

# Judicial Communications Office

Tuesday 10 January 2012

## **COURT GIVES JUDGMENT IN LORETO GRAMMAR SCHOOL APPEAL**

### Summary of Judgment

The Court of Appeal today partly allowed an appeal by the Department of Education by ruling that representations and actions by the Department of Education and the Minister of Education did not give rise to a substantive legitimate expectation that a new Loreto Grammar School, financed by public funding, would be built on the existing site. The Court, however, quashed the decision of the Department to categorise the capital project submitted by the School as non-compliant.

Loreto Grammar School (“the School”) challenged two decisions of the then Minister for Education, Caitriona Ruane, in judicial review proceedings last year. The first was a decision by which Ms Ruane refused to honour what the School described as a pledge made by a previous Minister, Barry Gardiner, in 2004 which it is alleged committed the Department to provide £14.6m to fund the construction of a new school building on the existing site of the School. The second was a decision made by Ms Ruane and her officials, communicated to the School on 29 June 2010, which was to the effect that the School had not acted in compliance with the Department’s Sustainable Schools Policy criteria in its economic assessment for the building project and was thereby “non-compliant” with the policy. On 25 March 2011 Mr Justice McCloskey concluded that the governors of the School had a legitimate expectation enforceable by the court that a new Loreto School would be developed with public funding on the existing site by 2010 at the latest. He concluded that the conduct, delay and inactivity of the Minister and department officials frustrated the legitimate expectation of the School and that an “unjustifiable breach of trust” had occurred.

The Department appealed Mr Justice McCloskey’s decision. It contended that the Minister’s Statement in 2004 could not be viewed as unqualified but was necessarily implicitly qualified by the need for the School to satisfy the requirements of an acceptable economic assessment and plan which would be subject to scrutiny and required approval by both the Department and the Department of Finance and Personnel (DFP).

Lord Justice Girvan, delivering the judgment of the Court, said that it was inevitable that the details of a project such as this would develop and change over time. He commented that the School must reasonably have understood that the project was one that did not have a predetermined outcome. The assessment of the project was ongoing and would ultimately require detailed approval and demonstrate value for money.

The judge said that a legitimate expectation can only arise where there has been a “clear and unambiguous representation devoid of relevant qualifications” as to the decision maker’s future conduct. It may arise from an express promise given by or on behalf of a public authority or it may arise from the existence of a clear and regular practice which a claimant

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can reasonably expect to continue. Lord Justice Girvan said that “wise judicial minds can come to diametrically opposite views on whether the circumstances of individual cases give rise to legitimate expectations” and that this was a case in point. He considered that in this case the evidence fell short of establishing the type of clear unambiguous representations devoid of qualification required to give rise to a substantive legitimate expectation on the part of the School. Lord Justice Girvan said that it was plainly implicit that the delivery of a project of such scale, duration and ambition would always be conditional on the availability of the requisite funds and on the policy decisions of the Government of the time. He concluded that **no legitimate expectation could arise until the final approval of an application for funding – a stage which has not yet been reached in this case.**

Lord Justice Girvan said that the Court reached this decision with regret. He said it was not difficult to understand “the School’s increasing sense of impotence and frustration in what was becoming an increasingly obstructed obstacle course”. The process had been highly bureaucratic and the Department’s documentation at times was opaque and laden with jargon. He said it was important that Government departments act in a way that maintains the highest standards of trust:

“Trust can be broken by over stated public statements which appear to be unqualified though as a matter of law they are qualified. It can be broken by leading parties along a track which appears to lead inevitably to an ultimately favourable outcome and while they are on that path throwing up new hurdles. Trust in the system is undermined when that outcome is frustrated by long delays on the part of the relevant department and by its introduction of additional hoops and policies through which the parties must pass. The way a Government department treats an individual or an organisation such as the School and the way it conducts its processes and implements its bureaucratic processes are all matters for which the Department is and should be accountable in the democratic process. A working democracy must have in place effective mechanisms for holding the Executive to account if its conduct, actions and practices fall below appropriate standards of good and fair administration.”

Lord Justice Girvan then turned to the issue of the Department’s decision that the School had not complied with the Department’s Sustainable Schools Policy criteria in its economic assessment for the building project. The School claimed that the Department was acting unreasonably and irrationally in its decision to reject the economic appraisal and feasibility study because it had not included “a full economic assessment of the Lisanelly<sup>1</sup> option”. The Department claimed in court that it only expected the School to provide “a kind of ball park figure” of the cost of constructing a school at Lisanelly assuming it had a site there to develop and assuming standard accommodation for the number of pupils concerned. Lord Justice Girvan said it was surprising that the Department had not communicated this to the School if this was really what it expected of the School in considering the Lisanelly option.

The judge referred to the categorisation of capital projects. He said that if a project raised “major concerns” and reworking was required to address the school specific or area issues it would be categorised as “non-compliant”. Such a categorisation was not a definitive rejection of the project but required the relevant school to deal with the issues requiring clarification to the Department’s satisfaction. The Department summarised the issue of

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<sup>1</sup> Lisanelly is the site of former army barracks gifted by the Ministry of Defence to the NI Executive.

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concern in this project by stating that it was essential that “all feasible options were fully addressed within the context of a revised economic appraisal including the potential offered by Lisanelly”. The Department said that it would be in contact with the School trustees to discuss the matter with a view to formulating a plan for resolution, but the Court said it did not appear that officials had contacted the trustees.

Lord Justice Girvan found that the Department failed to provide clarification of what it expected from the School. He said that the conclusion to be drawn was that the Department’s thinking of the impact of Lisanelly on the School project was unclear. The judge said that the School accepted and interpreted the Department’s response as an indication that the Lisanelly idea would not frustrate the School’s project of building on its existing site.

Lord Justice Girvan said the following conclusions could be drawn from the evidence before the Court:

- Before the feasibility study and economic assessment were finalised and submitted the Department’s officials led the School to believe that the Lisanelly option could be dealt with by the School discounting it by setting out the reasons why the School needed to remain on its existing site;
- To the knowledge of the Department the consultants did not carry out an economic assessment of the Lisanelly option because they were led to believe this was not necessary as the School would be setting out the reasons why it was discounting the option. The Department should and would have known that without input from expert consultants the School could not be expected to provide an economic assessment of the option;
- The decision to categorise the economic assessment as non-compliant was made a considerable time after the assessment had been submitted – “It may well have been influenced by the intervening strong Ministerial support for Lisanelly”;
- The inference to be drawn is that the Department failed to take into account that the economic assessment had been prepared and worded as it was in light of the School’s understanding of the Department’s stance;
- If the Department was requiring the School to provide a financial assessment of the Lisanelly option it was necessary for the nature of the actual requirement to be clear and focussed – “the Department did not bring focus and clarity to what it was demanding of the School”;
- Having led the School to believe that the economic assessment could discount the Lisanelly option without an economic assessment, it was unfair for the Department to subsequently condemn the assessment as inadequate because it failed to do what it had been led to believe was not required.

The Court of Appeal concluded that the decision to treat the School’s economic assessment as non-compliant was, accordingly, flawed in that the Department in so deciding failed to take into account the fact that the School and its consultants had prepared the economic assessment on the basis of a belief induced by Departmental officials that it did not need to provide an economic assessment of the Lisanelly option as it could be discounted by the School giving its reasons for doing so. Furthermore, the Department was bound to make clear to the School the nature of what was required of it. The Court concluded that the Department failed to take into account that it had not clearly indicated to the School what it

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expected of it in this context and accordingly the decision to designate the School as non-compliant must be quashed and the Department must reconsider this matter.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website ([www.courtsni.gov.uk](http://www.courtsni.gov.uk)).

**ENDS**

If you have any further enquiries about this or other court related matters please contact:

Alison Houston  
Judicial Communications Officer  
Lord Chief Justice's Office  
Royal Courts of Justice  
Chichester Street  
BELFAST  
BT1 3JF

Telephone: 028 9072 5921

Fax: 028 9023 6838

E-mail: [Alison.Houston@courtsni.gov.uk](mailto:Alison.Houston@courtsni.gov.uk)