

Neutral Citation no. [2006] NIQB 89

Ref: **NICC5685**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **20/12/06**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JAMES KEYS AND BERNADETTE McGINLEY

Applicants

and

DEPARTMENT OF REGIONAL DEVELOPMENT

Respondent

NICHOLSON LJ

Introduction

[1] The issues in this case are: whether a Vesting Order made by the Department of Regional Development (the Department) has validly vested land owned by Mrs Mary Teresa Keys in respect of whom Mr James Keys and Mrs Bernadette McGinley, her children, have an Enduring Power of Attorney and, if so, whether there has been non-compliance with the procedural requirements of the relevant legislation which has substantially prejudiced their interests: and whether there have been breaches of the applicants' Convention rights and, if so, what are the consequences.

[2] The Department claims that the land is required to permit the construction of the Skeoge Road Link. The link road scheme is stated to have a number of aims. Its principal aim is to complete an orbital route from Buncrana Road to Foyle Bridge in Londonderry. It is said that it will strengthen a key transport corridor linking County Donegal, Londonderry and Belfast, ease pressure on local routes and provide much needed housing and industrial units.

[3] The merits of the scheme are not in dispute. But it is common case that the Keys family were not given notice of the Department's intention to vest. Accordingly they challenge the making of the Vesting Order in so far as it

affects land owned by their mother, which was part of the old Londonderry and Lough Swilly railway line running parallel to the Buncrana Road from Upper Galligh Road to Elagh Road.

Statutory Framework

[4] The Local Government Act (Northern Ireland) 1972 (as amended) provides by Schedule 6:

“Preliminary Procedure

2. ... Where the Department proposes to acquire land otherwise than by agreement, notice of its intention to do so

(a) shall be published by the [Department] on at least two occasions in the locality in which the land is situated;

(b) shall be served by the [Department] on every person appearing to the [Department] to have an estate in the land;

(c) shall also be served by the [Department] on such government departments and public bodies as the Department shall think fit;

and such notice shall state the time within which objections to the proposal may be made to the Department.

3.-(1) After the expiration of one month from the date of the last publication of the notice mentioned in paragraph 2(a), the [Department], -

(a) after considering all representations which have been made to the [Department] by any interested party; and

(b) after causing a local inquiry to be held if it appears to the Department necessary to do so may -

(i) make a vesting order, which may contain any modifications of the [Department's] proposal that the [Department] thinks proper, vesting in the

[Department] all or any part of the land for an estate in fee simple or for such other estate as may be specified in the vesting order; or

(ii) decide not to make the order.

(2) If a local inquiry is held as aforesaid, the Department and any person interested in the land, and such other persons as the person holding the inquiry may allow, shall be permitted to appear, in person or by a representative, and to be heard at the inquiry, and, before making a vesting order, the [Department] shall consider the report of the person who held the inquiry.

4. ...

5.-(1) The following provisions of this paragraph shall have effect with respect to the validity of a vesting order and the date on which such an order is to come into operation-

(a) as soon as may be after a vesting order has been made the [Department] shall publish a notice, stating that the vesting order has been made naming a place where a copy of the vesting order and of any map or plan referred to in it may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the [Department] of his objection to the application for vesting order, appeared at a local inquiry in support of his objection;

(b) if any person aggrieved by a vesting order desires to question its validity on the ground that it is not within the powers conferred by this Act or that the procedure specified in this Schedule has not been complied with, he may, within one month from 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, and on such an application the court -

(i) 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;

(ii) if satisfied upon the hearing of the application that the vesting order is not within the powers conferred by this Act, or that the interests of the applicant have been substantially prejudiced by any requirement of this Schedule not having complied with, may quash the vesting order either generally or in so far as it affects any property of the applicant;

iii) if not so satisfied, shall dismiss the application; ...”

The Human Rights Act 1998 incorporates (by Schedule 1 Part 2) Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides:-

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Article 6 of the Convention is also incorporated by Schedule 1, Part 1. It provides:-

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an

independent and impartial tribunal established by law.”

[5] The applicants argue that the onus is on the Department to satisfy the court that it carried out diligent enquiries as to the ownership of the land belonging to the Keys family and complied with the statutory requirement to serve notice on every person appearing to the Department to have an estate in the land. They contend that as the 1972 Act is expropriatory it must be strictly construed against the government body seeking to make the vesting order: see, for example, Prest v Secretary of State for Wales [1982] 81 LGR 193 at 211 per Watkins LJ.

[6] They further argue that in this instance the Department had many sources of information open to it to ascertain ownership of the land to which it did not have regard. The applicants did take steps to make their ownership known to the Department and were ignored. Their right to a hearing under Article 6 of the European Convention was denied.

[7] As to the sources of information available to the Department, they have referred to the vesting map and photographs taken of the land in dispute. They claim that apart from the obligation to serve notice on them as owners of the land an inspection of it would or should have led the Department to make enquiries of Mr James Keys at 6 Upper Galliagh Road, Londonderry. They further rely on his affidavit sworn on 11 July 2006 to which he has exhibited copies of the relevant documents of title. These show that his father acquired the land by way of a conveyance dated 25 October 1961. His father died intestate in 1977. Hence the ownership of the land in dispute belongs to his mother. In 2005 the house and garden at 6 Upper Galliagh Road, Londonderry was transferred to him. It is claimed that the strip of disused railway line seen in the photographs is obviously connected to the house.

[8] The family were aware that their land would be affected by the Skeoge Link road and expected to be notified of any proposals. A number of developers had approached the family with offers to purchase the land but they decided to wait. In February 2005 the Rivers Agency, part of the Department of the Environment, trespassed on the land to deal with drainage ahead of the planned link road and paid compensation for doing so on 18 February 2005. Mr Keys telephoned Adam Quigley of Roads Service, an agent of the Department, and advised him that the Keys family owned the land in dispute. He wrote to Mr Quigley on 18 February 2005, confirming that his family owned the land and held the title deeds. The land had formerly been part of the Londonderry and Lough Swilly Railway line. As a result of the trespass by the Rivers Agency Mr Keys realised that the Road Service might also be unaware; hence his telephone call to Roads Service and letter. In the summer of 2005 a representative from Derry City Council called at his home and he received a letter from the Council on 8 August 2005,

stating that they understood he was the owner of this section of the old railway line. He noted on their letter that he had spoken to an employee of the council, as requested in the letter, and said that he was waiting for an approach from a developer but would do what he could to help in the construction of a cycle path which the council wished to make.

[9] In his affidavit he went on to state that his sister had gone to the Planning Department, an agency of the Department of the Environment, in May 2006 and subsequently the Keys family learnt of a planning application affecting the land. They lodged objections, only to learn that the land had been vested on 8 June 2006.

[10] In an affidavit sworn on 25 September 2006 Mr Keys claimed that Mr Philip Johnston, the Roads Service engineer, was likely to have been aware of the ownership of the land by the Keys family. Babtie, a firm of consulting engineers, had sent him a map on 14 March 2005 showing his name substituted for the Londonderry and Lough Swilly Railway. He stated that Babtie were retained by the Department for such road works. He expressed scepticism about the investigation carried out into the ownership of the land.

[11] Accordingly it is argued on behalf of the Keys family that not only had they owned the land since 1961 but that the Rivers Agency and the council were aware that they owned the land prior to the Notice of Intention to Vest and Mr Adam Quigley of the Department had been so informed by telephone on 18 February 2005 and on the same date a letter had been sent to him of which Mr Keys kept a copy. Moreover there should have been a note or memorandum made of the telephone call by Mr Quigley which had not been disclosed to the applicant.

[12] On behalf of the Department, which is the respondent to this application, it is submitted that it complied with the notice provisions of the 1972 Act by reason of the claim by the Londonderry and Lough Swilly Railway Company to ownership of the land formerly occupied by their railway track as far back as 2002. Correspondence was exhibited to that effect. The railway company had no objection to vesting. Proof of title was not usually required until compensation was to be paid.

The Department had caused appropriate notices to be placed in the local press. There had been a public inquiry into the Derry Area Plan 2011, extensive advance publicity had been devoted to the road link and press advertisements giving notice of the Department's intention to make a vesting order in relation to lands including that portion of the land belonging to the Keys family which was vested.

The Department had been in further correspondence with the Londonderry and Lough Swilly Railway Company on 18 February 2003,

receiving written confirmation of the ownership of the strip of land on 27 February 2003. The railway company appointed Mr Pat Andrews to act as its agent in respect of compensation. Philip Johnston did not know about the disputed land, as he had stated in his affidavit. Babbie worked exclusively for the Rivers Agency. Adam Quigley never received the letter written by Mr Keys. But the telephone call was not disputed.

[13] It is argued on their behalf that the portion of the land has been validly vested and in the alternative, that the applicants have suffered no substantial prejudice by the failure to comply with the requirements of the Act, the vesting order being within the powers conferred by the Act. The re-zoning of the applicants' land that will result from the construction of the road link will substantially enhance the value of the remainder of the land. Not more than 5 per cent of the land owned by the applicants is required for the road link. There is a reasonable compensation scheme in place for the land vested with a right of appeal to the Lands Tribunal.

It is contended that a long-delayed and sorely needed road scheme would be put in peril by the quashing of that part of the vesting order affecting the applicants' land. A wide range of third party interests would be affected and the Skeoge Link which will not merely strengthen a key transport corridor in the North-West but provide much needed housing and industrial projects, as well as easing pressures on local routes, will be seriously jeopardised.

[14] Affidavits and exhibits supporting these propositions have been produced. Correspondence commencing on 30 April 2002 undoubtedly led the Department to believe at that time that the Londonderry and Lough Swilly Railway Company retained ownership of the strip of land and this was confirmed by the railway company in 2003. An affidavit to this effect was sworn by Kenneth Concarr, a former accountant with the railway company, in December 2005. An affidavit was sworn by Colm Doherty, Chairman and Director of the railway company, in July 2003. Searches were carried out by the railway company in the Registry of Deeds in September 1998 and October 2000 and copy Memorials of each entry appearing on the Registry of Deeds showing grants of land by the Railway Company to others up to 1997 were furnished to the Department.

[15] When the Key's claim was drawn to the attention of Mr Andrews, who, incidentally, had no responsibility for claiming that the land belonged to the railway company, he consulted his clients and promptly acknowledged the Keys' claim to ownership. But his attention was not drawn to the Keys' claim until June 2006.

[16] It transpired that the transfer by the railway company of the land had been made to a Mr Robert McNutt who in turn transferred it to Mr Thomas

Kevin Keys, husband of Mary Teresa Keys and father of Mr James Keys and Mrs Bernadette McGinley. These transfers had been registered in the Registry of Deeds on 3 August 1961 and 2 November 1961 respectively. How it came about that the railway company searches failed to reveal this has never been explained. The Lands Officer of the Department can scarcely be faulted. But for the vigilance and researches of Mrs McGinley, however, the Keys' interest might not have been properly protected.

[17] The Department did offer to outline the scheme in detail and address "any possible concerns" the Keys family might have. The portion of the land which has been "vested" is 0.1306 of a hectare. This is about 1/20th of the strip of land which is about 4 acres in total. The portion "vested" is some distance away from the bottom of Mr Keys' house. But it cuts the strip into two, divided by portion of the road link. There was a meeting with Roads Service on 27 June 2006, following the offer by the Department to meet the Keys family.

The legal position

[18] In my opinion the Department has power to make the Vesting Order under the 1972 Act (as amended) subject to Article 1 of Protocol 1 of the Convention.

The proper approach to vesting of lands was dealt with by Girvan J in Cowan v Dept of Economic Development [2000] 122. After setting out the statutory vesting procedures to be found in Schedule 6 of the 1972 Act, he referred to the powers of the court at p130, citing a passage from the judgment of Lord Denning in Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 3 All ER 371 at 374. He then dealt with compulsory powers of acquisition under domestic law, stating that:-

"The courts are particularly astute to impose a strict construction on legislation involving expropriation of property rights. Where there are two alternative approaches to expropriatory legislation the court should adopt the construction which is favourable to the owner and occupier of the land."

Having considered the steps taken by the Department, as set out in the affidavit of John McKinley, Senior Engineer of Roads Service, including the history of the Skeoge Link Road Scheme first proposed in the 1980s and included as a Strategic Highway Proposal in the Derry Area Plan 2011, which was adopted in 2000 and identified in the Derry Transportation Study commissioned to support the Derry Area Plan 2011, the public consultation, including the holding of a Public Inquiry in 1997-1998 at which a number of

issues relating to the Skeoge Link were raised and addressed, the aims which the Scheme has, as set out in paragraph [2] of this judgment and the extensive public scrutiny referred to at paragraph 7 and the redesign to provide a dual carriageway dealt with at paragraph 8, I am satisfied that, as I have stated, the making of the Vesting Order is within the power of the Department.

Accordingly the first issue with which I must deal is whether the Department has complied with the procedural requirements of Schedule 6 of the 1972 Act and, in particular, whether it has given notice of the application to vest to every person appearing to the Department to have an estate in the land. There is no doubt that the Londonderry and Lough Swilly Railway Company misled the Department in 2002 and 2003 and by appointing Mr Andrews to negotiate with the Department misled it still further. I am satisfied that in 2003 it did appear to the Department that the railway company still owned the disused railway track. But I am also satisfied that before the Notice of Intention to Vest was served in April 2006 the Department was or should have been put on Notice that there was at the very least a dispute about the ownership of the land as between the Keys family and the railway company and that with reasonable diligence the Department could have and should have ascertained that the Keys family owned the land claimed by the railway company.

I conclude, therefore, that there was a breach of the procedure set out in Schedule 6, the effect of which was to deprive the Keys family of an opportunity to object to the making of the Vesting Order.

The 1972 Act empowers this court to consider whether the interests of the Keys family have been substantially prejudiced as a result and, if satisfied that they have been, the court may quash the Vesting Order either generally or in so far as it affects any property of the applicants.

I have also to bear in mind Article 1 of Protocol 1 and Article 6 of the Convention which have been incorporated into our domestic law by the Human Rights Act 1998 and which were dealt with in the judgment of Girvan J in Cowan's case.

The 1972 Act must be construed so as to be compatible with Convention rights, so far as it is possible to do so: see Section 3 of the 1998 Act.

Article 1 of Protocol 1 is undoubtedly engaged in this case and the Vesting Order undoubtedly involves a deprivation of property. It can only be justified if it is in the public interest and a fair balance has been struck between the demands of the general interest of the community and the need to protect individual rights. A right to compensation has been provided for but is that enough?

A compulsory power interfering with private rights of property may infringe Article 1 if it is not attended with basic procedural safeguards: see Cowan at p132.

Article 6 is also engaged because the making of a Vesting Order relating to a person's land relates to a civil right and where the acquisition is opposed by the land owner a dispute exists for the purposes of Article 6(1): see Cowan at p133.

This is a brief and superficial survey of the legal position in this case.

The factual position

[19] In Mr Key's affidavit of 11 July 2006 he makes no secret of the fact that his family were aware of the fact that their land would be affected by the planned Skeoge Link Road scheme but expected to be notified of any decision or proposals. They were also aware that the Department were negotiating with developers and a number of developers had approached them with offers to purchase their land but he had made a decision to wait closer to the time of any formal decision being taken or notification being made. When he received a letter from Derry City Council in August 2005 he made a note on their letter indicating that he had spoken to a Mr Kennedy as requested. It appears from this note that he was waiting for an approach from a developer and would do what he could to help the development of a cycle path which the council were working on. In his affidavit he states that he told them on the telephone that the family had made no decision about what they would do with the land in light of the development.

[20] The family lodged objections to a planning application only to learn that a Vesting Order had been made. They met with Roads Service on 27 June 2006 and expressed the view that they were not happy with the payment of compensation as they had not been given a proper opportunity to have their views heard and to make objections to the Vesting Order.

[21] At paragraphs 17 and 18 of the affidavit he set out family concerns about the Vesting Order and in particular objected that they were not afforded an opportunity to consider the option of selling the land in advance of the development and vesting.

[22] Mr McGinley in his affidavit of 4 September 2006 refers to the meeting and states that the Roads Service delegation emphasised that their interests were adequately secured in the post-vesting period by their entitlement to compensation and explained that the value of the remainder of their land (the bulk of their property, other than the small strip being vested) would be substantially enhanced by the completion of the road link. He added that the

Skeoge Road Link has the full support of all local councillors, MLAs, the Chamber of Commerce and the general public. A planning application for “much needed social and affordable houses” is awaiting approval but cannot proceed without the construction of Skeoge Road Link.

Application of the law to the facts

[23] I first consider whether the interests of the applicants have been substantially prejudiced by the failure to give them Notice of the Vesting Order. Notwithstanding the objections referred to at paragraphs 17 and 18 of Mr Keys’ affidavit I cannot accept that any representations which they would have made following Notice of Intention to Vest would have had any effect on the outcome. I am satisfied that in the public interest the Skeoge Road Link would have been approved. If I quashed the Vesting Order so far as the applicants are concerned and a Notice of Intention to Vest was served on them and they made representations in accordance with paragraphs 17 and 18 of Mr Keys’ affidavit they would be unsuccessful and they would be in the same position as they are today. I would be doing them no favours.

I would have needed evidence from a roads engineer or some such expert to satisfy me that their portion of the Skeoge Road Link was not needed or that some steps could be taken to prevent severance of one part of their land from the other. As it is, so long as compensation is fair, I am not satisfied that the interests of the applicants have not been prejudiced.

[24] I emphasise that the compensation must be fair. I have no evidence before me that it will not be fair. But it is important that compensation is assessed on the basis that the Keys family were denied the opportunity of negotiating with developers. If there is evidence that they would have obtained increased compensation, had they been served with Notice of Intention to Vest, they must be compensated accordingly. At any rate that is my view and I trust that it will be taken into account by those who assess compensation and, if needs be, by the Lands Tribunal.

[25] So far as Article 1 of the First Protocol of the Convention is concerned there has been a breach in that the Keys family were not served with Notice of Intention to Vest. But in my view, provided that just and fair compensation is paid they will have suffered no damage from that breach. There has also been a breach of Article 6 but as I consider that no damage has resulted as a result of the failure to enable them to make representations about the vesting, this does not affect the validity of the Vesting Order.

[26] The Keys family have shown a responsible attitude to the proposals to vest. They have taken every reasonable step to notify the Department of their ownership and are justifiably aggrieved that they have been denied the

opportunity to make representations, as is their right. Notwithstanding these facts, the application must be dismissed.