice on the claimant invoking circumstances giving rise to no entitlement to compensation.

11. Section 13 of the Act of 1990 and reads as follows:-

> "(1) Where a claim for compensation is made under section 11, the planning authority concerned may, not later than three months after the claim is received and having regard to all the circumstances of the case, serve a notice in such form as may be prescribed on the person by whom or on behalf of whom the claim has been made stating that, notwithstanding the refusal of permission to develop land or the grant of such permission subject to conditions, the land in question is in their opinion capable of other development for which permission under Part IV of The Principal Act ought to be granted.
>
> (2) For the purpose of subsection (1), other development means development of a residential, commercial or industrial character, consisting wholly or mainly of the construction of houses, flats, shops or office premises, hotels, garages and petrol filling stations, theatres or structures for the purpose of entertainment, or industrial building (including warehouses), or any combination thereof.
>
> (3) A notice under subsection (1) shall continue in force for a period of five years commencing on the day of service of the notice unless before the expiration of that period-
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> a. The notice is withdrawn by the planning authority, or
>
> b. A permission is granted under Part IV of The Principal Act to develop the land to which the notice relates in a manner consistent with the other development specified in the notice, subject to no conditions or to conditions of a class or description set out in the Fourth Schedule, or
>
> c. The notice is annulled by virtue of subsection (5)
>
> … ."

12. In addition to the foregoing two sections, s. 6 of the Act provides that the Minister may make certain regulations pursuant to the Act. It states:-

> "6. Regulations made by the Minister may provide for:-
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> a) The form in which claims for compensation are to be made,
>
> b) the provision by a claimant of evidence in support of his claim and information as to his interest in the land to which the claim relates,
>
> c) a statement by a claimant of the names and addresses of all other persons (so far as they are known to him) having an interest in the land to which the claim relates and, unless the claim is withdrawn, the notification by the planning authority or the claimant of every other person (if any) appearing to them or him to have an interest in the land…"

13. The Minister did make regulations, and in so far as these regulations are relevant, Articles 109 and 111 read as follows:

"109 (1) a compensation claim shall be made to the planning authority in writing and shall include-

a) The names and addresses of the claimant and a statement of his interest in the land to which the claim relates,

b) A statement of the matter in respect of which the claim is made, the provisions of the Act of 1990 under which it is made, the amount of compensation claim and the basis on which that amount is being calculated, and

c) The names and addresses of all other persons (so far as they are known to the claim) having an interest in the land to which the claim relates or, where the claimant does not know of any such persons, a statement to that effect.

(2) Where a planning authority receives a compensation claim which fails to comply with the requirement of Sub Article (1), the authority shall, by notice in writing, require the claimant to comply with such requirement and may defer consideration of the claim until the claimant has complied with such requirement."

"111. Where a compensation claim is made, the planning authority may, by notice in writing, require the claimant to provide evidence in support of the claim and evidence as to the claimant's interest in the land to which the claim relates and may defer consideration of the claim until the claimant has complied with such requirement."

14. Mr. Macken, S.C., for the respondent, submitted that Article 109 is one directed to the validity of a claim for compensation, and that when the provisions of sub article (1) are not complied with, the local authority is obliged to require the claimant to comply with such requirements: that this is what occurred here: that the time limit of three months provided for in s. 13 of the Act of 1990 by which the local authority must serve a notice pursuant to that section, does not run until the claimant has actually complied with the provisions of Article 109: and that this had not been done until the documents sought had been sent by the Applicant to the respondent's solicitor. In the circumstances, he submitted that the statutory notice served pursuant to section 13 of the said Act, was served within the timescale provided for in that Section, calculated from the date of receipt of the response from the applicant's solicitor, was perfectly valid, and continues in existence.

15. Further, he submitted that when considering the actual notice for compensation filed on behalf of the claimant, the description of its interest in the lands, if it appeared at all, appeared only in the recitals to the document. That being so, there was in reality no proper description of the claimant's interest in the lands, as is required pursuant to the Regulations.

16. Mr. Galligan, S.C., for the claimant, did not contest that Article 109 is one under which the validity of an application falls to be considered. He argued, however, that the local authority could not have considered this claim for compensation as not being a valid claim, because the interest of the claimant was clearly and accurately stated in the claim itself, which must be read in its entirety. Further, he contended, and that if it had been otherwise, the respondent would have been obliged to notify or indicate to the claimant that no valid application had been received. If not, a claimant could not know this, and the deadline during which a valid claim could have been made would then expire without the claimant being able to remedy the same.

17. I do not agree with the submission made on behalf of the respondent that Article 109(1) was not complied with by the claimant, because, it was argued, the description of the nature of the claimant's precise legal interest must be disclosed in the claim, and was not.

18. A reading of the claim itself makes it clear that a statement of the claimant's interest in the land is found in the claim itself. This document is presented in a formal format commencing with "TAKE NOTICE" and followed by three recitals, and then by a further "TAKE NOTICE" and then certain details. It bears a title which includes the Local Government (Planning and Development) Act 1963-2000 title, a reference to the application being made under s. 11 of the Act of 1990, an indication that it is a notice to Kildare County Council, and that it is an application seeking compensation on behalf of Abbeydrive Developments Limited in respect of the lands in question.

19. In the recitals themselves the lands are referred to as being "owned by the Company". In the main part of the claim the name and address of the claimant is adequately furnished. The lands are described as being held by the claimant pursuant to two conveyances which are clearly identified. For the purposes of Article 109(1), the other relevant information contained in the claim, apart from the amount of compensation sought, and the basis for the claim, is the following statement: "The Company gives notice that the only other person having an interest in the land to which the claim relates is the ACC Bank with an address at Charlemont Street, Dublin 2".

20. Mr. Macken argued that the requirement to state the claimant's interest in the land must be understood as a requirement for a statement of the detailed and precise legal interest which the claimant has, as otherwise the local authority cannot know whether it is dealing with a person who has a freehold or leasehold interest or on what other precise basis the claimant holds the lands.

21. I am not satisfied that such a requirement arises from the terms of Article 109 itself. The requirements for making a valid compensation claim must be capable of being readily understood by any person who has been refused planning permission. If the exact nature of the precise legal interest under which the claimant, as freeholder, or as leaseholder, charge holder or so forth, holds the lands, were an essential regulatory requirement, one would expect to find words in the regulations which would make this clear. It is certain that the provisions must be such as to cover a reasonably wide range of situations, including all of the above types of ownership, even, in certain circumstances, the interest of a person holding pursuant to a contract to purchase lands, as well as other interests.

22. It is also the case that, although many such applications for compensation will undoubtedly be made, as here, by large developers, wise in commercial ways, and having full expert and legal advice, the right to make a compensation claim is available to all persons, even a single applicant applying for permission for a small single dwellinghouse, operating without such expertise or advice. The Article must therefore be capable of being understood by all persons, including those having no legal advice, so as to make such regulations reasonably possible, rather than unreasonably difficult, to comply with. An interpretation which adds to the requirement to include a "statement of his interest" in the lands something which is not evident from the fairly clear wording is not, in my view, appropriate, and I have not been persuaded that the additional precision contended for by the respondent is capable of being read into the Article.

23. I am satisfied that, taken as a whole, the claim in the present case, which refers to the claimant as the "owner" of the lands, and

as holding them pursuant to two identified conveyances, which must have been understood by the respondent's advisers as giving the claimant something reasonable in terms of ownership, and together with the statement that no other person except a named bank had any interest in the lands, was sufficient to comply with the requirements of Article 109(1)(a) of the Local Government (Planning and Development) Act, 1990, as to the claimant's "interest" in the lands.

24. Mr. Galligan, however, made an additional argument on this issue, based on Article 111 of the Regulations. In the present case, he submitted that not only does Article 109 not apply, but that the only article which could apply to the letter is article 111 of the Regulations. That article governs, not the validity or content of the claim itself, but the entitlement of a planning authority to secure evidence in relation to the claim, including as to the claimant's interest in the lands in question, and he submits this is clear from its text. Since the letter of 31st July, merely sought evidence of the claimant's interest in the lands, by asking for copies of the conveyance/transfer referred to in the compensation claim itself, it was, he argued, clearly a request made pursuant to Article 111.

25. The letter reads as follows:

> "The above claim has been referred to us and to enable the Council comply with the statutory requirements we would be glad to have as quickly as possible a certified copy of the conveyance/transfer of 24th May, 1988 and of the conveyance of the 15th June 1999 referred to in the statement of claim.
>
> Immediately the same are to hand we will then raise the other statutory requirements in relation to further information as will arise."

26. According to Mr. Galligan, the very text of this letter does not lend itself to a demand for compliance with the provisions of Article 109, in that the text does not in any way suggest that the claim might be or was being regarded as invalid, but does lend itself naturally to being considered as a request under Article 111, being confined to evidence in the form of documents in support of the claimant's stated interest in the lands.

27. On this argument, Mr. Macken submitted that it was clear the respondent was indeed giving notice that it could not proceed with the statutory requirements until it had the necessary statement of the claimant's interest in the lands in question, and that such a request complied with Article 109, and was not one made pursuant to Article 111.

28. Again, I am not satisfied that the letter reflects the respondent's contention. The provisions of s. 6 of the Act are clearly intended to permit the Minister to ensure that certain formalities must be complied before an application can be considered to be a valid one, and also to permit a planning authority to require that the claimant provide evidence to support any part of his claim. For this reason, there is a very natural division between Article 109 on the one hand and Article 111 on the other. The first covers the issue of a valid application, the second not. These must have been deliberately provided for in separate articles, simply because their respective contents are intended to fulfill separate functions.

29. It is true that the letter indicates that the Council requires the documents mentioned "so as to enable the Council comply with the statutory requirements", but it is nowhere evident in that letter what the Council means by that, nor that the Council considers the claim to be invalid as not complying with the basic requirements of Article 109. But there is a specific requirement in the regulatory scheme as to how to proceed in the event a valid application is considered not to have been made, as is clear from the wording of Article 109(2). The terms of Article 109(2) include a formula which makes it clear that if non compliance is being alleged by the planning authority, it must call on the claimant to comply with that specific requirement which has not been met. This makes obvious sense, since it is the very failure to comply with a specific requirement of Article 109(1) which would render the claim as lodged invalid and which is intended to be caught by the obligatory notice under (2). Nevertheless, the letter of 31st July, 2001, made no reference to any failure to comply with any requirement under Article 109(1), and it did not call on the claimant to comply with any such (unmentioned) requirement.

30. I am driven to the view that the argument advanced on behalf of claimant on this aspect of the matter is the preferable view, namely, that the letter is one issued pursuant to Article 111 of the above regulations, since it is one in which a classic piece of evidence which would support the claimant's stated interest in the lands is sought, namely the two title documents referred to.

31. I find as a fact that on its correct interpretation the letter of 31st July, 2001, could not be said to be a letter issued pursuant to Article 109(1).

32. In the foregoing circumstances, the claimant lodged a valid compensation claim on 11th July, 2001, in compliance with s. 11 of the Act of 1990 and in compliance with Regulation 109 of the Regulations of 1994. In consequence, the notice issued by the respondent on the 13th December, 2001, was not served within the time limit provided for under s. 13(1) of the Act of 1990 and was therefore not a valid notice.

33. The answer to Question A of the case stated is no.

The Second Question

34. As to the second question, this clearly depends on the correct interpretation of s. 12 of the Act of 1990 and the application of that provision to the relevant facts in the present case. Section 12 of the said Act, in its relevant parts, provides:-

> "(1) Compensation under section 11 shall not be payable in respect of the refusal of permission for any development –
>
> (a) …
>
> (b) if the reason or one of the reasons for the refusal is a reason set out in the Third Schedule.
>
> (2) …"

35. The present case stated concerns only the question as to whether the reasons for refusal of the planning application set out in the decision of An Bord Pleanála of 22nd May, 2001, constitute reasons for refusal which come within the meaning and intent of s. 12(1)(b) of the Act of 1990. These in turn, depend on the meaning and intent of the following invoked reasons, namely Reasons 1(e) and (f), Reason 3, Reasons 8(iii) and (iv) and Reason 11, listed in the Third Schedule.

36. To understand the arguments of the parties on this aspect of the case stated, it is necessary to set out the relevant parts of the

third schedule to the Act of 1990, as well as the reasons in the decision itself.

37. First, as to the reasons given by An Bord Pleanála, they read as follows:

> "Having regard to:-
>
> (a) the Special Village status of Ballymore Eustace in the current Kildare County Development Plan, where the special amenity character and quality of the village is to be retained,
>
> (b) the Strategic Planning Guidelines for the Dublin and Mid-East Regions,
>
> (c) the scale of the proposed development,
>
> (d) the absence of an adequate public transport infrastructure and
>
> (e) the deficiencies in the road network servicing the area,
>
> it is considered that the proposed large scale, low-density, suburban-type development would not integrate successfully with the existing village, would conflict with the provisions of the Development Plan and would seriously injure the amenities of the area. The proposed development would by reason of its nature and scale result in an unsustainable form of development and would, therefore, be contrary to the proper planning and development of the area."

38. Counsel for the respondent argued that all of the reasons invoked are ones which fall within the specific invoked reasons included in the third schedule. This was strongly contested before me by the claimant.

39. Both Counsel are agreed that the jurisprudence of this Court and of the Supreme Court makes it clear that when considering whether or not the reasons given by An Bord Pleanála fall within the reasons found in the legislation, it is not necessary that those reasons should be in a format identical with the provisions of the third schedule. In that regard both parties invoked the judgments in *XJS Developments Limited v Dun Laoghaire Corporation* [1987] 659, and *Dublin County Council v. Eighty Five Developments Limited* [1993] 2 I.R. 392. I agree with counsel, and in particular with the following extract from the judgment of McCarthy, J. in the latter judgment, dealing with an argument as to meaning to be attached to extracts from the earlier judgment, and on this very point:-

> "The Defendant argues that the effect of this Judgment is that unless the precise wording of s. 56 is used in the reasons stated for refusal, the exclusion from compensation does not apply. This is not so. Certainly, it is desirable that, where appropriate, a reason which fits within the precise wording of s. 56 should be expressed in the words of the section – that is what Keane, J. said. The failure to do so, however does not mean that the section does not apply to the reason, however stated, if it is clearly within the section. … . One must look to the wording used and determine whether or not it is a reason which, construed in its ordinary meaning, would be understood by members of the public without legal training, as well as by developers and their agents, as being within the relevant exclusion. … ."

40. Counsel for the claimant also argued that it is for the respondent to establish that the reasons furnished by An Bord Pleanála constitute non-compensatable reasons for refusal which fall within s. 12 of the Act of 1990. The respondent did not contest this, and it appears clearly in line with the jurisprudence on the matter.

41. That leaves, as between the parties, only the question as to whether the reason invoked by An Bord Pleanala fall within the third schedule or not. As to the first reason, the respondent submits that this is within Reason 11 of the third schedule to the Act of 1990 which reads as follows:-

> "The development would contravene materially a development objective indicated in the development plan for the use solely or primarily (as may be indicated in the development plan) of particular areas for particular purposes (whether residential, commercial, industrial, agricultural or otherwise)."

42. According to Mr. Macken, the reference in the Development Plan to the Special Village Status of Ballymore Eustace where the "special amenity character and quality of the village is to be retained" is a reference to a development plan objective comprising a land use zoning objective. In particular Mr. Macken contended that the Plan sets out basic policies and objectives and the emphasis is on "retaining the character of the village and encouraging compatible development within the village while at the same time restricting ribbon development and maintaining a clear division between the town and countryside."

43. Further he argued, the decision of an Bord Pleanála that the development "would not integrate successfully with the existing village, would conflict with the provisions of the Development Plan and would seriously injure the amenities of the area" is a determination by the respondent that the development would materially contravene a land use zoning objective of the Development Plan. It therefore comes within Reason 11 of the said schedule.

44. The claimant entirely rejects this contention Mr. Galligan firstly submits that as to Reason 11, an essential element is the materiality of the alleged contravention of the Development Plan. He argues that the reasons given by An Bord Pleanála do not even mention material contravention.

45. Moreover, as to (a) of the reasons given by An Bord Pleanála, that is to say the "special village status" of the town in question, this is not a planning matter at all. As to (b) this reason would depend on the determination of the question of "use" as applied to the Guidelines. In the *XJS* case, *supra*, the land in question was clearly designated as open land in the appropriate Plan. It therefore had a planning or land use objective according to that Development Plan, and therefore the proposed residential use of the same land was in breach of Reason 11, because such land use would be a material contravention of the open land use objective designation as residential land use.

46. He contended that here the reason given is not a land use reason or objective at all, which is what is required under Reason 11. That speaks of a "material contravention of a development objective indicated (in the development plan) for the use solely or primarily as may be indicated in the plan for particular purposes (whether residential, commercial, industrial, agricultural or otherwise)". Here the development is, Mr. Galligan argued, a residential development, in accordance with the Development Plan, and does not contravene Reason 11 by being in any way different to any of the particular purposes listed, or to the specific particular purpose of "residential".

47. It seems to me on this aspect of the case that the essence of the respondent's argument is that Reason 11 is a widely drafted reason. Moreover, that having regard to the special village status of Ballymore Eustace, recognized in the Development Plan, it is appropriate and proper to conclude, when assessing (a) and (b) of the reasons of An Bord Pleanála together with the description of the development as being "large scale, low density, suburban-type development which would not integrate successfully with the existing village", and together with the words "would by reason of its nature and scale result in an unsustainable form of form of development" that such a reason is indicative of a planning application which constitutes a material contravention of a development objective in the Development Plan.

48. As the Keane, C.J. pointed out in the case of Eighty-Five Developments *supra*, it is most desirable that if the reason for a refusal coincides with one of the exclusionary clauses of [the Third Schedule] the reason should be expressed as closely as possible to that clause, even if the absence of use of the exact words of the section will not prevent a common sense appraisal of the reasons given to ascertain the real reason. Adopting that approach, my conclusion is as follows on Reason 11.

49. The reasons at (a) and (b) even when read together with the subsequent words which I have set out above do not permit me to conclude that it is a refusal of permission because the development would "materially contravene a development objective" indicated in the Development Plan, in particular having regard to the words 'development objective' and 'material contravention'.

50. It is certainly a development. There is no suggestion that it is a type of ribbon development, which Mr. Macken says is precluded. The reason given could only come within Reason 11 if it falls into the category of "otherwise" after the words "residential, commercial, industrial or agricultural". I am not satisfied that "otherwise" in the context in which it is found, is intended to cover, within any of those categories, a particular sort or character of one of these categories. The words "residential commercial industrial or agricultural" all fall within the same genus of recognised types of development. The word "otherwise" could of course cover, within the same genus, the development of, for example, sports arenas or similar facilities or many other types of development. But if the word is to cover something more, such as is contended for here by the respondent, it would have been necessary to adopt different and additional words to those used. As is clear from the decision of Denham, J. in *Hoburn Homes and another v An Bord Pleanala* (1993) I.L.R.M. "compensation is a statutory right and should only be removed in clear, precise cases."

51. I am satisfied that the reasons given do not fall within Reason 11 of the said schedule, and that compensation is not, therefore, precluded on that ground.

52. I now turn to Reasons 1 and 8 invoked by the respondent. These read in their relevant parts:-

> "1. Development of the kind proposed on the land would be premature by reference to any one or combination of the following constraints and the period within which the constraints involved may reasonably be expected to cease –
>
> …
>
> (e) any existing deficiency in the road network serving the area of the proposed development, including considerations of capacity, width, alignment, or the surface or structural condition of the pavement, which would render that network, or any part of it, unsuitable to carry the increased road traffic likely to result from the development.
>
> (f) any prospective deficiency (including the considerations specified in subparagraph (e)) in the road network service the area of the proposed development which-
>
> (i) would arise because of the increased road traffic likely to result from that development and from prospective development as regards which a grant of permission under Part IV of the Principal Act, an undertaking under Part VI of that Act or a notice under section 13 exists, or
>
> (ii) would arise because of the increased road traffic likely to result from that development and from any other prospective development or from any development objective, as indicated in the development plan, and
>
> (iii) would render that road network, or any part of it, unsuitable to carry the increased road traffic likely to result from the proposed development.
>
> … ."

53. And as to Reason 8, this reads as follows:

> "In the case of development including any structure or any addition to or extension of a structure, the structure, addition or extension would –
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> …
>
> (iii) seriously injure the amenities, or depreciate the value, of property in the vicinity;
>
> (iv) tend to create any serious traffic congestion,
>
> … ."

54. An Bord Pleanála invoked as reasons (d) of its decision, the absence of an adequate public transport infrastructure and (e) the deficiencies in the road network. According to Mr. Macken, these are sufficient descriptions to come within both Reasons 1 and 8 of the third schedule, in particular 1(e) and 1 (f)(i) and (ii), because what must be taken into account also is increased road traffic from prospective development. The same reasons also clearly come within Reason 8(iv).

55. On the contrary, Mr. Galligan contends that this is not so. He argues that in the Eighty-Five cases, *supra*, the court was able to look at the reason for the decision, which were very detailed, and come to the view that the reason given was because the development would endanger public safety.

56. He submits that, as regards Reason 1(e) the only reason given by An Bord Pleanála is the bald statement that "having regard to the deficiencies in the Road Network serving the area" without any further indication as to what this is intended to cover. There is no reference at all to the issue of the development being "premature" as required by Reason 1. Similarly, although invoking 1(e) baldly, there is no indication in the reasons that the deficiency is such as would render the road network, or any part of it, unsuitable to carry the increased road traffic likely to result from the development, which is what is required as a reason.

57. Further, as to 1(f), this envisages a consideration of the increased road traffic from the development together with that from prospective development. Here no prospective development is even referred to by An Bord Pleanála.

58. On this aspect of the respondent's case, it seems to me that the statement "the deficiencies in the road network serving the area" is not a sufficient reason, although it uses part of the words also used in the third schedule. Reasons 1(e) and (f) of the third schedule, being the parts relied on by the respondent, require something more. Firstly, as a general requirement in respect of all particular reasons under Reason, as is clear from its wording, it requires some indication that the development is premature. Secondly that it is premature, not only by reference to one or other of the specified constraints invoked, but also by reference to the period during which the specific constraints invoked are likely to cease. Neither prematurity nor, perhaps of greater importance, the period during which the constraint is likely to cease is mentioned, nor even though not mentioned, can these be found by the use of other words which make it clear that, while not using the words of the Third Schedule, nevertheless matters such as prematurity and the period during which the restraint(s) will cease are referred to.

59. Further, Reasons 1(e) and (f) cover two different situations, one existing, on prospective. As far as (e) is concerned, this requires an indication that existing deficiencies are such as to render the road network, by reference to certain specified or additional criteria, unsuitable to carry the increased road traffic generated by the development itself. In the case of (f) this requires that prospective deficiencies are to be assessed by considering those arising from the proposed development and those arising from prospective development which together, would render the road network unsuitable. The reasons given do not refer to any criteria whatsoever.

60. Further, as to 1(f), the position is even more specific, because it covers, in the first place two possible options, depending on whether there is already in existence a development for which a grant has already issued, or prospective development, as well as the consequences flowing from the combination of one or other of these when considered with the subject development, these possible options to be considered by reference, at least, to the same criteria as may be considered under 1(e). They are not even mentioned.

61. Having regard to these specific requirements, it is not possible to conclude that the statement at (e) of the reasons given by the respondent falls within Reason 1(e) or 1(f) of the third schedule so as to preclude compensation.

62. As to Reason (d) of the reasons given by the respondent in its decision, it reads "the absence of an adequate public transport infrastructure". This simple statement is not one found in the third schedule. Having regard to the manner in which the constraints are described, is it sufficient to tell a lay person, operating without legal advice, since that is, according to the decision of McCarthy, J. in *the Eighty Five Developments Ltd* case, *supra*, the test to be applied, that the development would be premature by reference to the constraints found in Reason 1(e), or (f), or by reference to one or other of them, and the period within which the constraints involved may reasonably be expected to cease. I do not think so. This reason is not to be found in the general words used in Reason 1, nor specifically in 1(e) or (f) of Reason 1 either expressly or by necessary implication.

63. In the circumstances, I do not consider that this reason falls within the scope of Reason 1(e) or 1(f) of the third schedule so as to preclude compensation.

64. Next in logic, I deal with the contention that the reasons also fall within Reason 8 (iv), of the third schedule. This reason must, however, involve something different to Reason 1, although each of them concerns traffic issues. Reason 8, on its logical reading, covers a development which includes a structure which would tend to create serious traffic congestion. In the reasons given by An Bord Pleanála there is no mention whatsoever of any traffic congestion, let alone serious traffic congestion. The statement that the reason is based on the absence of "an adequate public transport infrastructure" does not indicate serious traffic congestion. Nor do "deficiencies in the Road Network serving the area" of themselves necessarily result in "serious congestion" arising from a structure or structures included in the development, particular as here where the development was to be phased over a number of years.

65. In these foregoing circumstances I find that the reasons in the decision do not come within Reason 8 (iv) of the third schedule.

66. As to Reason 8(iii), this requires, on its ordinary, meaning that in order to be excluded from compensation, the development must consist of a "structure … which would seriously injure the amenities, or depreciate the value, of property in the vicinity".

67. I am not satisfied that the argument put forward by the respondent satisfies the requirement of Reason 8. Mr. Macken's arguments are set out above. The decision of An Bord Pleanála states that the development "would seriously injure the amenities of the area". Mr. Galligan argues that this phrase fails to include the remaining part of Reason 8(iii) which requires that the injury to the amenities must be "of property in the vicinity".

68. I agree. The terms of an identical reason in earlier legislation have already been considered by the Supreme Court in its decision in the case of *XJS Investments*, *supra*. In that case McCarthy, J. considered its meaning when dealing with two stated reasons given in the decision. The first read: "The site of the proposal is an elevated one with steep contours with high scenic and amenity values and portions of the development would be clearly seen from long distances. Implementation of the proposal would therefore seriously interfere with the visual and recreational amenities of the area". while second stated: "The proposed development, including the access road, driveways, boundary walls and the considerable excavation, would be seriously injurious to the overall character of the area …": In considering those words, McCarthy, J. stated:-

> "As to the submission based upon the wording of sub-paragraph (i), I express no concluded view on the issue of the applicability of that sub-paragraph to a complex development; does it only apply to a single structure? I am inclined to the latter view but it is not necessary, in my judgment, to decide it in the instant case. It is sufficient to say that the reason stated by the planning authority does not, in my opinion, come within the ambit of Section … I cannot equate "overall character" and "amenities", it is important to note that the injury envisaged is to the amenities "of property" which in context must mean private property."

69. The wording of Reason 8 (iii) makes it clear, by its use of a hanging phrase, that the "amenities" referred to must be those "of property in the vicinity" and not amenities generally, which is what the respondent has adopted as its reasoning on this matter.

70. I too express no concluded view as to whether this reason applies to a complex development. If the reason does apply to a

development of the present kind, I am satisfied that it does not apply to amenities in general. That being so, the question of compensation is not precluded by the stated reasons given by An Bord Pleanála being within Reason 8 of the third Schedule.

71. Finally I consider Reason 3 of the third schedule as invoked on behalf of the respondent. This reads:-

> "Development of the kind proposed would be premature by reference to the order of priority, if any, for development indicated in the development plan."

72. Mr. Macken on behalf of the respondent argued that in the Kildare County Development Plan certain areas are highlighted for development and certain other areas are not. Given that Ballymore Eustace has a special village status, it fits in as being in the nature of having priority and consequent low development possibilities and therefore constitutes a good reason why the development is considered to be premature. He submits that the respondent is not wrong in having a specific view of particular areas, such as the particular character of Ballymore Eustace, and that these will have a priority in land use terms.

73. For the claimant, Mr. Galligan submits that while no Development Plan is mentioned, he accepts it is likely An Bord Pleanála was referring to the Kildare County Development Plan. However, he argues that there is no reference at all in that Plan to any "priority", and that the respondents have not pointed to any such priority, but rather have simply invoked the special character of the village, or alleged special amenities in support of so called priority. These do not come within the term "priority" as that it understood in development terms. What is envisaged, he submits, in terms of priority development is, for example, a decision to develop within a town in priority to developing outside a town.

74. In response, Mr. Macken argued that "priority" is a wider concept than that contended for by Mr. Galligan, and can include priority as to resources, for example, or as to more or less development, as here, and therefore a limited reading of the term should not be accepted.

75. On this question, so far as the Development Plan is concerned, Mr. Macken, in fairness, does not suggest a specific priority is mentioned in it. While I am prepared to accept that the term "priority" may well be wider than a simple priority in time as, for example, between one area and another or between commercial or and residential, or depending on services or resources, I do not think it is necessary in the instant to decide what precisely is covered by "priority". What is clear is that the third schedule requires that an order of priority, if any, should be one indicated in the Development Plan in question. I have been referred to that plan, and the existence of a true priority in that Plan has not been identified as having actually been adopted or set out, at least in so far a development of this nature is concerned, namely a residential development. Not only must some form of priority be indicated in the Development Plan, but such priority should be capable of being on a reasonable examination of its contents found in the plan, even if not by the use of that word, or by way of a priority schedule. The mere fact that the village in question has a "special village status" does not result, as Mr. Macken submits, "low development possibilities" and in turn in a clear priority designated in the Development Plan.

76. It not being the case here that there is any discernible priority in respect of this type of development in the Development Plan designated, of the type contended for,

77. I find that compensation is not precluded by virtue of Reason 3 of the third schedule to the Act.

78. None of the reasons for refusal found in the decision of An Bord Pleanála being such as to exclude the payment of compensation for the refusal of the Planning Permission in question.

79. Having regard to the foregoing, I hold that the second question raised by the arbitrator in this special case stated should be answered "no".