

THE HIGH COURT

[2013 No. 506 SP.]

**IN THE MATTER OF THE COMPANIES ACT 1963-2012 AND IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT 1963 AND
IN THE MATTER OF SECTION 290(1), (2), (3) AND (8) OF THE COMPANIES ACT 1963**

BETWEEN

**ANTHONY J. FITZPATRICK IN HIS CAPACITY AS LIQUIDATOR OF BOHERGAR DEVELOPMENTS LIMITED (IN VOLUNTARY
LIQUIDATION)**

APPLICANT

AND

CUIRT MONARD MANAGEMENT COMPANY LIMITED

RESPONDENT

SOUTH TIPPERARY COUNTY COUNCIL

NOTICE PARTY

JUDGMENT delivered by Mr. Justice Michael White on the 21st day of January, 2014

1. The applicant was appointed liquidator of Bohergar Developments Limited (hereinafter called "the Company") on the 1st April, 2012. He applied to the High Court for an extension of time to bring an application pursuant to s. 290(1) of the Companies Act 1963.

2. Section 290(1) of the Act of 1963 states:-

(1) Subject to subsections (2) and (5), where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property which is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, may, with the leave of the court and subject to the provisions of this section, by writing signed by him, at any time within 12 months after the commencement of the winding up or such extended period as may be allowed by the court, disclaim the property.

3. Liberty was granted by order of 28th August, 2013, to extend the time.

4. Subsequently, the applicant issued a special summons seeking leave to disclaim the operation and maintenance of a sewage treatment plant and pumping station on lands at Monard, Co. Tipperary, which were the subject of a notification of grant of planning permission on 14th December, 2005, issued by South Tipperary County Council, planning permission reference No. 05/462.

5. The applicant further sought an order vesting the estate and maintenance obligations and legal entitlements of the applicant in the respondent. Pursuant to his application the applicant averred that Inis Housing-who own 10 units in the development-took it over and are currently attempting to maintain same in a caretakers capacity. Pearse O'Sheil, who is a director of the respondent company, in sworn affidavits and evidence to the court stated that he was also a director of Inis Housing Association ("IHA"), which is the owner of the properties in the adjoining estate to Cuirt Monard. He stated that the applicant was incorrect in the averment that IHA had taken over responsibility for the sewage treatment plant. He further stated that he became a director of the respondent company in order to cooperate with the applicant to ensure the best interests of the residents of both estates.

6. The application was heard by this Court on 12th and 26th November, 2013, and judgment was reserved.

7. Bohergar Developments Limited, which is now in voluntary liquidation, built 52 houses, a creche and four apartments as part of a development in Monard, Co. Tipperary. The Company traded successfully but due to the decline in the housing market and lack of sales, found it impossible to keep trading. A number of houses in the development had been completed and sold. There are now limited resources available to the applicant.

8. The Company, as part of planning permission reference No. 054/462 granted on 14th December, 2007, was vested with certain responsibilities as part of the permission to develop the properties.

9. The relevant conditions are as follows:-

10. "The proposed wastewater treatment system shall comprise a Bio Pac Model NO 30 or similarly approved system, capable of serving a population equivalent of 300 persons and shall otherwise be constructed and maintained in accordance with the manufacturers specifications as submitted on 29th September, 2005, and the Waste Water Treatment Manuals, Treatment Systems for Small Communities, Business, Leisure centres and Hotels as published by Environmental Protection Agency in 2000. The reason for that condition was in the interest of public health and amenity.

11. The wastewater treatment system for the proposed development shall be completed and ready for operation before any house, apartment or creche facility are occupied. Reason: In the interest of public health and amenity

12. Prior to commencement of development, the developer shall submit to the Planning Authority satisfactory evidence of the establishment of a maintenance company for the proposed development. The Company shall be responsible for the maintenance (and renewal where appropriate) of all site development works on the proposed site including roads, footpaths, water mains, surface water and foul sewers, wastewater treatment system, public lighting and public open

space. The contract of sale of the proposed units shall provide for the support of the maintenance company. The reason for this condition was to provide for the maintenance of all site development works services on site and public open space in the interests of the proper planning and sustainable development of the area."

10. Condition 19 stated:-

"The proposed foul water pumping station shall be constructed to adequately cater for peak demand and shall incorporate the following duty and standby pumps: three phase electric supply control and alarm systems, telemetry monitoring to a manned base and shall include planned response and maintenance measures in place by the applicant all to the satisfaction of the sanitary authority. The reason stated was in the interest of public health and to ensure efficient operation of essential services."

11. Condition 20 stated:-

"An emergency generator shall be installed for the foul water pumping station to operate during periods of power cut off and a management company shall be put in place to permanently operate the pumping station to the satisfaction of the planning authority. The reason given was 'in the interests of public health and to ensure efficient operation of essential services'."

12. By letter of 7th August, 2013, the applicant wrote to South Tipperary County Council (the notice party to these proceedings) advising it that he intended to disclaim the onerous obligations of the maintenance of the Waste Water Treatment Plant and associated issues such as surface water, public lights that the County Council may try to attach to him. He stated that he intended to have all these obligations assigned to Cuirt Monard Management Company Limited. By letter of 13th August, 2013, the notice party wrote to the applicant in response to the applicant's letter of 13th August, 2013, contending that the liability for the maintenance of roads and services within the above mentioned estates shall remain with the developer and their successors until such times as the notice party takes charge and specifically referred at para. 3 of their letter to the following: "carry out works for the completion and maintenance of the treatment plant, including for clearing of site, safe access/hard standing, full electrical and operation inspection, full electrical and operation service including desludging WWTP replacement of defective parts and provisions of H&S manual facility".

13. Ins. 1 of the Multi-Unit Development Act 2011, "common areas" and "owners' management company" are defined in the following terms:-

"'common areas' means all those parts of a multi-unit development designated, or which it is intended to designate, as common areas and including where relevant all structural parts of a building and shall include in particular-

(a) the external walls, foundations and roofs and internal load bearing walls; (b) the entrance halls, landings, lifts, lift shafts, staircases and passages;

(c) the access roads, footpaths, kerbs, paved, planted and landscaped areas, and boundary walls;

(d) architectural and water features;

(e) such other areas which are from time to time provided for common use and enjoyment by the owners of the units, their servants, agents, tenants and licensees;

(f) all ducts and conduits, other than such ducts and conduits within and serving only one unit in the development;

(g) cisterns, tanks, sewers, drains, pipes, wires, central heating boilers, other than such items within and serving only one unit in the development;

[....]

'owners' management company' means, subject to subsection (3), a company established for the purposes of becoming the owner of the common areas of a multi-unit development and the management, maintenance and repair of such areas and which is a company registered under the Companies Acts."

14. Section 7 of the Multi-Unit Development Act 2011, states:-

"The transfer of the ownership of an interest in the relevant parts of the common areas of a multi-unit development shall not relieve the person who would otherwise have been responsible from the duty, obligation or responsibility to ensure completion of the development, including-

(a) compliance with the requirements or conditions of a planning permission under the Planning and Development Acts 2000 to 2009 which relates to the development concerned,

and

(b) compliance with the Building Control Acts 1990 and 2007."

15. It is important to draw a distinction between works undertaken to comply with conditions of planning permission under which the development has proceeded and ongoing maintenance.

16. Compliance with planning conditions to a standard to enable permission to be granted and the development to proceed is a statutory requirement pursuant to the Planning Acts.

17. Section 7 of the Multi-Unit Development Act 2011 demonstrates that a developer and his successors are not exempt from compliance with planning conditions by reason of transfer of the common areas.

18. The applicant has opened a number of authorities to the court which relate to burdens and covenants based on contract and conveyancing covenants. The obligation of the company in this matter was a statutory requirement.

19. The only authority opened to the court which has some relevance to statutory responsibility is the case of *Minister for Environment v. Irish ISPAT Limited* [2005] 2 I.R. 338, where the court allowed the liquidator to disclaim a licence which had onerous conditions attaching to the owners to carry out expensive work in restoring a polluted site.

20. A licence had been obtained by Irish ISPAT Limited after it had ceased production when it had no assets and was insolvent. The company in this case, having been granted planning permission in December 2005, proceeded to develop the works on foot of the planning permission, sold properties and failed to discharge their responsibility to comply with the planning conditions which was a statutory responsibility as distinct from a licence.

21. There may be serious practical problems where the assets of the company in liquidation may be negligible or in the negative. That of itself does not allow the liquidator to disclaim responsibilities to have the development taken in charge.

22. In the individual contracts of sale of the particular units, the company indicated that if services were not in charge appropriate easements and indemnities for the purchasers of individual units were in existence.

23. The fact that Pearse O Shiel, a director of the respondent and also a director of Inis Housing Association, the body responsible for the provision of the Social Housing part of the development, clearly cooperated with the liquidator and proceeded to assist in trying to keep the water treatment plant in operation does not act as an estoppel, nor does it transfer the responsibility from the applicant to the respondent.

24. The appropriate procedure for the applicant and the notice party is to proceed to cooperate to activate the bond of €140,000 completed and pursuant to condition No.6 of the planning permission which was dated 31st August, 2006.

25. The relief is refused.