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1983 No. 627 Sp.

THE HIGH COURT

IN THE MATTER OF THE ACQUISITION OF LAND
(ASSESSMENT OF COMPENSATION) ACT 1919

AND THE PROPERTY VALUES (ARBITRATIONS AND APPEALS)
ACT 1960

AND THE HOUSING ACT 1966

AND THE ARBITRATION ACTS 1954 and 1980

AND THE DUBLIN COUNTY COUNCIL COMPULSORY PURCHASE
(TYMON NORTH KILNAMANAGH/TEMPLEOGUE/GREENHILLS)
ORDER 1973

AND CONFIRMATION ORDER DATED THE 12th DAY OF MAY, 1975

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF
DUBLIN

PLAINTIFF

AND

ANNIE HEALY AND JOHN R.
SHACKLETON

DEFENDANTS

Judgment of Mr. Justice Barrington dated the 2nd day of March, 1984.

The Plaintiff is the Planning Authority and Sanitary Authority
for the County of Dublin.

The first named Defendant claims a fee simple interest in
possession in certain lands consisting of approximately 12 acres in
the townland of Kilnamanagh and Barony of Uppercross contained in
Folio 4659 of the Register County of Dublin, which land is being

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acquired by the Plaintiff as the Acquiring Authority under the Dublin County Council Compulsory Purchase (Tymon North Kilnarnagh Tallaght Templeogue Greenhills) Order 1973.

The second named Defendant is a property arbitrator who, at the request of the first named Defendant, was nominated by the Land Values Reference Committee to arbitrate between the first named Defendant and the Plaintiff as to the compensation to be paid by the Plaintiff for the compulsory acquisition of her interest in the lands in question.

The arbitration proceeded before the second named Defendant on the 7th day of February 1983, the 2nd day of May, 1983 and the 18th day of November, 1983. I am satisfied, and indeed the parties agree, that the taking of evidence had concluded on the 2nd day of May 1983 and that each party had closed his case subject to one outstanding point of law. The outstanding matter was whether the arbitrator should, on the basis of the evidence tendered, state a case for the opinion of this Court on a point of law. The adjournment was to enable the County Council to prepare a draft of the case stated and the hearing on the 18th of November 1983 was for the purpose of considering the case stated and considering legal

arguments on whether the arbitrator should or should not state a case. In the event the arbitrator decided not to state a case.

In the present proceedings the County Council seeks an order under Section 35 of the Arbitration Act 1954 directing the arbitrator to state a case on the point of law in question and also an order, in the nature of an order of mandamus, directing the arbitrator to hear further evidence which the County Council wishes to adduce at the arbitration.

The background to the case is unusual. The Plaintiff is a frail and elderly lady. She was only registered as owner of the land in question on the 18th of July 1980. The previous owner, Patrick Kavanagh, had died on the 14th of December, 1972 but a protracted probate suit then ensued and the claimant was unable to establish her title to the lands until after the Judgment of Mr. Justice Costello delivered on the 24th of October, 1978 in the case of Healy -v- Lyons (1975 No. 4361B) whereby a purported will made in favour of the Defendant named in that suit was condemned by the High Court and an earlier will in favour of the claimant was established.

Meanwhile, without the knowledge or consent of the claimant,

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a stranger was using the lands for unauthorised dumping. The claimant, as originally stated, was not, initially, aware that this dumping was taking place but the County Council were aware of the dumping and, for some years, took no steps to prevent it. After the claimant's title had been established in 1978, a relative of hers, a Mr. McCourtney, attempted, unsuccessfully, to stop the dumping and ultimately entered into an agreement in December 1979 under which the dumping was to be controlled. Only topsoil or subsoil was to be dumped and the Plaintiff was to receive £1 in respect of each load dumped.

The Compulsory Purchase Order in the present case was made in 1973, the Confirmation Order was made in May, 1975 and the Notice to Treat is dated the 29th of May 1980. The County Council, though aware for many years of the unauthorised dumping, did not do anything to prevent it until the end of 1980 when an enforcement notice was served.

The purpose of the Compulsory Purchase Order was to enable the County Council to acquire the lands for road development and amenity park land. As a result of the unauthorised dumping the configuration of the lands was changed between the date of the

Compulsory Purchase Order in 1973 and the date of the Notice to Treat on the 29th of May 1980 and was again altered between the date of the Notice to Treat and the opening of the arbitration on the 7th of February 1983. The parties agreed that as a result of the unauthorised development some 120,000 cubic metres of material had been dumped on the lands of which some 90,000 cubic metres had been dumped before the Notice to Treat and some 30,000 cubic metres thereafter. Again it was agreed that the cost to the County Council of removing this material would be £3 per cubic metre or some £360,000 in all.

However the problem facing the arbitrator was to value the lands at the date of the Notice to Treat. An issue arose between the parties as to whether or not the lands were suitable for residential development or whether they should be valued merely as open space. Residential development did not require the removal of the spoil but the presence of the spoil on the lands would create exceptional development costs. The claimants valuer valued the lands for residential development at £480,000 but conceded that a sum of £140,000 would have to be deducted from this figure for exceptional development costs. On the basis of open

space he valued the lands at £96,000. These figures were not challenged by the County Council who did not call any evidence on value.

The parties apparently accepted that the question of whether the Plaintiff would get the residential value of the lands or the open space value of the lands turned on the question of whether the Plaintiff had an absolute right to connect into the County Council sewer for the purpose of draining the developed lands. The parties accepted that this issue would be governed by the decision of the Supreme Court in Dublin County Council -v- Short (1983 Irish Law Reports Monthly page 377) which was delivered on the 13th of May 1983 and which was still pending when the arbitration adjourned on the 2nd of May 1983.

The problem which was then exercising the minds of the parties was the problem of the spoil. The County Council was arguing that the arbitrator, in valuing the lands, should take into consideration the cost to the County Council of removing the spoil. This was the point on which they wished, and wish, to have a case stated. The arbitrator however ultimately took the view that his job was to value the lands either for residential purposes or as open space. He would

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take account of the spoil in so far as it affected the value of the lands as they stood on the 29th of May, 1980. This he believed was his function in accordance with the rules set out in the Acquisition of Land (Assessment of Compensation) Act 1919 as amended by the provisions of the Local Government (Planning and Development) Act 1963 and the Housing Act 1966. He was not concerned with the cost to the County Council of developing the lands for their own purposes. He held that the County Council's submissions confused cost with value.

The County Council relied upon the fact that the alteration to the subject lands was made after the date on which notice of the Compulsory Purchase Order was served that is to say after the 14th of August 1973. But the Arbitrator held that service of notice of the Compulsory Purchase Order did not prevent the owner from dealing with his lands in such way as he himself saw fit.

The County Council also relied on Rule 4 of Section 2 of the Acquisition of Land (Assessment of Compensation) Act 1919 and of Rule 12 which was inserted into the said Section by Section 69 of the Local Government (Planning and Development) Act 1963 in accordance with the provisions of the fourth schedule to that Act.

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Rule 4 reads as follows:-

"Where the value of the land is increased by the use thereof or by any premises thereon in a manner which could be restrained by any Court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account."

Rule 12 reads as follows:-

"No account shall be taken of any value attributable to any unauthorised structure or unauthorised use."

Rule 4 deals only with increases in value and the arbitrator held it was irrelevant because there was no evidence of any increase in the value of the lands occasioned by the dumping.

Rule 12 provides that no account is to be taken of any value attributable to an unauthorised use. But again the arbitrator held that there is no evidence of any increase in value to the lands occasioned by the unauthorised use. Indeed the complaint is that the unauthorised use has diminished the value of the lands. It can hardly be said therefore that there is "any value" attributable to any unauthorised use. So far as there is the rule provides that no account is to be taken of it.

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Finally the County Council relied upon Section 76 of the Housing Act 1966 and on the modifications to the Acquisition of Land (Assessment of Compensation) Act 1919 introduced by paragraph 2 sub-paragraph L of the third schedule to that Act. Sub-paragraph L provides as follows:-

"The Arbitrator shall not take into account -

- (i) Any interest in land created after the date on which notice of the order having been made is published in accordance with Article 4 of this Schedule or
- (ii) Any building erected or any improvement or alteration made after the said date if, in the opinion of the Arbitrator, the erection of the building or the making of the improvement or alteration was not reasonably necessary and was carried out with a view to obtaining or increasing compensation."

Again the Arbitrator held that, on the facts of this case, sub-paragraph L had no relevance.

He therefore held that the evidence did not exist which would enable or permit him to state a case on the interpretation of the various rules cited and he accordingly declined to state a case.

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The County Council claims that it is a fundamental principle of law that the owner of property subject to a Compulsory Purchase Order cannot-at any rate after the date of the service of a Notice to Treat - increase the burden on the Acquiring Authority. He certainly cannot do so by increasing the value of the property in any of the various ways contemplated by the rules for assessing compensation. In the present case the value of the property has been decreased not increased. There is no suggestion that there was any deliberate or fraudulent attempt to devalue the property. The arbitrator values the property as of the date of the Notice to Treat. In so far as the presence of the spoil has reduced the value of the property as of that date this matter is taken into account by the arbitrator in his valuation. What the arbitrator does not take into account is the cost of removal of the spoil. But he does not do so because it is not his function to do so. It is irrelevant to the value of the lands at the date of service of the Notice to Treat.

The Arbitrator has decided that there is no relevant point of law on which he needs the assistance of the Court to enable him to come to a decision in the present case. He has accordingly

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exercised his discretion not to state a case. In my view he has exercised his discretion properly and, in the circumstances, I would not feel justified in directing him to state a case.

Section 41 of the Arbitration Act 1954 provides that 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 that, where leave is so given, judgment may be entered in terms of the award. It may be that the County Council has some form of claim against the claimant arising out of the cost of removing the spoil from the lands or from the diminished value of the lands to them arising from the presence of the spoil. If they have such a claim they may, possibly, succeed in having a stay put on the award pending the resolution of their claim. I express no view on this matter. But it does not appear that any such claim can be resolved within the scope of the arbitration as to value and compensation contemplated by the 1919 Act as amended.

I turn now to the second form of relief sought by the County Council in these proceedings. This is described in paragraph 2 of the Indorsement of Claim on the Special Summons as follows -

"An order directing the second named Defendant to hear such

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"further evidence as the Plaintiff may wish to adduce as to the terms and conditions (if any) upon which Dublin Corporation would cause or permit any sewer or drain from the said lands of the first named Defendant to communicate with the sewer of Dublin Corporation and/or the terms and conditions upon which Dublin Corporation would receive effluent from the said lands".

As previously stated when the arbitration was adjourned on the 2nd of May 1983 both sides had closed their respective cases subject to the outstanding legal argument concerning the proposed case stated. The arbitrator had been given two figures in respect of the value of the lands one of which was based on the potential of the lands for residential development and the other of which was based on the open space value of the lands. Neither figure was in dispute. Which was the relevant figure would depend upon whether the claimant had or had not a right to connect with the sewers of the Dublin County Council. Both parties expected that this matter would be governed by the decision of the Supreme Court in Dublin County Council -v- Short (1983 Irish Law Reports Monthly page 377) which was then pending.

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In fact the Supreme Court gave its decision in the Short case on the 13th of May, 1983 and its decision was that the claimant in that case (whose position appears to be identical with that of the claimant in this case) had a statutory right under Section 23 of the Public Health (Ireland) Act, in the circumstances of that case, to connect with the County Council's Dodder Valley sewer.

The judgment of the Court was delivered by the Chief Justice and the relevant passage in his judgment appears at page 379 of the Report. It reads as follows:-

"The Planning and Engineering witnesses called on behalf of the acquiring authority had stated that the Dodder Valley sewer to which a housing development on the subject lands would require connection, was "pre-empted" for other housing development in the area which had not yet taken place. I assume that this means that the sewer had been constructed in the light of the development which the Planning Officers foresaw as probable in the area intended to be drained. In these circumstances the arbitrator asked two questions, the answers to which he hopes will assist him in considering the reality of valuing these lands as building lands. These questions

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"are necessarily hypothetical since they have not arisen and cannot arise on the actual facts. Nevertheless I would be anxious, as was McMahon J., to give the arbitrator as much assistance as possible. For this reason I now turn to the first of these questions. This is question No. 3 in which, in effect the arbitrator asks whether the County Council as the Sanitary Authority could, in the event of housing development taking place on the subject lands, refuse a connection for sewerage to its main sewer, such sewer then being capable of absorbing such sewerage. In my view, it could not so refuse. It seems to me that the Public Health (Ireland) Act, 1873, particularly Section 23 thereof, obliges the Sanitary Authority to receive into its sewers the sewerage of all the premises within its district, provided proper notice is given and the appropriate regulations observed. I agree with McMahon J., and for the reasons which he gave, that this section is not repealed by implication by the provisions of the Planning Act."

This passage would appear to be conclusive so far as the

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present case is concerned.

However on the 24th of June 1983 Mr. Justice O'Hanlon delivered his judgment in the case of McKone Estates Limited -v- The County Council of the County of Kildare. That case turned, not upon the rights of an owner or occupier to connect with the sewers of his own Sanitary Authority, but with his right to connect with the sewers of an adjoining Sanitary Authority. This matter is governed by Section 24 of the Public Health (Ireland) Act 1878.

The relevant part of Section 23 (dealing with the rights of an owner or occupier to connect with the sewers of his own Sanitary Authority) reads as follows -

"The owner or occupier of any premises within the district of a Sanitary Authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that Authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that Authority to superintend the making of such

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communication".

Section 24 (dealing with the rights of an owner or occupier to connect into the sewers of a different Sanitary Authority) reads as follows -

"The owner or occupier of any premises without the district of a Sanitary Authority may cause any sewer or drain from such premises to communicate with any sewer of the Sanitary Authority on such terms and conditions as may be agreed on between such owner or occupier and such Sanitary Authority, or as in the case of dispute may be settled, at the option of the owner or occupier, by a Court of Summary Jurisdiction or by arbitration in manner provided by this Act."

The distinction between the two Sections appears to be that under Section 23 the owner or occupier has, subject to compliance with certain technicalities, an absolute right to connect into the sewer of the Sanitary Authority, but under Section 24 he still has the right to connect with the sewer of the Sanitary Authority but only on such terms and conditions as may, in the absence of agreement be decided by a Court of Summary Jurisdiction or by arbitration.

The significance of this is that if one were attempting to assess the

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development potential of lands for residential purposes and the development proposed that the drains from the lands should connect with a sewer of an outside Sanitary Authority then the terms or conditions which the outside Sanitary Authority might propose for accepting the connection or which might, in default of agreement, be settled by a Court of Summary Jurisdiction, or by arbitration, might be a relevant factor in assessing the value of the lands.

As previously stated all parties to the present arbitration proceeded on the basis that, so far as drainage of the land was concerned, this case was on all fours with the Short case. In this they were correct. But after the decision in the McKone case the County Council concluded that there was a further point which they could have made in the Short case and which they had not made. This was that the County Council is not complete master of the sewer into which the claimant in the Short case and in this case notionally seek connection. This is because the County Council's sewerage pipe is connected with sewers controlled by Dublin Corporation and the County Council in its turn is bound by terms imposed by or agreed with Dublin Corporation.

At the resumed hearing of the arbitration on the 18th of

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November 1983 the Council which, as previously stated, had on the 2nd of May 1983 closed its case subject to the outstanding legal point concerning the case stated, sought to adduce fresh evidence from Mr. Kevin O'Donnell Chief Engineer (Sanitary Services) of Dublin Corporation to the effect that the Council's sewer drained into a Corporation sewer and outfall and that the claimant, by connecting into the Council's sewer would, in effect, be connecting into the Corporation sewer and that therefore the case properly fell to be decided under Section 24 of the Public Health Act 1878.

On the other hand it is at least equally arguable that the primary duty for draining its district in accordance with Section 17 of the Public Health Act 1878 falls on Dublin County Council and that the owner and occupier of lands in Dublin County is not concerned with what arrangements the Council may make with other Sanitary Authorities for draining its own sewers and that the case therefore is properly regarded as a Section 23 case.

In any event the arbitrator refused to hear the new evidence proposed to be adduced on the 18th of November 1983 as both parties had previously indicated that, subject to the legal argument on the case stated, their cases had been closed. Moreover the arbitrator

did not regard the evidence sought to be adduced as new evidence because it was available at the date of the original hearing on the 2nd of May, 1983.

I am now asked to interfere by an Order in the nature of Mandamus with the arbitrator's conduct at the arbitration proceedings and to direct him to receive evidence which he, in his discretion, has decided not to receive. There is no suggestion of any form of impropriety on the part of the arbitrator. The decision not to accept new evidence was a responsible decision made by him in the exercise of his discretion. The decision appears to me to have been the right decision. But even if I thought the decision was erroneous I do not think it would be proper for me to interfere by way of Mandamus, in the circumstances of this case, with the exercise by the arbitrator of his discretion as to the proper conduct at the arbitration proceedings.

A somewhat similar application was made to me at a vacation sitting on August the 29th 1983 arising out of the decision in the Short case. This was in the case of Dublin County Council -v- McCarthy & Short (1983 No. 5203P) where the County Council sought an

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Interlocutory Injunction restraining the arbitrator in the Short case from publishing his award pending the determination of proceedings for an order directing him to receive new evidence of the kind proposed in the present case. I declined to grant the injunction sought on the grounds, inter alia, that to do so would be an unwarranted interference by me with the proper exercise of the arbitrator's discretion.

I would accordingly dismiss the Plaintiff's case.

Approved

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