Neutral Citation no [2003] NIQB 78 | *Ref:* **WEAB4516**

Final

Judgment: approved by the Court for handing down | *Delivered:* **17/12/2003**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RONALD BOWDEN & ORS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for leave to apply for judicial review of the decision of the Department of Social Development of 7 November 2003 to make a Vesting Order in respect of properties at Victoria Square in Belfast, to take effect on 18 December 2003.

[2] The proposed respondent contends that the Court does not have jurisdiction to entertain the challenge to the validity of the Vesting Order.

[3] An interim decision on the proposed Vesting Order was made on 11 June 2003; a final decision and statement on the proposed Vesting Order was made on 24 October 2003; the Vesting Order was made on 7 November 2003 under Article 87 of the Planning (NI) Order 1991. The public advertisement of the Vesting Order was placed in appropriate newspapers on 11 and 18 November 2003.

[4] The application for leave to apply for judicial review was made on 5 December 2003 and that application was served on the proposed respondent on 10 December 2003. The basis for the proposed respondent's objection to jurisdiction arises under the Local Government Act (Northern Ireland) 1972. Paragraph 5 of schedule 6 makes provision for the validity and operation of Vesting Orders.

[5] Paragraph 5(1)(a) provides:

> "as soon as may be after a Vesting Order has been made the Department shall publish in the

> prescribed form and manner a notice, stating that the Vesting Order has been made……..”

Paragraph 5 (1)(b) provides:

> “if any person aggrieved by a Vesting Order desires to question its validity……he may, within one month from the publication of the notice of the making of the Vesting Order, make an application for the purpose to the High Court in accordance with rules of court……”

Paragraph 5 (1)(c) provides:

> “subject to head (b) a Vesting Order or the making of such an Order shall not be questioned in any legal proceedings whatsoever, and a Vesting Order shall become operative at the expiration of a period of one month from the date on which the notice of the making therefore is published in accordance with the provisions of head (a).”

[6] The appropriate procedure to challenge the validity of the Vesting Order is at the heart of this dispute. Paragraph 5(1)(b) provides that the application be made in accordance with rules of court. The proposed respondent submits that the relevant rule is Order 55, which requires proceedings by an Originating Notice of Motion, and that is not the procedure that has been adopted in the present case. Accordingly, the proposed respondent submits, there has been no application made to the High Court in accordance with rules of court and therefore, in accordance with paragraph 5(1)(c), the Vesting Order shall not be questioned in any legal proceedings whatsoever.

[7] Similar legislation has been considered in England and Wales. Smith v East Elloe Rural District Council [1956] AC 736 concerned compulsory purchase provisions in the Acquisition of Land (Authorisation Procedure) Act 1946. It was provided that any application be made to the High Court within six weeks of notice of the confirmation or making of the Compulsory Purchase Order and it was further provided that otherwise the Compulsory Purchase Order should not be questioned in any legal proceedings. It was held by the House of Lords that this was a plain prohibition against questioning the validity of the order, whereby the jurisdiction of the Court was ousted in respect of any proceedings other than in accordance with the statute.

[8] It is only necessary to refer to Viscount Simons at page 751:

> "……I find it quite impossible to qualify the words of the paragraph in the manner suggested. It may be that the legislature had not in mind the possibility of an Order being made by a local authority in bad faith or even the possibility of an Order being made in good faith being mistakenly, capriciously or wantonly challenged. This is a matter for speculation. What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology".

A Writ of Summons had been issued outside the six week time limit. An application to strike out the Writ of Summons was successful.

[9] A more recent example was R v Cornwall County Council ex parte Huntington [1992] 3 All ER 566. Mann LJ referred to the relevant provision in the Wildlife and Countryside Act 1981 as being a standard form preclusive clause, the common features being the prescription of an opportunity for challenge on specified grounds and of the period within which that challenge could be made, together with the proscription of any challenge outside that period. The conclusion was that the authorities presented an insuperable obstacle to the applicant who had not complied with the statute. The Court of Appeal agreed.

[10] R (On the application of Deutsch) v Hackney [2003] EWHC 2692(Admin) concerned a statutory scheme under the Road Traffic Regulation Act 1984 dealing with designated parking areas. It provided for challenge to a Designation Order by application to the High Court within a period of six weeks and further that the Designation Order could not be questioned in any legal proceedings whatever, other than in accordance with the statutory provisions. The Court concluded that it was necessary to comply with the statutory scheme and there was no other basis for legal challenge.

[11] On the basis of the above line of authorities Mr Straker QC, on behalf of the proposed respondent, submits that the applicant, not having applied in accordance with the statutory regime by way of Originating Notice of Motion under Order 55, is precluded from making any legal challenge to the Vesting Order now that the one-month time limit has expired. Accordingly, he argues, the High Court has no jurisdiction to deal with the matter under Order 53.

[12] The issue is whether the application has been made in accordance with the rules of court. Order 55 deals with statutory appeals and rule 13(1) provides that:

> "……an appeal to the High Court or a Judge thereof pursuant to the provisions of any statutory provision must be brought in accordance with the rules of this Part."

Rule 14(1) provides:

> "Every appeal must be brought by Originating Motion entitled in the matter of the relevant statute and shall specify the grounds upon which the appellant relies".

Rules 15 provides for service of the Notice of Motion on any party affected by the appeal.

[13] The applicant has not proceeded under Order 55 but has proceeded by this application for judicial review under Order 53. Order 53 involves a two-stage process of applying for leave to apply for judicial review, and if one is granted leave, applying for judicial review. Order 53, Rule 3 provides for the grant of leave and Rule 5 provides that where leave has been granted an application for judicial review shall be made to the Court by Originating Motion. The Notice of Motion must be issued within fourteen days after leave or else leave shall lapse.

[14] Mr McCloskey QC for the applicant seeks to rely on Order 2 to correct any irregularity. Rule 1 applies, "Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings…." That might be said to be this case in so far as the applicant has purported to begin proceedings, if they are indeed "proceedings".

[15] Rule 1 applies where "there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules. …." That applies in this case, because the thing done has been the issue of an ex-parte docket and an Order 53 Statement, which constitutes a failure to comply with the requirements of the rules that there be an application under Order 55 by way of an Originating Motion.
Rule 1 goes on, "whether in respect of time, place, manner, form or content or in any other respect…..". Clearly the requisite form of failure has arisen in this case, because it applies to a failure in any respect, so that covers everything.
Rule 1 then provides that "the failure shall be treated as an irregularity and shall not nullify the proceedings, any step in the proceedings, or any

document……" We reach the stage on analysis of that rule that, if the steps that have been taken under Order 53 constitute "proceedings" they amount to an "irregularity".

[16] Mr Straker questions whether proceedings have begun in this case or the applicant has purported to begin any proceedings. Order 5 of the rules specifies a number of ways in which proceedings might begin and they are by Writ, Originating Summons, Originating Motion or Petition and no mention is made of an ex-parte application. The English rule is the same and the commentary in the 1999 White Book in paragraph 2/1/2 states that "Proceedings for the purposes of this rule, include any application to the Court, however informal".

[17] The White Book makes reference to Harkness & Bell [1967] 2 QB 72. An ex parte application was made for leave to issue a Writ of Summons out of time and a Registrar made an Order and the Writ was issued. The relevant rule provided that the powers vested in the Judge, not the Registrar, so there was an application to set aside the Order. That application was not successful because it was held that the application to the Registrar constituted proceedings in the High Court within Order 2, Rule 1 and the Court had power to correct errors and irregularities and the plaintiff was granted leave. Lord Denning at page 735 stated:

> "It is said that this rule does not cover this case for two reasons. First it is said that at the time of the Registrar's Order there were no "proceedings"; because no Writ had been issued. So the rule, it was said, did not apply. I think this is far too narrow an interpretation. This rule should be construed widely and generously to give effect to its manifest intentions. I think that any application to the Court, however informal, is a "proceeding". There were "proceedings" in being at the very moment that the plaintiff made his affidavit and his solicitor lodged it with the Registrar".

I am satisfied that there are "proceedings" in the present case and that Order 2, Rule 1 is capable of applying to the ex-parte application that has been made in this case. It is necessary to return to the issue of time limits at this stage.

[18] Ex parte Johnston & Benn (1997) EWHC (Admin) 569 concerned an application for leave to apply for judicial review to challenge a planning decision concerning the construction of a second runway at Manchester Airport. The application was made on 13 March 1997 and the decision had been contained in a letter dated 15 January. The relevant statutory scheme was the Town and Country Planning Act 1990 and it provided under Section 288 that applications should be made to the High Court within six-weeks.

The application was within the judicial review time of three months, but outside the statutory six-weeks limit. The applicant sought to avoid this difficulty by applying to amend his application so as proceed by way of Originating Motion for a statutory review, which in effect is what Mr McCloskey seeks to do in this case by converting his present application into an application under the statutory scheme. Tucker J stated of the applicant that the -

> "….real problem would be again the time limit, because if he were now to seek to challenge by way of section 288, it is of course long after the six-week period has elapsed. Mr Charleton (of Counsel) would seek to overcome that difficulty by regarding the application to apply for judicial review as the application to the High Court under the section 288, he would as it were, refer the amendment back. He is in difficulties about that, it seems to me, because the application to move for judicial review is an application to apply for a motion calling for judicial review. It is not itself a motion to commence the proceedings. Whereas an application under section 288 is governed, as it seems to me, by Order 94 Rule 1 (and that provided that the application be made by Originating Motion. It is the direct equivalent of the rules applicable in this case). There has not been any Originating Motion. The application for judicial review does not constitute an Originating Motion and even if it did, it would still have been outside the six-week time limit".

[19] There is a critical fact in that case which distinguishes it from the present case, namely, even if the proceedings in that case had been treated as an Originating Notice of Motion the application would still have been issued outside the six-week time limit. In the present case the applicants have applied within one-month so they are not met by the relevant statutory time limit.

[20] In Johnston and Benn there was no reference to the irregularity rule which would have applied in England at that time that appears to have been because it would have been to no avail. To have established the irregularity would not have saved an application that was in any event outside the statutory time limit of six-weeks.

[21] I am satisfied that Order 2, Rule 1 applies to this case and that the proceedings amount to an irregularity. Now it is necessary to consider the effect of an irregularity.

Order 2, Rule 1(2) provides:

> "… the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks fits, set aside either wholly or in part the proceedings in which the failure occurred …….. or exercise its powers under these rules to allow such amendments(if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit".

[22] The applicant seeks amendment of the application. This is obviously a matter of discretion and I have to consider what circumstances apply in relation to the exercise of discretion. Mr Straker refers to various matters that I think the applicant does not dispute. It is necessary that there be legal certainty within this scheme and that is why there is a one-month rule and a specified route for the challenge to a Vesting Order. Allied to that is the concept of good public administration, because it is obviously appropriate that where there is a scheme involving the complexities of Vesting Orders, the defined statutory scheme should be adhered to by the parties. Further, of course, it is important that any prejudice to others should be taken into account in determining whether the matter should proceed. I look to those and all other considerations in determining whether to exercise my discretion in relation to the powers under Order 2, Rule 1(2).

[23] In this case the proceedings were issued within time; they were also served within that time; the content of the application made under Order 53 is the same content as that which would have applied had the application been properly formulated in the prescribed manner under Order 55. Therefore, it seems to me there is no prejudice to the concept of legal certainty, or to good public administration, or any other prejudice to the proposed respondent or others between the present situation and that which would have prevailed had the proceedings been in the proper form as an Order 55 Originating Notice of Motion. In those circumstances, I propose to exercise my discretion to treat the application as if it had been formulated by Originating Notice of Motion under Order 55. Accordingly, I will make an Order that will require the applicant to amend the proceedings to comply with an Order 55 application. If the application is converted into an Originating Notice of Motion under Order 55, leave is not required, and therefore when the matter is properly constituted, there will be no need for an application for leave.

[24] Under the 1972 Act, paragraph 5(1)(b)(i) provides that the Court may by Interim Order suspend the operation of the Vesting Order, either generally, or in so far as it affects any property of the applicant until the final

determination of the proceedings. There is an application for Interim Relief in paragraphs 4.7 and 4.8. The Vesting Order takes effect on 18 December 2003.

[25] The position is now as follows. The applicants will furnish to the Court and to the respondent, the amendments to their application papers so as to convert the same into an Order 55 Originating Notice of Motion. Secondly, in exercise of the powers contained in paragraph 5(1) I propose to make an Interim Order suspending the operation of the Vesting Order until further order. Thirdly, the applicants will undertake not to deal with the property in any manner during the period of suspension and it will be understood that it will be a Contempt of Court if any attempt is made by any party to take any steps which put beyond the immediate reach of the vesting authority any claim to the property that the applicants presently enjoy.

[26] The proposed respondent intends to obtain possession on 18 February 2004. I anticipate that if this application fails when it is heard in January, that date for possession may still be capable of being achieved. That being the case, I am not proposing to require any cross-undertaking in damages from the applicants. On the other hand should the application succeed there will not be a recoverable loss sustained by the proposed respondent. If on the hearing of the application I make further Orders or further Interim Orders, then it may be that the issue of the cross-undertaking in damages will be revisited, if it would appear that the matter is going to be delayed beyond 18 February.

[27] At the request of the proposed respondent I will include in the Order a provision that the time for appeal from this Interim Order will run from the conclusion of the proceedings and if required I will otherwise extend time at the appropriate stage to enable the respondent to appeal this Interim Order. The issue of costs to date is reserved.