Neutral Citation [2012] IEHC 146

THE HIGH COURT

[2010 No. 1250 JR)

BETWEEN

SEAN DUNNE & SEAN MULRYAN

APPLICANTS

v.

AN BORD PLEANÁLA

RESPONDENT

KILDARE COUNTY COUNCIL

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered the 30th of March 2012.

1. The first applicant resides at 67 Merrion Square, Dublin 2. The second applicant resides at Fonthill House, Old Lucan Road, Palmerstown, Dublin 20. The respondent is an independent appellate authority, established pursuant to the Local Government (Planning and Development) Act 1976, charged with the determination of certain matters arising under the Planning and Development Acts. The notice party is the County Council with responsibility for the administrative area of Kildare.

2. The applicant seeks the following reliefs:-

> (i) An order of *certiorari* by way of application for judicial review quashing so much of the decision of the Respondent dated 29th July 2010 (notified to the Applicants under cover letter dated 4th August 2010 and received by their agents on 5th August 2010) on the referral of the Applicants made pursuant to section 34(5) of the Planning and Development Act 2000 (as amended) (bearing Reference No. PL09.RP2025).
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> (ii) An order of *certiorari* by way of application for judicial review quashing so much of the decision of the Respondent dated 29th July 2010 (notified to the Applicants under cover letter dated 4th August 2010 and received by their agents on 5th August 2010) on the referral of the Applicants made pursuant to section 34(5) of the Planning and Development Act 2000 (as amended) (bearing Reference No. PL09.RP2026).
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> (iii) Damages and/or costs in the amount of the expenses and administrative costs incurred by the Applicant in connection with the within proceedings.

Background

3.1 The applicants seek judicial review of two decisions of the respondent on referrals made pursuant to section 34(5) of the Planning and Development Act 2000 as amended. The referrals were made on the 7th February, 2008 in relation to the development of the Whitewater shopping Center, Newbridge, Co Kildare. At paragraph 2.2 of the referral the determination sought is as follows:-

> "The Board is now asked to adjudicate and determine the points of detail comprising the amounts of the levies applicable in respect of conditions 14 and 15 of 02/1514 and 27 and 28 of 03/1981.
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> A substantial amount of works, the funding of which was to have been contributed to by the applicants on foot of the subject permission and conditions thereto, has been carried out by the applicants on behalf of KCC. The costs associated with these works are to be recovered by the applicant, from KCC. That is being pursued separately by the applicant. For the avoidance of doubt, the Board is not requested to determine the matter of recovery of these costs in this referral.
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> Following the Board's determination of the levies the applicants and KCC can then move to proceed to the next stage i.e., to agree the amount to be repaid to the applicants for works done by the applicants on behalf of KCC. These works originally should have been carried out by KCC."

Section 34(5) provides a procedure whereby a matter that cannot be agreed between a planning authority and the person carrying out the development may be referred to An Bord Pleanála for determination. This procedure was exercised by the applicants, and in the within proceedings they seek leave to quash the Board's determination of that referral. The Board's determination dealt with two conditions of two planning permissions granted by the Council to the applicants. The conditions, referrals and decisions in respect of the two permissions are in like terms and effect and will be considered together. The conditions in question are conditions 14 and 15 of permission 02/1514.

3.2 Condition 14 required the applicants, before the development was opened to the public, to pay to the Council the entire cost of the works necessary to facilitate the proposed development and to agree the sum prior to commencing the development. The applicants carried out these works themselves (with the exception of the works listed at

(e) below) rather than paying the Council to carry out the works. The works necessary to facilitate the development are listed in condition 14 as follows:-

> (a) Access to the development was to be in accordance with drawing ref: SK/K73/005 of 14/2/02.

(b) Refurbishment of existing traffic signals.

(c) Provision of new traffic signals.

(e) Implementation one way system -Cutlery Road, Henry Street, Eyre Street.

(f) Improvement of Inner Ring Road to provide extra capacity at the Athgarvan road and Cutlery Road.

Condition 15 required the applicants to arrange for the payment to the Council of a financial contribution towards the cost of providing the necessary road improvements and infrastructure and to agree the sum prior to commencing the development. The applicants commenced the development prior to agreeing the level of the financial contribution. The works necessary to ensure the sustainability of the development are listed in condition 15 as follows:-

(a) Provision of public bus service linking the development with the town centre and the train station.

(b) Provision of Boardwalks and junction improvements.

(c) Provision of Outer Ring Road.

(e) Provision of a North South spur.

(f) Improvement of lnner Ring Road to provide extra capacity at Edward Street and Main Street.

3.3 The original planning permission no. 02/1514 was granted to Newbridge Investments Ltd, a company controlled by the applicants on the 22nd January, 2003. In planning permission no. 03/1961 the Council agreed to an amendment to the original permission. This amendment was agreed on the 2nd January, 2004. The applicants made a referral to the Board on the 7th February, 2008. The referral was made pursuant to section 34(5) of the Planning and Development Acts 2000-2010 in respect of matters left over for agreement by the planning permissions on which the Council and the applicants had not reached agreement i.e. the referral. On the 23rd September, 2008 the Council made a submission to the Board in response to the referral. On the 17th December, 2008 the applicants made a submission to the Board in response to the Council's submission. On the 9th June, 2009 the Council made a further submission. On the 20th July, 2009 the applicants responded to this further submission. On the 18th November, 2009 a meeting between the parties and the Board's Inspector took place at the Board's office. On the 30th December, 2009 the Board's Inspector finalised his report in respect of the referral. The Board made directions in respect of the referral on the 28th July, 2010 and on the 29th July, 2010 the Board made its decision on the referral.

3.4 The Board determined that:-

(a) the amount of the contribution in relation to condition number 14 be €100,000 and

(b) the amount of the contribution in relation to condition number 15 be €16,091,700.

In relation to condition number 14, the Board considered it reasonable, having regard to the condition as stated, that the referrers should pay the entire cost of the works specified. The Board had regard to the fact that all but the implementation of the one-way street system at Henry Street and Eyre Street had been undertaken by or on behalf of the referrers. Furthermore, the Board considered that the cost of the "improvement of the Inner Ring Road to provide extra capacity" specified at condition 14(f) and also at condition 15(f) should be allocated equally between each condition, that is €1,5000,000 to each condition. In relation to condition number 15, the Board considered that the apportionment of the costs of the works specified in this condition to the referrers on the basis of floor area related to the general rate for road infrastructure specified in the Kildare County Council Development Contributions Scheme 2004, would not constitute a reasonable contribution having regard to the traffic generation specified in the environmental impact statement lodged with the planning application. It considered that the percentage traffic change at various locations on the local road network, as specified by the planning authority constituted a reasonable basis for the formulation of a contribution, reflecting the impact and cost of the development to the local road network. Furthermore, the Board considered that the allocation of half the cost of the improvement of the Inner Ring Road to provide extra capacity, noted in relation to condition 14(f) above, to condition 15(f), should be on the basis that the referrers should pay 33% of this cost. The applicants argue that the Board had no entitlement to value any of these works.

3.5 The applicants seek to challenge the legality of An Bord Pleanála's determination of the amount payable by way of financial contributions under the two planning permissions. The applicants contend that An Bord Pleanála's determination is invalid. It is contended that An Bord Pleanála exceeded its jurisdiction by purporting to make findings in respect of matters that were outside the scope of the referral to it. The applicants further claim that the board should have assessed the contribution by reference to the Kildare development contribution scheme of 2004 and that it should not have based this assessment on the change in traffic assessment. The applicants are therefore seeking to have the Board's decision quashed. A telescoped hearing has been directed in this case. As such, both the leave and the substantive application are before the Court which may, if appropriate, grant leave to the applicants to proceed directly to a consideration of the substantive issue without the need for a second hearing.

Applicant's Submissions

4.1 The applicants submit that their referral to An Bord Pleanála was confined to the level of financial contribution payable under the relevant planning conditions. Instead of staying within its statutory jurisdiction, An Bord Pleanála purported to carry out the further, separate exercise of attempting to value the quantum meruit claim which the developers have against the planning authority. The applicant's submit that An Bord Pleanála had no entitlement to attempt to value any of these works. The Board's jurisdiction was confined to resolving the dispute which had arisen under the planning conditions. The limitations upon An Bord Pleanála follow from the wording of s. 34(5) of the Planning and Development Act, 2000 which provides as follows:-

> "The conditions may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the the matter may be referred to [An Bord Pleanála] for determination."

The applicants note that the jurisdiction which An Bord Pleanála exercises in determining a referral is more limited that that which it exercises in the context of a planning appeal. The exercise of determining points of detail under a planning condition is, by definition,

circumscribed by the terms of the planning condition itself. An Bord Pleanála's jurisdiction is confined to determining the "points of detail" which have been left over for agreement under the condition. The Board is not at large to determine other disputes which may exist between the parties. The applicants submit that it follows as a corollary of the limited jurisdiction which An Bord Pleanála exercises under s.34(5) (as amended) that the standard of review which the High Court should apply is more exacting than that under the *O'Keeffe v An Bard Pleanála* [1993] 1 I.R. 39 principles.

4.2 An Bord Pleanála purported to reduce the level of financial contribution under each of Conditions No. 14 and No. 15 by reference to works carried out by the applicant on behalf of the planning authority. In the case of condition 14, the implication of the Board's decision seems to be that the Board considered that the value of the works carried out by the applicants coincided precisely with the amount of the financial contribution required under the condition. In the case of condition No. 15, the Board reduced the sum said to be payable under the condition by a figure of €3,700,000 which the Board seems to have suggested to be the value of works already undertaken. This however the applicants argue is in dispute between them and Kildare County Council. They submit that the Board erred in purporting to determine this *quantum meruit*/contractual claim. This was done notwithstanding the fact, that this dispute simply does not arise in the terms of the planning conditions at all; secondly, it did not form part of the referral under section 34(5); and thirdly, the planning authority itself accepted in its written submissions of 9th June, 2009 that these works were not part of the referral. It is submitted that the approach adopted by the Board was erroneous. The Board disregarded the actual wording of the two planning conditions and treated the conditions instead as if they had been imposed pursuant to s.26(2)(f) and s.26(7) and then the Board set about calculating the contribution to be paid to the developers by the planning authority. Sections 26(2) (f) and s.26 (7) of the Planning and Development Act 1963 provide as follows:-

> Section 26 (2). Conditions under subsection (1) of this section may, without prejudice to the generality of that subsection, include all or any of the following conditions
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> > (f) Conditions for requiring roads, open spaces, car parks, sewers, water mains or drains in excess of the immediate needs of the proposed development
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> Section 26 (7). In a case in which a condition referred to in paragraph (f) of subsection (2) of this section is attached to any permission or approval granted under this section, a contribution towards such of the relevant roads, open spaces, car parks, sewers, water mains or drains as are constructed shall be made by the local authority who will be responsible for their maintenance, and the contribution shall be such as may be agreed upon between that local authority and the person carrying out the works or, in default of agreement, as may be determined by the Minister.

Alternatively the Board appears to have arrogated to itself a right to determine the *quantum meruit*/contractual dispute between the parties. On either analysis, An Bord Pleanála plainly exceeded its jurisdiction under s. 34(5) of the Planning and Development Act, 2000 (as amended).

4.3 It is clear from the Inspectors Report of December, 2009 that the Inspector was aware that the developers had not sought a determination from An Bord Pleanála on the *quantum meruit*/contractual dispute. Notwithstanding this the Inspector went on to purport to determine the issue of offsets as follows:-

> "I consider that the levies sought under condition 15 should be as calculated and apportioned to the referrers at Appendix Page A21 of the original response of the planning authority. The referrers have asked that there should be no allowance for works already carried out. However, I consider that this would be unreasonable.
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> The offsets are shown on Page A21 and I consider that the amount specified by the Board should reflect such offsets."

No further rationale appears to have been advanced by the Inspector in his report, nor the Board in its decision, in support of this contention that it would be "unreasonable" not to determine the so-called offsets. An Bord Pleanála's plea in its Statement of Opposition to the effect that the parties to a referral cannot fetter the Boards jurisdiction appears to confuse two distinct issues, namely (i) statutory jurisdiction and (ii) fair procedures. The applicant's principal argument is that given the provisions of s. 34(5) of the Planning and Development Acts, 2000 and the wording of the relevant planning conditions, the Board could never have jurisdiction to determine the *quantum meruit*/contractual dispute, even if (which did not happen) the parties had asked the Board to decide this issue. This is because the parties to a referral cannot, even by agreement, extend the scope of An Bord Pleanála's statutory jurisdiction.

4.4 The Board seeks to suggest, by way of a *locus standi* objection, that the fact of its having determined offsets was an advantage to the developers. It is suggested in the Statement of Opposition that the effect of the Boards decision was to reduce the sums owed by the applicants to the planning authority, and that this is an advantage, not a detriment, to the applicants. The applicant argues that there is no legal basis for this *locus standi* objection. The *locus standi* requirements for judicial review proceedings under the Planning and Development Acts are well known, and are set out at s. 50A(3) of the Planning and Development Act, 2000 (as amended in 2006). The High Court shall not grant leave to apply for judicial review unless satisfied *inter alia* that:-

> "(b)(i) the applicant has a substantial interest in the matter which is the subject of the application,"

The applicants argue that in the present case that they have a "substantial interest" and thus *locus standi* to raise jurisdictional objection in respect of the determination of the *quantum meruit*/contractual dispute. The applicants were a party to the referral and have a direct financial interest in the outcome. The argument relied on by the respondent seems to be that an applicant cannot challenge the *vires* of an act or decision of An Bord Pleanála where same, in the opinion of the Board confers an "advantage" on the applicant. There is, claim the applicants, no legal basis for such a patronising and paternalistic requirement. The purpose of the "substantial interest" requirement is to ensure that a person who has at best only a generalised interest in a particular planning decision cannot challenge that decision. In contrast, a person who, like each of the applicants in the present case has a weighty and personal interest is entitled to bring judicial review proceedings. The applicants have at all material times maintained that they have performed works of considerable value going far beyond that which was required by the planning conditions. The applicants categorically reject the suggestion that the Board's determination of "offsets" conferred any "advantage" on them. The amounts determined by An Bord Pleanála are below the value of the applicant's *quantum meruit*/contractual claim.

4.5 The applicants argue that even if (which is denied) An Bord Pleanála had jurisdiction to determine the *quantum meruit*/contractual dispute, it would constitute a breach of fair procedures for the Board to determine this issue in circumstances where it did not form part of the referral. The developers were proceeding on the basis that the referral was confined to determining the value of the financial contributions. The value of the works done by the developers on behalf of Kildare County Council did not

form part of the referral. One aspect of the right to fair procedures is an entitlement to notice of matters which the decision maker intends to take into account. In *Mc Goldrick v An Bord Pleanála* [1997] 1 I.R. 497, the High Court set aside a decision of An Bord Pleanála on the basis that the Board had determined a Section 5 referral on an issue which had not been brought to the applicant's attention. Under Section 137 of the Planning and Development Act, 2000, An Bord Pleanála may only take into account matters other than those raised by the parties where it gives statutory notice of its proposal to the parties. The applicants were given no prior notice of the fact that An Bord Pleanála intended to go beyond the terms of the referral by purporting to determine the *quantum meruit* claim. Accordingly, there was no notice of the basis upon which calculation was to be performed, nor of the surrounding information relevant to such calculation. Furthermore, no advance notice was given to the applicants that the Board intended to decide a legal issue, namely that there was a right to set-off. These are all matters in respect of which the applicants were entitled to be heard.

4.6 The applicants indicated in their submission of December, 2009, that they were prepared to accept, for the purposes of the referral, the estimated costs as per the Development Contribution Scheme. The referral to An Bord Pleanála required the Board to determine the level of financial contribution which was payable under the planning conditions. It is correct, of course, to say that because both planning permissions predated the Development Contribution Scheme, the relevant conditions were not imposed pursuant to s. 48 of the Planning & Development Act, 2000, but were instead imposed pursuant to s.26(2) of the Local Government (Planning & Development) Act, 1963. Notwithstanding this it is the applicant's contention that the Board should have used the logic and methodology of the Development Contribution Scheme. The obligation upon An Bord Pleanála was to determine what level of financial contribution would be fair and equitable. The Development Contribution Scheme constituted *prima facie* evidence of this. The planning authority had included as part of the Scheme the very road works and improvements which had been identified under the planning conditions. The estimated costs of these works had thus been included as part of the estimated cost over twenty years of €726.5 million. The planning authority had proceeded to break this cost down into an estimated annual cost and had then calculated the appropriate levy by reference to the estimated levels of residential and commercial/industrial developments. An Bord Pleanála in its determination rejected the applicants submissions on this issue, and instead purported to fix the level of financial contribution on an entirely different basis, one which purportedly relied on the traffic impact of the development on the local road network as implied by the traffic generation specified in the environmental impact statement ("EIS"). The Board stated in its decision:-

> "In relation to condition number 15, the Board considered that the apportionment of the costs of the works specified in this condition to the referrers on the basis of floor area related to the general rate for road infrastructure specified in the Kildare County Council Development Contribution Scheme 2004, would not constitute a reasonable contribution having regard to the traffic impact of the development on the local road network as implied by the traffic generation specified in the environmental impact statement lodged with the planning application. It is considered that the percentage traffic change at various locations on the local road network, as specified by the planning authority constituted a reasonable basis for the formulation of a contribution, reflecting the impact and cost of the development to the local road network."

The applicants submit that the decision of An Bord Pleanála to reject the Development Contribution Scheme was unfair and unreasonable. The planning authority itself, a mere eight weeks after the grant of the second planning permission (Reg. Ref. 02/1514), decided that the appropriate method of levying development contributions was to do so on a county wide basis. The Scheme proceeded on the principle that development contributions were to be levied on what might be described as a generic or global basis, i.e. the rate of contribution was not directly linked to the "benefit" which the development of particular lands obtained from the provision by the local authority of specific items of public infrastructure. Rather, the same rate of development contribution was to be levied on all developers. An Bord Pleanála, in its decision of July, 2010 appears to have adopted precisely the opposite approach. Instead of calculating the level of contributions on a generic basis the Board attempted to forge a direct link between the contribution payable and the "benefit" to the permitted development.

4.7 The applicants submit that the approach adopted by An Bord Pleanála is invalid for the following reasons. First, it is inherently unfair in that it purports to allow the planning authority to double charge in respect of road and infrastructure improvements. The costs of these items have been included in the Development Contribution Scheme and thus incorporated into the rates for the development contributions under the Scheme. Secondly, the approach fails to respect the applicant's property rights under the Constitution. The applicants have been treated differently than all other developers within the planning authority's functional area in that the level of their financial contributions has been set using a different method. Thirdly, the approach which An Bord Pleanála took to the Development Contribution Scheme was inconsistent and irrational. The Board was prepared to accept the estimated costs of the road works as per the Scheme, yet then rejected the logic of the Scheme in determining the rate of the financial contributions. It is submitted that An Bord Pleanála's divergent approaches to the Development Contribution Scheme were both irrational and unreasonable. This submission is made without prejudice to the applicant's arguments concerning the appropriate standard of review.

4.8 The applicants argue that even if (which is denied) an assessment based on traffic generation was appropriate, the actual methodology applied by the Board in this regard was invalid. The Board appears to have accepted the planning authority's argument that traffic attributable to the Whitewater Shopping Centre should be calculated from the EIS submitted with the planning application. As explained in the applicant's submissions on the referral, the EIS was not intended to be so exact as to identity the relevant benefit to the Whitewater development as a fraction of the overall benefit to developments and the community. In particular, the EIS was not required to and did not differentiate between the different types of trips said to be generated by a development at different junctions. Put simply, not every person who drives to Whitewater Shopping Centre would have stayed at home but for the existence of Whitewater. Those driving to Whitewater might have had to go to the town of Newbridge anyway in order to buy whatever they bought at Whitewater. Without clear establishment of the effect of non-new trips, the EIS data inevitably overestimates the relative benefit of the infrastructure to the Whitewater development. This argument was rejected by the Board without any indication why. The applicants also dispute the suggestion in respect of the planning authority's chosen methodology that "such a methodology is in widespread use elsewhere." It is submitted that the Board chose not to interrogate the supposed precedents put forward by the notice party; instead the Inspector and on his recommendation, the Board simply concluded that the methodology proposed by the notice party was the only "reasonable" solution here.

4.9 The applicants submit that the determination of An Bord Pleanála is also unlawful on the basis of An Bord Pleanála's failure to have any or any adequate regard to the content of an earlier permission to the owner of an adjoining site, Baba Exports. Condition 11 of the Saba Exports Grant required that the developer pay for the "entire cost" of substantially the same engineering and road infrastructure works described in condition 14 of the applicants grant of planning permission. In its decision however, An Bord Pleanála makes no reference to this issue and in its Inspector's Report, a recommendation is made that no discount be applied to the applicants liability under condition 14. The sole reason for the failure to engage in a process of apportionment would appear to be the Inspector's conclusion to the effect that the traffic using the development carried out by Baba Exports "is largely discounted in terms of an increase in traffic flows". The said conclusion was evidently reached by the Inspector before being relied upon by An Bord Pleanála in its ultimate decisions, despite the fact that there was no empirical evidence to support it. It is submitted that in imposing conditions which effectively required identical expenditure on the part of the applicants and Baba Exports, the notice party created a

reasonable expectation on the part of both the applicant and Baba Exports that the contributions would be apportioned in a reasonable manner.

Respondents Submissions
5.1 This is a telescoped hearing where both the leave and the substantial application are before the Court. The applicants must satisfy the Court that they have substantial grounds and a substantial interest. The Board contends that the applicants do not have substantial grounds. They argue that there are several striking aspects of the applicant's claim that should be noted. The applicants are technically in breach of the conditions in respect of which they now invoke this Court's jurisdiction. Condition 14 required details of the costing of the works in question to be agreed with the planning authority before development commenced and payment to the planning authority of the contributions before the development was opened to the public. This did not occur. Condition 15 required details of the level of the financial contribution to be agreed with the planning authority before the development commenced. This did not occur. Many of the issues of which the applicants complain arise because the applicants proceeded with their development without having dealt with the development contributions at the outset. The applicants neither appealed nor challenged the validity of the conditions at issue in the within proceedings. Yet the substance of the applicant's complaints is not that the Board acted in breach of the conditions but that the Board should have chosen a different approach for carrying out the assessment required by the conditions. It does not lie with the applicants to make such a complaint. If the applicants considered that a different approach was required by the conditions, they should have appealed or challenged the conditions. Not having done so, the applicants cannot object to the Board adopting an approach that was open under the conditions. The applicant's essential complaint relates to the Board's choice of approach for assessing development contributions. This was a matter that lay within the Board's expert decision making function and as such the applicants can only succeed if they can demonstrate that the Board acted irrationally. The applicants do not remotely approach this threshold in their arguments.

5.2 Section 34 (5) of the Planning and Development Act 2000, as amended, provides that planning conditions may require that points of detail relating to a grant of permission be agreed between the planning authority and the person to whom the permission is granted. In *Boland v An Bard Pleanála* [1996] 3 IR 435, the Supreme Court approved certain principles to govern the jurisdiction to leave matters over for agreement. Hamilton CJ stated these principles as follows at page 440:-

> "1. The Board is entitled to grant a permission subject to conditions.
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> 2. The board is entitled, in certain circumstance, to impose a condition on the grant of a planning permission in regard to a contribution or other matter and to provide that such contribution or other matter be agreed between the planning authority and the person to whom permission or approval is granted.
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> 3. Whether or not the imposition of such a provision in a condition imposed by the Board is an abdication of the decision-making powers of the Board depends upon the nature of the "other matter" which is to be the subject matter of agreement between the developer and the planning authority.
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> 4. The "matter" which is permitted to be the subject matter of agreement between the developer and the planning authority must be resolved having regard to the nature and the circumstances of each particular application and development.
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> 5. In imposing a condition that a matter be left to be agreed between the developer and the planning authority, the Board is entitled to have regard to:
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> (a) The desirability of leaving to a developer who is hoping to engage in complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise.
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> (b) The desirability of leaving technical matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience;
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> (c) The impracticability of imposing detailed conditions having regard to the nature of the development;
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> (d) The functions and responsibilities of the planning authority;
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> (e) Whether the matters essentially are concerned with off-site problems and do not affect the subject lands;
>
> (f) Whether the enforcement of such conditions require monitoring or supervision.
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> 6. In imposing conditions of this nature, the Board is obliged to set forth the purpose of such details, the overall objective to be achieved by the matters which have been left for such agreement, to state clearly the reasons therefor and to lay down criteria by which the developer and the planning authority can reach agreement."

The purpose of these principles is both to limit the scope to leave matters over for agreement and to provide guidance to the planning authority when deciding whether to provide agreement. The courts have thus addressed the role of planning authorities in agreeing matters with developers pursuant to conditions of this nature. In short, the powers of the planning authority and by extension, the Board if the matter is referred to the Board in default of agreement, are restricted by the terms of the condition leaving matters over for agreement.

5.3 In *O'Connor v Dublin Corporation* (No 2) [2000] IEJC 68, the applicant challenged the manner in which Dublin Corporation had dealt with matters that had, by condition, been left over for agreement between the Corporation and the developer. The Corporation argued that it's decision could only be set aside if its interpretation was unreasonable. The applicant argued that the decision was an administrative decision and not one that could be reviewed only by reference to the *O'Keeffe* standard. O'Neill J held that the appropriate test to be applied is that the decision of the respondents must be looked at to see if it was correct in law and not reasonable in the sense of the test laid down in *O'Keeffe*. A number of principles emerge from the judgment of O'Neill J. First, when a referral is made to the Board in circumstances where a developer and a planning authority have failed to reach agreement on a matter of detail pursuant to a condition, the Board is confined by the planning permission as objectively interpreted. The planning permission should provide sufficient detail to guide the Board in determining matters of detail left over for agreement. However, where the planning permission is vague but unchallenged by way of judicial review, the Board must interpret its terms as best it can and determine the matters that are left over for agreement. Where the conditions leave open a number of possible approaches, it is for the Board to decide which one to adopt.

5.4 The applicants contend that the Board acted *ultra vires* in purporting to determine the *quantum meruit* of engineering and road infrastructure works carried out by the applicants for the benefit of the Council. It is contended that such matters fall outside the jurisdiction of the Board and/or were not part of the referral made by the applicants. It is also contended that the Board acted in breach of fair procedures in purporting to decide the *quantum meruit* without notice to the applicants and without seeking any submissions from the applicants on the issue. Finally it is contended that the Board erred in making such a determination without evidence and that the Board erred in considering an irrelevant consideration, namely the value that the Board itself attributed to the *quantum meruit*. The Board takes a fundamental objection to these grounds on the basis that the applicants do not have standing to maintain them. The Board's consideration of the off sets has resulted in an assessment of a lower contribution from the applicants to the Council than would otherwise be the case. The applicants have therefore not suffered on account of the Board taking this approach and do not have standing to seek judicial review on the basis that the Board ought not to have taken this approach. In his supplemental affidavit sworn on behalf of the applicants. Kieran Rush asserts that the Board is incorrect in its contention that it was to the advantage of the applicants that the Board reduced the sums due by the applicants. It is submitted that if there are any remaining issues between the Council and the applicants as to the value of any works done by the applicants on behalf of the Council, those issues can still be resolved through agreement or litigation. Nothing the Board has done precludes such a possibility.

5.5 Without prejudice to the foregoing, the respondents argue that, the applicant's claims in relation to off-setting are misconceived. The applicants advance two separate bases for their contention that the Board did not have jurisdiction to consider off-setting. First, it is contended that the calculation of the costs of those works was expressly excluded from the scope of the referral and second it is contended that the Board has no statutory function in determining such costs. Each of these claims is incorrect. Section 34(5) of the 2000 Act reads:-

> 'The conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development, if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination."

The Board's statutory role is not as an arbitrator to resolve questions framed by the parties to the reference, still less framed by one party to the reference. The Boards jurisdiction is to make a determination in respect of the matter left over by the grant of planning permission because it has not been agreed. The question therefore arises as to what was left over in each condition in the within proceedings and how the Board approached each condition. Condition 14 required the applicants to pay the entire costs of works necessary to facilitate the proposed development and to agree the sum prior to commencing the development. The applicants breached the condition by carrying out the works themselves rather than by paying the Council to carry out the works. The Council noted that the applicants had carried out all the works as set out in condition 14, with the exception of those works under 14 (e). The Council therefore confirmed that it was not seeking any payment from the applicants under condition 14 other than the costs associated with condition 14 (e). It is clear from the Inspector's report that the approach he took was to make no determination in respect of the amount due under condition 14, with the exception of condition 14 (e). He did not make an assessment of the amount due and then off-set it with reference to the works done. Accordingly, there was no off-set at all under condition 14 and the applicant's complaints in this regard are wholly without foundation. Condition 15 leaves over to be agreed, again before the development commences, details of the level of the financial contribution towards the costs of providing specified works necessary to ensure the sustainability of the development. Again, the applicants breached this condition by commencing the development prior to agreeing the level of the financial contribution and several years prior to making the referral to the Board. Under Condition 15 what the Board was required to determine was not simply the costs of the works, but rather the level of contribution that the applicants should make to the costs of those works. The Board reduced the applicant's contribution both by reference to the impact that could be attributed to the applicant's development and by reference to off-sets to take account of works already carried out by the applicants. The allowance of offsets is fully consistent with determining the level of the financial contribution, in circumstances in which the condition itself provided no guidance as to how that level of contributions should be determined. It is therefore manifestly within the terms of what was left over to be agreed by condition 15. Accordingly, the Board acted within jurisdiction in allowing the off-sets.

5.6 The applicant also complains that the Board acted in breach of fair procedures in determining the off-sets issue without notice to the applicants and without seeking any submissions or evidence from the applicants on the issue. This complaint is without foundation. The Council made several written submissions to the Board in this respect and these were circulated to the applicants for comment. The applicants were aware from an early stage in the process that the Council was contending that it was appropriate for the Board to apply off-sets in the manner in which it ultimately did and had a full opportunity to respond to such contention. The applicant's penultimate complaint in this regard is that the Board made a decision in respect of the off-sets without any evidence. This is without foundation. The Board relied on the Council's submissions and on the estimates of the value of the works as adopted in the development contribution scheme and agreed between the parties for assessing the value of the works referred to in the conditions. The applicant's final complaint in this regard is that the Board in making the determination had regard to irrelevant considerations, namely the value attributed by the Board to the *quantum meruit* of the said works. The Board's approach in this regard was completely logical. If the parties have agreed the basis upon which certain works are to be valued and the Board is allowing an off-set against a contribution due by the applicants on the grounds that the applicants have carried out certain of the works, then it is entirely consistent to assess the value of the off-sets on the same basis as the works themselves are being valued.

5.7 The applicants contend that the Board erred in its interpretation of Condition 14 in that the Board's determination requires the applicants to pay for the cost of engineering and road infrastructure works that another person is required to discharge in full. The basis for this contention is that a condition attached to a permission for Baba Exports required that party to pay the entire costs of substantially the same engineering works. The applicants contend that conditionl4 should not be interpreted as written i.e. it should not be interpreted as requiring the applicants to pay the entire costs of the works referred to, but instead should be re-interpreted on account of an alleged inconsistency with a condition attached to another planning permission. These grounds of challenge amount to an unlawful questioning of the validity of a decision taken by a planning authority other than through judicial review proceedings instituted within eight weeks of the decision, as required by section 50 of the Planning and Development Act 2000. The applicants are seeking through the guise of arguing for a reinterpretation of Condition 14, to in fact set aside Condition 14. The Respondent argues that it is clearly not open to the applicants to do so in proceedings such as these.

5.8 The permissions at issue in the within proceedings were granted before the Council's Development Contribution Scheme was adopted. Accordingly, conditions 14 and 15 were framed without reference to that Scheme and cannot be interpreted nor applied on the basis of that Scheme. The Board was required to devise an approach for the assessment of such contributions that was rational. Provided that the approach was reasonable in the sense outlined in *O'Keeffe vAn Bord Pleanála* [1992] 1 IR 37, there is no basis for setting aside the decision of the Board. The Board undertook a detailed process to avoid, insofar as was possible, any possibility of double-charging. Such apportionment can never be perfect. The Boards decision was reasonable and within jurisdiction.

5.9 The applicants complain of the approach taken by the Board to assessments of the level of contribution under Condition IS. The

applicants contend that it was incorrect for the Board to adopt a methodology based on traffic generation. The applicants also complain that they had no opportunity to make submissions as to whether the methodology was in widespread use or not. These grounds again illustrate the fundamental misconceptions that underpin the applicant's case. It was a matter for the Board, within its expert decision-making discretion, to decide on the appropriate approach. The applicants must demonstrate that the Boards approach was irrational in the *O'Keeffe* sense in order to succeed in their application. The Board was required to identify some way of sharing the cost of the provision of road infrastructure among various developers and potential developers. An approach based on traffic generation is one permissible way of doing that. Such an approach had been adopted in respect of a number of broadly similar developments in the UK and in a number of other jurisdictions. Since traffic development was a significant planning issue as regards the applicant's development and since the levies in question arose in a condition which required a contribution to road infrastructure because the existing road infrastructure was incapable of accommodating the development, the use of a methodology based on traffic generation was entirely reasonable and appropriate in planning terms. The Council had raised this method as a possible means of apportionment and the applicants had adequate opportunity to make submissions in respect of the appropriateness of this methodology.

Decision of the Court

6.1 Section 34(5) of the Planning and Development Act 2000 provides a procedure whereby a matter that cannot be agreed between a planning authority and a developer may be referred to An Bord Plenála for determination. This procedure was invoked by the applicants in relation to the Whitewater Shopping Centre, Newbridge, Co Kildare. The Board's determination dealt with two conditions of two planning permissions granted by the Council to the applicants. The conditions in question are conditions 14 and 15 of permission 02/1514. Condition 14 required the applicants before the development was opened to the public, to arrange for the payment to the Council of the entire cost of the necessary road improvements and infrastructure which had been identified in the Newbridge Traffic Management Plan as being necessary to facilitate the proposed development. The works were to be completed to the "witten satisfaction of the Council before the development opened to the public. Condition 15 required the applicants to arrange for the payment to the Council of a financial contribution towards the cost of providing the necessary road improvements and infrastructure which had been identified in the Newbridge Traffic Management Plan as being necessary to ensure the sustainability of the development. Again, the condition provided that details of the financial contribution were to be agreed with the Council before the development commenced. In these proceedings the applicants seek to challenge the legality of An Bord Pleanála's determination of the amount payable by way of financial contributions under two planning permissions. The applicants contend that An Bord Pleanála's determination is invalid. It is contended that An Bord Pleanála exceeded its jurisdiction by purporting to make findings in respect of matters that were outside the scope of the referral to it. The applicants are therefore seeking to have the Board's decision quashed.

6.2 The issues that fall to be decided in this case are as follows:-

> (a) Do the applicants have *locus standi* to raise the issue as to whether the respondents acted *ultra vires* in determining the level of contribution to be made by the applicants to the respondents and therein assessing the value of works already done by the applicants.
>
> (b) Did the respondents actually value and determine the *quantum meruit* claim that the applicants allege they have against the local authority in respect of works done by them which they allege far exceeds the works required of them in their planning permission.
>
> (c) If so, was there a breach of fair procedures by the respondent in that it never indicated it was going to do this and the applicants were thereby precluded from arguing their case in respect of the value of these works.
>
> (d) Should the respondent have used the Development Contribution Scheme in valuing the contribution to be made by the applicants rather than the traffic generation methodology. Did the applicants have a fair chance to comment on this as a possible methodology.
>
> (e) Was the respondent's decision to ignore the terms of the planning permission granted to Baba Exports unlawful.

6.3 (a) The *locus standi* issue.

The respondents argue that the result of the decision it made on the referral was in fact advantageous to the applicants. The board reduced the amount of the contribution required by over three million euro. Since they suffered no disadvantage they have no complaint and therefore no interest in challenging the decision made.

Section 50(a)(3) of the Planning and Development Act 2000 provides that the High Court shall not grant leave to apply unless satisfied *inter alia* that the applicant has a substantial interest in the matter which is the subject of the application.

The applicants argue that they have such an interest because in determining the contribution to be made by them to the local authority, the board greatly undervalued the works already done by them under the relevant condition. It seems to me that there is an inherent flaw in this argument because the applicants are arguing also in this case that in fact the board should not have valued these works at all. Had this course of action been followed then the applicant would not have obtained the substantial reduction in the contribution that was decided by the board. In fact they would have received no reduction at all. It seems to me that the only reason the applicants can claim to be disadvantaged by the boards decision is that they take the view that it has in effect decided the *quantum meruit* claim they have in respect of the works performed by them. If this is true, then they have been disadvantaged and they do have *locus standi*. If it is not true, then in my view they have no *locus standi* to challenge the decision made. This leads therefore into the second question.

6.4 (b) Did the Board actually determine the issue of the *quantum meruit*?

The works involved were the engineering and road infrastructure works carried out by the applicants. It is agreed by all that they did works over and above what they were required to do. They have been and continue to be in dispute as to the value of these works. In his supplemental affidavit sworn herein, Kieran Rush claims that the board in its decision valued these works and seems to suggest that it thereby determined the dispute as to their value. At paragraph 16 of his second affidavit of the 10th May, 2011 he states:-

> "In that context, the scope of the referrals was as to what part of the figures at (a) and (b) above were at the ultimate cost of the applicants. This was a question of determining a percentage of the overall cost to which the applicants were liable; alternatively, it was open to the respondent to determine the cost of the works themselves. Had the respondent carried out that task, as the referrals identified, and as the arguments preceded before it, then the notice party and the

applicants could have by a process of valuation of the works (whether by agreement, arbitration or litigation) and simple mathematics, determined the ultimate liability between them."

Mr Rush appears to believe that the parties are now precluded from resolving this dispute themselves because the board has valued the works in question. Yet both the board and Kildare County Council have stated plainly in Court that they do not believe this to be so. Moreover in paragraph 18 of the same affidavit, Mr Rush himself seems to say that agreement or litigation is still possible on this matter. No authority was opened to me to support the proposition that the applicants and Kildare County Council are bound by this valuation. The decision of the board is clearly not *res judicata*. The Supreme Court has held in *Belton v Carlow County Council* [1997] 2 ILRM 405 that in order for a matter to be *res judicata* it must be the final decision of a court of competent jurisdiction. The decision of An Bord Pleanála is not such a decision. In my view the parties are free to resolve by agreement, arbitration or litigation the *quantum meruit* to which the applicants refer. Thus there is no substantial interest in play for the applicant in regard to this question. No order of this Court can benefit them and thus they have no *locus standi*. In the light of this decision, no issue arises in relation to ground (c).

6.5 (d) Should the board have used the Development Contribution Scheme (DSC) to value the contribution to be made by the applicants rather than the traffic generation methodology?

The applicants accept that the planning permission predates the Development Contribution Scheme and that the conditions were imposed pursuant to s. 26(2) of the Local Government Planning and Development Act 1963. They nonetheless argue that the board should have used the Development Contribution Scheme because this would have been fairer. It would indeed have resulted in a very much smaller contribution. The applicants further challenge the methodology applied by the board in determining how much traffic was generated by the shopping centre. They claim the board relied upon the EIS submitted with the planning application which they claim was never intended to be used for such a purpose.

6.6 In *Boland v An Bard Pleanála* [1996] 3 IR 435 the Supreme Court approved certain principles governing the jurisdiction to leave matters over for agreement.

These principles are set out above at 5.2. They both limit the jurisdiction to leave over points for agreement and also the manner of providing such agreement. It is clear and I do not think this was in dispute, that the board in such cases as herein is restricted by the terms of the condition leaving matters over for agreement.

The Courts role in cases where matters had by conditions been left over for agreement was considered in *O'Connor v Dublin Corporation* (No.2) 2000 IECJ 68. In that case O'Neill J observed at paragraph's 52 to 53:-

> 'Therefore in my view it necessarily and obviously follows that the respondent must be confined in this exercise solely to ascertainment of the true and correct meaning of the conditions and consequent, on that, confined in their agreement to proposals which faithfully adhere to and implement those conditions.
>
> Necessarily, such an approach excludes, in my view, "the reasonableness test" as laid down in *O'Keeffe v An Bord Pleanála* from the compliance procedure."

A number of principles emerge from the case law.

> (i) In a referral, the board is confined by the planning permission.
>
> (ii) The permission should provide sufficient detail to guide the board in determining the matter left for agreement.
>
> (iii) Where it is unclear the board must interpret its terms as best it can.
>
> (iv) The board acting thus is exercising its decision making powers as an expert body.
>
> (v) Where a number of possible alternatives exist it is for the board to decide which one it will choose.

6.7 Applying these principles to this case it is clear firstly that the board was limited by the terms of the conditions. The condition in question was number 15. This left over for agreement the details of the financial contribution to be made towards providing specified works that were considered necessary to insure the sustainability of the development.

This condition required the board to determine both the cost of the works and the contribution of the applicants thereto. No guidance was given to the board in condition 15 as to the manner of assessing the contribution. The board was therefore obliged to do the best it could in this regard. If there were alternative ways of doing this, then in choosing between them, the board was acting as a tribunal with special expertise.

6.8 The role of the Court in Judicial Review of decisions of expert bodies is well established. This Court addressed the matter in the case of *Frank Harrington Ltd. V An Board Pleanála* [2010] IEHC 428 at paragraph 7.1 as follows:-

> "When judicially reviewing a decision of an expert body the courts must exercise an appropriate measure of restraint. The nature of Judicial Review of expert bodies was addressed in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. Hamilton CJ stated at page 45 that:-
>
> "It would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and argument heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."
>
> The need for restraint has been helpfully explained in the following terms:-
>
> "While a court must not lose sight of its unique role in determining the legality of a public decision, there are sound reasons for the exercise of restraint in the application of the review principles. If the judges overreach, they commit the error which review has been designed to prevent: they abuse jurisdiction. And in doing so, there is a practical danger that

they may end up being responsible for decisions which they are not, by training or experience qualified to make. Specialist bodies are established by legislation often because their members will have particular knowledge of their fields of activity. That knowledge may often not necessarily be imparted to or rest in a judge dealing with a review application." *De Blacam*, Judicial Review, Second Edition (Dublin 2009).

6.9 When the board used the traffic generation methodology in order to assess the contribution to be made by the applicants it seems to me it was acting well within the bounds of reasonableness. The claim of the applicants that the board should have used the Councils Development Contribution Scheme instead of the traffic generation methodology is somewhat difficult to sustain. In the first place it is agreed that the Development Contribution Scheme was not in existence when the planning permission was granted. Secondly condition 15 did not specify how the contribution should be assessed. Thus it was both necessary and open to the board to choose such methodology as seemed appropriate to it in order to assess the level of contribution which the applicant should make to share the cost of road infrastructure. The evidence before the court was that the board ascertained that the assessment of traffic generation was an approach adopted in a number of similar developments in the UK and in other countries. Clearly the development was going to generate road traffic to an extent depending on its nature and intensity. Moreover the very purpose of condition 15 in this regard was to assess the level of contribution to be made by the developers to the infrastructure that would be required to meet the expanded traffic volume due to the development. Why the board would have reference to a scheme that was not in existence when the condition was attached in order to ascertain how to assess a contribution to be made under that condition, is not easy to understand. The most that has been argued is that the scheme subsequently introduced would have been fairer. As noted above, it would undoubtedly have resulted in a lower contribution. That however is very far from the standard of irrationality required to overturn the decision of an expert tribunal.

6.10 As to the claim that the applicants did not have sufficient notice of the board's intention to use the traffic generation methodology, this is not supported on the evidence. The council in its submissions to the board of September 2008 and July 2009, and at the meeting of November 2010, raised this methodology as a means of assessing the contribution. It was indicated this methodology was in use in other countries. These submissions were circulated to the applicants and they had every opportunity to respond.

6.11 (e) Finally in relation to the claim of the applicants that condition 14 requires them to pay the entire cost of substantially the same works to be provided by Baba Exports, it must be borne in mind that the applicants never sought to either appeal or challenge this condition. Condition 14 requires the applicants to pay the entire cost of certain infrastructural works and the applicants case in this regard was very carefully considered by the Inspector in his report to the board at pages 44 to 47. The inspector notes correctly that the applicants are seeking to have condition 14 interpreted other than in accordance with its simple meaning. His analysis of the Baba exports permission concludes that, contrary to the applicant's argument, there are in fact important differences between the two conditions. He notes that the purpose of the two developments, i.e. the shopping centre and the multi storey car park are quite different. The car park services the existing town centre whilst the shopping centre is *ipso facto* a traffic generating development. It is a valid distinction and shows the Inspector did address his mind clearly to the case made by the applicants in this regard. He did not accept their argument and explains clearly why he did not. In relying on the Inspectors decision the board was exercising its expert judgment on a planning matter. I agree with the Inspectors carefully reasoned decision but even if I did not, I could not intervene in Judicial Review proceedings with the decision made because it was a perfectly rational decision made by an expert tribunal utilising its practical expertise. Moreover, the time to appeal or challenge condition 14 is long gone. The applicant's argument in regard to Baba Exports is an attempt to mount a collateral attack on the validity of the condition and cannot be allowed.

In respect of each of the grounds set out above, leave to seek judicial review is refused.