



PAC-R-40

**Anne Ferris TD**

Mr. John McGuinness TD
Chairperson
Public Accounts Committee
Dáil Éireann
Leinster House
Dublin 2.



19th July 2011
Ref. AF

Dear John

I am bringing to your attention a matter of concern pertaining to Wicklow County Council and I enclose documentation regarding the case.

In short, the members of Wicklow County Council voted yesterday (Monday 18/7/2011) to borrow €3m for the acquisition of 1.4022 hectares of land in Greystones. This land was subject to a CPO served on the owners in 2004. There were two different valuations carried out on the land in 2006 and 2008.

I understand that Local Authorities are outside the remit of the PAC; however I believe that the purchase of this piece of land at €3m is a scandalous waste of taxpayers' money. I heard that a figure of €300,000 would reflect the current value of this land. I further understand that about a year ago the Bray Town Council approved seeking a loan of €6m to buy land under a CPO agreed many years prior to that.

I fully understand that when a CPO is agreed that the Local Authority must pay the amount agreed. However, the decision by local Councils to purchase lands at hugely inflated prices is a disgrace and I believe that the PAC should contact the Department of the Environment, Community & Local Government to urge a change in legislation concerning CPOs.

Yours sincerely

Anne Ferris TD
Member of Dáil Public Accounts Committee
Wicklow/East Carlow Constituency.

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COMHAIRLE CHONTAE CHILL Mhantáin

Wicklow County Council

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E-Mail: housing@wicklowco.ie
Web: www.wicklow.ie

Your Ref:

Our Ref:

28th June 2011

To: **The Cathaoirleach and Each Member of the Council**

Re: **COMPULSORY PURCHASE ORDER NO. 6 - 2004**
Acquisition of land at Three Trouts, Charlesland, Greystones, Co. Wicklow.

Dear Member,

An Arbitration hearing has concluded for the purchase of circa 1.4022 hectares of land at Three Trouts, Greystones, Co. Wicklow. The purchase price of the land has been agreed at €3 (Three) million and must be paid by 31st August 2011.

The lands are zoned within the current Greystones/Delgany Local Area Plan 2006-2012 - R2 "*To preserve and improve residential amenity - maximum of 17.3 residential units per hectare*". This zoning contained two objectives - one for a green corridor and one for roads.

Your approval is requested for the borrowing of €3 (Three) million for the acquisition of 1.4022 hectares of land at Three Trouts, Charlesland, Greystones, Co. Wicklow in accordance with the provisions of the Local Government Act, 2001, Section 106.

Please see attached report.

Yours sincerely,



Catherine Halligan,
Senior Executive Officer,
Housing & Corporate Estate

Land at Three Trouts, Charlesland, Greystones.

Compulsory Purchase Order No. 6 of 2004.

Wicklow County Council served a Compulsory Purchase Order on the owner of 1.4022 hectares of land at Three Trouts, Charlesland, Greystones, Mr. William Irwin, "Somerset", Church Road, Greystones, County Wicklow and on the occupier of this land, Mr. John Nolan, Charlesland, Greystones, Co. Wicklow on the 6th December 2004. The Compulsory Purchase Order was issued on the basis of a report dated 13th August 2004, from the Housing Senior Engineer, Michael Mangan, outlining that the site was suitable for the purpose of accommodating social and affordable housing and recommending that the Council acquire this land.

The above Compulsory Purchase Order was confirmed, without modification, by An Bord Pleanála on the 25th April 2006. A Notice to Treat was served on the 12th July 2006 on the above parties. A claim was received from Lennox Estates, acting on behalf of Mr. Irwin on the 17th August 2006 in the amount of €10,425,000. A claim was also received on the 16th August 2006 from Ganly Walters, acting on behalf of Mr. Nolan who was grazing the land in the amount of €6,349,325.

G.V.A. Donal O'Buachalla was engaged by the Council to value the lands and their report of the 30th June 2008 advised that -

If the lands are owned by Mr. Irwin the land valued was €4,580,000 and if the lands are owned by Mr. Nolan the value was €5,215,000 as Mr. Nolan had land adjoining the land in question and provided good access to the land contained in the Compulsory Purchase Order.

Both Mr. Irwin and Mr. Nolan died in the Autumn/Winter of 2008 but the Legal Personal Representatives of both Mr. Irwin and Mr. Nolan sought to have this matter resolved.

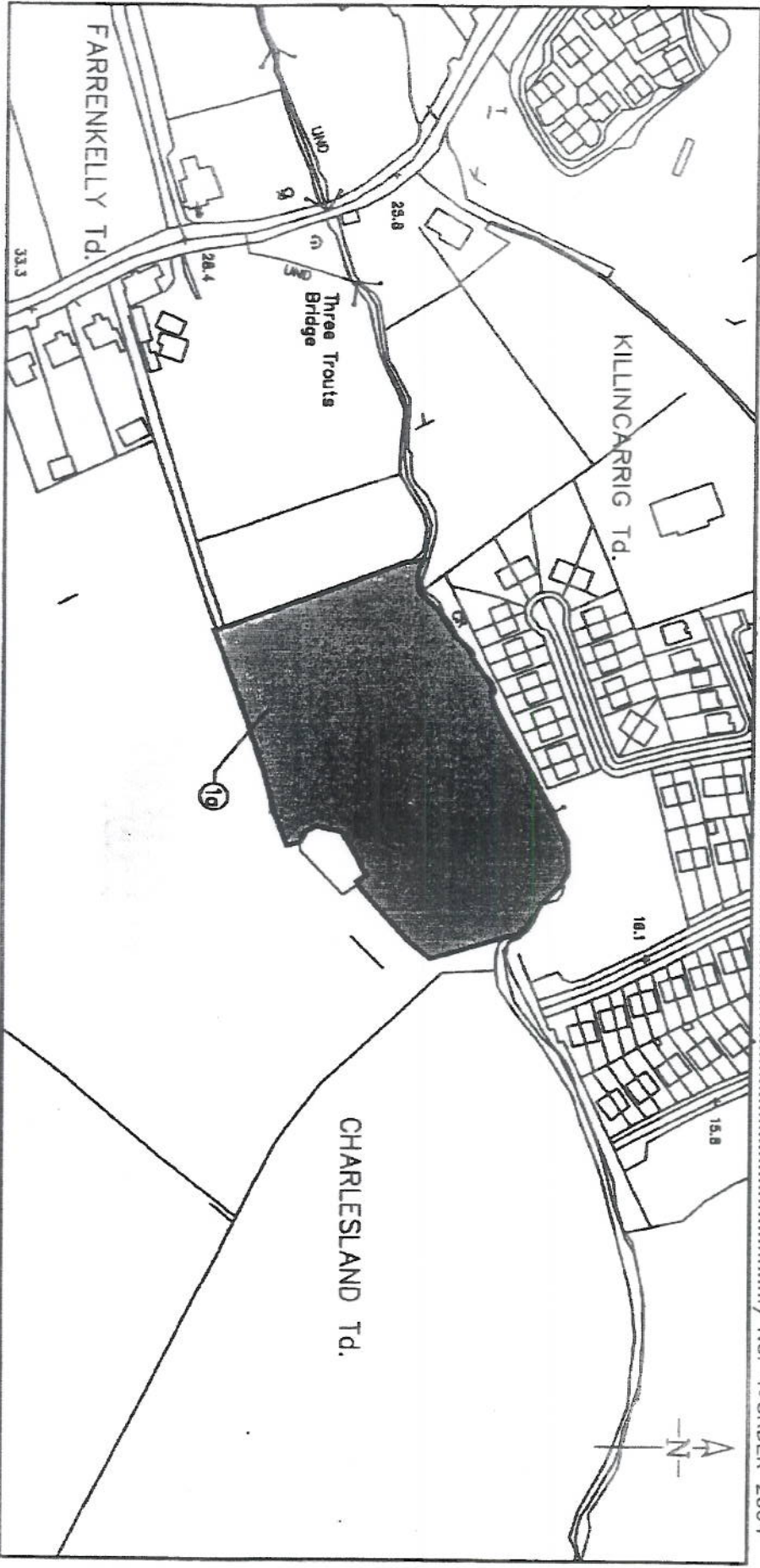
A Notice to Enter was not served in this case but as the Council had served the Notice to Treat we were legally committed to proceed with the purchase of the land.

After a lot of detailed discussion and correspondence passing between all parties the Irwin interest referred the matter to the Property Arbitrator. This Hearing took place on the 24th March 2011 with a settlement figure of €3m having been agreed between representatives of the Irwin and Nolan Estate.

This amount has to be paid before the 31st August 2011 and your approval is requested for the borrowing of €3m.

Catherine Halligan
29th June 2011

WICKLOW COUNTY COUNCIL COMPULSORY PURCHASE (.....) LANDS AT CHARLESLAND GREYSTONES (.....) No. 4-ORDER 2004



Extract from O.S. Sheet 5732\A

THE OFFICIAL SEAL OF THE LOCAL AUTHORITY WAS AFFIXED
 HERETO THIS DAY OF 2004
 IN THE PRESENCE OF:-

CHAIRMAN\NOMINATED MEMBER
 DIRECTOR OF SERVICES FOR HOUSING
 AND CORPORATE ESTATE.
 SENIOR EXECUTIVE OFFICER CORPORATE AFFAIRS

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**WICKLOW
 COUNTY
 COUNCIL**

**DIRECTOR OF SERVICES
 HOUSING & CORPORATE ESTATE
 COUNTY BUILDING, WICKLOW.**

NO. 4-ORDER 2004
 TITLE: COMPULSORY PURCHASE OF
 LANDS AT CHARLESLAND
 GREYSTONES.

WICKLOW COUNTY COUNCIL
 COMPULSORY PURCHASE
 ORDER NO. 4-2004 **NO. 4**

DATE: 18/08/04
 BY: E. Murphy
 AUGUST 2004

PLANNING NO. 04\027\100



Comhairle Chontae Chill Mhantáin

WICKLOW COUNTY COUNCIL

Aras An Chontae
Cill Mhantáin
Telefón : (0404) 20158
Fax No : (0404) 20112
Intl VPN : 1035 2158
E-Mail: cosec@wicklowcoco.ie
Web: www.wicklow.ie

Your Ref:

Our Ref: **13ú Ia Iuil 2011**

DON CHATHAOIRLEACH AGUS DO GACH BALL

Tionolfar Gnáthcrinniu de Chomhairle Chontae Chill Mhantain sa Seomra Comhdhála, Aras an Chontae, Co. Chill Mhantain Dé Luan, 18ú Ia Iuil, 2011 ag **2.00 p.m.** chun an gnó seo a leanas a chur i gcrích.

Iarrtar ort bheith i lathair.

The Special Meeting of Wicklow County Council will be held on Monday 18th July, 2011 in the Council Chamber, County Buildings, Wicklow commencing at **2.00 p.m.** to consider the agenda detailed hereunder.

Your attendance is requested.

Beannacht Leat.

LORRAINE GALLAGHER
SENIOR EXECUTIVE OFFICER
ENTERPRISE & CORPORATE SERVICES

CLAR GNÓ

1.	To seek the approval of the Council for the borrowing of €3,000,000 for the acquisition of 1.4022 hectares of land at Three Trouts, Charlesland, Greystones, Co. Wicklow in accordance with the provisions of the Local Government Act 2001 (Section 106) (report previously circulated)
2.	To dispose of 0.2544 hectares or thereabouts of land at Boley, Shillelagh, Co. Wicklow to Gail Hanbidge, Whitestown, Stratford, Co. Wicklow (previously circulated)
3.	To dispose of 0.0214 hectares or thereabouts of land at 59 Monastery, Enniskerry, Co. Wicklow to John and Denise Corcoran, 106 Elgin Heights, Bray, Co. Wicklow (previously circulated)

14 July, 2011.

Ms. Catherine Halligan,
Senior Executive Officer,
Housing and Corporate Estate,
Wicklow County Council,
County Buildings,
Wicklow.

CPO No. 6- 2004: Acquisition of Three Trouts, Charlesland, Greystones, Co. Wicklow.

Dear Catherine,

I refer to your letter of 7 July, 2011 in connection with the purchase of the above lands for housing purposes.

As you will be aware, the issues referred to were the subject of a meeting between Minister Penrose and a delegation from the Council, including the Director of Services for Housing.

It was explained at this meeting that the issue of the CPO was a matter for the local authority and that it would not be possible to include these lands in the Land Aggregation Scheme at this point. This, however, does not preclude them from being submitted to the Department for inclusion at a future date.

Yours sincerely,

Denis McDonald
Assistant Principal
Social Housing (Supply) Section
Tel. 01 888 2288

CASE TO COUNSEL

WICKLOW COUNTY COUNCIL COMPULSORY PURCHASE (LANDS AT CHARLESLAND, GREYSTONES) NO. 6 ORDER OF 2004.

Landowner: William Irwin, Deceased.
Querist: Wicklow County Council.
Agent: David Sweetman, Law Agent.

Counsel is briefed with the booklet previously prepared by Agent for purposes of briefing Counsel for the arbitration hearing on 24th March 2011 in the above entitled CPO.

The attention of Counsel is drawn to the confirmation of the Order by An Bord Pleanála dated 25th April, 2006 and to the Notice to Treat dated 12th July, 2006. Counsel is also referred to the claims submitted on 16th and 17th August, 2006. As Counsel is aware the Acquiring Authority did not withdraw its Notice to Treat dated 12th July, 2006 on receipt of either of the claims from the interested landowners.

The matter was ultimately referred to arbitration and the Arbitrator was appointed on 18th June, 2010.

Counsel will further recall that the arbitration commenced on 1st November, 2010 but was adjourned ultimately to 24th March, 2011.

On that day the arbitration commenced and after considerable discussions a settlement was reached with the landowners whereby the Council agreed to purchase the lands in question for €3,000,000 together with the Claimant's costs reasonably and necessarily incurred, such costs to be taxed in default of agreement.

Querist's Director of Services for Housing brought a proposal to the meeting of the Council on the 4th July, 2011 seeking the authority of the Council Members to borrow €3,000,000 to complete the purchase of these lands.


The Council Members expressed a number of reservations and Counsel is asked to advise in relation to the legal points raised by the Members.

1. The Members queried whether or not there was any way of withdrawing from the Compulsory Purchase process at this stage. Agent, at the meeting, indicated that once a Notice to Treat had been served the only opportunity available to an Acquiring Authority to withdraw from a CPO was to withdraw its Notice to Treat pursuant to the provisions of Section 5(2) of the Acquisition of Land (Assessment of Compensation) Act 1919. Counsel is asked to advise as to whether there is any other mechanism available to the Council which would enable it to withdraw from the CPO other than this provision.

2. During the course of the meeting the Members suggested that the settlement reached between the parties should have had a clause within its text making the settlement subject to the Members authorising the loan which in fact the Council has to take out in order to finance the purchase without resorting to other funds at its disposal. Agent inclines to the view that if such a clause had been suggested to the Claimants they would have refused to agree to the inclusion of such a clause in any terms of settlement and would have continued with the arbitration and / or sought an award from the Arbitrator. Counsel is asked to advise as to whether such a clause would affect the Council's legal position given that the Notice to Treat and Landowner's Statement of Claim had both been served in 2006 and the Notice to Treat had not then been withdrawn as is permitted under the 1919 Act.
3. It was also suggested at the meeting that the Notice to Treat should have been issued "subject to loan approval being forthcoming" or the equivalent and Counsel is asked to advise as to whether such a provision in a Notice to Treat would be valid.
4. Counsel is asked to advise generally.

Dated this 11th day of July, 2011.

Signed:


David Sweetman,
Law Agent,
Wicklow County Council,
County Buildings,
Wicklow.

**IN THE MATTER OF WICKLOW COUNTY COUNCIL COMPULSORY PURCHASE
(LANDS AT CHARLESLAND, GREYSTONES) NO. 6 ORDER OF 2004**

**AND IN THE MATTER OF A CLAIM BY THE ESTATE OF WILLIAM IRWIN,
DECEASED AND**

**IN THE MATTER OF A CLAIM BY THOMAS ALPHONSUS NOLAN AND WICKLOW
COUNTY COUNCIL, RESPONDENT.**

OPINION

For: Law Agents, Wicklow County Council.

I have been asked to advise Agents acting on behalf of Wicklow County Council in relation to the above entitled compulsory purchase order arising out of queries raised by the elected members of Wicklow County Council at a meeting on the 4th July 2011.

It should be noted that I represented Wicklow County Council at the arbitration and negotiated the settlement of the matter on its behalf.

A number of queries have been raised and these are as follows:

1. Whether the Notice to Treat should have been issued "Subject to Loan Approval being forthcoming" or words similar.
2. Whether or not there is any way of withdrawing from the Compulsory Purchase process at this stage.
3. Whether it would have been feasible to have made the settlement of the arbitration conditional upon the members of Wicklow County Council authorizing the loan which is necessary in order to finance the purchase without resorting to other funds at its disposal.

Legal Framework:

The Compulsory Purchase Order which was made herein was made pursuant to the provisions of Section 76 and the Third Schedule to the Housing Act of 1966 as extended by Section 10 of the Local Government(No. 2) Act of 1960 and as amended by the Planning and Development Acts as they then were of 2000 to 2002. That Order referred to one parcel of land only being Plot No. 1A of the Schedule attaching to the C.P.O. in question and being land owned by William Irwin and occupied by John Nolan. The Order in question had the official seal of Wicklow County Council affixed thereto on the 6th of December 2004 as was witnessed by the Cathaoirleach, the County Manager, the Senior Executive Officer of Corporate Affairs and the Director of Services for Housing and Corporate Estate. Same followed on from efforts made by officials within Wicklow County Council to agree voluntary purchase of the lands in question which lands were in close proximity to and could be accessed from the Council's existing housing estate a Burnaby Lawns.

Section 79 of the Housing Act 1966 as amended by Section 198 of the Residential Tenancies Act of 2004 provides as follows:

“(1) Where a compulsory purchase order made and confirmed under this Act has become operative and the Housing Authority decide to acquire land to which the order relates, the Authority shall serve a Notice (in this part referred to as a ‘Notice to Treat’) on every owner, lessee and occupier of the land stating that they are willing to treat for the purchase of the several interests in the land and requiring each such owner, lessee and/or occupier to state within a specified period (not being less than one month from the date of service of the Notice to Treat) the exact nature of the interest in respect of which compensation is claimed by him and details of the compensation claimed, and, if the authorities so require, distinguishing separate amounts of the compensation in such manner as may be specified in the Notice to Treat and showing how each such amount is calculated.

(2) A Notice to Treat under subsection (1) of this Section shall be deemed to be a Notice to Treat for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919.

By reason of the Statutory requirement that the Notice to Treat must state that the County Council is willing to treat for the purchase of the several interests in the land, it is my view that were the Council to serve a Notice to Treat indicating that they were only prepared to treat “subject to loan” or other similar words, that same would not have been a valid Notice to Treat and would not have served to give effect to an obligation on the part of the land owner to convey his lands in question. A Notice required under Section 79 must be served within eighteen months of the date of the Order becoming operative pursuant to the provisions of Section 217(6) of the Planning and Development Act of 2000 which provides that where a compulsory purchase order or provisional order is confirmed by a local authority or the Board and becomes operative, then notwithstanding Section 123 of the Lands Clauses Consolidation Act of 1845, if the local authority decide to acquire land to which the order relates, the local authority shall serve any Notice required under any enactment to be served in order to treat for the purchase of the several interests in the land (including under Section 79 of the Housing Act, 1966) within eighteen months of the order becoming operative. This period has been extended only in circumstances in which the C.P.O. or the underlying Environmental Impact Assessment has been the subject of a Court challenge (pursuant to the provisions of the Compulsory Purchase Orders (Extension of Time Limits) Act of 2010.

Clearly if the Council were sending Notices indicating that they were not in fact willing to treat but were only in a position to do so subject to further steps being taken by them, in this case obtaining loan approval, same would be likely in my opinion to be held by a Court not to comply with the provisions of Section 79 of the Housing Act 1966 and given the Constitutional protection to private property it is likely, in my opinion, that a Court would construe the requirements of Section 79 strictly as against a local authority seeking to exercise compulsory purchase powers.

Accordingly, in relation to Question No. 1, it would be my view that the Council would not be in a position to validly serve a Notice to Treat which sought to render same conditional upon the

County Council obtaining loan approval.

2. Whether there is a way for the local authority to withdraw from the compulsory purchase process at this stage.

While a Notice to Treat need not be served or indeed could be served by the County Council only in relation to some and not all of the land in respect of which compulsory purchase order had been made, once the Notice to Treat is served, same does not comprise merely an invitation to negotiate but is the first step in the exercise of the compulsory powers obtained when the compulsory purchase order becomes operative. The Notice to Treat is not a contract "but it creates a relationship which ripens into an enforceable contract when the compensation has been either agreed by the parties or assessed by the arbitrator" (See *Henchy J in Greendale Building Company v Dublin County Council* [1977] IR 256). Accordingly where as here the compensation has been agreed or indeed, if it had proceeded to arbitration, had been determined by the Arbitrator, then "either party can obtain specific performance, the one to have the title conveyed on payment of the price, the other to have the price paid on conveying the legal title" (See *Birmingham City Corp. V West Midland Baptist (Trust) Association* [1969] 3 All ER 172).

The Notice to Treat in this case was served on the 12th day of July 2006. An Bord Pleanála having confirmed without modification the compulsory purchase order on the 25th of April 2006. A Notice to Treat on that point in time was served both on William Irwin and on John Nolan. The Notice to Treat were in the same format and required the submission of a statement in writing showing the exact nature of the interest in the lands in respect of which the parties were claiming compensation and the details of the amount of compensation claimed by Mr. Irwin and Mr. Nolan for their interests in the land, setting out how such amount had been calculated. A Notice for Claim on behalf of William Irwin was received, dated the 17th August 2006 which amounted to a claim in the sum of €10,425,000. On the 16th August 2006 Messrs. Ganly Walters submitted a claim on behalf of John Nolan claiming the sum of €6,349,325.

As noted in McDermott & Woulfe 'Compulsory Purchase and Compensation in Ireland': "A Notice to Treat, once served, cannot be withdrawn unilaterally by the acquiring authority unless it has statutory power to do so."

However Section 5, subsection 2 of the Acquisition of Land (Assessment of Compensation) Act of 1919 does grant a power to the local authority in providing inter alia as follows:

"The Notice of Claim shall state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amount under separate heads and showing how the amount claimed under each head is calculated, and when such a Notice of Claim has been delivered the acquiring authority may, at any time within six weeks after the delivery thereof, withdraw any Notice to Treat which has been served on the Claimant or on any other person interested in the land authorised to be acquired, but shall be liable to pay compensation to any such claimant or other person for any loss or expense occasioned by the Notice to Treat having been given to him and withdrawn, and the amount of such compensation shall, in default of agreement, be determined by an official arbitrator."

By reason of the foregoing, once six weeks had expired from the date of delivery of the Notice of Claim received it would appear from at least one of them on the 21st of August 2006, then the local authority were not in a position thereafter, at least in the absence of any amended Notice of Claim on behalf of the Claimants herein, to withdraw the Notice to Treat.

In the circumstances, were the County Council to fail to complete the conveyance of the lands in question in respect of which they had served a Notice to Treat, which has not been withdrawn and could not be withdrawn after the expiry of six weeks referred to above, and where the compensation has been in this case agreed and in default of agreement would have been assessed by the arbitrator, the County Council must close the sale in question and if they fail to do so, they will be subject to an Order of Specific Performance including the costs of those proceedings as well as potentially an Order for Payment of Interest on the purchase price at rates which are penal, amounting in the present case to something in the order of 12 to 15 percent if so ordered by the Court.

3. Whether the settlement reached between the parties should have had a clause within its text making the settlement subject to the members authorizing the loan which the Council has to take out in order to finance the purchase without resorting to other funds at its disposal.

In this regard, it must be noted that the settlement reached herein was reached against a backdrop whereby the arbitration had been set for that day and if agreement had not been reached, the arbitration would have proceeded and would have been likely, in my opinion and the views of the expert valuers engaged on behalf of the Council, to have given rise to a finding that the compensation to be paid should be greater than the €3,000,000 agreed. Furthermore, if the matter had proceeded, the costs would have been likely to have been far greater both in relation to the basis for costs (since the arbitrators frequently give costs on a solicitor/client basis which would be likely to give rise to a higher amount for costs than the party/party basis which were agreed to as part of the settlement, and would also have resulted in a number of days costs since the arbitration, in my opinion, would have been likely to have run for something in the order of three days.

In so far as any suggestion of inserting a clause into the agreement that it could in some way be subject to the Council obtaining approval for a loan, in my opinion such a clause, if same had been suggested, would under no account have been accepted by the Claimants and they would have simply proceeded to have the arbitration determined since the arbitrator's award would under no circumstances have included any such conditionality and there would have been no basis whatsoever for seeking to have the arbitrator's award made subject to loan approval. The Claimants at that time had received a Notice to Treat and they were entitled to have their compensation either determined by the arbitrator or agreed by compromise between the parties, but there was no basis whatsoever for the Council to seek to, at that stage, render the compensation figure subject to loan approval since there was no chance whatsoever of the arbitrator directing same.


General:

In my opinion, while clearly the price paid for the lands is extremely high relative to their current

worth, it must be noted that under Section 84 of the Housing Act of 1966, it is specifically provided that compensation payable for land acquired compulsorily should be the value of the land at the time of the service of the Notice to Treat. Given the fact that the Notice to Treat in this case was served on the 12th of July of 2006, which was close to if not actually at the very peak of the market, and given the fact indeed that the six week period following the service of the Notice to Claim during which such Notice to Treat could have been withdrawn, also occurred at a time the market was exceptionally buoyant, and given the values for lands being paid in the area as of that time, it is my view that if this matter proceeded to arbitration the Council would have been likely to have an award made against them in excess of the figure of €3,000,000 which was agreed and which was negotiated in circumstances in which we were contending on behalf of the Council that given the competing claims between Mr. Nolan and Mr. Irwin that same would have had the effect of reducing the figure from what might well otherwise have been obtained by the Claimants of something in the order of €6,000,000. That argument however was far from certain to succeed in front of the arbitrator, given in particular the defect that Mr. Nolan's and Mr. Irwin's estates had compromised their competing claims between them albeit after the date of the service of the Notice to Treat.

In the circumstances of the case, while I can well understand how the Council is reluctant to have to proceed with the purchase of this land at a price which is undoubtedly far in excess of its current market value, the issue in question herein however was that the alternative of allowing the matter to proceed to arbitration in circumstances in which such an award would have been immediately enforceable by the Claimants would, in my opinion, have been very likely to have resulted in a far higher award being made as against the Council herein.

Nothing further occurs at present.


ESMONDE KEANE, S.C.
The Law Library,
Distillery Building,
145/151 Church Street,
Dublin, 7.

July 13, 2011