Neutral Citation [2015] IEHC 619

**THE HIGH COURT**

**[2008/648SP]**

**BETWEEN:**

**JACKSON WAY PROPERTIES LIMITED**

**PLAINTIFF**

**and**

**DUN LAOGHAIRE/RATHDOWN COUNTY COUNCIL**

**DEFENDANT**

**JUDGMENT of Mr. Justice Binchy delivered on the 9th day of October, 2015.**

1. This is an application for a mandatory injunction, requiring the defendant to pay the plaintiff the sum of €7,010,700.00 arising out of the compulsory acquisition of lands by the defendant from the plaintiff pursuant to a compulsory purchase order made by the defendant on 19th October, 1998. The effect of the application, if granted, would be to give summary judgment to the plaintiff of the amount claimed, which forms part of the total sum of €12,860,700.00 claimed by the plaintiff from the defendant in the proceedings. The plaintiff maintains that the amount now claimed pursuant to the notice of motion in this interlocutory application is beyond dispute by reason of developments that have taken place since the issue of these proceedings by way of special summons on 31st July, 2008.

2. In order to deal with this application it is necessary to set out in summary form the very long and detailed history of the matters giving rise to these proceedings. This may be broken down under a number of headings.

**The Compulsory Purchase Order**

3. The plaintiff is the owner of lands contained in Folio 4940 County Dublin comprising (on the face of the folio exhibited in the proceedings) 43.951 hectares. The ownership is subject to a number of burdens registered under the folio, one of which is a covenant not to erect any buildings on the lands described in the folio (entry number 4), which covenant is stated to be modified to the extent specified in an instrument described at entry number 5 on the folio.

4. On 19th October, 1998, the defendant made the Dun Laoghaire/Rathdown County Council South-eastern Motorway Scheme, by which the defendant was authorised to acquire 8.168 hectares of lands belonging to the plaintiff (herinafter "the lands").

5. On 14th June, 2000, the defendant served notice to treat in connection with the acquisition of the lands, which notice to treat required the defendant, in the usual way, to give particulars of the defendant's title and also particulars of the defendant's claim for compensation in connection with the acquisition.

6. On 27th June, 2001, Messrs. Hamilton Osborne King, as agents of the plaintiff, submitted a claim for compensation in the sum of IR£72,700,000.00 in connection with the acquisition of the lands. On 17th September, 2001, the defendants served notices of entry on the plaintiff, and on 3rd October, 2011 the defendant took possession of the lands. Subsequently, the defendant constructed a portion of the M50 motorway through the lands.

7. On 11th October, 2001, the plaintiff applied to the Reference Committee to nominate a property arbitrator, and Mr. John R. Shackleton was nominated as arbitrator to hear and determine the dispute in relation to the compensation to be paid by the defendant to the plaintiff in connection with the acquisition of the lands. Soon afterwards, Mr. Shackleton wrote to the parties proposing the date of 14th January, 2002 as the start date for the hearing of the arbitration.

8. On 19th November, 2001, the law agent on behalf of the defendant wrote to the arbitrator requesting that he should not fix a date for hearing for procedural and substantive legal, factual and public policy reasons. These related to allegations (then under investigation by the Tribunal of Inquiry into Certain Planning Matters and Payments) that certain lands, including the lands of the plaintiff, may have been rezoned for development improperly. The plaintiff opposed this application and the arbitrator in reply confirmed that he was satisfied that he had been correctly appointed and that he intended to proceed with the arbitration on the proposed date of 14th January, 2002.

9. By a further letter of 17th day of December, 2001, the law agent for the defendant notified the Criminal Assets Bureau of the plaintiff's claim for compensation and the pending arbitration in case the Bureau might wish to investigate the matter and on 20th of December, 2001 the Chief Bureau Officer replied to the defendants law agent to confirm a willingness to meet to discuss the matter.

10. On 7th January, 2002 the defendant issued proceedings purporting to stay the arbitration. The motion for an interlocutory injunction came before the Court on 21st January, 2002. Mr. Justice O'Sullivan granted an order restraining the hearing of the arbitration. The plaintiff appealed this decision to the Supreme Court, which delivered its decision on 17th June, 2002. In allowing the appeal, Keane C.J. stated that in his opinion the injunction should not have been granted and furthermore, there was no factual or legal basis put forward to justify the issue of proceedings in the first place.

11. Correspondence then followed between the parties in preparation for the arbitration, which was rescheduled for hearing on 19th October, 2002. The defendant's solicitors sent a notice for particulars in connection with the claim to the solicitors for the plaintiff which notice, *inter alia*, raised an enquiry in relation to burden numbers 4 and 5 on the plaintiff's folio as well as other queries of a title nature and some queries relating to the ownership/structure of the plaintiff. The plaintiff declined to reply to this notice for particulars and the arbitrator declined to the defendant's request to convene a preliminary hearing in relation to this issue. In a letter to the arbitrator dated 2nd September, 2002, the plaintiff's then solicitor stated the following in relation to the notice for particulars:

> *"There is nothing whatsoever in the purported notice which falls within your jurisdiction. The notice breaks down into two parts, the first of which seeks to identify the beneficial owner of the claimant company and the second of which*

*seeks to carry out a title investigation. Insofar as the former is concerned the claimant is a legal entity and its beneficial ownership does not come within your remit. In the latter case the claimant says its interest in the property is a freehold free from encumbrances and this is the basis upon which the claim is made. It is submitted it is a matter for you to adjudicate the claim upon this basis and should the claimant not be able to vouch for the title claimed following publication of your award it would then be open to either party to seek to have the matter remitted to you for the purpose of adjusting your award."*

12. On 13th September, 2002, and on the basis that the plaintiff held a freehold and unencumbered title to the property being acquired, the council made an unconditional offer to the plaintiff in the sum of €9,499,987.00 in full and final settlement of the plaintiff's claim.

13. On 19th September, 2002, the solicitors for the plaintiff wrote to the law agent of the defendant enclosing an up-to-date copy of Folio 4940 County Dublin to vouch their client's title. In the same letter they stated that "we understand the burdens at entry numbers 2, 3, 4, 5 and 6 no longer affect the property and this will be vouched in due course following publication of the property arbitrator's award in the course of the conveyancing aspect of the matter."

14. The arbitration proceeded on 9th October, 2002, and concluded on 8th November, 2002. The arbitration proceeded on the basis that the title of the lands to be valued was an unencumbered freehold title subject only to certain easements and without any regard to possible restrictions upon the development of the lands being acquired i.e. on the basis that the restrictions referred to at entry numbers 4 and 5 of Folio 4940 County Dublin did not affect the lands being acquired.

15. On 18th December, 2002, Messrs. Smith Foy and Partners, solicitors, wrote to the defendant apparently in reply to a letter sent by the defendant on 2nd December, 2002 to Messrs. Smith Foy whereby the defendant made certain enquiries about the restrictive covenant upon the title of the plaintiffs. In their reply. Messrs. Smith Foy claimed, on behalf of their clients (Mr. and Mrs. T.K. Smith, Mr. Smith being one of the principals, of the firm) that the dwelling house occupied by Mr. and Mrs. Smith benefited from the burden i.e. the restrictive covenant registered on the lands of the plaintiff. In this letter, Mr. Smith also stated that he had spoken (following receipt of the letter from the defendant of 2nd December, 2002) with Mr. Miley, solicitor for the plaintiff who, according to Mr. Smith, indicated that Mr. Miley would be communicating with him in due course to discuss the covenant.

16. The defendant subsequently became aware that the claimant had been struck off the register of companies. Because of this, and also on account of the correspondence referred to above regarding the application of the restrictive covenant to the lands being acquired, the defendant requested the arbitrator to reconvene the arbitration before the delivery of his award. The arbitrator agreed to do so and the reconvened hearing took place on 2nd October, 2003. By this time the plaintiff company had been restored to the register of companies, but counsel for the defendant, Mr. Flanagan S.C., took the opportunity to address the arbitrator again as regards the uncertainty as to whether or not the lands being acquired might be affected by the restrictive covenant referred to at entry numbers 4 and 5 on Folio 4940, County Dublin. He submitted to the arbitrator that, in light of the information that had become available to the defendant since the arbitration hearing had concluded (i.e. the correspondence from Messrs Smith Foy asserting that the restrictive covenant did indeed affect the lands being acquired), that the appropriate course for the arbitrator to take would be to make an award in the form of a case-stated and on the basis of two alternative valuations, one on the basis that the title to the land being acquired is not affected by the restrictive covenant, and the alternative on the basis that the lands being acquired are so affected. Upon the determination of the case-stated, the valuation of the lands being acquired would then automatically be determined also. Mr. Flanagan S.C. submitted that an award in this form would allow the Court, if necessary, to determine thereafter the validity of the restrictive covenant at the relevant date and further submitted that this approach would avoid "duplicatory and unnecessary legal proceedings after the arbitration process has concluded and brings finality to the valuation process."

17. This proposal was opposed by counsel on behalf of the claimant, then Mr. O'Neill S.C., who impressed upon the arbitrator that the claimant was claiming compensation on the basis of a title that was not affected by a restrictive covenant. He also argued that questions of title were outside the jurisdiction of the arbitrator who was obliged to act on the presumption that the title claimed is correct. Mr. O'Neill S.C. stated that, if the lands acquired were affected by the restrictive covenant, then the claimant would not be entitled to be paid compensation because he would not be able to produce the title on the basis of which compensation had been determined. For his part the arbitrator confirmed that the claim had been made on the basis that title to the lands being acquired was a freehold title subject only to certain rights of way and other easements, and not subject to any restrictive covenant and that he would be proceeding to value the lands acquired on that basis.

18. The arbitrator delivered his award on 12th November, 2003. The plaintiff was awarded the total sum of €12,860,700 of which sum €9,691,000 related to the value of the lands being acquired. In the ordinary course of events, what would follow upon such an award is that the claimant would produce title to the acquiring authority which would then investigate the title, and subject to being satisfied with the same, would proceed to acquire the land the subject of the compulsory purchase order for the compensation as so determined by the property arbitrator. In this instance however, the plaintiff failed to produce any evidence that the restrictive covenant appearing at entry numbers 4 and 5 on the Folio did not affect the lands being acquired by the defendant. On 7th July 2008, the plaintiff's solicitors wrote to the defendant's law agent requesting the defendant to complete the transaction within 21 days, failing which the plaintiff would issue proceedings to compel the defendant to do so. These proceedings subsequently issued on 31st July, 2008.

**The Proceedings**

19. In an amended statement of claim delivered on behalf of the plaintiff dated 10th December 2008, the plaintiff claims *inter alia* an order pursuant to s. 41 of the Arbitration Act, 1954 for leave to enforce the award of the arbitrator of 12th November, 2003 in an Arbitration between the Plaintiff and the Defendant in respect of the acquired lands awarding the Plaintiff the sum of €12,860,700 compensation in respect of land taken, injurious affection and disturbance by the defendant.

20. In its defence and counter-claim to these proceedings delivered on 2nd April 2009, the defendant, *inter alia*, denies that the plaintiff has produced a title to the defendant such as would entitle the plaintiff to payment of the compensation assessed by the arbitrator and in particular denies that the restrictive covenants do not affect the lands being acquired. In addition, the defendant counter-claims, pursuant to order 56 of the Rules of the Superior Courts, for an order setting aside the award made by the property arbitrator on 12th November, 2003 or, alternatively, an order remitting the award to a property arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919.

**The "Smith" Proceedings**

21. The plaintiff subsequently brought an application to join Thomas Kevin Smith and his wife, Mairead Smith, as notice parties to these proceedings. Mr. and Mrs. Smith resisted that application, successfully, as a result of which the plaintiff issued proceedings against Mr. and Mrs. Smith which commenced on 8th March, 2010. Subsequent to the issue of the notice of motion herein, those

proceedings have been allocated a hearing date of 1st December, 2015. In those proceedings, the plaintiff seeks, *inter alia*, a declaration that the burden of the covenants contained at entry numbers 4 and 5 on Folio 4940, County Dublin, was not "as of 14th June, 2000 annexed to the lands described in Folio 4940 of the Register" and further seeks a declaration that the defendants, Mr. and Mrs. Smith were not as of that date entitled to enforce the said covenants. If successful in those proceedings, the plaintiff should be in a position to transfer an unencumbered title in the lands to the defendant, assuming that all other aspects of the title are satisfactorily and that it is otherwise in a position to adduce title to the defendant. If it is unsuccessful in those proceedings, however, and if it is established that the lands are subject to the restrictive covenant, as of the date of service of notice to treat by the defendant upon the plaintiff i.e. 14th June, 2000 then there is no valuation of the plaintiff's interest in the lands which can be enforced as against the defendant because it is absolutely clear that the valuation of the property arbitrator of 12th November, 2003 is a valuation of the lands acquired on the basis that the restrictive covenant does not affect the same.

**The Smith claim for compensation and the relief sought by this application**

22. On 18th September, 2009, Mr. and Mrs. Smith lodged with the defendant a claim for compensation of their interest in the lands in the sum of €5,850,000. It is on the basis of this claim for compensation by Mr. and Mrs. Smith that the within application is advanced on behalf of the plaintiff i.e. the plaintiff maintains that, since the arbitrator has assessed the value of the entirity of the plaintiff's claim in the sum of €12,860,700, and since Mr. and Mrs. Smith have placed a value on their claim in respect of the property in the sum of €5,850,000, that there can be no doubt at all but that the plaintiff must be liable to pay to the defendant the sum of €7,010,700 being the difference between the amount of the award of the property arbitrator, and the amount claimed by Mr. and Mrs. Smith. Even if Mr. and Mrs. Smith succeed with their claim, the plaintiff submits, the Council will still be bound to pay the plaintiff not less than €7,010,700. And accordingly, the plaintiff submits, there is no reason why the Council should not now pay that sum to the plaintiff, pending the determination of both the Smith proceedings and these proceedings.

**Counsel's Submissions**

**Submissions of the Plaintiff**

23. The plaintiff relies upon the decision of *Grange Developments Ltd. v. Dublin County Council (Number 4)* [1989] 1 I.R. 377. In that the case the plaintiff had obtained an award from the property arbitrator. That award was an award of compensation arising out of the refusal of an application for planning permission made by the plaintiff to the defendant. The defendant purported to avoid or delay payment pending the determination of a challenge to the constitutionality of a provision of The Local Government Act (Planning and Development) Act, 1963 which provided for a right of compensation for refusal of planning permission. There were, however, no issues outstanding in relation to title. Murphy J. stated at page 381:

> *"As to the title, two points must be made. First of all, the property arbitrator and the parties have dealt with the matter of title in accordance with the statutory regulations appertaining to those matters. It may be that other procedures would be desirable or more suitable or more appropriate or could certainly be conceived or devised. However, on the evidence before me I am satisfied that the parties, as required by law, and indeed as required by the property arbitrator have dealt with the title matters as required by the ministerial regulations. Secondly, or perhaps for that reason, no challenge has been made to the award by virtue of the questions raised in relation to title and no challenge has been made resulting in proceedings.*
>
> *The County Council have not applied to this Court to remit the matter to the property arbitrator for any further finding. There is no challenge made in that sense to what he has done or what he may be alleged to have omitted. There is nothing before this Court, and there is nothing pending before this Court, challenging the actions of the property arbitrator in relation to title matters. In those circumstances it seems to me there is no substance in this point."*

24. Later in the same decision, Murphy J. stated:

> *"At this stage it seems to me that I am simply asked to permit an award to proceed or to be enforced as a judgment of the Court. So, far from taking any action which would postpone the payment that justice requires, I have no doubt that this Court should assist the plaintiff by every appropriate means to recover payment of the compensation to which they became entitled in principle in July, 1981 and which has been quantified in detail by the award made by the property arbitrator. In those circumstances it seems to me that the application should be granted."*

25. Counsel for the plaintiff submitted that in this case the plaintiff has established its title, subject only to disputed burdens and that therefore its entitlement to compensation for what counsel describes as "its established title" cannot be gainsaid and that it would be unjust to permit the defendant to continue to withhold the sum claimed in the within motion in circumstances where the defendant does not dispute that it compulsorily acquired the lands of the plaintiff.

26. Counsel for the plaintiff further submits that, insofar as it is possible that Mr. and Mrs. Smith may increase the amount claimed in respect of the restrictive covenant, that the defendant should be adequately protected by the obligation which the plaintiff claims, that the Council will have to pay a substantial amount of interest to the defendant in addition to the amount of the award or the amount of the award less the value of the restrictive covenant, as the case may be, arising out of the delay in payment of the award.

27. Counsel also relies on a statement of Keane C.J. made at the time of the application of the defendant to stay the arbitration in 2002, to which I have made reference earlier in this judgment. He stated:

> "The tribunal has been sitting as a matter of public record for quite some time now. It is likely to continue sitting for quite some time and it was in that time framework, and that time framework alone, that the plaintiffs were putting forward their claim that the entire of the arbitration and the payment of every penny to which the defendants are entitled, their land having been taken from them, should on this flimsiest of factual basis, as matter now stand, be put off for that indefinite period of time. The attempts of the plaintiffs to try to mitigate the extremely unjust and inequitable consequences of that approach appear to have found favour with the learned High Court judge. They do not find any favour with me."

28. Counsel also refers to a comment of Laffoy J. made on one of the many occasions when these proceedings came before her by way of interlocutory application when she stated:

> "It does seem that a lot of costs are going to be incurred here which might not need to be incurred. The reality is that we all have the pleasure of driving on the M50. It is there, Dun Laoghaire County Council have it. They haven't had to pay out any money for getting Jackson Way's lands. I mean there is an underlay, it seems to me, of injustice. I am not condoning the way Jackson Way have started off these proceedings, but there is a fundamental underlay of injustice

here. …"

**Submissions of the Defendant**
29. For its part, the defendant argues that there is a clearly defined code for determining the amount of compensation payable to persons whose lands are compulsorily acquired by state authorities. That code, it is submitted, confers on the property arbitrator alone, the exclusive jurisdiction to determine the value of lands or interests in lands being compulsorily acquired, and that even if the court has jurisdiction to make an order of part payment to the plaintiff as part of its inherent jurisdiction, the court would have a discretion not to do so in circumstances in which there is a detailed statutory framework for determining the value of interests in lands.

30. Counsel submits that it is abundantly clear that the award made by the arbitrator was made on the basis that the claimant would have available to transfer to the council a full freehold and unencumbered title; that there is no award for the amount claimed by the plaintiff in this application and that the amount claimed does not correspond to any part of the award as formulated by the arbitrator. Apart from those occasions already referred to earlier in this judgment on which counsel for the plaintiff, the arbitrator himself and Laffoy J. all referred to the requirement for the plaintiff to have an unencumbered freehold title in order to collect the award, counsel also referred to the statement of evidence produced at the arbitration hearing by the plaintiff's valuer in which it is stated:

> "I understand that the claimants own a registered freehold interest with the benefit of vacant possession of the entire …."

31. It is also submitted on behalf of the defendant that it is incorrect to state that the compensation claim by Mr. and Mrs. Smith in respect of whatever interests they may have in the lands is "capped" at €5,850,000.00, in circumstances where it is open to Mr. and Mrs. Smith to alter the amount of their claim right up to the date of the hearing of the arbitration of the same and that this is a regular occurrence in practice.

32. Insofar as the plaintiff relies upon *Grange Developments v. Dublin County Council*, counsel for the defendant submits that in that case all title issues had been addressed and resolved prior to the arbitrator's award, in contrast to this case in which not only were they not addressed and resolved, but the plaintiff opposed proposals whereby the issues may have been addressed by the arbitrator *i.e*. the defendant's proposals that the Arbitrator make alternative assessments of compensation, one based on a freehold title and one based on a freehold title subject to a restrictive covenant.

33. Counsel for the defendant further submits that the passage quoted by the plaintiff from the decision of Keane CJ. on the application made by the defendant for an injunction (to restrain the arbitration proceedings in 2002) is cited out of context, an that issues regarding the title of the plaintiff and the value of the plaintiffs interest in the lands were not before the Court on that occasion.

34. It was further submitted on behalf of the defendant that the nature of the relief sought is mandatory and that the plaintiff has not even attempted to address the test for an interlocutory injunction not to mention the test applicable to an application for a mandatory interlocutory injunction. The defendant argued that the plaintiff must establish to the satisfaction of the court that it has a strong case that it is likely to succeed at the hearing of the action and cites the cases of *Lingam v. Health Services Executive* [2005] IESC 89 and *AIB v. Diamond* [2011] IEHC 505. In addition, counsel for the defendant submits that the plaintiff did not put forward any argument at all that damages would not be an adequate remedy to the plaintiff in the event that its application is now declined but that it is successful at the trial of the action.

35. Counsel for the defendant further relies on the decision of this Court in the case of *Danish Polish Telecoms v. Telekomunikacja Polska SA* [2012] 3 I.R. 44 and the decision of the Court of Appeal in England in the case of *National Nigerian Petroleum Corporation v. IPCO (Nigeria) Ltd.* [2008] EWCA Civ 1157. Those cases involved attempts by the plaintiffs to enforce part of an award made by an arbitrator in the context of a commercial arbitration in each case. In the *National Nigerian Petroleum Corporation* case, Lord Justice Tuckey stated that "I can see no objection in principal to enforcement of part of an award provided the part to be enforced can be ascertained from the face of the award and judgement can be given in the same terms as those in the award." In the *Danish Polish Telecoms* case, Finlay-Geoghegan J. agreed with that rationale, but declined the relief sought in that case because she found there was no order of the arbitral tribunal in the partial award separately directing payment of the amount claimed by the plaintiff in the proceedings, such that any judgement in that amount could be considered a judgement "in terms of the award" for the purposes of s.23 (1) of the Arbitration Act, 2010. In that case the plaintiff was purporting to enforce that part of an award which was not in dispute i.e. the plaintiff subtracted the amount in dispute from the total of the award and invited the court to take the view that since the balance of the award was impliedly not in dispute, the court should make an order directing enforcement of the award to the extent of the undisputed balance. But this balance did not correspond to any part of the award as formulated by the arbitrator. In so far as the nature of the application made in that case was very similar to the plaintiff's application on this motion, counsel for the defendant submits that this is an unduly restrictive interpretation of the powers of the Court and relies upon s.41 of the Arbitration Act, 1954 which states that:

> *"41.—An award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award."*

36. Counsel for the plaintiff submits that this section enables a court to enforce an arbitration award in whole or in part. Counsel for the plaintiff further submits that it is part of the inherent and supervisory jurisdiction of this court to protect the constitutional rights of the citizen and that in circumstances where the defendant compulsorily acquired lands of the plaintiff and took possession of the same as far back as September 2001, the value of those lands has been determined by arbitration and the only impediment to the transfer of title is a claim by a third party to the benefit of a restrictive covenant over the lands of the plaintiff as at the time of acquisition. Counsel argues that in these circumstances it is appropriate that the court exercise its inherent and supervisory jurisdiction by directing payment to the plaintiff of such sum as is equivalent to the award made by the arbitrator less the value of the restrictive covenant as claimed by those third parties. Alternatively, counsel for the plaintiff argues that the defendant should at least be required to pay to the plaintiff now such sum as is equivalent to the amount tendered by way of sealed offer prior to the arbitration less the amount claimed by Mr. and Mrs. Smith in respect of the restrictive covenant i.e. €3,549,987.

**Decision**
37. There is no dispute of any material nature regarding the facts giving rise to this application. 8.168 hectares of lands belonging to the plaintiff were acquired by the defendant by way of compulsory purchase order made on 19th October 1998, and the defendant has had the benefit of those lands since 3rd October, 2001. Following a lengthy hearing, the property arbitrator made an award in favour of the plaintiff in respect of the interest claimed by the plaintiff over the lands acquired on 12th November 2003, in the sum of

€12,860,700. The interest claimed by the plaintiff was a full freehold title, subject only to certain easements but otherwise free from encumbrances. The plaintiff, at that time and at all subsequent occasions when the issue arose, made it clear that if it could not establish such title it could not collect whatever compensation might be assessed on this basis. The property arbitrator too stated that if the plaintiff could not establish such a title, it might be necessary to remit the valuation of whatever interest the plaintiff might be determined to have in the lands acquired for further assessment and adjudication.

38. Following upon the award of the arbitrator, the plaintiff was asked to produce evidence of his title which it did by simply producing a copy of the folio, but the plaintiff failed to address the applicability of the restrictive covenant registered upon the folio to the lands acquired, or to produce any evidence that it did not apply to the lands acquired. The plaintiff did nothing at all to advance the transfer of an unencumbered title to the defendant, and in 2008 instituted these proceedings against the defendant. During the course of these proceedings, the plaintiff sought to join Mr. and Mrs. Smith as notice parties and it appears that it was only in the course of dealing with that application that it became apparent to the plaintiff that it would need to have this issue determined, in the absence of agreement with Mr. and Mrs. Smith, by the issue of proceedings. On 18th September 2009, Mr. and Mrs. Smith lodged with the defendant a claim for compensation in respect of their interest in the property being acquired in the sum of €5,850,000.

39. The plaintiff issued proceedings against Mr. and Mrs. Smith on 8th March 2010 with a view to determining that the restrictive covenant does not affect the lands acquired. Those proceedings have been listed for hearing on 1st December 2015. By this application, the plaintiff requests the court to part-enforce the property arbitrator's award by requiring the defendant to pay to the plaintiff now such sum as the plaintiff maintains must, beyond any doubt, be due by the defendant to the plaintiff, even if the restrictive covenant does affect the lands being acquired.

40. A considerable volume of law has been opened to the court in these proceedings. It is trite law that the plaintiff is entitled to be paid compensation for its interest in the lands acquired by the defendant, to be determined by the property arbitrator in the absence of agreement. The property arbitrator made an award in favour of the plaintiff which is predicated upon a title that the plaintiff is unable to prove and which the plaintiff will not be able to prove unless and until such time as the plaintiff succeeds in its proceedings against Mr. and Mrs. Smith. Moreover, even if the plaintiff reached an agreement or accommodation with Mr. and Mrs. Smith resulting in the release of any restrictive covenant attaching to the lands acquired by Mr. and Mrs. Smith and thereby putting the plaintiff in a position to transfer an unencumbered freehold title to the defendant, this would not overcome the problem of determining whether or not the interest of the plaintiff was subject to such a restriction as of the date of service of the notice to treat, which of course is the date on which the plaintiff's interest in the lands must be valued for the purpose of determining compensation.

41. If it is the case that the plaintiff's interest in the lands acquired, as of the date of the service of the notice to treat, was subject to a covenant restricting any development on those lands without the consent of the beneficiaries of the restrictive covenant, then the determination of the property arbitrator of 12th November 2003 does not avail the plaintiff at all because there will then be no valuation of the plaintiff's actual interest in the property as of that date. In that event it will be necessary for the plaintiff to submit its claim afresh reflecting its actual interest in the lands and to refer that to arbitration if necessary.

42. If all of this were to occur, it is not difficult to imagine that there will be another very significant dispute between the parties as to the value of the lands as of the date of service of notice to treat. It is apparent from the award of the property arbitrator that the lands must have been valued on the basis that they had a development value as distinct from their current use value, because, without reference to injurious affection or disturbance, it appears that the lands were valued by the property arbitrator at a sum in the order of €1,186,459.35 per hectare (this sum is calculated based upon the value attributed to the lands only in the award, i.e. €9,691,000). If the lands were subject to a covenant prohibiting development thereon without the consent of a third party, then at this remove at least it seems likely that a strong argument can be made that this would have a significant impact upon the value placed upon the lands by the property arbitrator. For this reason, if the Court were to accede to the plaintiff's application, it is quite possible that this would result in a very substantial overpayment to the plaintiff. The issues involved are quite simply too complex to arrive now at a conclusion that would justify the Court ordering the defendant to make a significant payment to the plaintiff.

43. Furthermore, the only authority on the question of whether or not a Court may direct part payment of an arbitral award *i.e.* the *Danish/Polish Tele*coms case makes it clear that a Court should only make an order for part payment of an award where the part of the award sought to be enforced is not in dispute and is for a fixed amount that can be clearly identified from the terms of the award. This application is predicated on the proposition that it is possible to identify an amount that is indisputably due by the defendant to the plaintiff now, but for the reasons outlined above, this is not so.

44. Furthermore, even though the amount claimed by Mr. and Mrs. Smith in respect of the value of the restrictive covenant which they claimed to own over the lands acquired is very substantial, they are quite entitled to amend their claim right up to the arbitration of that claim. While counsel for the plaintiff has suggested that the amount of interest that will be payable to the plaintiff will afford a sufficient "cushion" against any overpayment that might result from any court order to pay part of the award of the property arbitrator now, it is clear from the arguments advanced by the parties that there will be a dispute as to liability for interest, and it is certainly not possible to form any conclusion now as to how that dispute might be resolved in due course.

45. I am also satisfied that the plaintiff has not met the test for the granting of a mandatory injunction and furthermore it has not advanced any meaningful argument as to why damages will not be an adequate remedy to the plaintiff in the event that it succeeds at the trial of the action. While it is difficult not to feel considerable sympathy for the plaintiff in circumstances where its lands have been taken from it by the defendant more than fourteen years ago, it seems to me to be difficult to fault the defendant for the delay in the plaintiff receiving its compensation.

46. The plaintiff resisted the efforts of the defendant to have compensation determined in the alternative by the arbitrator. The plaintiff insisted that it would produce and transfer to the Council an unencumbered freehold title. Following upon the conclusion of the arbitration and the award of the property arbitrator, the defendant asked the plaintiff to submit evidence of such title to the defendant, but the plaintiff failed to do so. Not only that, the plaintiff failed to take any steps to clear the restrictive covenant from the face of its title until it issued proceedings against Mr. and Mrs. Smith on 8th March 2010, some one year and eight months after it issued these proceedings against the defendant. While counsel for the plaintiff explained the personal difficulties experienced by its principal director, Mr. Kennedy, during this period, and while it may fairly be said that those difficulties would reasonably have contributed to a delay on the part of the plaintiff in taking the steps necessary to progress matters, it is nonetheless clear to me that it would be unfair to attribute any of the delay during this period to the defendant.

47. For all of these reasons I must dismiss the application. In light of my findings above, it is not necessary to address the arguments advanced to the court in relation to whether or not it has or has not an inherent jurisdiction to make an order of the kind sought by the plaintiff in these proceedings.

Counsel for the plaintiff:

Martin Hayden SC (with Frank Beatty BL and Joseph Kennedy BL) instructed by Delahunt Solicitors.

Counsel for the defendant:

Dermott Flanagan SC (with Stephen Dodd BL) instructed by Edward C Hughes Solicitors.