Neutral Citation Number: [2006] IEHC 353

THE HIGH COURT

[2004/1955 SS]

IN THE MATTER OF THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919,
THE ARBITRATION ACTS, 1954 AND 1980,
THE PROPERTY VALUES (ARBITRATIONS AND APPEALS) ACT, 1960,
THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACTS, 1963-1999
AND
IN THE MATTER OF
SEAN COOPER
V
CORK CITY COUNCIL (FORMERLY CORK CORPORATION)

Judgment of Mr. Justice Roderick Murphy dated the 8th day of November, 2006

1. Outline

This is a case stated on the net point of construction of a condition in a planning permission which relates to a claim for compensation under the Local Government (Planning and Development) Act, 1990 (the Act of 1990).

The applicant owned land at Douglas Hall, Cork which is situate on the sea side of the M55. The site consisted of 0.83 hectares out of a larger site of 1.4 hectares.

Previous applications for planning permission for development of 42 units had been refused. On 28th July, 1999 planning permission was granted for 33 apartment units. This was appealed to An Bord Pleanála.

On 15th March, 2000, the Board granted permission for 33 units subject to twelve conditions. The units have since been constructed.

A claim was made to the Property Arbitrator on 11th September, 2000 for the loss of the eight apartments pursuant to s. 11 of the Act of 1990.

2. Legislative provisions

Section 11 of the Act of1990 provides 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 –
>
> (a) such amount, representing the reduction in value, as may be agreed,
>
> (b) in the absence of agreement, the amount of such reduction in value, determined in accordance with the *First Schedule*, and
>
> (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."

The *First Schedule* details rules for the determination of the amount of compensation, s. 12 of the Act provides that such compensation shall not be payable in respect of any development of a class or description set out in the *Second Schedule* or for a reason or reasons set out in the *Third Schedule* or for the imposition of conditions on the granting of permission which conditions are of a class or description set out in the *Fourth Schedule*.

Section 12(2) of the Act of 1990 provides as follows:-

> "Compensation under s. 11 shall not be payable in respect of the imposition, on the granting of permission to develop land, of any condition of a class or description set out in the *Fourth Schedule*."

The following paragraphs of the *Fourth Schedule* are relevant:

> "6 – Any condition relating to all or any of the following matters –
>
> …
>
> (b) building lines, site coverage and the space about dwellings or other structures;
>
> …
>
> 10 – Any condition relating to –
>
> (a) the disposition or layout of structures or structures of any specified class (including the reservation of reasonable open space in relation to the number, class and character of structures in any particular development proposal);
>
> (b) the manner in which any land is to be laid out for the purpose of development, including requirements as to road layout, landscaping, planting;
>
> …
>
> 12 – Any condition relating to the layout of the proposed development, including density, spacing, grouping and

orientation of structures in relation to roads, open spaces, and other structures.

…

18 – Any condition relating to the preservation of views and prospects and of amenities of places and features of natural beauty or interest.

19 – Any condition relating to the preservation and protection of trees, shrubs, plants and flowers."

The claim in the present case is, of course, under the provisions of the Act of 1990, the notice of claim for compensation having been served on 11th September, 2000. The arbitrator submitted his question in relation to the relevant provisions of the 1990 Act.

The subsequent Planning and Development Act, 2000 and the Third, Fourth and Fifth Schedules of that Act considerably reduce the circumstances in which compensation can be claimed and also considerably reduce the likely amount of such claims. The principle of compensation following adverse planning decisions is retained but the entitlement is virtually eliminated in case of developments which would have unduly interfered with the general amenities of the public or neighbourhood or with public safety or environmental well being.

3. Case Stated
Mr. Eoin O Buachalla, property arbitrator, made an award in the form of a special case stated for the opinion of the High Court on 14th October, 2004.

At the request of the respondent (Cork City Council) he submitted the following question for the decision of the High Court:-

"Do the provisions of s. 12(2) and one or more of paragraphs 6(b), 10(a), 10(b), 12, 18, 19 of the *Fourth Schedule* to the Local Government (Planning and Development) Act, 1990 preclude me from awarding compensation pursuant to s. 11 of the 1990 Act to the claimant in this case."

If the answer of the court to that question is in the negative he awarded that the respondent pay to the claimant the sum of €150,000 as compensation pursuant to s. 11 of the 1990 Act in respect of the imposition of condition number 5 of the grant of planning permission by An Bord Pleanála dated 15th March, 2000, together with costs.

If the answer of the court to the question set is in the affirmative that the compensation be paid by the respondent to the claimant as nil and that the claimant and the respondent bear their own costs of and incidental to the reference to arbitration and to the taking up of the award.

4. Conditions relating to permission granted
The decision of 15th March, 2000 to grant permission for the development of apartments on the claimant's lands was subject to 12 conditions. The effect of condition number 1 was to reduce the number of apartments to 33.

The notice of claim served on the respondents on 11th September, 2000 was for the sum of IR£850,000 (£600,000 for loss of eight apartment units and £250,000 for loss of amenity) in respect of the alleged reduction in the value of the claimant's interests in the subject lands as a result of the aforesaid condition.

By amended notice of claim dated 16th November, 2001, the amount of the reduced claim was £280,000 and was confined to the alleged reduction in the value of the claimant's interests in the subject lands as a result of condition number 5 of the decision of An Bord Pleanála.

Condition number 5 is as follows:-

"No development shall take place east of the existing line of beech trees which traverses the site. This area shall be fenced off prior to the commencement of development and no access shall be provided to this area during the construction phase. Following the completion of the development, the area to the east of the line of beech trees shall be retained in its natural undeveloped state and no gardens or other development shall be placed in this area. The proposed car parking space east of the line of beech trees shall be relocated onto the western portion of the site. Details of fencing off the site during the construction phase, and of the revised car parking layout, shall be submitted for agreement of the planning authority prior to the commencement of development.

Reason: in the interest of amenity."

The arbitrator found that it is this condition No. 5 that gives rise to the case stated.

5. Planning Inspector's Report
By report dated 13th March, 2000, Paddy Keogh, inspector, referred to his site visit on 6th January, 2000 and to the description and context thereof. He referred to the proposal, planning history and planning authority department reports. He referred particularly to a report from the planning authority parks department dated 25th June, 1999 which expressed the opinion that the proposed development would seriously contravene the Cork City Development Plan Review of 1998 zoning for the site. All of block 5 in the 30-bay car park fell within the designated amenity area in which development may be restricted or prevented to protect the visual amenity and habitat for wild flora and fauna. It stated that further reduction in the size and scale of the development should be sought to reduce the impact of the development on the amenity area.

He also referred to conditions 2 and 3 of the planning authority decision of 28th July, 1999 which corresponded to part of condition 5 of An Bord Pleanála.

The applicant's appeal related, *inter alia*, to the planning authority's conditions. The applicant had said as follows:

"The planning authority have not given any reason or explanation or produced any scientific grounds to show that a landscaped garden would be detrimental to the general environment that exists on the eastern portion of the site. Furthermore, they have not stated what it is that must be protected at this location.

To screen the development in the area from the south ring road might be best be achieved by a line of trees along the

river bank and an extension of the existing line of trees southward to the boundary of the site.

The inspector's assessment agreed, on balance, with the approach adopted by the planning authority which recognised that the lands on the western portion of the site which are located in reasonably close proximity to Douglas village have no apparent habitat value compared with the adjacent lands on the eastern portion of the site and could accommodate a limited form of development: he considered that the existing line of beech trees which traversed the site defined a natural boundary between low lying eastern portion of the site, which is significant from a nature conservation point of view and the western portion of the site, which has potential for development. Furthermore, subject to supplemental planting, this line of trees offered a valuable opportunity for the visual screening of any development on the western portion of the site and the protection of visual amenity across the estuary from a number of local vantage points. He considered that works necessary to develop the eastern portion of the site for use as gardens serving the apartments and the intensification in the use of this area which result would not be compatible with the requirements of the area in terms of nature conservation and should not be permitted."

The Inspector recommended that planning permission for the proposed development be granted subject to certain conditions including condition 8:

> "This site shall be landscaped in accordance with a comprehensive scheme of landscaping to include both soft and hard landscaping including suitable surfacing of the access road and car park and providing for supplementary tree planting along the existing line of beech trees which traverses the site. Details shall be submitted to the planning authority for agreement prior to commencement of development. The scheme shall include a time scale for its implementation.
>
> Reason: In the interest of visual amenity."

6. Cork City Development Plan Review, 1998
Chapter 4 of the review deals with environmental policy. Paragraph 4.2.8 addresses nature conservation and identifies the Douglas estuary on the western part of Lough Mahon adjacent to the subject lands which is referred to as a significant area of salt marsh, reed bed and inter-tidal mudflat holding international important numbers of waders. That part of Cork harbour had also been designated as a special protection area for wild birds (SPA) under the European Communities (Conservation of Wild Birds) Regulations, 1994.

Chapter 6 on development policies outside the central area refers to amenity in paras. 6.6 and 6.7. It notes to the continuous process of land development in the city, having reduced woodland areas and other amenity land, including land available for active and passive recreation. Nonetheless, substantial areas are zoned as areas in which development may be restricted or prevented for a range of amenity reasons which were outlined. The objective is to preserve the essential amenity characteristics of the land. The areas zoned are divided into five categories based on their essential amenity characteristics including land with amenity value which has potential for development as an open space; and areas which provide a habitat for wild flora or fauna.

The Douglas estuary is referred to in para. 6.27 where it is stated that a section of the shore remains relatively undeveloped and is zoned as a restricted development area because of its amenity value. Only modest development for recreational purposes which would promote the wild life function, or not be incompatible with it, is envisaged.

7. Authorities
The following cases with regard to the interpretation of planning permissions were referred to:

7.1 In *Re X.J.S. Investments Ltd*. (1986) I.R. 750 at 756 was relied upon in relation to the principles of construction. In that case McCarthy J. had stated:

> "To state the obvious, [planning documents] are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material. They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents unless such documents, read as a whole, necessarily indicate some other meaning."

7.2 *Dublin City Council v. Liffeybeat,* [2005] 1 I.R. 478 *per* Quirke J., elaborated. Such document should be couched in terms which are comprehensive and capable of construction in their ordinary meaning. The planning authorities should take reasonable steps to ensure that the terms of documents granting or refusing planning permission will be comprehensive to members of the public. Some documents of a technical character must, of necessity, be couched in technical terms. Quirke J. continued as follows at 494:

> "It follows that there is a requirement (and a corresponding obligation upon the planning authorities and An Bord Pleanála) to ensure that where the permitted use of property is restricted or confined by a condition or a number of conditions, then the terms of those conditions should be clearly comprehensible and capable of definition and explanation."

7.3 Finlay C.J., in *Dublin County Council v. Eighty Five Developments Ltd*. (No. 2) [1993] 2 I.R. 392 at 399 in relation to exclusionary clauses that:

> "[It] must in general be most desirable from the point of view of certainty and precision, that it should express the reason by which it has reached such a decision, as closely as possible in accordance with the wording of the relevant sub-section or sub-clause (of the relevant section)."

7.4 In *Hoburn Homes and Anor. v. An Bord Pleanála* [1993] I.L.R.M. 368, Denham J. observed that compensation was a statutory right and should only be removed in clear precise cases.

8. Applicant's submission
Mr. Galligan, counsel for the claimant, submitted a reason which fits within the precise wording of the section should be expressed in the words of that section. If a condition is to exclude compensation it must fall squarely within the paragraph of the *Fourth Schedule.*

The term "relating to" is used in the preamble to paragraph 6 of the *Fourth Schedule*. The words "relating to" in the context of the *Fourth Schedule* essentially means "concerned with".

A "rolled up" paragraph dealing with a myriad of different requirements or conditions relating to a grant of permission to develop land

could be used as a device to defeat a claim for compensation in certain circumstances. It is wider than a specific paragraph relating to an imposed condition which would not attract compensation. Such an approach to the interpretation of the Schedule would not accord with the legislative intention.

The respondent had sought to rely on paragraph 6(b) of the *Fourth Schedule* of the Act of 1990 which refers to any condition relating to all or any of the following matters: building lines, site coverage and the space about dwellings and other structures. The claimant was not aware of the basis of the respondent's contention that condition 5 of the decision of the Board falls within the scope of that paragraph. The condition is patently not concerned with either building lines, site coverage or the space about dwellings or other structures.

In relation to paragraph 10 of the *Fourth Schedule* there is no development on the eastern side. It is submitted that condition 5 of the permission is not concerned with paragraph 10(a) of the *Fourth Schedule* the purpose of which is to ensure that no development takes place on the specified portion of the site which is to be retained in its "natural undeveloped state" and the proposed car parking spaces are to be removed from this location. The primary purpose is the protection of the amenity of the area to the east of the beech trees it is not concerned with the disposition of or layout of structures but the reservation of reasonable open spaces. Furthermore the condition makes it quite clear that "no gardens or other development shall be placed in this area". Condition 5 goes considerably further than the disposition of layout of structures and does not fall within the scope of paragraph 10(a).

The condition has the effect of precluding all forms of exempted development insofar as the prohibition on development is absolute in the area east of the beech trees.

Neither is condition 5 of the permission relevant to paragraph 10(b) – the manner in which any land is to be laid out for the purpose of development, including requirements as to the road layout, landscaping and planting etc. The condition is in the interests of amenity only.

In relation to the contention that the purpose of the condition may have been to preserve a place of wildlife importance or interest, such places are not referred to in the context of the paragraphs of the *Fourth Schedule*. By contrast, conditions relating to the preservation of sites of archaeological, geological or historical interests are protected under paragraph 17 of the *Fourth Schedule* and places of natural beauty or interest under paragraph 18.

A condition relating to the preservation and protection of trees, shrubs, plants and flowers in paragraph 19 of the *Fourth Schedule* does not include the words "or wildlife". Paragraph 12 refers to the layout of the proposed development. None of the requirements or conditions of condition 5 relate thereto. Paragraphs 18 and 19 relate to the preservation of views and prospects or places and views of natural beauty and the preservation and protection of trees, shrubs, plants and flowers which is conjunctive to the preservation of use and amenities. There is no specific reference to any of these elements in condition 5. Accordingly it is submitted that paragraphs 18 and 19 do not apply. A condition which on its face is not related to the preservation of views and prospects could not be deemed to fall within the wording of paragraph 18.

Counsel for the claimant submitted that condition 18 in the *Fourth Schedule* of the 1990 Act was not included in the inspector's report nor, indeed, in the An Bord Pleanála decision.

He referred to condition 19 of the *Fifth Schedule* to the Act of 2000 which reads:

> "Any condition relating to the protection of features of the landscape which are of major importance for wild fauna and flora."

which is separate from the next condition:

> "20. Any condition relating to the preservation and protection of trees, shrubs, plants and flowers."

and:

> "21. Any condition relating to the preservation (either *in situ* or by record) of places, caves, sites, features and other objects of archaeological, geological, historical, scientific or ecological interest."

The rewording signified a problem in relation to the wording of the previous schedule in the Act of 1990.

Counsel believed that the respondent was asking the court to speculate beyond the provisions of condition 5 as encompassing amenities of property. In relation to paragraph 18, which, counsel says, should be read conjunctively, he stresses that in other paragraphs such as 17 the disjunctive term "or" is used.

In the circumstances the claimant submits that the answer to the question submitted from the arbitrator should be in the negative.

9. Submissions on behalf of the respondent.
Mr. Morris Collins SC and Mr. Declan McGrath BL contend that condition 5 of the decision of the Board comes within one or more of the relevant paragraphs in the *Fourth Schedule*. There was no requirement in the 1990 Act that any condition should invoke one or more paragraphs of that schedule. There is a distinction between the position of refusal of planning permission as in *X.J.S.* and the present case where permission is granted subject to conditions. Section 12(2) refers to any condition *of a class or description* set out in the *Fourth Schedule*.

Counsel submitted that the proper approach to the interpretation of the Act is to give to the words of the statutory provision or provisions in issue their natural and ordinary meaning; *Howard v. The Commissions of Public Works in Ireland* [1994] 1 I.R 101 applies. That case does not dictate that the enactments must always be given a literal meaning, irrespective of the result. The courts can and ought to have regard to the purpose of the provisions being construed and, where the purpose is clear and where it is reasonably open on the language of the provision at issue, give the provisions a construction that advances, rather than frustrates, that purpose. He referred to D.P.P. *(Ivers) v. Murphy* [1999] 1 I.R. 91 at 109 – 111 regarding the purposeful approach. Having referred to the dictum of Griffiths L.J. in *Pepper v. Hart* [1993] AC 593 at 617 regarding such approach, Denham J. states at 111:

> "The rules of construction are part of the tools of the court. The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then that is the appropriate interpretation for the court to take."

A similar approach is evident in s. 5(1) of the Interpretation Act, 2005:

> "In construing a provision of any Act (other than a provision which relates to the imposition of a penal or other sanction) that is obscure or ambiguous, or that on a literal interpretation would be absurd or would fail to reflect the plain intention of… [the parliament concerned] the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

O'Sullivan and Shepard, Irish Planning Law and Practice at 6.106 refers to the 1990 Act as considerably reducing the circumstances in which compensation can be claimed and also considerably reducing the likely amount of such claims. The principle of compensation following adverse planning decisions is retained but the entitlement is virtually eliminated in the case of developments which would have unduly interfered with the general amenities of the public or neighbourhood or with public safety or environmental wellbeing.

The purpose of the 1990 Act was acknowledged by Fennelly J. in *Ballymac Designer Village Ltd. v. Louth County Council* [2002] 3 I.R. 247 at 256 where he referred to the scheme of compensation having been modified and, in some respects, restricted over the years.

It was submitted that there was no constitutional presumption in favour of compensation. It was not required for every restriction of property rights and the absence of compensation would not have itself mean that a particular restriction constituted an unjust attack on property rights. This was particularly so where the restriction did not expropriate property or the rights of private ownership but merely regulated the exercise of those rights. He referred to O'Callaghan v. Commissioners of Public Works [1985] ILRM 364 (O'Higgins C.J.) in relation to the preservation of a national monument and to the decision of Kenny J. in Central Dublin Development Association v. Attorney General [1975] 109 ILTR 69 in relation to town planning as an attempt to reconcile the exercise of property rights for the demands of the common good being not an unjust attack on those property rights.

Counsel referred to article 26 in the Planning and Development Bill 1999 [2000] 2 I.R 321. The decision of the Supreme Court was that the granted planning permission is an enhancement of the value of property rights and, accordingly, a planning authority is entitled to impose conditions which regulate the development for which permission has been granted even if these conditions have the effect that a person does not obtain the full increase in value consistent with a grant of that permission.

He referred to the judgment of Keane C.J. at 353:

> "Planning legislation of the nature now under consideration is of general application and has been a feature of our law since the enactment of the Town and Regional Planning Act, 1934, although it did not take its modern, comprehensive form until the enactment of the Act of 1963. Every person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of the property in the public interest. Inevitably, the fact that permission for a particular type of development may not be available for the land will, in certain circumstances, depreciate the value in the open market of that land. Conversely, where the person obtains a permission for a particular development the value of the land in the open market may be enhanced. As Finlay C.J. observed in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23 at p. 37:-
>
> > 'What the Minister [for Local Government] was doing in making his decision in 1977 to grant outline planning permission to the then owner of these lands was not intended as any form of delimitation or invasion of the rights of the owner of those lands but was rather intended as an enlargement and enhancement of those rights.
> >
> > The purchase of land for development purposes is manifestly a major example of a speculative or risk commercial enterprise. Changes in market values or economic forces, *changes in decisions of planning authorities and the rescission of them*, and many other factors, indeed, may make the land more or less valuable in the hands of its purchasers.' [Emphasis added]
>
> …
>
> In the present case, as a condition of obtaining a planning permission for the development of lands for residential purposes, the owner may be required to cede some part of the enhanced value of the land deriving both from its zoning for residential purposes and the grant of permission in order to meet what is considered by the Oireachtas to be a desirable social objective, namely the provision of affordable housing and housing for persons in the special categories and of integrated housing."

Counsel referred to the proper approach to the construction of planning permission and referred to *Readymix (Éire) v. Dublin County Council*, Supreme Court, 30th July, 1974; to *Jack Barrett (Builders) Ltd. v. Dublin County Council* (Unreported, Supreme Court, 28th July, 1983); *X.J.S. Investments Ltd. v. Dun Laoghaire Corporation* [1987] ILRM 69; *Westport UDC v. Golden* [2000] 1 ILRM 439; *Kenny v. An Bord Pleanála* [2001] 1 I.R. 565; *Ní Éilí v. Environmental Protection Agency,* (Unreported, Supreme Court, 30th July, 1999) and to *Fairyhouse Club Ltd. v. An Bord Pleanála*, (Unreported, High Court, 18th July, 2001).

The form of wording required to exclude compensation, considered in *X.J.S. Investments Ltd. and Dublin County Council v. Eighty Five Developments Ltd*. (No. 2), already referred to. Finlay C.J. in the latter case referred to *X.J.S.* at 398 as follows:

> "The decision of this Court in re *X.J.S. Investments Ltd*. [1986] I.R. 750 was not, as has been contended, a decision to the effect that a reason for the refusal for planning permission could only be non-compensatory, within the provisions of s. 56, if it followed the precise wording of one of the subsections or sub clauses of that section."

It was desirable that a planning authority should express the reason for refusal "as closely as possible" in accordance with the wording of the relevant subsection or sub clause of s. 56 but the absence would not prevent a common sense appraisal of what the real reason is from being made by the court (at 399).

McCarthy J., in the same case stated at 402 that:

> "It may be that the Board is reluctant to use the precise wording of the relevant portion of the section for the very reason that it might be thought that the reason was being advanced in order to defeat a claim for compensation, in effect, an allegation of bad faith. 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."

There is a clear distinction between s. 12(1)(b) and s. 12(2) in relation to the refusal of permission for any development. Section 12(1)(b) restricts the payment of compensation in respect of the refusal of permission for any development "if the reason or one of the reasons for the refusal is a reason set out in the *Third Schedule*" (Reasons for the Refusal of Permission which Exclude Compensation). In contrast s. 12(2) provides that compensation shall not be payable in respect of the imposition, on the granting of permission to develop land, of any condition of a *class or description* set out in the *Fourth Schedule.* (Conditions which may be Imposed, of the Granting of Permission to Develop Land Without Compensation).

The Cork City Development Plan Review of 1998 recognises the Douglas Estuary area as significant. As noted above it has been designated as a special protection for wild birds area under the European Communities (Conservation of Wild Birds) Regulations of 1994. Paragraphs 6.6, 6.7 and 6.27 referred to the objective of preserving the essential amenity characteristic of the area.

The condition and the reason for condition 5 mirror that contained in the Inspector's Report and Recommendation "in the interests of amenity". There cannot be any doubt but that condition 5 falls within both paragraphs 18 and 19 of the *Fourth Schedule*, that is:

> "Any condition relating to the preservation of views and prospects and of amenities of places and features of natural beauty or interest,
>
> Any condition relating to the preservation and protection of trees, shrubs, plants and flowers." [Emphasis added]

Condition 5 relates to site coverage at layout as provided for in paragraphs 6(b), 10(a), 10(b) and 12 of the *Fourth Schedule*.

It is submitted that the question stated by the arbitrator should be answered in the affirmative.

10. Decision of the Courts.
Section 11 of the Local Government (Planning and Development) Act, 1990 gives a right to compensation where a claim is made to the planning authority and it is shown that as a result of a decision involving a refusal of permission to develop land or a grant of such permission subject to conditions, the value of an interest of any persons existing in the land to which the decision relates at the time of that decision is reduced, that person shall, subject to the provisions of this part, be entitled to be paid compensation representing the reduction of value or the damage (if any) to a claimants trade, business or profession carried out on the land.

Section 12 restricts compensation in respect of the refusal of permission for any development of a class or description set out in the *Second Schedule* and for the reason one of the reasons for the refusal set out in the *Third Schedule.*

Many of the cases referred to by the claimant are cases which result from the refusal of permission. It is clear that the reasons should be stated with certain concision. Notwithstanding that, McCarthy J. in *Eighty Five Developments Limited* referred to the Board being reluctant to use the precise wording of the relevant portion of the section for the very reason that it might be thought that the reason was being advanced in order to defeat a claim for compensation. In effect, an allegation of bad faith could arise.

There is, of course, a distinction between compensation for the refusal of permission and compensation in respect of the imposition, on the granting of permission to develop land, of any condition of a class or description as set out in the *Fourth Schedule*. The addition of the words "of a class or description" seems in the view of the court to be wider and more flexible then the use of the words "a reason as set out in the *Third Schedule*".

It seems to this court that the principles of interpretation relied upon by each party are not at significant variance with one another. A purposive approach is clearly permitted as is clear from s. 5 of the Interpretation Act, 2005, that best reflects the plain intention of the parliament where that intention can be ascertained from the Act as a whole.

This is also clear from the decision of *Howard v. The Commissioners for Public Works in Ireland* [1994] 1 I.R. 101 and in the judgment of Denham J. of the Supreme Court in *D.P.P. (Ivers) v. Murphy* [1999] 1 I.R. 91 at 109, approving *Pepper v. Hart* [1993] AC 593 at 617.

The courts now adopt a purposive approach and seek to give the true effect to the purpose of legislation.

It is significant that different rules apply, as is clear, from the strict interpretation of revenue legislation and provisions that relate to the imposition of a penal or other sanction. There is no sanction involved in the interpretation of the 1990 Act. Rather there is a question of compensation for refusal or, as in this case conditions attached to the granting of permission. It is clear from the decision of Finlay C.J. in *Eighty Five Developments Ltd*. at 398 that:

> "The absence of [the statutory] form does not, in my view, on the decision in In re *X.J.S. Investments Ltd*. [1986] I.R. 750 or on any other principle, prevent a common-sense appraisal of what the real reason is from being made by the court."

The enhancement value following from a grant of planning permission may, indeed, be lessened by the imposition of conditions. It is clear that the regulation of property rights is constitutional. Planning is an attempt to reconcile the exercise of property rights with the demands of the common good. Planning legislation defends and vindicates as far as practicable property rights with the common good and regulation by way of planning is not an adjust attack on property rights as is clear from the judgment of Kenny J. in *Central Dublin Development Association v. Attorney General* [1975] 109 ILTR 69.

The Supreme Court decision in re article 26 *in the matter of the Planning and Development Bill 1999* [2000] 2 I.R. 321 at 353 referred to restrictions which the general law of planning imposes on the use of property in the public interest.

Finlay C.J. in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23 at 37 referred to decisions to grant outline planning permission as being not intended as any form of delimitation or invasion of the rights of owners of lands but was rather intended as an enlargement and enhancement of those rights.

The thrust of the present case is, of course, more focused on the references to the conditions excluding compensation in the *Fourth Schedule* to the Act. It is clear that the 1990 Act increased the number of conditions which might be imposed without compensation just as the 2000 Act has further increased the number of conditions from the Act in relation to which this claim is being made.

It seems to this court that the reference to "any condition of a class or description set out in the *Fourth Schedule*" is necessarily broader than the reference to "reasons for the refusal is a reason set out in the *Third Schedule*" in relation to the refusal planning permission.

More specifically it seems clear that condition 5 of the Board's decision following on the recommendation of the inspector, relates to the preservation and protection of trees, shrubs, plants and flowers (paragraph 19 of the *Fourth Schedule* of the Act of 1990) and, notwithstanding the amendment thereto in the *Fifth Schedule* to the 2000 Act, falls within a condition of a class or description in paragraph 18 of the *Fourth Schedule* of the Act of 1990. It does not seem to me that it is necessary to read the condition disjunctively once its any condition or a class or description as set out therein,

Condition 6(b) relates to the west part of the site. Condition 10(a) and (b) both refer to the layout of developments. Neither appears to be relevant.

Accordingly it would seem to the court that the question posed by the arbitrator in the case stated should be answered in the negative.

The Arbitrator is not precluded by s. 12(2) of the Act of 1990 from awarding compensation pursuant to s. 11 of that Act.