THE HIGH COURT

[2021] IEHC 504

[2019. No 1398 S.S.]

In the Matter of the Acquisition of Land (Assessment of Compenstion) Act 1919

And in the Matter of the Property Values (Arbitration and Appeals Act) 1960,

And in the Matter of Part V of the Planning and Development Act 2000 (As Amended)

And in the Matter of an Arbitration

Between

Noel O'Driscoll, Nora O'Driscoll, Noel O'Driscoll Jnr, Joseph O'Driscoll, Michael O'Driscoll, Denis O'Driscoll, Donal O'Driscoll, John O'Driscoll and Helen O'Driscoll Carrying on Business Together Under the Style and Title of the Levis Quay Partnership

Claimants

and

Cork County Council (Formerly Skibbereen Town Council)

Respondent

Special Case for the Opinion of the High Court Stated by Paul Goode Property Arbitrator Pursuant to S. 6 of the Above Entitled Act of 1919

Arbitration – Points of law – Case stated – Property arbitrator stating a special case for the opinion of the High Court – Whether the property arbitrator was entitled to award interest to the claimants

Digest

Facts: The claimants, the O'Driscolls, delivered a Statement of Claim dated the 6th September, 2019 and the respondent, Cork County Council, delivered a reply dated the 22nd October, 2019. The respondent in its reply referred to four points of law and pleaded that if the claimants did not accept the points of law, then each point was a real and substantial issue of law which required to be decided for the purposes of completing the arbitration. The respondent requested the property arbitrator, Mr Goode, to state a special case for the opinion of the High Court on each point of law. By written legal submissions to the property arbitrator, the respondent raised a fifth point of law. The claimants consented to the property arbitrator stating the special case for the opinion of the High Court. The questions for the High Court as set out by the property arbitrator were as follows: (1) whether a planning authority can accept the transfer of zero units in satisfaction of a determination of An Bord Pleanála pursuant to s. 96 of the Planning and Development Act 2000, that a developer shall enter into a Part V agreement with a planning authority for the transfer of an unspecified number of onsite social and affordable units; (2) whether a property arbitrator, in an arbitration for the purposes of s. 96 (7) of the 2000 Act, is required to have regard to the development plan (a) as of the date of the grant of the planning permission contained in the planning condition giving rise to the arbitration, (b) as at the date of the Board's order, or (c) as of the date of the commencement of the arbitral proceedings; (3) whether a Part V agreement must provide for the transfer to the planning authority of the same percentage of lands or units in the development as is specified in the policy objectives set out in the relevant development plan as being required to be reserved for the purposes of social and affordable housing; (4) whether a property arbitrator calculating the compensation payable upon transfer of units in accordance with s. 96 of the 2000 Act should calculate the site costs on the basis of the provisions of the 2000 Act in force at the time of (a) the grant of the planning permission, (b) the date of the Board's order, or (c) the commencement of the arbitral proceedings; (5) whether a property arbitrator in an arbitration for the purposes of s. 96 (7) of the 2000 Act may award interest as compensation in respect of the costs of retaining ownership since their completion of any units which the arbitrator orders to be transferred to the respondent by his award.

Held by Creedon J that it was not within the jurisdiction of the property arbitrator to find that the agreement should be for the transfer of zero units and such a finding would be ultra vires his function. The Court found that the answer to question (1) is "no". The Court was satisfied that the property arbitrator is bound to determine matters by reference to the law in force at the date of the Board's order which law is the same as was in force at the date of the planning permission. The Court determined that the answer to question (2) is (a) or in the alternative (b) but not (c). Creedon J held that it was not within the jurisdiction of the property arbitrator to alter the determination of the Board as to the percentage of lands or units to be transferred; accordingly, the answer to question (3) is "yes". The Court determined that the provisions of the Urban Regeneration and Housing

Act 2015 could not be applied by the property arbitrator and accordingly the answer to question (4) is either (a) or (b), which amount to the same thing, but not (c).

Creedon J held that, in circumstances where there had been considerable delay in proceeding with this case and where there is no statutory provision which allows for interest in the terms claimed by the claimants, the answer to question (5) is “no”.

Case stated.

22nd 06 2021

Decision of Ms. Justice Creedon, **delivered on the 22nd day of June, 2021**

Background

1.

Paul Goode, arbitrator in the above entitled arbitration (hereinafter referred to as the arbitration), was appointed pursuant to the Property Values (Arbitration and Appeals) Act 1960 by the Reference Committee on the 31st July 2019.

2.

The claimants have delivered a Statement of Claim dated the 6th September, 2019 and the Respondents have delivered a reply dated the 22nd October, 2019.

3.

The respondent in its reply, referred to four points of law and pleaded at paras. 7, 9, 19 and 23 of that reply that if the claimants do not accept the points of law as stated by the respondent, then each point is a real and substantial issue of law which requires to be decided for the purposes of completing the arbitration. On this basis, the respondent requested the property arbitrator, Mr. Paul Goode, to state a special case for the opinion of the High Court on each said point of law. In addition, by their written legal submissions to the property arbitrator, the respondents raised a fifth point of law concerning the property arbitrator's entitlement to award interest to the claimants.

4.

The claimants, while contesting the respondent's view of the said points of law, have consented to the property arbitrator stating this special case for the opinion of the High Court.

5.

The property arbitrator has not entered upon the hearing of the arbitration but confirm that the following facts are agreed between the parties, whilst the following issues are agreed as being in dispute between them, the resolution of which will require a decision on the points of law herein stated for the opinion of the High Court.

Statement of agreed facts

6.

The claimants state that they are the owners of certain lands at Levis Quay off of Main Street, Skibbereen in the County of Cork and while the Respondent has required proof of such ownership by its reply, it accepts that ownership for the purposes of this special case.

7.

The Respondent is the planning authority for *inter alia*, the town of Skibbereen, Co. Cork and is the successor planning authority to Skibbereen Town Council.

8.

In 2004, planning permission was granted by Skibbereen Town Council for a mixed residential and commercial/retail development including inter alia 42 apartments, a restaurant/public house at ground/terrace level, retail units and offices, reconstruction of part of the existing buildings and the development of open urban spaces at their premises at Levis Quay, off of Main Street Skibbereen Co. Cork by planning permission, reference number 19/03 dated the 6th November 2003, as varied by planning permission reference no. 04/ 57014 dated the 13th August 2004 (the planning permission).

9.

Condition 49 of the planning permission states as follows:-

> *"49. The applicant or any other person with an interest in land to which this application relates shall enter into an agreement with the planning authority providing for the transfer of land or houses or partially or fully serviced sites to the planning authority or persons nominated by the planning authority in accordance with Part V of the Planning and Development Act 2000. Before any development commences and preferably within eight weeks of the grant of this permission provision to this effect shall be embodied in an agreement between the Applicant (or other person with an interest in land to which this Application relates) and the planning authority in accordance with ss. 96 and 47 of the Planning and Development Act 2000".*

10.

The reason given for this condition is stated in the second column to the planning permission as follows:-

> *"49. To ensure compliance with the policy objectives of the joint housing strategy which have been included in the development plan".*

11.

Condition 49 was not complied with prior to the commencement, or, completion of the development the subject of the planning permission. The development was completed in or about 2007.

12.

The parties failed to reach a concluded agreement for the purpose of condition 49 and in or about 2013, the claimants referred the issue of compliance with condition 49 to An Bord Pleanála (hereinafter the Board) pursuant to s. 96 (5) of the Planning and Development Act 2000 as amended (the PDA).

13.

By order, dated the 5th September, 2013, the Board determined that compliance with condition 49 required the transfer of onsite social and affordable housing units at the claimant's development and directed the claimants to enter into an agreement with the respondent pursuant to s. 96 of the Planning and Development Act 2000 (the PDA), within 8 weeks of the date of the said determination, providing for the transfer to the respondent of the said onsite social and affordable housing units.

14.

The agreement as required by the said order has not been entered into and in 2019 the claimants applied to the Land Values Reference Committee for the appointment of a Property Arbitrator and Mr. Goode was appointed. His role under s. 97 of the above entitled Act of 2000, is to determine the number and price of units in the development to be transferred.

The relevant extracts

15.

Condition 49 refers to the joint housing strategy as included in the development plan.

16.

As of the date of grant of the planning permission, the Cork planning authority's joint housing strategy of November, 2001, was included in the respondent's then development plan, being the Skibbereen Town Development Plan 2004 – 2010. It provided that the Cork local authorities would require 20% of all land zoned for residential use (or for a mix of residential and other uses) to be reserved for social and affordable housing. The claimant's lands at Levis Quay were zoned primarily in the town centre and subject to this requirement.

17.

As of the date of the Board's order in September, 2013, the relevant development plan was the Skibbereen Town Development Plan 2009 – 2015 and the relevant housing strategy document appended thereto was the Cork authority's joint housing strategy 2009. These documents confirmed that it was both “necessary” and the Council's policy that all areas affected thereby should reserve the maximum provision of 20% social and affordable housing, as allowed for under the Planning and Development Act 2000.

18.

The current Cork planning authority's joint housing strategy as included in the respondent's current development plan, provides that the Council will have a requirement that only 14% of units on all land zoned for residential used (or for a mix of residential and other uses) be reserved for the purposes of social and affordable housing.

Issues in dispute

19.

The claimants propose that the property arbitrator should order the transfer of 8 apartments being one 1 – bedroomed apartment (namely Apartment no. 36 of the development), five 2 – bed apartments (namely apartments no. 16, 23, 28, 29 and 30 in the development) and two three – bedroom apartments (namely apartments no. 25 and 35 in the development) for a consideration of either €1,975,213.09 or €1,742,240.79 depending on the determination as to the statutory regime which applies to site costs in the arbitration. The claimants are also claiming interest as compensation for having to retain ownership of any apartments the property arbitrator orders to be transferred from 2007, being the date of completion of the apartments to the date of hearing.

20.

The Respondent planning authority proposes that the property arbitrator should order the transfer of zero apartments in the development.

21.

There is an issue between the parties as to which development plan the Property Arbitrator should have regard to. The claimants maintain it is the development plan current as of the date of grant of planning permission, whilst the respondent maintains it is the development plan as of the date of initiation of the arbitration, i.e. the current development plan.

22.

In light of the above, the claimants maintained that condition 49 requires that the Part V agreement provides for the transfer of 20% of the residential content of the development subject of the planning permission to the respondent because of the reference to the reservation of 20% of land for social and affordable housing in the development plan, both at the date of grant of planning permission and as of the date of the Board's order.

23.

The respondent on the other hand maintained that the percentage reserved in the development plan is not definitive and that it has a discretion as to

what Part V agreement it enters into. The respondent said that it exercises this discretion in accordance with the criteria identified in s. 96 (3) (c) and (h) of the above entitled Act of 2000 and s. 69 of the Local Government Act 2001 and that such discretion entitles it on occasion to take zero units in a development.

24.

The claimants maintained that there is no discretion granted to the respondent as to what Part V agreement it enters into since this issue is determined by the Board in its order, which order was not challenged by the respondent. The claimants also maintained that the criteria identified in s. 96 (3) (c) and (h) are not matters within the Property Arbitrator's jurisdiction to consider when determining the identity, number and price of the units to be transferred as same are issues of principle which are matters properly within the jurisdiction of the Board and which were considered by the Board as part of its order.

25.

If the respondent is obliged to take units in the claimant's development, then issues arise between the parties as to how the site costs should be determined and as to interest (if any) payable.

26.

The claimants maintained that site costs should be determined on the basis of s. 96 (6) (b) of the Planning and Development Act 2000 as amended by the Planning and Development (Amendment) Act 2002 which was the legislation in force at the date of the grant of the planning permission. The respondent maintained that they should be determined on the basis of s. 96 (6) (b) of the Planning and Development Act, 2000, as last amended by s. 31 of the Urban Regeneration and Housing Act, 2015, as that was the law in force as of the date of the commencement of the arbitration.

27.

The claimants maintained that the Property Arbitrator is entitled to award the claimants interest as compensation for having to retain ownership of any apartments that the Property Arbitrator ordered transferred since the completion of those apartments and the respondent denied that the Property Arbitrator has such an entitlement.

The questions for the High Court as set out by the Property Arbitrator

28.

“I, Paul Goode, Property Arbitrator in the above entitled arbitration pursuant to s. 6 of the above entitled Act of 1919 and at the request of the respondent and with the consent of the claimants pray the High Court for its opinion on the following questions of law arising in the course of the arbitration;

(1) Whether a planning authority can accept the transfer of zero units in satisfaction of a determination of An Bord Pleanála pursuant to s. 96 of the Planning and Development Act 2000, that a developer shall enter into a Part V agreement with a planning authority for the transfer of an unspecified number of onsite social and affordable units.
(2) Whether a property arbitrator, in an arbitration for the purposes of s. 96 (7) of the Planning and Development Act, 2000, is required to have regard to the development plan:(a) As of the date of the grant of the planning permission contained in the planning condition giving rise to the arbitration;(b) As at the date of the Board's order or;(c) As of the date of the commencement of the arbitral proceedings.
(3) Whether a Part V agreement must provide for the transfer to the planning authority of the same percentage of lands or units in the development as is specified in the policy objectives set out in the relevant development plan as being required to be reserved for the purposes of social and affordable housing.
(4) Whether a property arbitrator calculating the compensation payable upon transfer of units in accordance with s. 96 of the Planning and Development Act 2000 should calculate the site costs on the basis of the provisions of the Planning and Development Act 2000 in force at the time of (a), the grant of the planning permission, (b) the date of the Board's order or, (c) the commencement of the arbitral proceedings.
(5) Whether a property arbitrator in an arbitration for the purposes of s. 96 (7) of the Planning and Development Act 2000 may award interest as compensation in respect of the costs of retaining ownership since their completion of any units which the arbitrator orders to be transferred to

the respondent by his award.

Respondent's Arguments

29.

As the respondent had requested the property arbitrator to state a special case for the opinion of the High Court on each of the five questions the respondent opened the case before the Court.

30.

The respondent opened in detail the provisions of ss. 93, 94, 95 and 96 of the Planning and Development Act 2000, as amended by the Planning and Development (Amendment) Act 2002, which are pertinent to these proceedings.

31.

The Court was also referred to the referral of the Planning and Development Bill 1999 by the President to the Supreme Court, pursuant to Article 26 of the Bunreacht Na hÉireann 1937 (hereinafter, the referral). The Supreme Court gave its judgment in Re Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill 1999 [2000] 2 IR 321. Deciding that Part V of the Bill was not repugnant to the provisions of the Constitution, the Court held, inter alia, that the objective of Part V of the Bill was to provide affordable housing and was within the competence of the Oireachtas to attain by the use of planning legislation. The Court's attention was drawn to a number of passages from this judgment by the respondent to demonstrate the principles and policies underpinning the legislation.

32.

The respondents also opened the case of Glenkerrin Homes v. Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 which is a decision of Clarke J. (as he then was). These proceedings concerned the legal entitlement of the defendant, if any, to alter a previously existing practice of issuing “letters of compliance” in relation to the payment of financial contributions required under planning permission granted to developers. The issues between the parties were also inextricably linked to the requirements placed upon developers under Part V of the Planning and Development Act 2000 as amended, relating to the obligation of developers to contribute to the provision of social and affordable housing. The dispute arose from the absence of an agreement between the parties as to how those obligations were to be met. The defendant maintained that in the absence of such an agreement it was under no obligation to provide letters of compliance while the plaintiffs sought to establish that it had a legitimate expectation that the letters of compliance would issue.

33.

In granting a declaration that the defendant was obliged to make available letters of compliance in respect of any unit within the development, Clarke J. held *inter alia* at p 418–419 that:-

> *“That the relevant provisions of s. 96 of the Act of 2000 require that any issue concerning the terms of any agreement which might require to be reached under s. 96 could be referred, for dispute resolution, either to An Bord Pleanála or to a property arbitrator. The matters which might be referred to a property arbitrator under subs. (7) included the “number and price of houses to be transferred”. Even though the section was silent as to whether there was conferred on a property arbitrator a jurisdiction to enable him to identify, in case of dispute, which units should, in fact be transferred, a property arbitrator did have such a jurisdiction. Where the units in a development were of different types and the question of the identification of the units to be transferred on foot of an agreement was so inextricably linked to the question of the number and price of the units to be so transferred, that a jurisdiction to determine those matters must necessarily be implied.”*

34.

Clarke J. held further at para 50 that:-

"…where issues arise as to whether, at the level of general principle, the social and affordable housing obligations of the parties should be met by(say) the provision of cash, other land, serviced sites, a combination of those, or the like, then the Board was the only body which had jurisdiction to resolve such questions. However, once the issue of principle had been determined,…then the question of value (including the identification of the particular type of units to be transferred), can be determined by a property arbitrator".

35.

Clarke J. held further at the same paragraph that:-

"Such a construction has the merit of dividing any possible disputes requiring resolution into two relatively separate types of dispute with a logical sequence as and between them … It, therefore, follows that in such circumstances all disputes would be resolved and an agreement as determined either in whole, or in part by the parties, the Board or the property arbitrator, could be implemented".

36.

He also held at p. 419:- *"That the term "agreement" as used in s. 96 of the Act of 2000, as amended, must include an arrangement arrived at as a result of one or other or both of the dispute resolution mechanisms specified. The term "agreement" must be taken in the context of subs. (5) and thus must be taken to include an arrangement determined by the appropriate dispute resolution mechanism".*

37.

The respondent also opened the High Court decision of Cork County Council v. John Shackleton & others [2011] 1 I.R. 443, which again was a judgment of Clarke J. (as he then was) that concerned the interpretation of s. 96 of the Planning and Development Act 2000 as amended and which the respondent references in its arguments set out below.

Question One

38.

In addressing the first question posed by the Property Arbitrator as to whether the planning authority could accept the transfer of zero units in satisfaction of the order of An Bord Pleanála made pursuant to s. 96 of the Planning and Development Act of the 5th September 2013, the respondent argued that Part V of the Planning Act imposes obligations on developers and confers entitlements on planning authorities, not the reverse. They quoted from the decision of the Supreme Court in the Re Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill 1999 S.C No.184 of 2000 at p.359 where it said:-

"The general policy of the Act is clear: it is that what is called "affordable housing" should be made available under the machinery provided in Part V to persons defined as "eligible persons…"

The respondent argued that it was therefore clear that Part V is intended to confer benefit not on property developers but on the community through the aegis of local authorities. The respondent said that Part V was never intended to subsidise developers or rescue those whose units cannot be sold. Rather, they argued, it was intended to confer a public benefit and to achieve a saving by reference to market value as appears from a further extract from the same case where the Supreme Court said at p.349 as follows:-

"That statutory scheme … . clearly envisages that a landowner who develops his property for housing and who is not exempted by other provisions of Part V will in general be required to cede up to 20% of the land to the housing authority for the provision of houses at a price which reflects the existing use of the land (normally agricultural value) and which, accordingly, will be significantly below the market value of the land, if by market value is meant the price which the property might be expected to fetch if sold on the open market enjoying the same right to develop as that enjoyed by the landowner in respect of the remaining 80% or more of the lands in question. Compensation will, accordingly, be paid for the undoubted restriction on the exercise by the landowner of his property rights, but it will in that sense be compensation at a level significantly short of its market value".

39.

The respondent argued further that in addition a local authority in making a Part V agreement must also act in accordance with s. 69 of the Local Government Act 2001 which requires that:-

> *"a local authority, in performing the functions conferred on it … shall have regard to—*
>
> *(a) the resources … that are available or likely to be available to it for the purpose of such performance and the need to secure the most beneficial, effective and efficient use of such resources".*

40.

Further, the respondent argued that the Department of Housing Planning, Community and Local Government Guidelines of 2017 acknowledge on p. 10 that:-

> *"It is recognised that there may be occasional cases where none of the units on the sites are suited to the needs of the local authority".*

The respondent stated that these guidelines are issued by the Minister under s. 28 of the Act and the respondent local authority is therefore obliged to have regard to them as was recognised by Clarke J. in the case of Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417, referred to earlier in this judgment. They argued that accordingly, the proposition that where units are the currency of a Part V agreement that they will always suit the local authorities need is not consistent with the guidelines.

41.

The respondent argued further that a zero requirement on the part of the respondent is not in conflict with the general principles identified in the case of Cork County Council v Shackleton and others [2011] 1 I.R. 443 referred to above. They argue that in Shackleton the Council had a significant housing need in a market that was extremely heated and competitive and that the current economic backdrop is a reverse of that; that there is a surfeit of apartments and that the Council's need is not the same. In the current changed economic context, the respondent argues that it can meet its housing objectives without recourse to the Levis Quay apartments.

42.

The respondent argued that while the claimants may say that a zero number of units runs contrary to the decision of An Bord Pleanála of the 5th of September 2013, the respondent argued that Part V explicitly gives the property arbitrator jurisdiction over the question of numbers therefore he is entitled to make an award setting a zero number on the basis *inter alia* that the local authority does not have a need for these apartments and that there is no statutory barrier to his doing so.

43.

The respondent accepted that it is true that the question of need is considered by An Bord Pleanála in the course of its decision making and the Council did make a case to An Bord Pleanála that it already had a Part V agreement for the acquisition of off-site units. They said however that one of Clarke J.'s useful determinations in Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 was his finding that an agreement must be taken to include an arrangement determined by the appropriate dispute resolution mechanism. The respondents argued that that being so, there presently is a partial Part V agreement by virtue of the order of An Bord Pleanála. Furthermore, they argued the property arbitrator's role is to resolve the final outstanding elements, being number and price of the property the subject of that agreement and so the provisions of s. 96 (3) (c) and (h) are still of relevance to the Council's deliberations and must inform the property arbitrator's award. The respondent argued that it would be absurd if the respondent and property arbitrator in giving consideration to the number of apartments, could not consider aspects of the housing strategy or the best use of resources or the need to counteract undue segregation.

44.

The respondent argued that the proviso in s. 96 (3) is a key provision. It requires the "aggregate monetary value" of the benefit that accrues to the local authority to be equivalent to the "net monetary value" the local authority would have obtained if the default option of the transfer of land to the local authority had been chosen. The respondent argued that in Cork County Council v Shackleton and others [2011] I I.R. 443 the developers argued that this equivalence mechanism should be operated in a manner such that the local authority would require a low number of units. The proviso was employed in a manner to provide a minimum number of units to the local authority but Clarke J. found that to be an incorrect interpretation.

45.

The respondents now argue that more than a decade further on, the claimants in this case are arguing the reverse that the proviso should be operated in a manner to provide the maximum number of units to a local authority and in addition the local authority is obliged to take that maximum number. The respondent argued that Clarke J.'s judgment in Cork County Council v Shackleton and others [2011] 1 I.R. 443 does not support either limb of such an interpretation and that the first thing that Clarke J. confirmed in Shackleton was that the local authority had an entitlement, not an obligation.

46.

Secondly, the respondent said the entitlement has a limit. Clarke J. stated at para 80:-

> *"The limit, on any view, of the local authorities' entitlement must, therefore, be at or about the number of units defined by the applicant's proposal"*.

Therefore, the respondent argued that the local authority entitlement exists somewhere between zero and maximum entitlement.

47.

The respondent argued that in determining whether this proviso has any relevance in determining where the needle settles on the entitlement scale that Clarke J. considered this briefly when he stated at para 78:-

> *"There is also weight in the suggestion that the proviso seems, in its language, to be designed to ensure no loss of value to the local authority rather than to represent the basis for calculating the number of units to be transferred in default of agreement"*.

The respondent said that in this case, it does not have a housing need for these units thus it declines the entitlement and thus the claimant developers are relieved of their burden. They argued that this approach does no violence to Clarke J.'s judgment in Cork County Council v Shackleton and others [2011] 1 I.R. 443 or the language of the Act, and argued that by contrast the claimant's approach turns the Shackleton judgment on its head.

48.

Referring again to the Shackleton decision, the respondent said that Clarke J. applied a purposive interpretation of s. 96 and that this purposive method also requires to be applied to the interpretation of the proviso within s. 96 (3) (b). The respondent said that in general, on a plain and ordinary reading of Part V and in particular s. 96 (3) (b) (i), the purpose is to transfer to the local authority houses that are the subject of agreement. They argued that s. 96 has all to do with agreement between the developer and the local authority and that in the event that agreement proves difficult then the dispute resolution mechanisms come into play. The respondent argued that to suggest, as the claimants do, that the proviso operates so as to compel the local authority to acquire the maximum entitlement of units once An Bord Pleanála determines that s. 96 (3)(b)(i) is to apply is an interpretation that runs counter to or beyond the purpose of s. 96. The Respondent argued that the interpretation which is in keeping with the purpose of the Act, is as Clarke J. sets out that the proviso operates to ensure no loss of value to the local authority.

49.

The respondent further argued that the claimant's suggestion also flies in the face of the local authority's entitlement to take into account certain

considerations in coming to a Part V agreement, that is ss. 96 (3) (c) and 96 (3) (h). The respondent argued that if the local authority was really under an obligation to take the maximum entitlement it would hardly be given a discretion to consider such a wide range of matters. Indeed, the respondent argued that if the local authority's entitlement is in fact an obligation to take maximum entitlement then that would absurdly deprive the arbitrator of his role and jurisdiction in determining the number of units.

50.

The respondents argued that the claimant's interpretation is one that tries to transfer a normal commercial risk from the developer to the local authority, that being the risk that there are no purchasers out there for apartments built at the height of the economic boom. They said that the claimants are trying to escape that risk by saying that the respondent is under a statutory duty to always acquire maximum entitlement no matter what the local authority's actual need is. They said further that in any event and to the extent that the proviso in any way touches upon the respondent's duty as a housing authority, the courts have been clear in acknowledging that the management of housing stock is not a matter for the courts. In that regard, they refer to the Court of Appeal decision of Peart J Mulhare v. Cork County Council [2018] IECA 206, and para. 34 where it stated:-

> *"As has been stated by numerous judges over the years, the management of the council's housing stock is very much a matter for the housing authorities in the first instance and not for the courts".*

51.

The Respondent submitted that neither of the objectives of Part V identified by the Supreme Court in Re Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill 1999 S.C. No.184 of 2000 is met by compelling a local authority to take the maximum entitlement oblivious to its resources and where it does not have such a need. They argued that compelling a local authority to take the maximum entitlement would interfere with the local authority's entitlement to consider its resources and the need to secure the most effective and efficient use of those resources and would similarly interfere with the property arbitrator's jurisdiction to have regard to these same factors.

Question Two

52.

In addressing the second question as to the date of the development plan to which a property arbitrator in an arbitration for the purposes of s. 96 (7) of the Planning and Development Act 2000 is to have regard, the respondent argued that it is wholly unrealistic to suggest as the claimants do, that the property arbitrator in an arbitration commenced in 2019, should have regard to the development plan as of 2003, a historical document of no current relevance. They said this is illustrated by the fact that Ms. Henderson, the claimant's planning expert, in her precis of evidence has regard to the 2014 Housing Strategy as comprised in the respondent's current development plan. The respondent argued that this lack of realism proceeds from the claimant's basic misapprehension that the Part V process is designed to benefit them as developers.

Question Three

53.

In addressing the question as to whether a Part V agreement must provide for the transfer to the planning authority of the same percentage of lands or units in the development as is specified in the policy objectives set out in the relevant development plan as being required to be reserved for the purposes of social and affordable housing, the respondents argue that each Part V agreement must be considered on its merits. They argued that in some cases such as the instant one, that may require that no units be taken, in others it may require that units be taken, but in each case the number of units will be a matter for the statutory discretion of the planning authority which discretion is to be exercised based on statutory criteria outlined above.

54.

The respondent says that s. 94 (4) (c) of the Act requires a local authority in its housing strategy to provide as a general policy a specified percentage not being more than 10% (currently) of residential land to be reserved for housing purposes. They argued that different local authorities

have used different language in their housing strategy documents to reflect this requirement. They gave the example again of the case of Cork County Council v Shackleton at para 93 in which Dun Laoghaire Rathdown had expressed this requirement as follows:-

> *"Where the developer/applicant proposes to accord with this requirement by the provision of units the following should be taken as a guide to the developer/applicant. 20% of the gross residential floor area of the proposed development is considered the proportion of the development to be under negotiation for the purpose of social and affordable housing"*

55.

The respondent argued that this was an understandable formulation as it indicated that 20% would be under negotiation. They go on to say that Cork County Council's housing strategy of 2001 found that *"it is estimated that by reserving 20% of zoned lands for social and affordable housing a further … . 500 houses will be available"*.

56.

The respondent argued that Policy 1.3 within the Cork Housing Strategy reads:-

> *"The Cork local authorities will require 20% of all land zoned for residential uses … to be reserved for the purpose of social and affordable housing"*.

The respondent said that this formulation is admittedly stronger than the one above as it does not mention negotiation. They confirm that the updated and current housing strategy puts it as follows in Policy no. 1.2:-

> *"The Councils will have a requirement that 14% of units on all land zoned residential … to be reserved for the purposes of social housing"*.

57.

The respondents argued that the claimants seek to take advantage of this type of language suggesting that it imposes an obligation on a developer to hold back 20% (or 14%) of units. The respondent argued that this is incorrect and that the mechanism for agreeing what happens to units is the mechanism in s. 96. They confirm that Clarke J. was of that view in Cork County Council v Shackleton and others [2011] 1 I.R. 443 where he was commenting on the Dun Laoghaire, Rathdown, housing strategy as against the legislative provisions. He said at para 93:-

> *"As a statement of the preferred position of the plaintiff in the second case,, this is wholly unobjectionable. However, it cannot alter the legal position of the entitlements and obligations arising under Part V…. It does not seem to me, therefore, that the inclusion of the provision which I have just quoted in the housing strategy can affect the proper criteria by reference to which the arbitrator is to determine the number of units to be transferred"*.

58.

The respondents go on to argue that applying the same principle to this case the statement in the housing strategy as to a 20% or 14% reservation does not override the criteria that the arbitrator is to have regard to including the vital consideration that the respondent has no housing need for these units. The respondent went on to quote an article written by Galligan entitled *"The Equivalent Monetary Value Principle in Social Housing"* IPELJ 2005 12 (3) where he opines that a percentage stated in a housing strategy should not determine what units are taken. He writes that:-

> *"It would appear to follow logically that insofar as the "currency" is different to land simpliciter, when a developer opts to transfer houses or sites, that there is no necessity for the land component in such transfer to represent the same percentage of land as specified in the relevant Development Plan objective"*.

59.

The respondent argued that this view is in keeping with Clarke J.'s view that the proper criteria for determining the number of units to be transferred are to be found in s. 96 and that the respondent commends this view to this Court.

60.

The respondent maintained that a housing strategy is a development plan document that was created in the public interest and that it does not create private rights or legitimate expectations such as are alleged by the claimant. The respondent said that this is trite law since the decision of the Supreme Court in Glencar Exploration plc. v. Mayo County Council (no. 2) [2002] 1 IR 84 per Fennelly J. at 160 – 163.

61.

The respondent went on to argue that the housing strategy is a component of the development plan, and referred to ss. 94 and 95 of the Act. The respondent stated that development plans themselves are a strategy document, as per s. 10 (1) of the Act. They argued that while a landowner may own land that is zoned as residential, they do not have an assurance as to getting planning permission to develop that land. A landowner still has to apply for planning permission and they have options of appeal and judicial review thereafter. The respondent submitted that the same applies here, there is no assurance in a strategy document that the local authority will take Part V units in the percentage specified in it.

Question Four

62.

Turning to the fourth question as to whether a property arbitrator, when calculating the compensation payable upon transfer of units in accordance with s. 96 of the Planning and Development Act 2000, should calculate the site costs on the basis of the provisions of the Planning and Development Act, 2000, in force at the time of the date of the planning permission, the date of the Board's order, or, the date of the commencement of the arbitral proceedings, the respondent argued that since the 1st September, 2015, when s. 31 (1) of the Urban Regeneration and Housing Act 2015 came into force there has been a relevant change in the determination of site costs as set out in s. 96 (6) (b). Accordingly if the pre – 2015 regime applies herein then the existing use value of the land on which the apartments are built will be determined based on present day values, whereas if the post – 2015 regime applies, it will be determined on 2003 values.

63.

The respondent argued that s. 33(2) of the 2015 Act sets out how the amendments made by s. 33(1) of the 2015 Act to s. 96 of the Planning and Development Act apply to existing Part V agreements as follows:-

> *"Where, on the date of the coming into operation of subsection (1), a permission has been granted subject to a condition referred to in section 96(2) of the Act of 2000 but a commencement notice within the meaning of Part II of the Building Control Regulations 1997 has not been lodged, any existing agreement under section 96 of the Act of 2000 may be amended prior to the lodgement of such commencement notice with the consent of all parties to such agreement provided that the agreement so amended complies with the provisions of section 96 on the date on which the agreement is amended".*

64.

The respondent argued that therefore the position is that the post – September 2015 regime does not apply to pre-existing Part V agreements unless development has not commenced, in which case any amendments to the agreement can only be made if those amendments bring the agreement into compliance with the post – September 2015 regime. The respondent therefore submitted that an obvious inference from the foregoing is that post – September 2015 regime applies to all Part V agreements entered into after September 2015. In this case they argued that the purpose of this arbitration is to fix certain terms of the Part V agreement in terms of the number and price of units to be transferred. Therefore it cannot be said that there is yet any conclusive Part V agreement between the parties and therefore it is submitted that the post – 2015 regime applies.

65.

The respondent said that even if there was no statutory provision in s. 33 (2) which implied the application of the post – 2015 September regime to post – September 2015 Part V agreements, it is submitted that such application would arise as a matter of simple contract law as at common law contracts are always governed by the law which applies when they are made. It is therefore submitted by the respondents that the answer to question 4 is the date of the commencement of the arbitral proceedings.

Question Five

66.

Turning to the final question of whether the property arbitrator in an arbitration for the purposes of s. 96 (7) of the Planning and Development Act may award interest as compensation in respect of the costs of retaining ownership since the completion of any units which the arbitrator shall order to be transferred to the respondent by his award. The respondent submitted that there is no provision in s. 96 (7) for the property arbitrator to award such compensation or interest and no statutory basis for same has been identified by the claimants in their Statement of Claim. They said further that any delay in finalising the Part V agreement arises from a failure of the parties to operate the dispute resolution mechanisms in a timely fashion and the claimants cannot rely on their own delay as entitling them to interest.

67.

In conclusion, the respondent argued that Part V agreements are the mechanism whereby developers may be burdened with the loss of the profit from a percentage of their sites for the public benefit. A developer who is spared any of this burden when a local authority declines its entitlement has no cause for complaint and it would be entirely inconsistent with the statutory intent for developers who claim the local authority has not complied with Part V to thereby gain a guaranteed market for that percentage of their units and would create a perverse incentive for noncompliance.

68.

Accordingly, the respondent submitted that the Court should make an order answering the question posed by the property arbitrators as follows:-

(1) Yes, it can.
(2) (c) As of the date of the commencement of the arbitral proceedings.
(3) No, there is no such requirement.
(4) (c) the time of the commencement of the arbitral proceedings.
(5) No, he may not.

The Claimant's Arguments

69.

In addressing the five questions the Claimant sets out its submissions as follows:-

Question One

(1) In respect of Question 1, the Claimant argued that this requires the Court to consider:-

(a) The correct interpretation of s. 96 of the Planning and Development 2000 (the PDA 2000) and whether it is as the respondent contends, entirely at its option to refuse to enter into an agreement for the transfer of any units in the development,and
(b) The jurisdiction of the property arbitrator in a referral to him under s. 97 (7) when the Board has already made a binding determination under s. 96 (5) that a development planning authority shall enter into an agreement for the transfer of onsite units.

70.

The claimant said that the respondent in its submission, referred to the purpose of Part V and stated that “In this regard it is the respondent's position that Part V imposes obligations on developers and confers entitlements on planning authorities, not the reverse”. The claimant argued however that it is clear from Part V itself (and in particular the amendments made since its enactment), that the Oireachtas placed obligations on both planning authorities and developers in pursuit of the objectives sought to be achieved by Part V. They referred the Court to the observations of the Supreme

Court in re: Planning and Development Bill 1999 [2000] 2 IR 321 at p. 348 where it states as follows:

> *"The objectives sought to be achieved by Part V of the Bill are clear; to enable people of relatively moderate means or suffering from some form of social or economic handicap to buy their own homes in an economic climate where housing costs and average incomes make that difficult and to encourage integrated housing development so as to avoid the creation of large scale housing developments confined to people in the lower income groups."*.

71.

The claimant went on to argue that s. 96 (2) as originally enacted provided at s. 96 (2) that:-

> *"A planning authority, or the Board on appeal, may require as a condition of a grant of permission that the applicant … enter into an agreement with the planning authority, concerning the development for housing of land to which a specific objective applies in accordance with section 95 (1)(b)"*.

72.

The claimant went on to argue that the Planning and Development (Amendment) Act 2002 substituted a new s. 96 which provided at s. 96 (2) that:-

> *"A planning authority, or the Board on appeal, shall require as a condition of a grant of permission that the applicant … enter into an agreement under this section with the planning authority, providing in accordance with this section for the matters referred to in para (a) or (b) of subsection (3)"*.

73.

The claimant argued that this amendment removed any discretion from the planning authority and the obligation to require a developer to enter into a Part V agreement became mandatory. The claimant said that the respondent seeks by its proposed answer to Question 1 to escape from its statutory obligation under s. 96 (2) and that this is not permissible.

74.

The claimant went on to argue that as Clarke J. noted at para 27 in Cork County Council v. Shackleton [2011] 1 IR 443 under s. 96:-

> *"the local authority can, have an alternative agreement imposed on it, even though the developer cannot"*.

75.

The claimant went on to say that in Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417, Clarke J. noted at para 53 that:-

> *"while recognising that the local authority has to exercise, at least initially, a judgment as to its social and affordable housing requirements and the proper management of its financial resources, I am nonetheless satisfied that the legislation as a whole does not contemplate the possibility of the local authority being, in effect, given a veto over a planning permission by simply not entering into an appropriate agreement"*.

76.

The claimant said that the respondent relies on s. 69 of the Local Government Act 2001, however s. 69 (2) also states as follows with regard to the performance by a local authority of the functions conferred on it by the 2000 Act (or by any other enactment):-

> *"A local authority shall perform those functions which it is required by law to perform and this section shall not be read as affecting any*

such requirement”.

77.

The claimant therefore argued that it follows that the respondent cannot seek to invoke s. 69 as a basis for refusing to perform the Part V agreement at issue in this case and which it is required to perform pursuant to the Planning and Development Act 2000 and the order of the Board dated 5th September 2013.

78.

The claimant went on to argue that insofar as the respondent relies on the departmental guidelines of 2007 the guidelines go on to state however that:-

“In these cases the local authority must pursue one of the other available options, e.g. the acquisition of land on the development site”.

The claimant argued that the guidelines do not state that a local authority can simply waive the provisions of s. 69 requiring it to enter into an agreement to comply with the obligations set out in Part V of the Planning and Development Act 2000. Further, the claimant argued that given the Board's determination that compliance with Part V was to be achieved by the transfer of onsite units no other “available options” are open to the respondent.

79.

The claimant stated further that the respondent argued that it does not have a “need” for these apartments yet its most recent development plan still requires the 14% of units of land zoned for residential development to be reserved for social housing.

80.

The claimants said that the Oireachtas provided in s. 96 for the eventuality whereby a local authority is left with units which it no longer requires for social or affordable housing. s. 96 (11) (as inserted by the 2002 Act) provides that:-

“… . if a planning authority becomes satisfied that land, a site or a house transferred to it under subsection (3) is no longer required for the purposes specified in subsection (9) or (10), it may use the land, site or house for another purpose connected with its functions or sell it for the best price reasonably obtainable and, in either case, it shall pay an amount equal to the market value of the land, site or house or the proceeds of the sale, as the case may be, into the separate account referred to in subsection (12)”.

81.

The claimant therefore argued that the respondent will be free to exercise its rights under s. 96 (11) in this case once the apartments identified by the property arbitrator had been transferred to it. They stated that the housing needs of a local authority can change at any point in time including in the normally short periods between the time that planning permission is granted and building commences or even during the building period itself. Once the obligation of the local authority under a Part V agreement has crystallised pursuant to a decision of the Board, any changes in the housing needs of the local authority are intended to be addressed under s. 96 (11) and not by permitting it to be released through an arbitrary enforced construction of the jurisdiction of the property arbitrator to allow him to fix the number of apartments to be taken at zero.

82.

The claimant went on to state that the High Court in Glenkerrin Homes v. Dun Laoghaire Rathdown County Council [2011] 1 IR 417 and also in Cork County Council v. Shackleton [2011] 1 IR 443 sets out the correct approach to the interpretation of s. 96 and to the manner in which the dispute resolution provisions of that section were to be applied. These authorities are of relevance in considering the jurisdiction of the property arbitrator in the within reference.

83.

The claimant said that in Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417, Clarke J., as he then was, distinguished at para. 50 between matters which were within the jurisdiction of the Board to resolve under s. 96 (5) and matters which were in within the property arbitrator's jurisdiction under s. 96 (7) of the Act:-

> *"... where issues arise as to whether, at the level of general principle, the social and affordable housing obligations of the parties should be met by (say) the provision of cash, other land, serviced sites, a combination of those, or the like, then the Board is the only body which has jurisdiction to resolve such questions. However, once the issue of principle as to the means by which the social and affordable housing obligations of the party concerned is to be met has been determined then it seems to me that questions of value (including the identification of the particular type of units to be transferred), can be determined by the property arbitrator. Such a construction has the merit of dividing any possible disputes requiring resolution into two relatively separate types of dispute with a logical sequence as and between them. The type of disputes which can be referred to the Board are, therefore, at the level of principle as to the precise manner in which the obligations are to be met on the facts of any individual case. Where no dispute arises as to those matters or where any dispute that does arise has been determined by the Board, then any further disputes concerning the precise means of implementing the obligation in principle which relate to the identification of types of units to be transferred, the price and number of such units and the like can then be determined by the property arbitrator. It, therefore, followed that in such circumstances (when the property arbitrator has determined the matters properly referred to him) all disputes would be resolved and the agreement as determined either in whole or in part by the parties, the Board or the property arbitrator, could be implemented". (see also* Cork County v Shackleton and others [2011] 1 I.R. 443 *at para. 91)*

84.

The claimant argued that the question therefore of the mechanism by which the social and affordable housing obligations of both parties under planning permission are to be satisfied is a matter for the Board to determine. In this instance the Board made such a determination in its order of the 5th September 2013. By said order, the Board determined that:-

> *"That in order to give effect to the objectives of the housing strategy the developer shall enter into an agreement with the planning authority under s. 96 of the said Act within eight weeks of the date of this order providing for the transfer to the planning authority of onsite social and affordable housing units at Levis Quay Skibbereen Co. Cork".*

85.

The claimant argued that if the respondent believed that the order of the Board was an error, then its remedy was to judicially review the Board, but it did not do so.

86.

The claimants said that they attempted to enter into such an agreement as directed by the Board on a number of occasions but the respondent refused to engage.

87.

The claimant said that the respondent suggested that a zero requirement for units is not in conflict with the general principles identified in Cork County Council v Shackleton and others [2011] 1 IR 443, or that there is no statutory prohibition to the property arbitrator making an award setting a zero number of units to be transferred. The claimant argued however that this is simply incorrect as is clear from s. 96 (3) and the dicta of Clarke J. in Shackleton.

88.

The claimant said that the Board in its order has determined that the agreement between the parties is to be one under s. 96 (3) and therefore the

proviso set out therein is applicable. They said that Clarke J. described it as follows in Cork County Council v Shackleton and others [2011] 1 I.R. 443 at para at para 58:-

> *"A number of key provisions seem to me to be relevant. Firstly, there is the proviso to s. 96(3). That proviso is stated to apply to every case in which an alternative agreement is to be entered into. It specifies that "the aggregate monetary value of the property or amounts or both" to be transferred on foot of any alternative agreement is to be equivalent to "the monetary value of the land that the planning authority would receive" in the event that the default provision applied".*

89.

The claimant argued that in determining that the proviso required that the net benefit of any alternate agreement must be the same in money or money terms as the planning gain, Clarke J. continued as follows in Shackleton at para 66:-

> *"Viewed in that way the proviso simply requires that the net benefit of an alternative agreement should be the same as the net benefit of the default agreement. As the net benefit of the default agreement is the so called planning gain, then the proviso simply requires that the net benefit of any alternative agreement must be the same, in money or money terms, as the planning gain".*

90.

Clarke J. continued at para 97 as follows:-

> *"Where the sites are not homogenous it seems to me that the property arbitrator must do the best that he can (in the absence of agreement) to identify a set of housing units for transfer where the aggregate of the planning gain attributable to the site on which each of those units has been built approximates to 20% of the total planning gain on the development as a whole, subject only to a balancing payment. In selecting which types of sites and units require to be included in such an arrangement, the property arbitrator should give all due weight to the reasonable requirements of the planning authority involved as to the type of accommodation which they need to supply for the purposes of social or affordable housing or both"*

91.

The claimant went on to argue that the decision in Cork County Council v Shackleton and others [2011] 1 I.R. 443 reflects the position that under s. 96 (3) (b) a local authority must obtain so many units such that the sites to be transferred with built housing units on them is equivalent to 20% of the planning gain for the site, para 76 of that decision states the following:-

> *"... the only way in which the local authority can achieve the same monetary value from an alternative agreement, as it would have had it employed the default provision (and the proviso requires it to obtain such equivalence), is if the total value of the planning gain attributable to the sites to be transferred, with the built housing units on them, amounts to 20% of the planning gain attributable to the site as a whole."*

The same decision goes on to state at para 81:-

> *"... Obviously if the parties reach an actual agreement which meets the statutory obligations of the local authority concerned, and complies with the equivalence requirements of the proviso, then they can agree whatever number of units they like."*

92.

The claimants argued that the suggestion that the property arbitrator could direct that the agreement should be for the transfer of zero units would be in breach of s. 96 (3) (b) and have the effect of rendering the order of the Board of no effect, and would be thus *ultra vires* his function and a direction he may not lawfully make. The Board having determined that onsite units must be transferred by the claimant to the respondent the only issue for the property arbitrator is to identify the particular units to be transferred to comply with s. 96 (3) (b) and to determine the price payable to

the claimant as a result of the transfer of the identified units as required by s. 96 (7) (a). The property arbitrator has no jurisdiction to sanction any other proposal and his function is solely to carry out the measurement exercise in accordance with s. 96 (7). The principles by which he is to carry out that measurement exercise are well – established and set out in Shackleton.

93.

Accordingly, the claimant submitted that the answer to Question 1 is, "no, it cannot".

Question Two

94.

Turning to Question 2, the claimant argued that the wording of Condition 49 in both permissions provides that the claimant *"shall enter into an agreement with the planning authority providing for the transfer of land or houses … in accordance with Part V of the Planning and Development Act 2000*". The reason in both is cited as *"to ensure compliance with the policy objectives of the joint housing strategy which have been included in the development plan"*.

95.

The claimant went on to state that the Board made its order on the 5th of September 2013. On that date the position was as noted in the inspector's report at p. 10 as follows:-

> *"The only further restriction in respect of these options specified under s. 96 (3) (b) is that the value of the property or amounts transferred or paid must be equivalent to the monetary value of the land that the planning authority would receive under s. 96 (3) (a), in this case 20% of the site"*.

96.

The claimant says that Dodd, in *"Statutory Interpretation in Ireland"* (2008) para. 4.129 refers to the following general principle by reference to the dicta of Wright J. in Athlumney's *Case* [1898] 2 QB 547 as cited with approval by O'Higgins C.J. in Hamilton v. Hamilton [1982] IR 466 at 475:-

> *"No rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only"*.

97.

Accordingly, the claimants argued that as a result of the planning permission the claimant had an "existing right" to enter into an agreement with the respondent whereby 20% of the lands would be transferred to the respondent or that an alternative agreement would be entered into by the parties but which would be subject to the proviso in s. 96 (3) (b) namely that sufficient units had to be transferred so as to achieve an equivalent planning gain of 20% of the site as a whole. The claimant said it further had an "existing right" to have the price to be paid for such units calculated in accordance with the provisions of the planning acts then in force.

98.

The claimant went on to argue that as and from the date of the Board's order the claimant had an "agreement" with the respondent. The High Court held in Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 at p. 54 that the term "agreement" used in s. 96 must include an arrangement arrived at as a result of one or other or both of the dispute resolution mechanisms provided:-

> *"The term "agreement", it seems to me, must, therefore, be taken in the context of subs. (5) and thus must be taken to include an arrangement determined by the appropriate dispute resolution mechanism"*.

99.

The claimant argued that it follows that as of the date of the Board's order, there was an agreement in place between the parties that onsite units at Levis Quay were to be transferred by the claimant to the respondent, the final terms of which agreement were to be determined by the property arbitrator in terms of number, identity and price of such units.

100.

The claimant argued that it is trite law that an agreement whereof specified elements are to be determined by arbitration in default of agreement nevertheless remains an agreement taking effect from its date that can be legally enforced (see " *Contract Law in Ireland*", McDermott and McDermott, 2nd ed Bloomsbury professional at para. 2196 et seq). The property arbitrator is bound to determine matters by reference to the law in force at the date of the Board's order, which law is the same as was in force at the date of the planning permission.

101.

The Claimant argued that by way of analogy, in the context of a notice to require the fee simple served under the Landlord and Tenant Acts in Smith (Harcourt Street) Ltd. v. Hardwicke Ltd (Unreported, High Court, O'Keeffe P. 30th July 1971) the High Court noted that:-

> *"The effect of service of notice is to give rise to a statutory contract of sale between the vendor and the purchaser, the price being determined, in default of agreement, by arbitration"*.

102.

The claimant argued further that planning permissions are to be capable of being understood by members of the public. In Re: XJS Investments Ltd. [1986] IR 750 at p. 756, McCarthy J. stated as follows with regard to the construction of planning permission:-

See also Lanigan v. Barry [2016] 1 IR 656.

> *"(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material*.
> *(b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning"*.

103.

The claimant said that applying the above principles it cannot be that the percentage of units that were to be transferred under the 2003 / 2004 permission are to be calculated by reference to a percentage set out in the housing strategy enacted in 2014. They argued that any person reading the 2004 permission would understand from the reason for Condition 49 that its purpose was to ensure compliance with the housing strategy as set out in the development plan in force as of the date of the permission.

104.

The claimant said that it is also to be remembered that grantees rely on the terms of planning permissions in deciding whether to proceed to develop their lands in reliance thereon. They argued that grantees make such decisions based on the projected out turns likely to result from such development. The financial consequences of proceeding to develop on the assumption that the local authority will be bound by the housing strategy in force at the date of the permission could be altered drastically if the local authority could later change its housing strategy to the detriment of the developer. Regardless as to whether the developer could or could not advance a legitimate expectation argument against the right of a local authority to do so, the fact that the developer could be subjected to such a detriment provides a further strong argument against such a change having a retrospective application so as to impair the developers "existing right" under an earlier permission.

105.

The claimants argued that there is nothing in Condition 49 which requires the percentage of "reserved land" to be that in the development plan pending on when an agreement might ultimately be reached between the parties as opposed to when the permission was granted. The whole purpose of the planning permission is to require the amount of land reserved for social and affordable housing as of the date of permission to be transferred to a local authority. They argued that if for example a person had a planning permission at a time when the reserved percentage was 10% but in a later development plan the percentage was now 15% it is doubtful that it would ever be contended by a local authority that the developer was now obliged to transfer a greater percentage than applied when he got the benefit of permission.

106.

The claimant therefore submitted that the answer to Question 2 is "A or B but not C".

Question Three

107.

Turning to Question 3, the claimant argues that s. 94 of the Act requires a planning authority to include in its development plan a housing strategy setting out a specified percentage of the land zoned for residential use (or mixed uses) that "shall" be reserved under Part V for the provision of social and affordable housing.

108.

The claimant argued that s. 96 requires that a condition must be included in each planning permission requiring any person with an interest in such lands to enter into an agreement with the planning authority either (a) transferring such part of the lands requiring to be so reserved to the planning authority as provided for in S. 96 (3) (a), or, (b) an alternative agreement providing for the transfer of built houses etc. as provided for in s. 96 (3) (b).

109.

The claimant argued that what is clear from the entire of Part V is that once the planning authority has decided the relevant percentage in its development plan that is the percentage that must be transferred as part of any agreement under s. 96 (3) (see also Shackleton para. 20).

110.

It is therefore submitted by the claimant that the answer to Question 3 is "yes it must so provide".

Question Four

111.

Turning to Question 4, the claimant argued that the applicable statutory provisions for calculating the site costs at the date of the planning permission and the Board's order were the same. The respondent asserted that the price to be paid to the claimants should be determined by s. 96 as amended by s. 33 of the Urban Regeneration and Housing Act 2015 (which came into force on the 1st September 2015) rather than s. 96 as set out in the Planning and Development (Amendment) Act 2002.

112.

The claimant argued that aside from the general principle against retrospectivity described above, here the Urban Regeneration and Housing Act which brought in the amendments relied upon by the respondent itself expressly deals with the issue of what prior planning permissions are to be caught by the amendments contained in the 2015 Act. S. 33 (2) of the 2015 Act states:

> *"Where, on the date of the coming into operation of subsection (1), a permission has been granted subject to a condition referred to in section 96(2) of the Act of 2000 but a commencement notice within the meaning of Part II of the Building Control Regulations 1997 has not been lodged, any existing agreement under section 96 of the Act of 2000 may be amended prior to the lodgement of such commencement notice with the consent of all parties to such agreement provided that the agreement so amended complies with the provisions of section 96*

on the date on which the agreement is amended".

113.

The claimants argued that the 2015 Act does not provide that it has retrospective application save for the scenario provided in s. 33 (2) of that Act. That section only applies where an agreement has been entered into between the local authority and the developer but no commencement notice has been served for the works. The claimants say such a scenario is not applicable in this instance.

114.

The claimant argued that in this instance as a result of the order of the Board of the 5th September, 2013, an agreement had been reached between the parties under s. 96 that the manner in which the social and affordable housing obligations were to be met was by the transfer of onsite units at Levis Quay. While the respondent did not agree as such to this transfer, the effect of the determination of the Board is that it amounts to such an agreement (as explained by Clarke J. in Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 (as set out above). On the date of the commencement of the 2015 Act, an agreement had therefore already been reached between the parties and a commencement notice had already been served, and there is therefore no scope under s. 33 (2) to amend that agreement (even if the parties wished to do so) and the provisions under the 2015 Act simply do not apply.

115.

The claimants therefore submitted that the answer to Question 4 is "A or B as the law in force was the same on both dates, but not C".

Question Five

116.

In addressing Question 5, the claimant argued that the property arbitrator is obliged to determine the price of the onsite units to be transferred to the claimant in accordance with s. 96 (3) (d) as inserted by the Planning and Development (Amendment) Act 2002, namely:-

"(d) Where houses or sites are to be transferred to the planning authority in accordance with an agreement under paragraph (b), the price of such houses or sites shall be determined on the basis of—

(i) the site cost of the houses or the cost of the sites (calculated in accordance with subsection (6)), and
(ii) the building and attributable development costs as agreed between the authority and the developer, including profit on the costs".

117.

The claimant stated that s. 96 (3) (d) of the 2002 Planning Act provides that in calculating the compensation payable "building" and "development costs" must be included in the calculation. Development costs are therefore different costs to the cost of the actual construction of the apartments. Development costs will involve the cost of funding construction and would include interest.

118.

The claimant argued that as the claimant has continued to carry an interest cost in relation to the finance of the building costs of those units it submits that it is entitled to recover interest on the building costs of the units which are to be transferred to the respondent from the date of completion to date of transfer.

119.

The claimant said that it did not cause the delay in the transfer. It claims that it is the respondent who has wrongly asserted defects in the construction of the pedestrian bridge (which is the subject of separate High Court proceedings) as a further reason to justify its refusal to engage with the claimant and to take a transfer of the required onsite units.

120.

The claimant therefore submitted that the answer to Question 5 is “Yes”.

121.

In conclusion, the claimant submits that the court ought to answer the questions stated as follows:- (i) No it cannot, (ii) A or in the alternative B but not C, (iii) Yes it must so provide (iv) A or in the alternative B as the law in force was the same on both dates but not C, (iv) Yes.

Discussion and Decision

122.

The background to this case to include a statement of the agreed facts, the relevant extracts, the issues in dispute and the questions for the High Court have been comprehensively set out at the beginning of this judgment and the court will not repeat them again here.

123.

The Court will answer the questions for the High Court raised by the Property Arbitrator by reference to the agreed facts as agreed between the claimant and respondent and set out above.

124.

In opening its arguments before the court the respondent opened Part V of the Planning and Development Act 2000 as amended by the Planning and Development (Amendment) Act 2002 and in particular ss. 93, 94, 95 and 96 of that Act which are pertinent to these proceedings.

125.

The court was also referred to the referral of the Planning and Development Bill 1999 by the President to the Supreme Court, In the matter of Article 26 of the Constitution and in the matter of Part 5 of the Planning and Development Bill 1999 [2000] 2 IR 321, where the Supreme Court decided that Part V of the Bill was not repugnant to the provisions of the Constitution and the respondent opened this judgment to the court to demonstrate the principles and policies underpinning the legislation.

126.

As set out the parties failed to reach a concluded agreement in accordance with Condition 49 of the Planning Permission, and the claimants, in or about 2013, referred the issue of compliance with Condition 49 to An Bord Pleanála pursuant to s. 96 (5) of the Planning and Development Act 2000 as amended.

127.

By order dated the 5th of September 2013 the Board determined that compliance with Condition 49 of the planning permission required the transfer of onsite social and affordable housing units at the claimant's development and directed the claimants to enter into an agreement with the respondent pursuant to s. 96 of the Planning and Development Act 2000 within eight weeks of the date of the said determination.

128.

The Board concluded that the transfer to the planning authority of onsite social and affordable houses would be consistent with the criteria listed under s.96 (3) (c) and s. 96 (3) (h) of the Planning and Development Act 2000 as amended and therefore in exercise of the powers conferred on it by s. 96 (5) of the Planning and Development Act 2000 as amended determined that in order to give effect to the objectives of the housing strategy the developer shall enter into an agreement with the planning authority under s. 96 of the said Act within eight weeks of the date of that order providing for the transfer to the planning authority of onsite social and affordable housing units at Levis Quay, Skibbereen, Co. Cork.

129.

This decision had been recommended to the Board by Ms. Emer Doyle, Inspector with An Bord Pleanála, in her report of August, 2013. This is a comprehensive report which sets out the factual background, the legislative framework and ultimately makes a recommendation to the Board in accordance with its ultimate decision. In her report she noted that the statutory development plan for the area at the time of the grant of the permission was the Skibbereen Town Development Plan 2004 – 2010 which included the Cork Planning Authority's Joint Housing Strategy of November 2001, which had as an objective to implement the provisions of the Cork Planning Authority's Joint Housing Strategy of November 2001. She further noted that Policy 1.3 of that strategy states as follows:-

> *"The Cork Local Authorities will require 20% of all land zoned for residential uses (or for a mix of residential and other uses) to be reserved for the purposes of social and affordable housing".*

130.

Neither party sought to judicially review this decision and no further action seems to have been taken in respect of this matter until 2019 when the claimants applied to the Land Values Reference Committee for the appointment of a property arbitrator under s. 97 of the Act of 2000.

Question One

131.

In considering the principles and polices underpinning the legislation and in particular the respondent's argument that the legislation imposes obligations on developers and entitlements on Local Authorities, the Court refers to the observations of the Supreme Court in re: Planning and Development Bill 1999 [2000] 2 IR 321 at p. 348 last paragraph where it states as follows:

> *"The objectives sought to be achieved by Part V of the Bill are clear; to enable people of relatively moderate means or suffering from some form of social or economic handicap to buy their own homes in an economic climate where housing costs and average incomes make that difficult and to encourage integrated housing development so as to avoid the creation of large scale housing developments confined to people in the lower income groups.".*

In that regard the Court is satisfied that the Oireachtas placed statutory obligations on both planning authorities and developers in pursuit of the objectives sought to be achieved by Part V of the PDA.

132.

Section 96 (2) of the Planning and Development (Amendment) Act 2002 provides that:

> *"A planning authority, or the Board on appeal, shall require as a condition of a grant of permission that the applicant, or any other person with an interest in the land to which the application relates, enter into an agreement under this section with the planning authority, providing, in accordance with this section, for the matters referred to in paragraph (a) or (b) of subsection 3".*

This amendment removes any discretion from the planning authority and imposes a mandatory obligation to require a developer to enter into a Part V agreement.

133.

The respondent, in its arguments, sought to rely on s. 69 of the Local Government Act 2001 and the Departmental Guidelines of 2007. By virtue of s. 69 (1) (a) of the Local Government Act 2001 the Local Authority shall have regard to the resources wherever originating that are available, or likely to be available to it for the purposes of such performance and the need to secure the most beneficial effective and efficient use of such resources, however s. 69 (2) states that a local authority should perform those functions which it is required by law to perform and this section shall not be read as affecting any such requirement. Accordingly, the Court is satisfied that the respondent cannot seek to invoke s. 69 as a basis for refusing to perform the Part V agreement it is required to perform pursuant to the Planning and Development Act 2000 and the order of the Board dated the 5th of September 2013.

134.

Similarly, regarding the 2007 guidelines, the Court notes that the guidelines state:-

> *"It is recognised that there may be occasional cases where none of the units on the sites are suited to the needs of the local authority. Every effort should however be made by the local authority by engagement with the developer at the design stage of the property to ensure that units suitable for the local authority's needs are included in the project"*.

135.

However, the Court further notes that the guidelines do go on to state as follows:-

> *"In those cases the local authority must pursue one of the other available options e.g. the acquisition of land on the development site (s. 96 (3) (a)) or the building or acquisition by the developer of houses/units elsewhere in the functional area of the local authority and the transfer of those houses to the local authority or persons nominated by the local authority including an AHB (s. 96 (3) (b) (iv))"*.

136.

Accordingly, the Court is further satisfied that the respondent cannot seek to invoke the 2007 Guidelines as a basis for refusing to perform the Part V agreement it is required to perform pursuant to the PDA and the order of the Board dated the 5th of September 2013.

137.

The Court is strengthened in that view by the decision of Glenkerrin Homes v. Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 referred to above, where Clarke J., as he then was, noted at p. 436 that:

> *"... while recognising that the local authority has to exercise, at least initially, a judgment as to its social and affordable housing requirements and the proper management of its financial resources, I am nonetheless satisfied that the legislation as a whole does not contemplate the possibility of the local authority being, in effect, given a veto over a planning permission by simply not entering into an appropriate agreement"*.

138.

The respondent argued that because there presently is a partial Part V agreement by virtue of the order of An Bord Pleanála, and the property arbitrator's role is to resolve the final outstanding elements, being number and price of the property the subject of that agreement, the provisions of s. 96 (3) (c) and (h) are still of relevance to the Council's deliberations and must inform the property arbitrator's award. Further it was argued that it would be absurd if the respondent and property arbitrator in giving consideration to the number of apartments could not consider aspects of the housing strategy or the best use of resources or the need to counteract undue segregation.

139.

In the Glenkerrin decision, Clarke J. distinguished between matters which were within the jurisdiction of the Board to resolve under s. 96 (5) and matters which were within the property arbitrator's jurisdiction under s. 96 (7) of the Act. The relevant portion of the judgment has been set out in detail above but can be best synopsised in the following extract at para 50:-

> *"The type of disputes which can be referred to the Board are, therefore, at the level of principle as to the precise manner in which the obligations are to be met on the facts of any individual case. Where no dispute arises as to those matters or where any dispute that does arise has been determined by the Board, then any further disputes concerning the precise means of implementing the obligation in principle which relate to the identification of types of units to be transferred, the price and number of such units and the like can then be determined by the property arbitrator"*.

140.

The Court finds that by its Order dated the 5th of September 2013 the Board has determined the agreement at the level of principle and determined that compliance with Condition 49 of the planning permission requires the transfer of onsite social and affordable housing units at the claimant's development and has directed the claimants to enter into an agreement with the respondent pursuant to s. 96 of the Planning and Development Act 2000 within eight weeks of the date of the said determination. What remains for the property arbitrator to do is to determine issues arising as to the means of implementing this decision.

141.

The respondent, relying on the proviso set out in s.96(3), argued that they no longer need the units and thus it declines it's entitlement and therefore the developer is relieved of their burden. The respondent argued that the Local Authority entitlement rests somewhere between zero and maximum entitlement.. Clarke J. described 96(3) as follows in Cork County Council v Shackleton and others [2011] 1 I.R. 443 at para 58:-

> *"A number of key provisions seem to me to be relevant. Firstly, there is the proviso to s. 96(3). That proviso is stated to apply to every case in which an alternative agreement is to be entered into. It specifies that "the aggregate monetary value of the property or amounts or both" to be transferred on foot of any alternative agreement is to be equivalent to "the monetary value of the land that the planning authority would receive" in the event that the default provision applied."*

142.

Clarke J. continued as follows in Shackleton at para. 66:-

> *"Viewed in that way the proviso simply requires that the net benefit of an alternative agreement should be the same as the net benefit of the default agreement. As the net benefit of the default agreement is the so called planning gain, then the proviso simply requires that the net benefit of any alternative agreement must be the same, in money or money terms, as the planning gain".*

143.

Clarke J continued at para. 76 of that judgment where it states:-

> *"... the only way in which the local authority can achieve the same monetary value from an alternative agreement, as it would have had it employed the default provision, (and the proviso requires it to obtain such equivalence) is if the total value of the planning gain attributable to the sites to be transferred, with the built housing units on them, amounts to 20% of the planning gain attributable to the site as a whole"*

144.

In considering the housing needs of the respondent, those circumstances are contemplated by the legislation at s. 96 (11) of the 2002 Act which provides that:-

> *"... if a planning authority becomes satisfied that land, a site or a house transferred to it under subsection (3) is no longer required for the purposes specified in subsection (9) or (10), it may use the land, site or house for another purpose connected with its functions or sell it for the best price reasonably obtainable and, in either case, it shall pay an amount equal to the market value of the land, site or house or the proceeds of the sale, as the case may be, into the separate account referred to in subsection (12)".*

145.

The Court has considered the referral case of In the matter of Article 26 of the Constitution and in the matter of Part 5 of the Planning and Development Bill 1999 [2000] 2 IR 321 which elaborates the principles and policies underpinning the legislation, the relevant legislative provisions and the caselaw namely the cases of Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 and Cork County Council v

Shackleton and others [2011] 1 I.R. 443 and is satisfied that the respondent is statutorily obliged to enter into an agreement with the claimants as provided for in s 96 (2) of the Planning and Development Act 2000 (as amended).

146.

The Court is further satisfied that the dispute mechanism as provided for in S. 96 is as elaborated upon by Clarke J (as he then was) in both Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 and Cork County Council v Shackleton and others [2011] 1 I.R. 443 which has been comprehensively set out above and can be encapsulated from his observations in Glenkerrin where he said at p. 419:

> *"Where issues arose as to whether, at the level of general principle, the social and affordable housing obligations of the parties should be met by the provision of cash, other land, serviced sites, a combination of those or the like, then the Board was the only body which had jurisdiction to resolve such questions. Once the issue of principle had been determined, then the question of value including the identification of the particular type of units to be transferred could be determined by a property arbitrator"*

147.

The Board made its determination that onsite units must be transferred by the claimant to the respondent in the terms of its order as set out above and as part of its decision making process considered inter alia s. 96 of the Planning and Development Act 2000 as amended, the provisions of the Joint Housing Strategy Cork Planning Authorities 2001 (as updated in 2009) and the Skibbereen Town Development Plan 2004 – 2010 which provides for the requirement for 20% of all lands zoned for residential uses to be reserved for the purposes of social and affordable housing. It also had regard to the criteria listed under s. 96 (3) (c) and s. 96 (3) (h) of the Planning and Development Act 2000 as amended. No review of that decision was taken by the respondent.

148.

The Court is satisfied that the Board having determined at the level of principle that onsite units must be transferred by the claimant to the respondent, the only issue for the property arbitrator is to identify the particular units to be transferred to comply with s. 96 (3) (b) and to determine the price payable to the claimant as a result of the transfer of the identified units as required by s. 96 (7) (a).

149.

The Court is therefore satisfied that on the facts of this case it is not within the jurisdiction of the Property Arbitrator to find that the agreement should be for the transfer of zero units and such a finding would be *ultra vires* his function.

150.

In those circumstances, the court finds that the answer to Question no. 1 is "No".

Question Two

151.

In considering the second question the Court notes the decision in Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 at p. 436 that the term "agreement" used in s. 96 must include an arrangement arrived at as a result of one or other or both of the dispute resolution mechanisms provided:-

> *"The term "agreement", it seems to me, must, therefore, be taken in the context of subs. (5) and thus must be taken to include an arrangement determined by the appropriate dispute resolution mechanism"*.

152.

Condition 49 which has been set out in full above required a Part V agreement to be entered into before any development commenced and

preferably within 8 weeks of the date of the grant of planning permission and the reason given for the decision was to ensure compliance with the policy objectives of the joint housing strategy which have been included in the development plan.

153.

The Board made its decision on the 5th of September 2013 and in doing so took into account *inter alia* the provisions of the Joint Housing Strategy, Cork Planning Authorities 2001 (as updated in 2009) which at policy 1.3 states the requirement for 20% of all land zoned for residential uses (or for a mix of residential and other uses) to be reserved for the purposes of social and affordable housing.

154.

On that date the position was as noted in the inspector's report at p. 10 as follows:-

> *"The only further restriction in respect of these options specified under s. 96 (3) (b) is that the value of the property or amounts transferred or paid must be equivalent to the monetary value of the land that the planning authority would receive under s. 96 (3) (a), in this case 20% of the site"*.

155.

The parameters of the dispute mechanism as provided for in S. 96 is as elaborated upon by Clarke J (as he then was) in both Glenkerrin Homes v Dun Laoghaire Rathdown County Council [2011] 1 I.R. 417 and Cork County Council v Shackleton and others [2011] 1 I.R. 443 and has been comprehensively set out above. The Board is the only body which has the jurisdiction to determine matters of general principle which it did in determining that an agreement be entered into between the parties under S. 96 of the Act within 8 weeks providing for the transfer to the Local Authority of onsite social and affordable housing units at Levis Quay, Skibereeen, County Cork.

156.

The decision of the Board was not challenged and the Court is satisfied that the property arbitrator is bound to determine matters by reference to the law in force at the date of the Board's order which law is the same as was in force at the date of the planning permission.

157.

In those circumstances the court determines that the answer to Question no. 2 is A or in the alternative B but not C.

Question Three

158.

Turning then to consider Question no. 3, s. 94 (4) (c) provides:-

> *"Subject to paragraph (d), a housing strategy shall provide that as a general policy a specified percentage, not being more than 20 per cent, of the land zoned for residential use, or for a mixture of residential and other uses, shall be reserved under this Part for the provision of housing for the purposes of either or both subparagraphs (i) and (ii) of paragraph (a)"*.

159.

Section 96 requires that a condition must be included in each planning permission requiring any person with an interest in such lands to enter into an agreement with the planning authority either:- (a) Transferring such part of the lands requiring to be so reserved to the planning authority under s. 96 (3) (a), or; (b) An alternative agreement providing for the transfer of built houses etc. as provided for in s. 96 (3) (b).

160.

The Court has considered the arguments of both sides set out above and also the decision in Cork County Council v Shackleton and Others [2011] 1

I.R. 443, in particular at para. 20 thereof where it states *inter alia*:-

> *"At an overall level, therefore, the approach of s. 96 is clear enough. Both the plaintiff in the first case and the applicant in the second case have, respectively, adopted development plans which provide that 20% of relevant land is to be reserved for social and affordable housing …. There is no doubt, therefore, but that the primary obligation of both developers in these proceedings, and the prima facie entitlement of both Councils, was to receive 20% of the land the subject of the respective planning permissions"*.

161.

As stated above, in its determination of the 5th September 2013, An Bord Pleanála ordered the developer to enter into an agreement with the planning authority under s. 96 of the Planning Act 2000 within eight weeks of the date of this order, for the transfer to the planning authority of onsite social and affordable housing units at Levis Quay, Skibbereen, Co. Cork, and in reaching that decision took into account and considered the provisions of the Joint Housing Strategy, Cork Planning Authorities 2001 (as updated in 2009) and the Skibbereen Town Development Plan 2004 – 2010 which included a policy objective that Cork Local Authorities will require 20% of all land zoned for residential uses or for a mix of residential uses to be reserved for the purposes of social and affordable housing.

162.

In this case the Board determined that the Part V agreement must provide for the transfer to the planning authority of the same percentage of lands or units in the development as is specified in the policy objectives set out in the relevant development plan as being required to be reserved for the purposes of social and affordable housing. The determination of the Board was not challenged.

163.

On the facts of this case it is not within the jurisdiction of the Property Arbitrator to alter the determination of the Board as to the percentage of lands or units to be transferred.

164.

Accordingly, on the facts of this case the answer to question three is yes.

Question Four

165.

Turning then to consider Question no. 4, the respondent is asserting that the price to be paid to the claimants should be determined by s. 96 as amended by s. 33 of the Urban Regeneration and Housing Act 2015 (which came into force on the 1st September 2015) rather than s. 96 as set out in the Planning and Development Amendment Act 2002. The critical provision here is s. 33 (2) of the Urban Regeneration and Housing Act 2015 which expressly deals with the issue of what prior planning permissions are to be caught by the amendments contained in the Act. That section states as follows:-

> *"Where, on the date of the coming into operation of subsection (1), a permission has been granted subject to a condition referred to in section 96(2) of the Act of 2000 but a commencement notice within the meaning of Part II of the Building Control Regulations 1997 has not been lodged, any existing agreement under section 96 of the Act of 2000 may be amended prior to the lodgement of such commencement notice with the consent of all parties to such agreement provided that the agreement so amended complies with the provisions of section 96 on the date on which the agreement is amended"*.

166.

The claimant argued that in this case as a result of the order of the Board of the 5th September, 2013, an agreement had been reached between the parties under s. 96 that the manner in which the social and affordable housing obligations were to be met was by the transfer of onsite units at Levis

Quay. The claimant acknowledged that the respondent does not agree as such to this transfer but says that the effect of the determination of the Board is that it amounts to such an agreement and that on the date of the commencement of the 2015 Act an agreement had therefore already been reached between the parties and a commencement notice had already been served and there is therefore no scope under s. 33 (2) to amend that agreement (even if the parties wished to do so) and the provisions under the 2005 Act simply do not apply.

167.

The Court accepts that the 2015 Act does not provide for any retrospective application save for the provisions of s. 33 (2) of the Act. That section only applies where an agreement has been entered into between the local authority and the developer but no commencement order has been served for the works. The respondent argued that as the property arbitrator has not yet been called on to calculate the site and development costs, the agreement has not yet been finalised and accordingly the respondent argued that the law which is in force at the time upon which he is called to do that is the law which he should apply.

168.

The respondent acknowledges that the Act deals with the particular circumstance which is different to the circumstance in this particular case which is where an agreement has been reached but development has not commenced. The respondent seeks to argue that in those particular circumstances, the Act provides that the agreement can be amended by agreement and so the respondent argues that the inference of that is that the Act does not apply to pre – September 2015 agreements. They said that because there is an option with some pre – September 2015 agreements to amend by consent, the inference they said that flows from that is that post – September 2015 agreements fall to be considered and determined on the basis of the 2015 Act. They also said that is not a retrospective application because it is something which has not yet been done, it has not yet fallen to be done and therefore should be decided on the basis of the law as it stands as of the date it is done.

169.

The Court is satisfied that any retrospective application of the 2015 Act has to be construed precisely within the terms of s. 33 (2) of that Act and as the respondents concede, the circumstances of this case do not fall precisely within the parameters of that section and accordingly the Court determines that the provisions of the Urban Regeneration and Housing Act 2015 cannot be applied by the property arbitrator and accordingly the answer to Question 4 is either A or B, which amount to the same thing, but not C.

Question Five

170.

Turning then finally to Question no. 5, in addressing Question 5 the claimant argued that the property arbitrator is obliged to determine the price of the onsite units to be transferred to the claimant in accordance with s. 96 (3) (d) as inserted by the Planning and Development (Amendment) Act 2002, namely:-

> *"(d) Where houses or sites are to be transferred to the planning authority in accordance with an agreement under paragraph (b), the price of such houses or sites shall be determined on the basis of—the site cost of the houses or the cost of the sites (calculated in accordance with subsection (6)), and the building and attributable development costs as agreed between the authority and the developer, including profit on the costs"*.

171.

The claimant stated that s. 96 (3) (d) of the 2002 Planning Acts provides that in calculating the compensation payable "building" and "development costs" must be included in the calculation. The claimant argued that the development costs are therefore different costs to the costs of the actual construction of the apartments. The claimant argued that development costs will involve the cost of funding construction and would include interest.

172.

In oral argument before the Court the respondent stated that a finance charge, as part of the development costs, has never been in dispute between the parties. Furthermore, it is their submission that the costs actually claimed as being the development costs subject to dispute as to the details of those figures are allowable by a property arbitrator, but the costs claimed as interest being very significant costs and damages clearly are not allowable and would be wholly contrary to the scheme of the Act. Clarke J. defined development costs in the case of Cork County Council v Shackleton and Others [2011] 1 I.R. 443 at para. 116 as follows:-

> *"For the reasons which I have set out earlier it seems to me that a harmonious construction of the section is assisted by viewing those costs as being the equivalent of the costs that would be incurred had the local authority "bought in" an independent builder to do the work for it"*.

173.

In those circumstances, the respondent argued that what development costs are and what is allowable, are in effect the price that the local authority would have had to pay somebody else to do the works and that if you hire a builder to carry out some works for you there may be some finance charges incurred by that builder in carrying out those works. However, the respondent said those are the finance charges which are incurred in carrying out the works. They are not finance charges incurred in being a property developer holding onto property for longer than was originally intended and the purpose of allowing the development costs is as stated by Clarke J. on a number of occasions, required to be neutral and it cannot therefore be referable to any particular costs incurred by a particular property developer or allegedly incurred by a particular property developer.

174.

When pressed at oral argument, the claimant was not able to point the Court to any provision in the legislation allowing for interest in the terms being claimed. In circumstances where there has been considerable delay in proceeding with this case, in particular the delay between the determination of the Board in 2013 and the seeking of the appointment of a property arbitrator some six years later with no cogent explanation as to the reason for the delay or who was precisely responsible for the delay, and further and most pertinently in circumstances where there is no statutory provision which allows for interest in the terms claimed by the claimant the Court determines that the answer to Question no. 5 is "no".

175.

The parties are requested to correspond with each other on the question of the appropriate form of Order. If the parties cannot agree costs within 14 days then the costs of this referral should be reserved to the hearing of the arbitration. This is subject to hearing any submissions on costs. The Order on costs will be finalised in the event that there are no such submissions within 14 days.