Neutral Citation Number: [2009] IEHC 262

THE HIGH COURT

2008 841 JR

Coras Iompair Éireann

And

Iarnród Éireann

Applicants

And

Cork City Council

And

An Bord Pleanála

Respondents

Judgment of O'Neill J. delivered the 28th day of May 2009

1. Relief sought

1.1 This is an application pursuant to ss. 50 and 50A of the Planning and Development Act 2000 (as amended) for leave to apply for judicial review for the following reliefs:-

> 1. An order of *certiorari* quashing the decision of the first named respondent making a compulsory purchase order described as Cork City Council Docklands Infrastructure Acquisition Order No. 1 of 2008 as stated in the notice dated the 23rd May, 2008, sent to the applicants, insofar as the said order relates to lands of the applicants including lands located at plots 62, 67, 71, 74, 75, 76 and/or any land in the scheme which are in the ownership and/or occupation (reputed or otherwise) of the applicants.
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> 2. A declaration that in making the said compulsory purchase order, without obtaining the previous consent of the Minister for Transport, the first named respondent acted *ultra vires* and/or erred in law by acting in breach of section 130 of the Transport Act 1944.
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> 3. An order of prohibition restraining the first named respondent from acting on foot of and/or consequent upon the decision to make the compulsory purchase order.
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> 4. Further and/or in the alternative and without prejudice to the above, a declaration that the first named respondent is required to obtain the consent of the Minister for Transport prior to the confirmation of the compulsory purchase order by the second named respondent.
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> 5. If necessary an order of prohibition/injunction restraining the second named respondent from making a decision on whether to confirm the making of the compulsory purchase order by the first named respondent.

1.2 The parties agreed that the hearing before me would be a *"telescoped"* hearing of the substantive matter, if the Court concluded that there were substantial grounds for contending that the impugned decision should be quashed.

2. Facts

2.1 The first named respondent made a compulsory purchase order entitled *"Compulsory Acquisition of Land Cork City Council – Docklands Infrastructure Acquisition Order No. 1 of 2008"* ("the C.P.O."), pursuant to s.76 of the Housing Act 1966 and the Third Schedule thereto, as extended by s.10 of the Local Government (No. 2) Act 1960 (as substituted by s.86 of the Housing Act 1966) as amended by s.6 and the Second Schedule to the Roads Act 1993 and by the Planning and Development Acts 2000-2006. The C.P.O. includes lands within the ownership of the applicants and it relates to the acquisition of lands for a proposed road scheme. The making of the C.P.O. was notified to the applicants by way of notice dated the 23rd May, 2008. The notice stated, *inter alia*, the following:-

> *"If confirmed, the order will authorise the local authority to acquire compulsorily the lands described in Schedule Part I to this notice together with any easement, wayleave, water-right or other right over or in respect of the said lands or water or any sub-stratum of the said lands for the purposes of performing its functions under the Planning and Development Acts 2000-2006 including giving effect to and facilitating the implementation of its Development Plan.*
>
> *…*
>
> *If land to which the order, as confirmed by either the Board or the local authority, relates is acquired by the local authority, compensation for the land will be assessed in respect of the acquisition as the value of the land at the date that the relevant notice to treat is served"*

2.2 The process of the compulsory acquisition of lands comprises of four stages. The first, the referencing procedure, involves identifying the lands and rights and interests over those lands and the occupiers and owners of the lands. Draft schedules of the lands are prepared and the preferred route for the proposed development is selected. The schedules describe the lands, the rights over those lands and private rights of way and easements on those lands. The second stage is notifying the public and individual landowners of the scheme and the actual making of the C.P.O. The third stage is the confirmation stage where the second named respondent either accepts or rejects the scheme. The fourth step is the compensation process where the acquiring authority (the first named respondent in this case) is given eighteen months to serve the notice to treat. When the notice to treat has been served, the acquiring authority may take possession of the land. The acquiring authority may ultimately make a vesting order upon the satisfaction of certain conditions.

2.3 The applicants, by letter dated the 5th June, 2008, wrote to the first named respondent objecting to the compulsory acquisition

of the lands on the grounds that the lands were required for railway purposes. Section 130 of the Transport Act 1944 ("the Act of 1944"), which requires the *"previous consent"* of the Minister for Transport ("the Minister") to acquire railway lands compulsorily or to acquire, terminate, restrict or otherwise interfere compulsorily with any easement, way leave or other right over those lands, was quoted in the letter and the following was stated:-

> *"…since I presume the consent of the Minister has not been obtained, any attempt to have the Order confirmed will be resisted by CIE, by all appropriate means because such an Order will be invalid and ultra vires."*

2.4 The first named respondent replied to the applicants by letter dated the 17th June, 2008, noting the provisions of s.130 of the Act of 1944 and stating that it intended to make an application to the Minister for consent to the acquisition of the lands. A response to that letter from the applicants dated the 9th June, 2008, reiterated that the absence of the *"previous consent"* of the Minister rendered the C.P.O. *ultra vires*.

2.5 In a letter dated the 24th July, 2008, the first named respondent wrote to the applicants stating that, having taken legal advice, it did not accept that the consent of the Minister must be obtained prior to the making of the C.P.O. However, it went on to indicate that it intended to make a formal application to the Minister under s.130 of the Act of 1944 on a without prejudice basis. That application was made to the Minister on the same date.

2.6 In a letter to the Minister dated the 19th September, 2008, the applicants expressed the substance of its objection to the compulsory acquisition of their lands in the following terms:-

> *"Section 130, Transport Act 1944*
>
> *The prohibition against compulsory acquisition ("CPO") of operational railway lands contained in section 130 [of] the Transport Act, 1944 has for over 60 years provided an effective and necessary safeguard against new road construction causing safety hazards and accidents to the operation of trains. It has been proven necessary in practice: the safeguard is not theoretical.*
>
> *Control over the operational railway must continue to reside with the railway undertaking if the responsibility of railway undertakings in regard to safety is to be effectively discharged. Compulsory acquisition is incompatible with the exercise of that control, and in any event is unnecessary….*
>
> ***Background***
>
> *CIE and IE only object to CPOs that affect operational land. It is primarily a safety issue. Total control of possession of the infrastructure on which trains operate is key to the safe operation of trains, and loss of that control (particularly to a construction contractor) would result in severe operating restrictions being imposed, in turn resulting in reduced or cancelled services. Control of possession is at risk if a CPO is confirmed, and a road authority may be contractually bound to support a contractor's / Public and Private Partnership's … position or risk major variation claims costs."*

2.7 These proceedings were instituted on the 15th July, 2008. The second named respondent has not participated in them. The C.P.O. was submitted to the second named respondent for confirmation. The second named respondent exercised its discretion to hold an oral hearing in advance of making a decision whether to confirm the order or not. That oral hearing has been part-heard and will not be resumed pending the determination of these proceedings.

2.8 A curious feature of these proceedings is that this case is the first occasion where an application for Ministerial consent was made under s.130 of the Act of 1944, at any stage of the process of compulsory acquisition. It appears to be common case that any past issue as to the compulsory acquisition of land of a railway undertaking was resolved by agreement and the Minister's consent was not sought. In this regard para. 9 of the Affidavit of Michael Carroll, sworn on the 24th day of September, 2008, is noteworthy:

> *"During that period of 24 years [of service in the legal department of C.I.É.] there were many instances where local authorities and the National Road Authority purported to make Compulsory Purchase Orders of operational railway lands; in each case the issue was resolved by agreement, sometimes after the commencement of legal proceedings by CIE. In no instance during the 24 years was an application for consent actually made, either before the CPO, before the oral hearing or before an attempt to proceed at notice to treat stage. I have not come across any record in my office, which dates from 1952, of such an application under section 130 of the Transport Act 1944."*

3. Leave

3.1 A statutory judicial review process is set out in the Planning and Development Act 2000 (the Act of 2000) for, *inter alia*, decisions taken by a local authority in the performance of its functions relating to the compulsory acquisition of land. Section 50A (3) (a) the Act of 2000, as inserted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006, provides that a Court shall not grant leave to apply for judicial review unless it is satisfied that there are *"substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed"*. Section 50 (3) (b) (i) the Act of 2000 requires a Court to be satisfied that the applicant has a *"substantial interest"* in the matter that is the subject of the application. The respondents do not dispute the applicants' substantial interest in the subject matter of this application.

3.2 This requirement for substantial grounds to be demonstrated was considered by Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 to mean the following at p.130:-

> *"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."*

3.3 The above statement was approved by the Supreme Court in *Re The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. I am satisfied that the grounds for judicial review that the applicant advances in these proceedings are substantial and give rise to a serious issue as to the interpretation of s.130 of the Act of 1944. That being so I will grant the leave sought. I must now go on to consider these grounds on the basis of a full hearing of the same.

4. Issue
4.1 Two interpretations of s.130 of the Act of 1944 are in issue in these proceedings. The central issue to be resolved is whether the first named respondent was required to obtain the consent of the Minister, in accordance with s.130 of the Act of 1944, prior to the making of the C.P.O., as submitted by the applicants, or, whether s.130 of the Act of 1944 requires that such consent be obtained prior to the service of the notice to treat, the point at which compulsory acquisition begins to take effect, as contended for by the first named respondent.

5. Section 130 of the Transport Act 1944

5.1 Section 130 of the Act of 1944 states as follows:-

> ***"130.***—*Notwithstanding anything contained in any enactment, no person shall, without the previous consent of the Minister, acquire compulsorily any land or premises held or occupied by a body corporate for the purposes of any railway, tramway, harbour, dock, inland navigation or air navigation undertaking or acquire, terminate, restrict or otherwise interfere with compulsorily any easement, wayleave or other right whatsoever over or in respect of any such land."*

6. Counsels' Submissions
6.1 Mr. Bradley S.C., for the applicants, submitted that the requirement of *"previous consent"* from the Minister means that obtaining such consent is a condition precedent to the making of a C.P.O. and the fact that it was not given prior to the making of the C.P.O. in this case rendered it *ultra vires*. He submitted that the requirement was jurisdictional, and unless done before the making of the CPO, the compulsory acquisition process could not advance. He noted that previous Ministerial consent is not only required where a person may acquire compulsorily any land but that it is required before a person can *"acquire, terminate, restrict or otherwise interfere with compulsorily"* with any right in respect of land. He characterised the making of a C.P.O. itself as a blight on the land which interfered with rights over the land and which gave rise to uncertainty on the part of the applicants as to whether they would have the land available to them for railway purposes.

6.2 Mr. Bradley contended that the making of a C.P.O. may be equated with the terms *"acquisition"* or *"acquire compulsorily"*, although he acknowledged that the word *"acquisition"*, in the context of the public law function of *"compulsory acquisition"* does not mean formally acquiring legal title to the land. Instead, he submitted, these terms are correctly construed as referring to the general process commenced by the making of a C.P.O. He pointed to s.217 of the Act of 2000 which, he submitted, served as an example of where these terms were used interchangeably. He stated that the Act of 2000, insofar as the acquisition procedure is concerned, is in *pari materia* with the Act of 1944 and, as such, may be used as an aid in the construction of the Act of 1944. He relied on the *dictum* of Henchy J. in the *State (Sheehan) v. The Government of Ireland* [1987] I.R. 550 and the *dictum* of O'Higgins C.J. in *Portland Estates (Limerick) Ltd v. Limerick Corporation* [1980] I.L.R.M. 77 in this regard. Mr. Bradley continued that even if the making of a C.P.O. is not the same as the acquisition of land by a local authority, it is an integral part of the acquisition process. He argued that the requirement to obtain previous consent means previous to the commencement of the process and not the point in the process at which compensation is triggered, which is the notice to treat stage, or when the legal interest is acquired.

6.3 The case of *In re Green Dale Building Company Limited* [1977] I.R. 256, and in particular the *dictum* of Henchy J therein, he submitted, should be distinguished as it was determined in the context of compensation claims by a person with an interest in the land. This was wholly distinct from the issue of jurisdiction or power to acquire compulsorily land held or occupied for railway purposes, in his submission.

6.4 It was argued by Mr. Bradley that particular meaning must attach to the word *"previous"*, in that, if the first named respondent was correct in its submission that the consent of the Minister is not required until prior to the notice to treat, then this would involve depriving the word *"previous"* of any real meaning and would be tantamount to construing the section, as if the section stated that *"…no person shall, without the* [ ] *consent of the Minister, acquire compulsorily any land."* i.e. without the word *"previous".* Mr. Bradley relied on the canon of statutory construction that presumes that words are not used in a statute without meaning or are superfluous and that effect must be given to all words used, as held in *Cork County Council v. Whillock* [1993] 1 I.R. 231; *Goulding Chemicals Ltd v. Bolger* [1977] I.R. 211; *Re Deauville Communications Worldwide Ltd.* [2002] 2 I.L.R.M. 388.

6.5 Mr. Bradley further submitted that there would be considerable uncertainty if the consent of the Minister could be obtained at any stage up to the service of the notice to treat as it would give the local authority a choice as to what stage of the process it could seek the consent of the Minister (i.e. before the making of the C.P.O. or after the making of the C.P.O. but before the confirmation of the C.P.O. or after the confirmation of the C.P.O. but prior to service of the notice to treat).

He relied on the *dicta* of Budd J. in the *People (Attorney General) v. McGlynn* [1967] I.R. 232 to the effect that if one construction may lead to the more harmonious working of the system it is a relevant factor in favouring such construction. Addressing the practical consequences of the interpretation put forward by the first named respondent, Mr. Bradley submitted that in the event that the Minister were to refuse consent, this would mean that significant expenses would be incurred up to this point in the process and would have been wasted.

6.6 Mr. Bradley submitted that the powers of compulsory acquisition constitute an interference with constitutionally protected rights and ought to be strictly construed and the interpretation which minimises such interference ought to be preferred as *per* Ó'Dálaigh C.J. in *Tormey v. Commissioners of Public Works* (Unreported, Supreme Court, 21st December, 1972).

6.7 Particular emphasis was placed by Mr. Bradley on two cases dealing with Ministerial consent. The first was the case of *Hendron v. Dublin Corporation* [1943] I.R. 566 where Gavin Duffy J. considered the consent of the Minister to be an *"essential preliminary"* to the exercise of compulsory powers of acquisition under s.40 of the Housing (Miscellaneous Provisions) Act 1931. The second case was *Rex v. Bedfordshire ex parte Sear* [1920] 2 K.B. 465, which was the only authority, which considered the meaning of the phrase *"previous consent"*, in the context of the process of compulsory acquisition. He submitted that the conclusions of the Court, in respect of the literal meaning of that phrase, as contained in s.10 (1) of the Land Settlement (Facilities) Act 1919, accorded with the interpretation he had urged on this Court i.e. that consent should be obtained prior to the making of a C.P.O. However, he conceded that the result of this case was not in his favour, in that, the majority held that consent was required before the exercise of the power to actually acquire the land by giving notice to treat or otherwise. He submitted that the reason for this outcome was inextricably linked to the particular object of the Act of 1919 (to facilitate the rapid land settlement of servicemen returning from the First World War) and, as no such object existed in the Act of 1944, a literal approach should be adopted by this Court.

6.8 Mr. Bradley lastly submitted that the Court should interpret this statutory provision in a manner which is most consistent with

procedural fairness in line with *Inland Revenue Commissioners v. Hinchy* [1960] A.C. 748 and *Lloyd v. McMahon* [1987] 1 A.C. 625.

6.9 Mr. Collins S.C., for the first named respondent, accepted that the consent of the Minister was a necessary pre-condition to the compulsory acquisition of lands of the applicants under s.130 of the Act of 1944. He contended that such consent must be obtained before lands are actually acquired and the earliest point at which it could be said that lands were being acquired, in his submission, was when the notice to treat was served. For a definition of the effect of a notice to treat he relied on the statement of Henchy J. in the case of *In re Green Dale Building Company Limited* [1977] I.R. 256 at p.265 where the learned Judge considered that a notice to treat does not, of itself, effect a transfer of interest to the acquiring authority but *"it creates a relationship, which ripens into an enforceable contract when the compensation has been either agreed by the parties or assessed by the arbitrator."*

6.10 Mr. Collins noted that s.130 of the Act of 1944 referred to the *"acquisition"* of land. He submitted that it did not refer to the making of an acquisition order, or the application for confirmation of such an order. He submitted that the applicants' argument relies on reading into s.130 of the Act of 1944 words which are not there and that the language of s.130 of the Act of 1944 does not expressly require that Ministerial consent be obtained before a C.P.O. can validly be made. He further submitted that the applicants' lands could not be acquired without confirmation of the relevant part of the C.P.O. by the second named respondent. He submitted that the first named respondent had not actually compulsorily acquired the applicants' lands at the C.P.O. stage, but had merely put in place a process whereby the end result may or may not be the acquisition of those lands. In essence, Mr. Collins submitted that the natural and ordinary meaning of the words used in s.130 of the Act of 1944 favoured the interpretation contended for by him.

6.11 Mr. Collins submitted that the applicants could not identify any prejudice, actual or potential, resulting from the procedures which had been adopted by the first named respondent in respect of the acquisition of their lands and stated that the concerns the applicants have in respect of the compulsory acquisition of their land could only materialise upon the confirmation and implementation of a C.P.O.

7. Decision

7.1 The logical starting point in the determination of these proceedings is to explore the literal meaning of s.130. It is clear from the terms of that provision that the *"previous consent"* of the Minister is required for the compulsory acquisition of the lands of the applicants, being railway lands, or the acquisition, termination, restriction or interference with any easement, wayleave or other right over or in respect of those lands. The question necessarily arises as to what exactly the Ministerial consent should be previous to? To answer that question the meaning of *"acquire compulsorily"* must be considered. Plainly, the consent must be obtained previous to the compulsory acquisition, whatever that is or is deemed to be. The phrase *"acquire compulsorily"* is not defined in the Act of 1944. Do these terms equate to the making of a C.P.O. or the service of the notice to treat or otherwise?

7.2 The scheme of compulsory acquisition by the first named respondent of the applicants' lands is governed primarily by the Housing Act 1966 (the Act of 1966) and there are a number of steps in this process. The meaning of *"acquire compulsorily"* must be construed against the backdrop of this staged process.

7.3 As to the applicant's contention that guidance can be obtained from other statutes regarding the meaning of *"acquire compulsorily"* on a *pari materia* basis, it was noted by O'Higgins C.J. in *Portland Estates (Limerick) Ltd v. Limerick Corporation* [1980] I.L.R.M. 77 that there was an inter-relationship between the Local Government Acts, the Housing Acts and the Planning Acts but he went on to observe at p.80 that the meaning of terms in those Acts was not uniform:-

> *"The seeker for the true meaning of particular statutory provisions is often sent from one statute to another and is frequently misled and confused by the use of different terms having the same meaning according to a particular adaptation used in one statute which may be absent in another. These statutes are drafted for an elite cognoscenti – those who in either central or local government are accustomed to the exercise of the powers prescribed and the language used. For others the ascertainment of what is laid down involves an arduous journey into the obscure."*

In such circumstances the search for the meaning of *"acquire compulsorily"* will not be rewarded solely by a reference to the provisions of other Acts.

7.4 The requirement to obtain the consent of the Minister pursuant to s.40 of the Housing (Miscellaneous Provisions) Act, 1931 (the Act of 1931) was considered in *Hendron v. Dublin Corporation* [1943] I.R. 566. Section 37 of the Act of 1931 permitted the local authority *"to purchase land compulsorily by means of a compulsory purchase order made by the local authority"* subject to confirmation by the Minister for Local Government and Public Health. Section 38 of the same act permitted a local authority with the consent of the Minister to acquire land but only by agreement of the owner, where the land was required for the purposes of Part III of the Housing of Working Classes Act 1890 but not immediately required for that purpose. At issue in the *Hendron* case was the purported exercise of the power under s.37 of the Act of 1931 by which the local authority made a compulsory purchase order in respect of certain lands which were not immediately required for the housing of the working classes. In fact, at the time the order was made the local authority had not decided at all what precise purpose was intended for the land the subject matter of the C.P.O., and indeed when the case came to Court four years later, the evidence established that the area in question was destined for commercial development, although the local authority had not yet formally decided this.

7.5 Clearly the *ratio* of this decision was the failure of compliance with the requirements of s.37 and what was said by the learned judge in respect to the requirement of ministerial consent pursuant to s.40 as required under s.38, which expressly excludes compulsory purchase, was manifestly *obiter*. Section 37 required confirmation by the Minister of a C.P.O. already made, as is now required in respect of the C.P.O. in issue in this case, save that the Minister has been replaced by the second named respondent. Section 38 had an entirely distinct and mutually exclusive function to s.37. Section.38 gave to a local authority a power to acquire with the consent of the Minister land required, but not immediately, for the purpose of Part III of the Act of 1890. There could have been no question in the *Hendron* case of the Court considering that the consent of the Minister was a requirement under s.37 to the making of a CPO. That did not arise. What was said by the learned judge in respect of the consent required by s.38 was no more that an observation that no such consent had been sought even though the land in question was ultimately destined primarily for commercial use. Gavin Duffy J. made the following comments in this regard at p. 574:-

> *"I note here, as a matter of interest, that the power of a local body to build shops in houses erected to lodge the workers is made subject to the consent of the Minister by s.40 of the Act of 1931…. No such consent has been sought nor given, and it is hard to see how compulsory powers under s.37 of the Act of 1931 can be utilised, where the design is to build shops and flats, without the consent of the Minister as an essential preliminary; otherwise the local authority could first take a man's land against his will, hoping for the best, and get the purchase confirmed, and then, perhaps several years later, find that the Minister refused consent to its particular scheme."*

7.6 In *Rex v. Bedfordshire County Council, ex parte Sear* [1920] 2 K.B 465 the issue of when *"previous consent"* should be given in a compulsory acquisition process was considered. By a majority of two to one it was held that s. 10(1) of the Land Settlement (Facilities) Act 1919 ("the Act of 1919") required that the consent of the Board of Agriculture and Fisheries be obtained prior to proceeding to acquire the land by giving notice to treat or otherwise. Section 10(1) of the Act of 1919 provided as follows:-

> *"The power of a council to acquire land for small holdings under the principal Act shall not be exercised during the period ending on the thirty-first day of March, nineteen hundred and twenty-six, except with the previous consent of the Board of Agriculture and Fisheries, or after the thirty-first day of March, nineteen hundred and twenty-six, except at such a price or rent or for such an annuity as, in the opinion of the council, will allow all expenses incurred by the council in relation to land to be recouped out of the purchase money or rent to be obtained by the council for the land."*

7.7 Lawrence J. in a dissenting judgment found that, on a literal interpretation, the requirement of previous consent meant that consent should be obtained prior to the making of the C.P.O. He concluded as follows at p.477:-

> *"It seems to me that there is no ground for saying that this statute authorizes an order for the acquisition of compulsory powers as distinguished from an order for the acquiring of land. The making of this order was an 'exercise' of 'the power' of acquiring the lands within the meaning of s.10 but it was unauthorized and therefore bad."*

7.8 Avory J., who was part of the majority, found that the literal meaning of s. 10(1) of the Act of 1919 would accord with the view of the applicant, though he ultimately held that the object of that particular Act did not favour a literal meaning at p.479:-

> *"The contention on behalf of the applicant is that s.10, sub-s. 1, of the Land Settlement (Facilities) Act, 1919, requires the consent of the Board of Agriculture to be given prior to the making of any such order as that of October 9 for the compulsory purchase of land, that such previous consent is a condition precedent to the validity of any such order, and that by the making of the order in this case and the giving of the notice thereof 'the power of a Council to acquire land' was 'exercised' within the meaning of that sub-section.*
>
> *…*
>
> *The words of s.10 of the Act of 1919 construed literally are undoubtedly capable of the construction contended for by the applicant, and prima facie it may be said this is the meaning to be attributed to them. …I think, however, that it is necessary to look the history of the legislation on this subject and the manifest object of this amending Act of 1919 in order to ascertain the true meaning of s.10."*

Thus adopting a purposive approach the learned judge then proceeded to extensively review the relevant legislative history, leading to the following conclusion at p.481:-

> *"Having regard to these considerations I have come to the conclusion that s.10, sub-s 1, does not require that the previous consent of the Board of Agriculture shall be given before an order such as that now in question is made by the County Council under s.1, but that it means as Mr Konstam has contended that such an order having been made, the consent of the Board must be given before the council proceed to acquire the land by giving the notice to treat under the Land clauses Acts; in other words, the council may proceed under s. 1, sub-s 1, to clothe or invest themselves with the powers conferred by the Land Clauses Acts in regard to some particular land, but must obtain the consent of the Board before proceeding actually to acquire the land by giving the notice to treat…."*

This was the majority decision in the case and manifestly it supports the submission made by Mr. Collins for the first named respondent.

7.9 Is the exercise of the power to make a C.P.O. the same as the actual acquisition of land compulsorily as is contemplated in s.130 of the Act of 1944? In my opinion, the answer must be no.

7.10 The making of the C.P.O. cannot be equated to *"acquire compulsorily"*. This is made clear in the terms of the notice itself, as outlined above, in that, it contemplates the taking of further steps to bring about the actual acquisition of the land. The C.P.O does not entitle the acquiring authority to exercise or enjoy any of the powers or privileges of ownership of the land sought to be acquired. Nor is there any restriction or interference in the use and enjoyment of their lands caused by the making of the C.P.O. The C.P.O. has no effect on ownership because, in the first instance, it must be confirmed by the second named respondent. If the C.P.O. is not confirmed, then manifestly it can have no effect. Even if it is confirmed, that merely entitles the acquiring authority to proceed to acquire the land but between the confirmation and the taking of the next necessary step in the process, namely the service of the notice to treat, the acquiring authority is not the owner of the land and does not enjoy any of the benefits of ownership. Up to this latter point the owner of the land is unrestricted in his use and enjoyment of the land.

7.11 It is clear that the service of the notice to treat does bring about significant interference for the applicants in respect of their lands, as for example, s. 80(1) of the Act of 1966 allows for the acquiring authority to take possession of and use the land or any part of it on giving not less than fourteen days notice. Section 81 (1) of the Act of 1966 goes on to provide that where an acquiring authority have entered on and taken possession of land in accordance with the powers conferred upon them by s.80 of the Act of 1966 and where, after the expiration of six months from the date of such entry certain conditions are satisfied the authority may by a vesting order *"acquire"* the legal title to the land.

7.12 In the course of the argument much stress was laid by Mr. Bradley on the potential wastage of money and time which would arise, if after the making of the C.P.O and the confirmation of it, the Minister then refused the consent under s.130. This, he submitted, pointed to an interpretation of s.130 which required the consent to be obtained before the making of the C.P.O. Undoubtedly this could happen, but so also could the reverse, namely, that after the consent of the Minister had been obtained there could be a refusal of confirmation by the second named respondent. In either case there could be a considerable loss of professional time with a consequential financial loss to the affected parties. In this context it is to be envisaged that the application to the Minister for consent under s.130 could be as difficult and as weighty as the proceedings in respect of the making of the C.P.O or its confirmation. In each instance much of the same material would be relevant to the decision to be made. Additionally, it could be said that Minister might wish to have available to him the determination of the second named respondent on the confirmation application before making his decision to grant or refuse consent. In short, the likely convenience and expense factors do not assist in ascertaining the correct meaning of s.130 of the Act of 1944.

7.13 I am satisfied that the C.P.O is merely a stage or step in the process that leads to a *compulsory acquisition* and cannot properly

be regarded as that *compulsory acquisition.* The acquisition begins to take legal effect only on the service of the notice to treat. Up to then the acquiring authority does not have a legal enforceable right to assume ownership or any of the indicia of ownership e.g. possession. After the notice to treat all that changes as discussed above.

7.14 I am satisfied therefore, that the consent of the Minister, required pursuant to s.130 of the Act of 1944, is not an initial pre-condition or jurisdictional step or requirement in the compulsory acquisition and can be obtained at any time in the process up to the service of the notice to treat.

8. Conclusion
8.1 For the reasons set above, I must refuse the relief sought by the applicants in these proceedings.