

THE HIGH COURT

1984 No. 23 S.S.

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HIGGS & CO. LTD.
21 JUN 1984

GRANGE DEVELOPMENTS LIMITED

.v.

DUBLIN COUNTY COUNCIL

Judgment of Mr. Justice McWilliam delivered 28th February 1984

Mr. Sean S. McDermott was duly appointed as arbitrator to determine the amount of compensation, if any, which should be paid to Grange Developments Limited (hereinafter called Grange) by Dublin County Council, as planning authority, as a result of the refusal of the County Council and, on appeal, An Bord Pleanala to give permission for a proposed development entailing the construction of five hundred houses on lands comprising an area of approximately seventy-five and a half acres at Mountgorrey and Drinan, Malahide Road, Co. Dublin.

When the arbitration commenced on 20th January, 1983, the title of Grange to part of the lands was questioned and the hearing was adjourned. On the resumption of the hearing on 7th March 1983, Grange admitted that it did not have sufficient interest in part of

the lands and also that there was an existing permission for industrial development in a further part, so that the area of land in respect of which compensation was claimed was reduced to approximately forty-five acres.

Although the word "subsequently" is used in the case stated it would appear that it was at this stage that an undertaking dated 19th January, 1983, executed under the provisions of section 55 of the Local Government (Planning and Development) Act, 1963, was produced to the arbitrator. It had not previously been furnished to Grange.

The undertaking is in the following terms:-

"ORDER: I hereby undertake to grant permission for the construction of industrial buildings, hotel or structures for the purpose of entertainment or any combination thereof on lands to which planning application T.A. 322 relates subject to conditions in relation to matters referred to in paragraphs (e), (g) and (h) of subsection (2) of section 26 and paragraph (c) of subsection (1) of Section 56 of the 1963 Act."

Section 55 of the Act of 1963 provides as follows:-

(1) If, on a claim made to the planning authority, it is shown

that, as a result of a decision under Part IV of this Act involving a refusal of permission to develop land or a grant of such permission subject to conditions (other than such condition as is referred to in paragraph (e), paragraph (g) or paragraph (h) of subsection (2) of section 26 of this Act) the value of an interest of any person existing in the land to which the decision relates at the time of the decision is reduced, such person shall, subject to the provisions of this Part of this Act, be entitled to be paid by the planning authority by way of compensation the amount of such reduction in value and, in the case of the occupier of the land, the damage (if any) to his trade, business or profession carried on on the land.

(2) In determining reduction of value for the purposes of this section, regard shall be had -

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- (a) to any permission under this Act to develop the land existing at the time of the decision,
 - (b) to any undertaking that may be given to grant permission to develop the land in the event of application being made under this Act in that behalf, and
 - (c) to the fact that exempted development may be carried out on the land,

and, in a case where there has been a refusal of permission, the calculation shall be made on the basis that, if permission had been granted, any conditions which might reasonably have been imposed in relation to matters referred to in paragraphs (e), (g) and (h) of subsection (2) of section 26 and paragraph (c) of subsection (1) of section 56 of this Act (but no other conditions) would have been imposed.

(3) In determining reduction of value for the purposes of this section in a case in which there has been a decision involving a refusal of permission, it shall be assumed that, after the decision and apart from any such undertaking as is mentioned in subsection (2) of this section, permission under this Act would not be granted for any development."

Section 57 provides as follows:-

"(1) Compensation under section 55 of this Act shall not be payable in respect of a decision whereby permission to develop land is refused if, notwithstanding that refusal, there is available with respect to that land permission for development to which this section applies or if compensation has already been paid under section 55 of this Act by reference to a previous decision under

Part IV of this Act involving a refusal of permission.

(2) Where permission for development to which this section applies is available with respect to part only of the land, this section shall have effect only in so far as the interest subsists in that part.

(3) Where a claim for compensation under this Part of this Act is made in respect of an interest in land, permission for development to which this section applies shall be taken for the purposes of this section to be available with respect to that land or a part thereof if there is in force with respect to that land or a part a grant of, or an undertaking to grant, permission under this Act for some such development, subject to no conditions other than conditions in relation to matters referred to in paragraphs (e), (g) and (h) of subsection (2) of section 26 and paragraph (c) of subsection (1) of section 56 of this Act.

(4) This section applies to any development of a residential, commercial or industrial character, if the development consists wholly or mainly of the construction of houses, flats, shops or office premises, hotels, garages and petrol filling stations, theatres or structures for the purpose of entertainment, or

industrial buildings (including warehouses), or any combination thereof."

On behalf of Grange it has been argued that the undertaking given by the County Council is not sufficient to satisfy the provisions of section 57. It is submitted that the decision to the contrary given by Gannon, J., in the case of Byrne .v. Dublin County Council (1983) 2 I.L.R.M. 213, under almost identical facts with regard to the time of the execution of the undertaking, need not be followed because it was not argued in that case that the provision of an undertaking at such a late stage deprived the claimant of his right to apply to An Bord Pleanala under the provisions of section 58 of the Act for a declaration that it would not be just the reasonable that the payment of compensation would be prevented by the provisions of sections 56 or 57 of the Act.

Subsection (1) of Section 58 of the Act provides as follows:-

"Where, in a case determined on an appeal under Part IV of this Act, permission to develop any land has, save in a case referred to in subsection (2) of this section, been refused or has been granted subject to any condition relating to any of the matters set out in paragraphs 3 and 4 of Part II of the Third Schedule to this Act,

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nothing contained in subsection (1) of section 56 or section 57 of this Act shall prevent compensation being paid if, an application having been made in that behalf within (but not after) two months after the notification of the decision by the Minister, the Minister makes an order declaring that he is satisfied that it would not be just and reasonable in the particular circumstances that payment of compensation should be prevented by the provisions of subsection (1) of section 56 or section 57 of this Act."

I am in agreement with the observations of Gannon, J., with regard to the unsatisfactory nature of the statutory provisions under consideration. In particular, section 55(2)(b) would seem to have a limited operation owing to the provisions of section 57, and section 58 should, in my opinion, have related the period of two months to the date of the notification to a claimant of the giving of an undertaking. I accept, however, that I have to apply a statute as I find it and that I am not entitled to substitute provisions which I consider to be more suitable or more equitable. Accordingly, I am of opinion that an undertaking given at the time of an arbitration is sufficient for the purposes of section 57 although I would certainly allow the costs of an arbitration to a

claimant under such circumstances.

It has also been argued that the undertaking may only be given on the same basis as a permission may be given under section 26 of the Act with regard to the provisions of the development plan and that this undertaking would offend against the development plan. Although there is no such finding by the arbitrator, the parties appear to have accepted that the area in question is zoned partly for light industrial development and partly for agricultural purposes. On behalf of Grange emphasis is placed on the fact that the undertaking adopts some of the words in section 57(4) including industrial buildings, hotel or structures for the purposes of entertainment or any combination thereof, that the various purposes mentioned in the subsection are governed by the first part of the subsection and can only come within the section if these purposes are of a residential, commercial or industrial character, and that hotels or structures for the purpose of entertainment cannot come within these overriding purposes. I prefer to accept that the subsection itself defines what are to be considered purposes which are to be considered as of a residential, commercial or industrial character, and I am not prepared to say that the purposes mentioned

in the undertaking cannot or ought not to be associated with light industrial development or commercial development.

It is further submitted that it is wholly unrealistic to give an undertaking for permission for industrial buildings, hotel or structures for the purpose of entertainment or any combination thereof for 45 acres at Swords and even more so if the undertaking was given in January, 1983, when the application related to 75 acres and that the undertaking must, therefore, be treated as having been given solely for the purpose of avoiding the payment of compensation and therfor given without bona fides. It does not seem to me that the object of avoiding the payment of compensation of itself necessarily makes such an undertaking improper. These provisions are contained in the Act to enable a planning authority to decide what is the best course to adopt and the fact that it may be considered that some of the provisions of the Act are unsatisfactory does not make it either fraudulent or dishonest of a planning authority to take advantage of them, provided that the final position is that the planning authority has not gone outside the provisions of the development plan.

In this case, it does not come well from Grange to allege

fraud or dishonesty on the part of the County Council in view of its claims with regard to land to which it had not sufficient title and its failure to disclose previous planning permissions.

The answers to the questions asked will be:-

1. The undertaking dated 19th January 1983, is a valid undertaking under the provisions of section 57 of the Act of 1963.
2. This undertaking precludes Grange from recovering compensation pursuant to section 55 of the Act.

Herbert R. McWilliam.

Herbert R. McWilliam.

28/3/84.

