

## THE HIGH COURT

2016 No. 689JR

Between:

BERNADETTE POLEON

Applicant

– and –

MEATH COUNTY COUNCIL

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 22nd August, 2017.

## I. Background

## i. The Transfer Order.

1. Sometime in 1990, Ms Poleon and her infant daughter were housed at a property in County Meath by Meath County Council, acting in its guise as a housing authority. Thereafter mother and daughter were housed at another property in County Meath. In September, 2005, pursuant to the Housing (Sale of Houses) Regulations 1995 (S.I. No. 188 of 1995), Ms Poleon purchased the latter property from Meath County Council at a discounted price. The Transfer Order whereby the property was transferred to Ms Poleon included the following obligation at clause 3:

*"The following special conditions shall apply to the dwelling for a period of Twenty Years from the date of vesting of the dwelling... (b) the dwelling or any part thereof shall not, without the consent of the housing authority, be mortgaged, charged or alienated otherwise than by devise or operation of law."*

2. The 20-year period expires in 2025.

## ii. The Consent to Sale/Purchase Form.

3. Ms Poleon's daughter is now an adult and living her own life away from home. Ms Poleon has decided that she now wishes to sell her house and embark upon a new stage of her life which will involve her pursuing doctoral studies somewhere abroad. As part of this process of restructuring her life, Ms Poleon identified a buyer for her house and in early-2016 submitted to the County Council what is described on its face as a 'Consent to Sale/Purchase' form. This is a document that, it seems, must be submitted to the Council as part of the process of obtaining a consent of the type referred to in the above-quoted clause 3(b). In it Ms Poleon, *inter alia*, gives a standard-form undertaking that: *"I/We the undersigned give up all rights to the house at [Address Stated] and I hereby undertake not to re-apply to Meath County Council for housing assistance of any sort at any time in the future"*, and confirms that she has permanent accommodation arranged at a stated address, being the address of a property owned by Ms Poleon's brother and at which he resides.

4. At the hearing of the within application, counsel for the Council indicated that in truth the above-quoted undertaking does not amount to much if anything because it does not prevent a person from in fact seeking whatever accommodation they may be entitled to receive under statute at some future time.

5. Some further questions are asked in the form. Ms Poleon inadvertently answered one of the questions wrongly because she assumed it referred to the property she lived in, rather than the property to which she intended to move. Nothing turns on this error.

## iii. The Letter of 15th February, 2016.

6. By letter dated 15th February, 2016, Meath County Council declined to grant the consent required under clause 3(b). The key portions of that letter read as follows:

*"Following great consideration of your request, unfortunately, based on the submitted information Meath County Council cannot consent to the sale of [Ms Poleon's house]...."*

*The information received detailing the property owned by [Ms Poleon's brother]...as your permanent accommodation does not adequately demonstrate provisions of housing should the sale be consented to.*

*Under the terms of the Housing Act 1966, Section 90(6)(b):*

*"[T]he housing authority may, without prejudice to any other power in that behalf, refuse to give such a consent if they are of opinion that...[inter alia] the intended sale or lease would, if completed, leave the vendor or lessor or his dependents without adequate housing."* [Emphasis in original].

7. The second paragraph of the above-quoted text is a bit garbled; however, the overall thrust of the letter is clear: the Council is declining the consent required under clause 3(b) of the Transfer Order of 2005 and it is doing so because, by reference to the Housing Act 1966, it is of the opinion that the intended sale would, if completed, leave Ms Poleon without adequate housing.

## iv. The E-mail of 15th February, 2016.

8. The text of the letter did not come as a surprise to Ms Poleon when received in the post. This was because an electronic version had been sent to her on the afternoon of 15th February, by e-mail, following a telephone conversation earlier that day between her and the relevant Council official. However, that e-mail sought to be more helpful than the bland formality of the letter. Thus it raised the following question:

*"Do you have a long term lease agreement secured with your brother (10-20) years or what is the current arrangement? Please further develop and clarify your intentions for residence...in order for us to be able to review this application!"*

9. The clear and correct inference to be drawn from this text was that if Ms Poleon was able to point to a long-term lease arrangement of the type referred to, a consent would be forthcoming from Meath County Council. Three points might be made in this regard:

– first, the letter was sent in 2016 when but 9 years and 7 months remained of the 20 year period under clause 3 of the Transfer Order. At no point has it been made clear why the Council would seek assurance for a period longer than the 9 years and 7 months remaining under a Transfer Order. It seems to the court that the most natural reading of clause 3(b) was that in return for getting a house at a discounted price, Ms Poleon would have to suffer the consent requirement for a period of 20 years but after that she would be on her own, free to sell her house without any interaction with the Council. Now here was the Council in 2016 seeking in effect to graft an additional 5 months to 10 years and 5 months onto that 20-year period.

– second, a question-mark arises as to whether what the Council was seeking was practically achievable. Though there is no evidence before it in this regard, the court considers that it can take judicial notice of the fact that 10-20 year residential leases of privately owned properties are not available readily, if at all.

– third, the reference to “adequate housing” in s.90(6)(b) of the Act of 1966 (which is not, as will be seen later below, the correct statutory provision but the term “adequate housing” also appears in the correct provision) is not a reference to ‘permanent housing’. Yet it seems implicit in the e-mail of 15th February, 2016 and in much of the Council’s correspondence thereafter, and even in its contentions before the court that it conflates the two notions so. Were the Council correct in its apparent view that any party who does not have legal title to an entire property or who has anything less than a 20-year lease, does not have “adequate housing” this could have interesting implications for a great many people, apart altogether from Ms Poleon.

*v. The Letter of 30th May, 2016.*

10. During March, 2016, some further correspondence ensued between Ms Poleon and the Council with the latter reiterating its position as per the letter of 15th February. Certain councillors who had been contacted by Ms Poleon also enquired on her behalf, in the proper exercise of their duties as public representatives, to see what could be done to facilitate Ms Poleon’s desire to sell her property. Their interventions met with no success. Likewise, a letter of 28th April, to the Council from a firm of solicitors engaged by Ms Poleon did not meet with any success, the Council again reiterating its position as per the letter of 15th February, and stating, *inter alia*, as follows in a reply letter of 30th May, 2016:

*“[Ms Poleon’s] Consent to Sale application does not provide sufficient definitive details in respect to the applicant’s future housing situation, and how the applicant proposes to fulfil same, in particular in the medium to long term.*

*The reasons cited for selling the property is to afford the applicant the opportunity to take up postgraduate studies abroad. It is not clear from the information provide, whether the applicant intends to permanently take up residence abroad, or whether it is simply for the duration of her studies with a return to Ireland at some point in the future, and the subsequent need for the applicant to arrange accommodation on her return.*

*Equally, there does not appear to be any firm decisions on behalf of the applicant in respect to where she specifically wishes to pursue her studies, associated costs...in addition to house purchase consideration in the area ultimately selected. Accordingly, there is no basis to determine if the proceeds of any sale of the property will be sufficient to cater for the applicant’s accommodation needs into the future, which may result in future reliance on social housing supports.*

*Reference to availing of accommodation with the applicant’s brother, is at best an interim temporary measure, and does not provide security of tenure into the future, and as such does not represent adequate housing.*

*While the applicant states that she will not seek further social housing support from Meath County Council post-sale of property, the information submitted does not sufficiently demonstrate that the possibility of a social housing need arising for the applicant in the future has been allayed.*

*Accordingly, it would be remiss of Meath County Council, and contrary to the spirit of the related Housing legislation on the matter, to provide consent to sale, where there is sufficient doubt in respect to how the future housing needs of a former social housing tenant will be fulfilled, a former social tenant who has had their accommodation needs already met by the Housing Authority, albeit [that she] has subsequently availed of the option of home ownership through the Tenant Purchase Scheme.*

[Section 90(6)(b) of the Act of 1966 is then quoted].”

*vi. The Letter of 1st September, 2016.*

11. On 5th August, 2016, the Council received a letter of 3rd August from Ms Poleon’s legal advisers seeking a reversal of the decision to refuse consent. Following an exchange of correspondence throughout August (which largely involved the Council indicating that the relevant official was away, and Ms Poleon’s legal advisers insisting on a prompt response) a letter issued from the solicitors for the Council on 1st September, 2016. This letter dealt with the confusion over s.90(6)(b) of the Housing Act, 1966, and is considered in the next section below. However, it also dealt with the possibility of Ms Poleon acquiring a right of residence in her brother’s property, a possibility which had first been flagged in the latter of 3rd August, stating as follows in this regard:

*“It is noted that in your letter of the 3rd of August last it was mentioned for the very first time that your client’s brother has offered to grant your client a right of residence at his property at [address stated]...The existence of any such right would be a relevant matter to be taken into account by the Housing Authority in deciding on your client’s application. Your client might accordingly consider whether she wishes to make a fresh application for consent including this new information and all relevant documentation supporting same which we would suggest should include a copy of your Client’s Folio showing the right of residence as a burden thereon or a copy of the Land Registry Dealing seeking to register such a burden AND a copy of the Grant of the Right of Residence.”*

12. When the court queried at hearing what was to stop Ms Poleon's brother executing a document conferring a right of residence that could be rescinded, and then, sometime after his sister was established abroad, rescinding the right of residence and doing whatever was necessary with the Land Registry, the response from the Council was that there was nothing to stop this: it must decide matters by reference to facts as they present at a moment in time, not as to how they might present thereafter.

*vii. The Confusion Regarding the Act of 1966.*

13. It is clear from the letter of 3rd August, 2016, that there was clear and honest confusion, and for good reason, on the part of Ms Poleon's solicitors concerning the Council's repeated reliance on s.90(6)(b) of the Housing Act 1966, as evidenced by the following extract from that letter:

*"We have taken the advice of counsel as regards the provisions of the Housing Act 1966. With respect, the Council have incorrectly cited section 90(6)(b) of the Housing Act 1966 as the basis for their refusal of consent. You will be aware that, while that provision was previously phrased in the terms cited, and ergo clearly applied, by the Council, the section was amended a number of decades ago by section 26 of the Housing (Miscellaneous Provisions) Act 1992. Section 90(6)(b) of the Housing Act 1966 now provides that:*

*'[A]s respects any sum due to them under paragraph (a) of this subsection and remaining unpaid after the due date – (i) secure payment of the sum by charging the dwelling under the Registration of Title Act, 1964, (ii) without prejudice to subparagraph (i) of this paragraph, recover the sum as a simple contract debt in any court of competent jurisdiction.'*

*Therefore, both our client and this firm are at a loss to understand how section 90(6)(b) of the Housing Act 1966 in its current form could impact upon the position of our client or otherwise justify the decision of the Council. We also note and are advised that the aforementioned quote by the Council, purporting to be section 90(6)(b), appears nowhere in the Housing Acts 1966–2014.*

*It is abundantly clear from the correspondence referenced above that the Council has erred in law by inter alia placing reliance upon a statutory provision which no longer has the force of law within the State, and has not done since 1992. It is further clear from the aforesaid correspondence that the repealed statutory provision was the sole basis for the decision of the Council. In the circumstances, the decision of the Council in relation to the application of our client is ultra vires and, consequently, invalid....*

*Without prejudice to the foregoing, we would respectfully draw your attention to the provisions of section 90(12) of the Housing Act 1966 (as substituted by section 26 of the Housing (Miscellaneous Provisions) Act 1992, and amended by section 14(3) of the Housing (Miscellaneous Provisions) Act 1997. We respectfully suggest that the Council should consider the effect of the foregoing provisions on the application of our client, in conjunction with its legal advisors."*

14. In the last-quoted paragraph, Ms Poleon's legal advisors were of course referring the Council to the provisions that they thought the Council in fact meant to rely upon. Section 90(12) of the Act of 1966, as substituted by s.26 of the Act of 1992, and amended by s.14(3) of the Act of 1997 (which inserts a new subsection (a) into the existing section 90(12)) reads as follows:

*"(12) The following additional provisions shall apply in respect of a dwelling to which a special condition prescribed in paragraph (c) of section 89 of this Act applies:*

*(a) the housing authority may, without prejudice to any other power in that behalf, refuse to consent to a sale of a dwelling if they are of opinion that –*

*(i) the intended purchaser is not a person in need of housing, or*

*(ii) the intended purchaser is or has been engaged in antisocial behaviour or that the intended sale of the dwelling would not be in the interest of good estate management, or*

*(iii) the intended sale would, if completed, leave the seller or any person who might reasonably be expected to reside with that person without adequate housing;*

*(b) where, in relation to the dwelling –*

*(i) a housing authority give or have given consent to a sale, or*

*(ii) a mortgagee has exercised his powers of sale under a mortgage,*

*the condition shall, from the date of such sale, no longer apply;*

*(c) any attempted or purported mortgaging, charging or alienation in contravention of the special condition shall be null and void against all persons; provided, however, that in any case where the consent of the housing authority is given after the attempted or purported mortgaging, charging or alienation, such consent shall, if the authority so direct, so operate as to validate with retrospective effect such attempted or purported mortgaging, charging or alienation."*

15. In the letter of 1st September, 2016, the response of the Council's lawyers to this correction of their client's error was as follows:

*"It is clear that the Council's decision to refuse consent was on the basis that it was not satisfied that were the sale to proceed your client would have adequate housing. Section 90(12)(a)(iii) of the Housing Act, 1966 clearly provides that this is a matter which can be taken into account by the Housing Authority. It is accepted that the Council Officials incorrectly attributed the relevant Statutory Provision to Subsection 6(b) rather than Subsection 12(a)(iii) as substituted by Section 14(3) of the Housing (Miscellaneous Provisions) Act, 1997, but this does not take from the fact that the Statute authorised the Authority to have regard to such matters."*

16. A similar line was taken by the Council in argument before the court, and in affidavit evidence before the court, an Executive Officer of the Council avers, *inter alia*, as follows:

*"While it is admitted that the Respondent erroneously referred to the Statutory provision of section 90 subsection 6(b)*

rather than section 90 subsection 12(a)(iii) as substituted by Section 14(3) of the Housing (Miscellaneous Provisions) Act, 1997, such an error was inconsequential and caused no prejudice as to the decision of the Respondent to refuse consent to sale contained all the essential features for validity in circumstances where, at all material times, the Respondent was statutorily obliged to consider, in its determination as to whether to consent to the Applicant's sale of the property, whether the Applicant had demonstrated that she had adequate housing following the sale of the property....

I say that the Applicant failed to satisfy the Respondent that, upon the intended sale of the property, that she would have adequate housing and accordingly the Respondent's determination to refuse to consent to a sale of the dwelling was justifiable in the circumstances. Throughout the Respondent's interaction and correspondence with the Applicant it has emphasised the need for the Applicant to demonstrate that the accommodation the Applicant sought to rely upon was adequate permanent accommodation which would provide security of tenure into the future and did not consist of availing of accommodation of an interim temporary measure, such as a 'kind offer' of accommodation with the Applicant's brother....

I say and believe and I am so advised that the Respondent has a statutory duty and obligation to ensure that when it is considering whether to provide a consent to sale there is sufficient information before it as to how the future housing needs of a former social housing tenant will be fulfilled. The Applicant had failed to so demonstrate."

## **II. Reliefs Now Sought**

17. Leave was granted by the court (O'Connor J.), by way of order made on 29th August, 2016, for Ms Poleon to seek the following, and certain ancillary, reliefs by way of judicial review:

"1. An order of certiorari quashing the decision of the Respondent communicated to the Applicant by letter dated 30 May 2016, purporting to refuse the Applicant consent to sale of her property at [address stated]...('the decision of the Respondent');

2. An order of mandamus directing the Respondent to consider afresh the Applicant's application for consent to sale of her property at [address stated]...in accordance with the correct statutory provision;

3. A Declaration by way of an application for judicial review that the decision of the Respondent of 30 May 2016 contains an error on the face of the record and was for that reason invalid and ultra vires the powers of the Respondent;

4. Further, or in the alternative, a Declaration by way of an application for judicial review that the decision of the Respondent of 30 May 2016 was made in error of law and was for that reason invalid and ultra vires the powers of the Respondent;

5. A Declaration by way of application for judicial review that the refusal of the Respondent to reconsider the Applicant's application for consent to sale of her property at 12 Kilbreea Estate, Dunboyne, Co. Meath was unreasonable and/or constitutes a breach of the Applicant's right to natural and constitutional justice;

6. If necessary, an order extending the time for the commencement of judicial review proceedings, if such an order should be deemed necessary by this Honourable Court".

## **III. Application Brought Out of Time?**

18. The Council contends that its decision was made on 15th February, 2016, and that the *ex parte* application for leave made on 29th August, 2016, was out of time. But, with respect, this elides the fact that it was not until 1st September, 2016, that the Council indicated which statutory provision it had meant to rely upon back in February, and by that time Ms Poleon's leave application had in fact been commenced. This is not a case where review was not speedily sought of a recognised wrong; it is a case where review was speedily sought of a wrong once recognised. And the wrong appears only to have been recognised following the intervention of that counsel learned in the law who was engaged by Ms Poleon's solicitors, with:

(i) an invitation then issuing to the Council to correct its reliance on the wrong statutory provision, and

(ii) the within application being commenced three days before the Council, in its letter of 1st September, admitted its error as to the applicable statutory provision (albeit that it contended the same statutory test to apply).

19. For the various reasons aforesaid the court is not entirely persuaded that the start-date from which to gauge the timeframe for commencing the within application is 15th February, 2016; however, for the same reasons, the court is satisfied in any event to grant any necessary extension of the requisite timeframe for the commencement of the within application to the date on which it was commenced. It is the person who suffers confusion, not the person who causes confusion, to whom the indulgence of the court falls generally to be extended.

## **IV. Discussion**

20. It is difficult when approaching this application not to recall Fennelly J.'s observation in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, para. 67, that "[A]t one level all [the controversy concerning the appropriate test for control of discretionary power] is no more than semantics; what is irrational or unreasonable depends on the subject matter and the context." On reflection, the court considers at least three deficiencies to arise as regards how the Council proceeded vis-à-vis Ms Poleon's application:

(1) the Council's decision fails when it comes to the critical link that ought to exist between reasons and reasonableness. The Council has been quite clear that it is concerned about Ms Poleon's ongoing ability to house herself, so that the cost of same does not fall afresh on the taxpayer (an entirely reasonable concern). However, the Council has never explained why this concern now has the effect that the Council wishes to graft onto the post-20-year risk of re-housing that it effectively accepted in the transfer order of 2005, an additional 5 months to 10 years and 5 months. In this regard, the court recalls the criticism made by Murray C.J., in *Meadows*, at 32 that "[T]he decision of the Minister [at issue in that case] is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced.... This decision is open to multiple interpretation." In truth, and with respect, much the same criticism can be levelled here. At first glance, the concern as regards re-housing seems entirely reasonable; however,

when one pauses a moment to consider matters, that reasoning in and of itself offers no explanation as to why the Council wishes to graft onto the risk related to re-housing that arises under the transfer order an additional period that could extend to a period in excess of 10 years (and given that the consent is being sought pursuant to the order, it does not seem to the court that one can separate the order from the consent and say that here one is dealing with an unconnected matter; the decision as to consent falls to be made within the penumbra of the transfer order);

(2) in two respects, it appears to the court that the Council's pre-requisites as to consent are unreasonable. First, the Council seeks details as to Ms Poleon's housing arrangements for the next 10-20 years. However, there is a big difference between 10 years and 20 years and there is no explanation offered for the remarkable expanse in time in respect of which detail is sought. Second, the court considers that it can properly take judicial notice of the fact that 10-20 year residential leases of privately owned properties are not available readily, if at all – a fact which has the result that Ms Poleon may well not be able to satisfy the pre-requisite as to future accommodation requirements that the Council is effectively seeking to impose;

(3) the reference to "*adequate housing*" in s.90(6)(b) of the Act of 1966 is not a reference to 'permanent housing'. Yet it seems implicit in the e-mail of 15th February, 2016 and in much of the Council's correspondence thereafter, and even in its contentions before the court, that it all but conflates the two notions so. Although the point was not argued expressly at hearing, the court must admit to some concern that were it to let the impugned decision stand, that might be to allow a decision to stand which is not consistent with the proper purpose of the Act of 1966. There are a range of decisions in this area, from, say, *Cassidy v Minister for Industry and Commerce* [1978] I.R. 297 onwards; however, Hogan G. and D.G. Morgan in *Administrative Law in Ireland* (4th ed.) succinctly capture the essence of the issue arising in this regard, observing, at 747:

*"'Improper purpose' in this context refers to the fact that, in enacting a statute, the legislature is assumed to have had a definable purpose(s) or object(s). True to the traditional idea that they are implementing the mandate of the legislature, the courts seek to ensure that the power contained in the measure is used only for the 'proper purpose'."*

Of course, to the extent that the risk of improper purpose presents, then the associated risk of irrelevant considerations likewise comes to bear. Regardless, however, of the points made under this point (3), the court considers that there is sufficient in points (1) and (2) for it to make the order that will issue pursuant to this judgment.

## **V. Conclusion**

21. For the reasons aforesaid, the court will:

(1) grant an order of *certiorari* quashing the decision of the Council communicated to the Applicant by letter dated 30 May 2016, purporting to refuse the Applicant consent to sale of her property (at the address stated therein);

(2) remit Ms Poleon's application to the Council for consideration in light of the court's judgment.

22. Finally, it may or may not assist for the court to note that had this application come before it in circumstances where the Council was merely seeking to address the risk of re-housing for the balance of the 20-year period settled upon in the Transfer Order, *this* Court would have considered that alternative case to involve a near self-explanatory and entirely reasonable decision by the Council that it was not willing to grant consent in circumstances where to do so would involve it assuming additional re-housing risk above that assumed by it in the Transfer Order.