Neutral Citation Number; [2006] IEHC 413

THE HIGH COURT
DUBLIN

[2006 No. 5574P]

GLENKERRIN HOMES

PLAINTIFFS

v.

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on 6th December 2006 The Judgement Of The Court was given by Mr. Justice Clarke, As Follows:

1. Mr. Justice Clarke: This matter comes before the court on foot of an application for an interlocutory injunction brought on behalf of the Plaintiff Company in which it seeks an Order which, in substance, is a mandatory order directing the Defendant County Council to furnish the Plaintiff Company with letters of compliance in respect of the payment of financial contributions attached to specific planning permissions which were granted by the County Council in respect of a residential development at Ballinteer Avenue.

2. The issues which arise between the parties in these proceedings are relatively net, although they raise important and, to some extent, difficult issues for resolution.

3. It would appear on the evidence placed before the Court on Affidavit that a practice has grown up over the years as a result of which planning authorities are prepared to issue to developers so-called letters of compliance in respect of the conditions set out in planning permissions concerning the making of financial contributions, under a variety of headings, to the Local Authority.

4. The fact that that practice has grown up and become established has, in turn, led to such letters of compliance coming to be regarded as the appropriate evidence to be furnished on completion by solicitors acting on behalf of developers to those acting on behalf of the purchasers of properties developed and, indeed, the relevant Law Society recommendations in respect of proper conveyancing practice recognises that fact.

5. The background to these proceedings is, therefore, that established practice and the fact that such letters of compliance have come to be regarded as being an important part of the necessary documentation to be handed over on completion of the sale of newly constructed property and, indeed, to remain part of the title to such property when subsequent sale transactions occur.

6. Against that background, it is necessary to refer to recent developments involving the Defendant County Council and the law generally. Firstly, it should be noted that there was no Statutory basis for letters of compliance and that the practice grew up as an administrative rather than a formal statutory process. Secondly, additional statutory intervention has led to a number of other matters becoming standard or required conditions in planning permissions, including, and of particular relevance to the dispute between the parties in this case, the obligations now placed upon developers to make available an appropriate percentage of land in respect of which planning permission for development is sought to the Local Authority to enable the Local Authority to provide for social and affordable housing.

7. In the relevant statutory scheme, there is an alternative provision allowing an agreement to be reached whereby, in lieu of land being handed over on foot of terms of the scheme to the Local Authority, other arrangements, including the handing over of developed units, the handing over of cash, or a combination of both, can be agreed as an alternative.

8. Planning permission is subject to compliance with those arrangements and it would appear that it has also become common practice for an express provision to be contained by way of condition in the planning permission dealing with those matters.

9. In that way, a condition was imposed on the facts of this case and the situation as it has developed leads to a situation where there have been protracted negotiations as to the manner in which the Plaintiff might comply with its obligations, which negotiations have not reached a conclusion. There have been attempts to refer the dispute to an appropriate form of determination or arbitration, though there is a difference between the parties as to whether the issues which arise are more properly to be dealt with An Bord Pleanala or by the property arbitrator. But it remains the case that, on any view, the relevant agreement has not been reached between the Local Authority and the Plaintiff as to the precise manner in which the Plaintiff Company's obligations in respect f social and affordable housing should be met.

10. It also needs to be noted that it would appear that Dun Laoghaire Rathdown County Council came to a Decision towards the middle of this year to the effect that it would no longer issue letters of compliance with financial contributions in circumstances where there were outstanding issues between it and the developer concerned in relation to other matters and, in particular, matters arising under the legislation concerning social and affordable housing.

11. hat context, the issues between the parties not having been brought to agreement, the Council took the view that it would cease to issue letters of compliance to the Plaintiff Company, although it would, as a fact, appear to be the case that at least some letters of compliance in favour of the Plaintiff were issued after the general policy decision was taken by the Defendant to the effect that it would not issue such letters while there were other outstanding issues.

12. Against that background, the County Council has declined to issue letters of compliance with financial contributions in response to a particular request concerning part of the development concerned.

13. I should note that it would appear to be part of the general practice which I have identified that local authorities, in their capacity as planning authorities, will ordinarily issue what I might call partial letters of compliance where there is a requirement to make an overall financial contribution and where portions of those contributions can appropriately be attributed to different parts of the development, so that some of the letters of compliance in this case would appear to relate to the appropriate proportion of the overall financial contribution required that was attributable to certain portions of the development.

14. Be that as it may, the dispute which now squarely lies between the Plaintiff Company and the County Council directly concerns the question of whether there is a legal obligation on Dun Laoghaire Rathdown County Council in all the circumstances of the case to issue letters of compliance. Before going on to deal with that legal issue and the issue of whether it is possible or appropriate to deal with that legal issue in the way sought in this interlocutory injunction, it is also important to note that, without prejudice to its contention that it has no legal obligations of the sort claimed to the Plaintiff, the County Council has, in the course of these proceedings, indicated that it is willing to furnish a letter which confirms that the relevant financial contributions have been made,

provided that that letter also makes reference to the fact that the agreement contemplated by the planning permission in respect of social and affordable housing has not in fact been completed. Therefore, the net issue which really arises in practice between the parties is as to whether the Plaintiff is entitled to what I might call an unconditional letter of compliance, or whether it is sufficient to meet any legal requirements on the County Council and, as I have noted, it does not accept that it has any legal obligation but, nonetheless, whether it would be sufficient to meet any legal obligation which does rest on it if a conditional letter of compliance in the form which it suggests is to be issued.

15. That is the net legal question that arises between the parties and it is as against that background that I must approach the question of whether it is appropriate to grant an interlocutory injunction.

16. The first issue which must always arise in such circumstances is to ask whether the Plaintiff has made out an arguable case that it may be entitled to the relief sought and, if it has, whether the Defendant has made out an arguable case to the contrary.

17. There are a number of important and difficult legal questions which arise. The first is as to whether the County Council has any obligation to issue letters of compliance at all, having regard to the fact that there is no statutory scheme which gives recognition to that process. On the other hand, the Plaintiff contends that the established practice gives rise to a legal entitlement, whether in the nature of a legitimate expectation or otherwise, that that practice will continue, at least in respect of planning permissions which were granted prior to any notified change in the policy.

18. In that context, and if such a principle were to be established, it would then be said that on the facts of this case, while it might well be within the remit of the County Council to alter prospectively its obligations in respect of the issue of letters of compliance, the refusal to complete the process of issuing such letters in relation to an existing planning permission would be impermissible.

19. Obviously that question itself raises important issues, but I am satisfied that the Plaintiff has made out an arguable case that it may have a legal entitlement under that heading, but I am equally satisfied that the Defendant has made out an arguable case that legal rights do not arise in the circumstances of this case, either because there is no legal obligation in the absence of a statutory provision or, alternatively, because it may also be arguable that the Defendant would be entitled to change its policy on giving notice to the parties and it is arguable that such notice, while it could not be retrospective in respect of, by definition, letters of compliance already issued, could, on the Defendant's case, which, as I have indicated, I consider to be arguable, could be prospective in the sense of applying to any letters of compliance applied for after the date of the notification of the change of the policy. It is not possible on this interlocutory application to reach a conclusion as to how those legal issues will ultimately be determined.

20. I am, therefore, satisfied that this is a case in which a fair issue to be tried has been made out by the Plaintiff, but that equally it is not one of those unusual cases where the Plaintiff is bound to succeed and where the Court must take that into account in deciding what interlocutory relief must be granted.

21. It does not seem to me that this is the kind of case where, on either side, damages would be an adequate remedy. Clearly, if the Council is right in its view, then it would be precluded by an interlocutory injunction from applying what would be a legally permissible policy and no damages could compensate it for that. Equally, if the Defendant is right, it may well not be able to recover damages because it does not necessarily follow that even if it is correct in its view of the law, that the Defendant would be liable to it in damages for any delay in issuing letters of compliance having regard to the principles applicable in the award of damages against statutory authorities carrying out their statutory role. Those principles seem to indicate that a statutory authority will only be liable in damages where it is guilty of something more than an error of law and, therefore, it seems to be a case where damages would not be an adequate remedy for either side.

22. The crucial question, it seems to me, stems from the fact that the Order sought in this case is, in substance, a mandatory order. It was, I think, properly accepted by counsel for the Plaintiff that while the Order sought at paragraph 1 of the Notice of Motion is expressed in negative terms, it is, in substance, a mandatory order involving a double negative and it seems clear that the substance of the Order sought is a mandatory order.

23. In addition, the Order sought goes further in the sense in that if an interlocutory Order is granted in this case it would, in substance, bring an end to the proceedings in that it would require that the Plaintiff get the letters of compliance sought and, once given, those letters could not be un given. By obtaining the interlocutory order sought the plaintiff would have achieved the entirety of what is, in substance, sought in the proceedings.

24. In those circumstances, I must approach this case as being one in which it is the fact that if an interlocutory Order is given it would bring an end in practice to the proceedings and on all the authorities, it is clear that a mandatory order and, in particular, a mandatory order which would, in substance, give the Plaintiff the entirety of the relief which the Plaintiff seeks, should only be given by the Court in a very clear case.

25. Unfortunately, I have come to the view that this is not such a clear case. While I have found that there are arguable grounds for the propositions put forward by the Plaintiff, I am also satisfied that there are equally weighty contentions put forward by the Defendant to the effect that it cannot be obliged to give an unqualified Certificate of Compliance with one element of a planning permission where it is aware of the fact that there may be doubts as to whether there has been compliance with another aspect of the planning permission.

26. In those circumstances, it does not seem to me that it would be appropriate to grant the interlocutory injunction sought. However, it does seem to me that the issue in this case is both a net issue and, while important, and perhaps for the reasons I have sought to outline, difficult, the issues ought, nonetheless, be capable of very early resolution at a full trial and subject to hearing what counsel have to offer, I would be minded to put in place measures to ensure that there can be a full trial of that net issue in the earliest possible time and, in the meantime, it does occur to me that without reaching any finding on the matter, that I should make some comments on one of the subsidiary issues that arose in the course of the hearing in the hope that it might lead to an orderly disposal of the issues between the parties.

27. The underlying history of the issues between the parties as to compliance with the social and affordable housing requirements chart detailed negotiations in which, in substance, the Plaintiff developer sought to reach an agreement whereby it would, partly in terms of units and partly in terms of cash, make an appropriate accommodation with the Local Authority.

28. The Local Authority, for its part, has adopted a policy which certainly appears to be entirely understandable (and which stems from the fact that it is a largely built up Local Authority area where areas for the development of further housing are limited and where, therefore, it says getting cash may not be of any great advantage to it in meeting its obligations in respect of social and

affordable housing) to the effect that its primary aim must be to obtain either land upon which it can develop or, at a minimum, actual residential stock which it can use for the purposes of its obligations.

29. Those negotiations do not appear to have reached any conclusion and in that context there appears to be a dispute between the parties as to the precise manner in which it is appropriate to resolve the statutory obligations of the Plaintiff Company.

30. The Plaintiff Company, placing reliance on the opinion of senior counsel, has put forward an interpretation which suggests a particular approach to the way in which its obligations should be determined and, as it were, as to the formula, for want of a better term, that should be applied as to the manner in which it obligations should be decided. That, in turn, has led to the dispute between the parties as to whether it is more appropriate that those issues go to the Board or go to the Property Arbitrator.

31. It would be wrong and premature of me to express any concluded view on that issue, but I do have to say that it seems to me that the recent, and admittedly very recent ministerial guidelines in respect of these issues seems to contemplate that a Local Authority should express itself as being satisfied that the social and affordable housing requirements have been met provided that there is in being an appropriate and binding process, whether before the Board or before the Property Arbitrator, which will lead to a definitive determination of the obligations of the developer concerned.

32. Therefore, without reaching a final determination on the matter, it does seem to me that provided there is in being an appropriate and binding process, there may well be very strong grounds for believing that the Local Authority should then issue a letter of compliance which would confirm not only compliance with the financial contributions, but also with the social and affordable housing provisions, I take that view because it does seem clear that the Local Authority, while not bound by the Ministerial guidelines, is required to have regard to them and would, therefore, need a good reason for not following those guidelines. While, of course, the Court would not attempt to second-guess a reasonable balancing exercise entered into by a Local Authority taking into account a number of relevant factors, it would, nonetheless, be the case that in the absence of there being a good reason for not following the Ministerial guidelines, and no stated reason being put forward, there would appear to be an obligation on the Local Authority to follow those guidelines.

33. In those circumstances, if, on a proper construction of the guidelines, it is the case that a Certificate of Compliance with the social and affordable housing requirements were to become an entitlement of a developer in circumstances where the matter had been referred to a binding decision of an appropriate authority then that would seem to bring an end to the issues between the parties.

34. It is not possible for me at this stage to form a view as to the rights and wrongs of the question as to the appropriate authority to whom the issue should be referred, but given that it now appears to be accepted by the developer that whatever his obligations are, they must be met in the form of units, save only for a minor financial contribution to adjust for any lack of an even number of units to be handed over, it ought not, in my view, be beyond the wit of the experienced lawyers on all sides to come up with an appropriate formula that would allow those matters to be referred to the appropriate body for a final determination which would be binding upon all parties and having regard to what the Ministerial guidelines suggest, it would seem to me that provided that process had been embarked on, there ought no longer be any issues between the parties.

35. I merely raise those matters because it is clear that it is in everyone's interests that this matter is brought to an early conclusion and in the hope that the comments which I have made may be of some assistance to the parties in finding a way of resolving these issues without the necessity for a full hearing. However, I obviously cannot assume that that will happen and, therefore, having refused an interlocutory Order for the reasons which I have indicated, it does seem to me that it is incumbent upon the Defendants to assist in ensuring that a final resolution of the legal issues can be come to in the earliest possible time consistent with allowing the parties a reasonable opportunity to make their arguments in the case.

36. I will hear counsel as to what measures they suggest might be put in place, or if they wish to discuss measures and come back to me later in the day, I will be happy to deal with it that way?

37. Mr. Gallagher: I should say, Judge, that this matter came by way of --

38. Mr. Justice Clarke: It was due to come before the Property Arbitrator this morning.

39. Mr. Gallagher: It was due to come before the Property Arbitrator today. He adjourned it at my application. It appears to me -- we clearly need time to consider what you have said, Judge, but it does appear to me from what was submitted this morning that there was a clear conflict between the parties as to the manner in which the section 96, and indeed part 5 should be interpreted, and whether or not the Property Arbitrator has in fact an entitlement to proceed, whether he has jurisdiction to proceed in circumstances where an agreement is not reached before development commences because that is what the section does provide.

40. There are a number of other issues, I should say, that were, one might say, tentatively flagged which may or may not resolve themselves but which may -- well, may mean that a final determination by the Property Arbitrator, or indeed by the Board, might not be immediately forthcoming. However, the matter, as you have said, is before the Board, having been referred there by the Council. It is before the Arbitrator at the moment. He has adjourned the matter to an unspecified date in January and he has mentioned the prospect of two Mondays at the end of January, 22nd and 29th or something of that order, as possible dates for resuming. Obviously he has directed that there will be an exchange as between the parties in the intervening period and that has been down without prejudice to my submission that the advices that were received by the developer are not corrected.

41. However, I would like to consider what you have said and I know my clients would want to consider what you have said and perhaps if you would put the matter in for mention some time next week so that I can consider it, get instructions, and perhaps come back.

42. Mr. Justice Clarke: The latter matters I mentioned are not really pertinent to the narrow issue in one sense that arises in these proceedings, which is: Are you legally obliged to issue the Certificate? and I would be anxious to have a full hearing on that question as quickly as possible.

43. The other matters, if they lead to a resolution, so much the better, but if they do not, I will still have to decide whether Mr. Condon is right in his contention that, in all the circumstances, he is entitled to a letter of compliance.

44. Mr. Condon: I was going to suggest, Judge, that you might put it in for mention on Friday morning with a view to letting the parties, I suppose, sleep on it to that effect in relation to these proceedings and then, if there is nothing happening, you can then

give directions in relation to exchange of pleadings.

45. Mr. Justice Clarke: I would like counsel, in any event, to discuss the sort of timescale and directions that might reasonably be given and could be met to lead to the earliest possible trial date.

46. Mr. Gallagher: Yes, I am quite happy to do that. I should say that I would be anxious, and I am sure my Friend would be anxious, to have a written version of the Judgment so that it can be considered. I know that my clients would be extremely anxious to have it available to them. So I would suggest, I am in some difficulties in this Court and elsewhere both today and tomorrow, and I would suggest, perhaps, if you would consider Monday as a possible date for mentioning it?

47. Mr. Justice Clarke: If I say -- I presume I will be dealing with the Chancery List on Monday, so if I say two o'clock on Monday.

48. Mr. Gallagher: I am grateful.

49. Mr. Justice Clarke: I would hope then to give directions that would lead to an early trial of the issue that arises squarely in this case as to whether the developer is entitled to letters, unqualified letters of compliance or not and, as I say, if the other matters cause a resolution of the issues, that is really between the parties.

50. Mr. Condon: In relation to the costs of this element, judge, I would ask you to reserve the costs for the time being and, if necessary, myself and Mr. Gallagher can address you in due course

51. Mr. Justice Clarke: I will reserve them certainly at least until Monday and we can consider them further on Monday or thereafter

52. Mr. Gallagher: May it please you, Judge.

53. Mr. Condon: I am obliged, Judge.

54. Mr. Justice Clarke: What I might do is giveback the papers at this stage to the parties.

55. THE HEARING WAS THEN ADJOURNED UNTIL 2:00 P.M. MONDAY,11TH DECEMBER 2006