THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2021] IECA 4
Court of Appeal Record No. 2019/470
High Court Record No. 2018/400SP

Noonan J.
Haughton J.
Murray J.

IN THE MATTER OF THE ARBITRATION ACT 2010 AND IN ARBITRATION PURSUANT TO THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT 1919

BETWEEN:

CORK COUNTY COUNCIL

PLAINTIFF/APPELLANT

- AND -

SYLVIA LYNCH AND DESMOND J. BOYLE

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Murray delivered on the 15th day of January 2021

1. The issue underlying this appeal is whether a property arbitrator appointed in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919, as amended ('the Act') has jurisdiction (a) to determine whether a party seeking to compulsorily acquire property pursuant to statute and the owner of that property have conducted themselves so that the former is bound to acquire less property than specified in the relevant compulsory

purchase order and, if so, (b) to assess compensation for that lesser take. Allen J. ([2019] IEHC 661) decided that the argument that the property arbitrator enjoyed such a jurisdiction was not '*real and substantial'*. As a result, he dismissed the application of the plaintiff for an order requiring the stating of a case presenting that question. I agree with that conclusion and would accordingly refuse this appeal against his judgment and order.

The facts

2. The proceedings followed from a compulsory purchase order made by the plaintiff on 16 October 2009. The order (the Cork County Council N22 Baile Bhuirne Macroom (Baile Bhuirne to Coolcour) Road Development Compulsory Purchase Order 2009) identified for acquisition *inter alia* two parcels of property owned by the first defendant at Ballyverane, Macroom, County Cork - plot 185a.201 comprising .175 hectares and plot 185b.201 comprising .071 hectares. Plot 185a.201 was an area of the first defendant's garden including part of the main entrance to her residential property, while plot 185b.201 was a length of road between the physical boundary of the property and the median of the existing road. The total area to be acquired was thus .246 hectares.

3. On April 7 2011 an Bord Pleanala acting pursuant to s. 51 of the Roads Act 1993, approved the road development giving rise to the proposed acquisition. On the same date it confirmed the compulsory purchase order itself pursuant to s. 76 of, and the Third Schedule to, the Housing Act 1966 as extended by s. 10 of the Local Government (No.2) Act 1960 (as substituted by s. 86 of the Housing Act 1966) and the Planning and Development Act 2000 to 2010.

4. Section 79 of the Housing Act 1966 Act provides that where a compulsory purchase order to which the Act applies has become operative and the authority has decided to acquire land to which the order relates, it should serve a notice to treat on every owner, lessee and occupier of the land. The notice must state that the authority is willing to treat for the purchase of the several interests in the land and require each such owner to state the exact nature of the interest in respect of which compensation is claimed by him or her, together with details of the compensation claimed. Section 79(2) provides that a notice to treat served under the provision shall be a notice to treat for the purposes of the Act of 1919. A notice to treat in due compliance with these provisions was served by the plaintiff on 7 August 2013. This identified the property to be acquired in accordance with the compulsory purchase order.

5. Following service of the notice to treat, there was some engagement between the plaintiff and the first defendant and/or her representatives. This occurred over the period between June 2014 and April 2016. The plaintiff's evidence to the High Court in these proceedings was to the effect that the first defendant requested the plaintiff to exclude the entrance to her residence from the property to be taken, and that following this request it was agreed that a revised map would be prepared in compliance with that request. In his affidavit grounding these proceedings Mr. O'Shea, the Senior Executive Engineer for the plaintiff, referred to e-mail communications between the first defendant and the plaintiff and averred that they disclosed that '*the parties appeared to agree a revised land take'.* Mr. Kirby, the plaintiff's property advisor, averred that he was of the view from the middle of 2014 that the plaintiff had agreed to exclude the entrance to the first defendant's property from the property to be acquired by the plaintiff. The first defendant contended that she had not agreed any matter relating to the acquisition by compulsion of the lands the subject of the notice to treat, asserting that while she was willing to consider any proposal the plaintiff may have made in relation to the

exclusion of the entrance to her property from the take, no reduction or diminution in the land to be acquired by the plaintiff was agreed between the parties.

6. On the 21 November 2016 the plaintiff served a notice of entry pursuant to s. 80 of the Housing Act 1966. Thereafter (on 29 March 2017) the first defendant's agents served revised details of the compensation claimed by them in respect of the acquisition as specified in the notice to treat. On May 15 of that year, the first defendant applied to the Land Values Reference Committee pursuant to Rule 7 of the S.I No. 91/1961 Property Values (Arbitrations and Appeals) Rules 1961 ('the 1961 Rules') for the appointment of a property arbitrator. The second defendant (who took no part in these proceedings in either this Court or in the High Court) was nominated for that purpose by the Reference Committee on July 26 2017.

7. The second named defendant gave directions for the delivery of a statement of claim. This was served on 4 September 2017. It set out the first defendant's claim for compensation in respect of the property specified in the compulsory purchase order. Contemporaneous with its reply to that statement of claim and by letter dated 26 October 2017, the plaintiff's solicitors undertook on its behalf to acquire a specified and reduced area of land comprising .226 hectares. The letter stated that this reduced land would align the acquisition with the entrance to the first defendant's property. The effect was to reduce the area of the first defendant's garden to be acquired by 200 sq. meters. In a separate letter of the same date, the plaintiff offered a specified sum for compensation for the acquisition of that property. The plaintiff said that it proceeded to prepare for the arbitration on this basis and sought to have the arbitrator adjudicate on the compensation for the reduced take. The first defendant objected to this course of action, saying that the arbitrator's only jurisdiction was to determine compensation for the take specified in the notice to treat.

The problem

8. As of the point at which the hearing of the arbitration commenced, the plaintiff had legal authority to compulsorily acquire identified property belonging to the first defendant, had served a notice to treat in respect of that property, had received from the first defendant a claim for compensation in respect of that same property, and was party to a process for the determination of the compensation payable to the first defendant. That process was initiated by the first defendant by reference to the property described in the compulsory purchase order and notice to treat.

9. However, according to the plaintiff, it had been requested by the first defendant to reduce the property it would take pursuant to the compulsory purchase order, it was prepared to do this and accordingly proceeded to arbitration on that basis. One of the points made in submission before the High Court was that the plaintiff found itself in what was described as '*a difficult position'* because it tried to facilitate the claimant and then found that (as it was put) '*the wind changes'*. Importantly, it had combined an unconditional undertaking to take less of the first defendant's property than specified in the compulsory purchase order and notice to treat, with an offer to pay a specified sum in respect of that lesser take.

10. Section 5(1) of the 1919 Act provides that where the acquiring authority has made an unconditional offer in writing of a sum as compensation to any claimant and the sum awarded by an official arbitrator to that claimant does not exceed the sum so offered, the arbitrator shall unless for special reason he thinks proper not to do so, order the claimant to bear his own costs and pay such costs of the acquiring authority as were incurred after the date the offer was made. The plaintiff clearly wished the arbitrator to take account of the unconditional offer in the letter

of 26 October for that purpose. To do so, however, the arbitrator would have had to determine that the property he was required to value was the property specified in the correspondence of that date, and not the larger property referred to in the notice to treat. This, it would appear, is not an uncommon problem: counsel for the plaintiff advised the High Court that the issue was one '*which crops up all over the place … because sometimes land isn't needed, sometimes swaps are done, sometimes when the CPO was done .. things have changed and it is necessary to have a certain degree of flexibility'.*

11. The plaintiff thus wishes account to be taken of that reality so that it can agree with the first defendant to a variation of the land take, to offer compensation on the basis of that reduced acquisition, to have the arbitrator value the reduced take, and – presumably – to claim costs against the first defendant on foot of its unconditional offer in the event that the award is less than offered. The first defendant, on the other hand, says that it is a matter for the plaintiff to determine the take it requires at the outset and that once it serves the notice to treat and does not withdraw it within the six week period from receipt of the notice of claim as permitted by s. 5(2) of the Act, the process of assessment of compensation must proceed on the basis of the land identified in the notice to treat. As and when the compensation for the entire take identified in the notice to treat is determined by the arbitrator, the first defendant says, the parties can then negotiate for compensation in respect of a reduced take.

12. The hearing before the second named defendant opened on 1 February 2018. In advance of any evidence being called, the plaintiff asked that the second defendant assess compensation by reference to the reduced area, it being contended in written submissions delivered the day before that the first defendant had by her conduct consented to and/or led the plaintiff to believe that a reduced take would be acceptable to her. The first defendant objected to this course of action. The second defendant expressed concern as to whether he enjoyed jurisdiction to deal

with the reference on the basis suggested by the plaintiff. Written submissions on the issue were directed and duly exchanged. The second defendant delivered his ruling on 23 May 2018. Essentially, he reasoned that his jurisdiction arose on the basis of the notice to treat, and that in consequence he could only deal with matters that were contained in that notice. He said that the fact that the first defendant had indicated that she would co-operate with the amendment in question was not relevant to the notice to treat. He concluded stating that he could only hear evidence relating to the entire take as stated in the notice to treat.

13. The plaintiff thereupon requested that the arbitrator state a case as follows:

> *"Whether the Arbitrator was correct in his ruling that his jurisdiction was confined to assessing compensation for the lands specified in the Notice to Treat dated 7th August 2013, and not the reduced area which excludes the claimant's entrance by agreement and having regard to the consequent undertaking by the acquiring authority dated 26th October 2017'*

14. The second defendant refused to state a case on the basis that there was no point of law in issue. That decision resulted in the issue of these proceedings, in which the plaintiff sought an order from the High Court pursuant to s. 6(1) of the Act of 1919 compelling the arbitrator to state a case in these terms. During the course of the hearing, the question proposed by the plaintiff was reformulated, as follows:

> *"Whether the jurisdiction of the property arbitrator is confined to the notice to treat in circumstances where the local authority has given an undertaking following an engagement between the parties not to acquire an entire holding."*

The decision of the High Court

15. Section 6(1) of the Act provides as follows:

> *The decision of an official arbitrator upon any question of fact, shall be final and binding on the parties, and the persons claiming under them respectively, but the official arbitrator may, and shall, if the High Court so directs, state at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and may state his award as to the whole or part thereof in the form of a special case for the opinion of the High Court.*

16. It is firmly established that the Court will not require the stating of a case on a point of law that is '*insubstantial'* (*JI Jennings Ltd v. O'Leary* [2004] IEHC 318), and it was on the basis that the question the plaintiff sought to be stated did not meet that test that Allen J. refused the relief thus sought ([2019] IEHC 661 at para. 55). The jurisdiction of a property arbitrator appointed under the 1919 Act, he said, derived from his appointment and could not extend to any question other than the questions he was appointed to hear and determine. In this case when the arbitrator was appointed, Allen J. said, the question that had arisen was that of the disputed compensation in respect of the two parcels of land the subject of the compulsory purchase order and notice to treat. It was the trial judge's view the property arbitrator had been appointed to adjudicate upon only that issue. Allen J. concluded as follows (para. 54):

> '*The jurisdiction of the property arbitrator does not extend to the assessment of the value of any modified, varied or reduced area of land, still less to the determination of disputed questions as to whether the reduction was made with the agreement of, or at the request of, or with the acquiescence of the landowner.'*

17. It is important in understanding this conclusion, the basis for it and the reason it was correct, to stress that there were in truth not one, but two issues rolled into the question the plaintiff ultimately sought to have stated.

18. One issue was whether parties could by agreement or through an undertaking from the plaintiff confer jurisdiction on the second named defendant to assess compensation for only part of the property specified in the notice to treat. The difficulty with that issue so stated was that the question of whether there was such an agreement was disputed, as was the legal effect of the undertaking. Understandably in those circumstances, the first defendant focussed her submissions to the High Court on the proposition that the Court could not direct the stating of such a question without there being findings as to the underlying facts.

19. The second issue was a broader one and was highlighted by the reformulated question presented by the plaintiff. As it was put by the first defendant in her written submissions, what the plaintiff in this case sought was that the second named defendant would determine contested issues as to whether there had been an agreement, or a legally effective undertaking of the kind alleged by the plaintiff. This was accepted by counsel for the plaintiff in the course of oral argument in this Court: when it was put to him that on his case the arbitrator '*must have jurisdiction to decide if there was such an agreement'* he unequivocally accepted that this was so. Accordingly, the question the plaintiff sought to have stated was not simply whether the arbitrator could have his jurisdiction reduced as a result of an agreement between, or conduct of, the parties to the reference before him, but whether he enjoyed an additional power to resolve a dispute between the acquiring authority and the property owner as to whether there had been a more general agreement between the parties the effect of which was to vary the take envisaged by the compulsory purchase order and notice to treat.

20. These two issues are closely related – the property arbitrator could not conceivably have jurisdiction to determine whether there had been an agreement or conduct of the nature alleged if he did not have the power to measure compensation for the reduced take. However, they are not necessarily the same issue: it is possible that the property arbitrator would have the power to measure the compensation payable for a reduced take if each party expressly consented before him to his doing so and if the property the subject of such a request was part of the property referred to in the notice to treat, while at the same time not enjoying the authority to adjudicate on a dispute as to whether the parties had, before the reference was even made, conducted themselves so that the acquiring authority had agreed to take less property than was specified in the compulsory purchase order and the notice to treat, and the landowner had agreed to give it.

21. Of course, it might be said that if the property arbitrator had the power to adjudicate on the value of a lesser take if the parties agreed to his so doing, he would necessarily have had the power to decide if they had entered into such an agreement in the first place. However, in my view one does not necessarily follow from the other. In practical terms it seems to me that there is every difference between parties agreeing before the arbitrator by a clearly expressed consent to the conduct of an arbitration by the valuation of only a portion of the property referred to in the notice to treat, and the conferral upon the arbitrator of the distinct power to embark upon an inquiry as to whether their conduct in the past should be treated as varying the take provided for in the compulsory purchase order and notice to treat. Allowing the arbitrator to address the former does not expand his jurisdiction, gives effect to the agreement of the only parties with an interest in the assessment of that compensation and, it seems to me, reflects the practical exigency that circumstances may arise in which there is much to be gained, and

nothing to be lost, by the arbitrator giving effect to the unequivocal consent of the parties who have ultimately determined his terms of reference.

22. I note, for example, that the property arbitrator who stated the case leading to the decision in *Re Green Dale Building Company Ltd* [1977] IR 256 awarded compensation by reference to two different dates reflecting the dispute in that case between the parties as to what the correct point for that valuation was (see [1977] IR at p. 263): inevitably he did not have the power to issue one of those valuations but for obvious reasons of practicality he proceeded to determine both. No-one, including the judges hearing the case, appeared to have had any difficulty with this. Interpreting the Act in a manner reflecting the reality of the arbitrator's task, I am far from convinced that he could not give effect to the agreement of the parties that he value only a reduced take, if there was such agreement and if both parties unequivocally accepted this before him. That is not to say, I must observe, that he would *have* to comply with such a request. As I explain shortly his jurisdiction is defined by his appointment, that is referable to the property defined by the notice to treat and an arbitrator is entitled to adopt the position that he will adhere rigidly to that remit. However, I observe all of this because I am anxious that nothing said in this judgment be interpreted as detracting from the power of any arbitrator, if he thought it appropriate so to do, to comply with reasonable, practical requests agreed to by all of the parties before him which did not involve him *expanding* his statutory remit.

23. This may well be an academic issue if the dynamic I have described earlier in this judgment applies in all cases because, (as I explain later), no matter how one views the issue, the power of the arbitrator to award costs by reference to an unconditional offer arises only where the acquiring authority offers less than the sum fixed as compensation for the entire take

specified in the notice to treat. However, at the level of principle there is an important distinction between the issue of whether the parties to an arbitration of this kind can reduce the arbitrator's task by clear and unequivocal consent communicated to him before or in the course of the proceedings, and the question of whether the arbitrator has the jurisdiction to find facts relevant to whether they had entered into an *a priori* agreement or otherwise brought about a state of affairs of the kind contended by the plaintiff in this case.

The legislation

24. It goes without saying that the property arbitrator is a creature of, and that his jurisdiction derives exclusively from, statute. Insofar as he is said to enjoy any particular power, it must be either rooted in the express language of the Act or other legislation or must arise by necessary implication from the terms of that legislation. The starting point in the consequent analysis is, s. 1(1) of the Act. It provides:

> '*Where by or under any statute (whether passed before or after the passing this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation, and, where any part of the land to be acquired is subject to a lease which comprises land not acquired, any question as to the apportionment of the rent payable under the lease, shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this section.'*

25. Section 4 of the Property Values (Arbitration and Appeals) Act 1960 provides:

'The arbitration referred to in subsection (1) of section 1 of the Act of 1919 shall, in relation to the reference and determination under that subsection of any question, be the arbitration of a property arbitrator nominated for the purposes of such reference and determination by the Reference Committee in accordance with rules made by the Reference Committee under this section and, accordingly, -

(a) so much of the said subsection (1) as provides for the reference of questions to and their determination by such one of a panel of official arbitrators to be appointed under the said section 1 as may be selected as therein provided shall cease to have effect, and

(b) references in the Act of 1919 to an official arbitrator shall be construed as references to a property arbitrator nominated under this section.'

26. The provision thus posits three reference points. First, the jurisdiction arises only in the context of legislation which authorises the compulsory acquisition of land. Second, there must be a '*question of disputed compensation'* arising, obviously, from such an acquisition. Third, it is that '*question of disputed compensation'* which is referred to and determined by the arbitrator and accordingly that question which exclusively defines his jurisdiction.

27. Each of these fall to be viewed in the light of the central role of the notice to treat in the process of compulsory purchase. The notice to treat is referenced throughout the 1919 Act (see s. 4 and s. 5(2)). It fixes both the date for the assessment of compensation under the Housing Act 1966 (s. 84(1)) and the interest in respect of which the owner can claim compensation (see Galligan and McGrath, '*Compulsory Purchase and Compensation in Ireland: Law and*

Practice', (2nd Ed. 2013) at para. 25.26). Upon service of that notice the acquiring authority is empowered to enter on the land specified in the notice and may, six months thereafter, acquire the land by order (ss. 80 and 81 Housing Act 1966).

28. The application to the Reference Committee, and appointment made by it, are regulated by the provisions of the Property Values (Arbitrations and Appeals) Rules 1961 ('the 1961 Rules'). The former is provided for by Rule 7, as follows:

> *"(1) Where a question has arisen, any party to or affected by the acquisition in relation to which the question has arisen –*
>
> *(a) may at any time after the expiration of fourteen days from the date on which notice to treat was served in relation to the acquisition, send to the Reference Committee an application in writing for the nomination of a property arbitrator for the purposes of the reference and determination of the question*

29. Rule 3(1) of the 1961 Rules provides that the reference here to '*question'* means to a question under s. 1(1) of the Act. Rule 7(2) stipulates that the application must specify '*the nature of the question to which the application relates'.* Rule 8 then carries that question through to the jurisdiction of the property arbitrator:

> *"8. Whenever the Reference Committee receives, pursuant to Rule 7 of these Rules, a valid application in writing for the appointment of a property arbitrator, it shall, as soon as may be, nominate a property arbitrator for the purpose of the reference and determination of the question to which the notice relates, and shall, as soon as it has*

nominated the property arbitrator, inform the parties to, or affected by, the acquisition in relation to which the question has arisen of his name and address."

30. The provisions, it appears to me, chart a clear path from the compulsory acquisition referred to in s. 1(1) of the Act and the '*question of disputed compensation'* which that provision enables to be referred to the property arbitrator, through the same '*question'* the affected party applies to have the arbitrator nominated to decide in accordance with Rule 7(1) of the 1961 Rules, to the nomination pursuant to Rule 8(1) by the Reference Committee of the arbitrator to decide that, and only that, question. The '*question'* is that of the assessment of compensation, and the compensation is in respect of the compulsory acquisition. Here, the property acquired by compulsory acquisition is that specified in the notice to treat.

31. It was contended in the submissions by the plaintiff that the term '*disputed compensation'* as it appears in s. 1(1) of the Act should be interpreted broadly so that it includes a dispute arising from an agreement as to the property in respect of which the compensation is to issue. The argument is, in my view, misconceived. The question of '*disputed compensation'* which is referred to is clearly a dispute as to the amount of compensation to be paid, not as to the fact or consequence of any agreement as to the land to be acquired. Section 1(1) proceeds on the basis that the land take is fixed when the matter is referred to the arbitrator, being determined by the first clause of the provision which refers to '*land ... authorised to be acquired compulsorily'* as carried into the terms of reference of the property arbitrator by Rules 7 and 8 of the 1961 Rules.

32. Such an arbitrator is not conferred by the legislation with the power to determine the value of any property other than that specified in the notice seeking his nomination and

consequent appointment and is not conferred with the jurisdiction to consider questions as to whether there has been an agreement to vary the take as originally sought. Whether or not the parties could by consent ask the arbitrator to value a smaller take, where the parties to an arbitration are in dispute as to whether there was an agreement between them whereby the property owner would yield and the acquiring authority accept less property than had been specified in the notice to treat, or indeed where one of the parties contends that an undertaking given by the acquiring authority operated to reduce the land take, the terms of the legislation would suggest that these are not questions the arbitrator has jurisdiction to determine. If this construction of the legislation were correct, it would follow that the property arbitrator had no role in receiving evidence or submissions as to the existence of an alleged agreement, the terms of an alleged undertaking, or the legal effect of either.

The plaintiff's case

33. Central to its position on this appeal is the complaint of the plaintiff that the trial Judge proceeded to decide the issue it says he sought to have stated instead of simply considering whether the issue was real and substantial. Obviously, where a Court refuses to state a case because it is not real and substantial it is inevitably deciding the issue sought to be stated, insofar as it is determining that the point admits of only one answer. The critical issue is thus (a) what test is applied in determining whether an issue is '*real and substantial'* for these purposes and (b) on which side of the line so falls the argument sought to be advanced here by the plaintiff.

34. The answer to the first of these questions cannot be controversial. Before the High Court will direct an arbitrator to state a case on a question of law, the point must be '*such as to be*

open to serious argument' (*Halfdan Grieg and Co. v. Sterling Coal* [1973] 1 QB 843, at p. 862). An issue which is '*too plain for serious argument'* does not meet that test (id. at p. 863).

35. Counsel for the plaintiff contended in oral submissions to this Court that the jurisdiction of a property arbitrator appointed under the 1919 Act extended to '*any question that might arise after his appointment which arises in the course of the arbitration'.* So stated, the formulation demands an immediate qualification: the mere fact that an issue might arise '*in the course of an arbitration'* is not and cannot be the benchmark of jurisdiction. The issue must be one falling within the express terms of his statutory remit, or it must follow necessarily from that remit. To prevail in its appeal, the plaintiff therefore had to establish not merely that the issue had arisen in the course of the proceedings, but that there was a real and substantial legal basis for contending that it was properly there in the first place.

36. In that regard, the plaintiff focussed on the unconditional letter of offer. In order to exercise the jurisdiction conferred by s. 5, it was said, the property arbitrator had to determine the validity of the undertaking, and in order to do that he would have to look at the background to that undertaking. In other words, as I understand the argument, by virtue of being empowered to make a finding as to whether the unconditional offer was effective for the purposes of determining costs under the section, it would be necessary for the arbitrator to decide whether, in point of fact, the undertaking to acquire less than the full take was legally effective.

37. Section 5(1) provides as follows:

> '*Where the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and* ***the sum awarded by an official arbitrator to that claimant*** *does not exceed the sum offered, the official arbitrator shall, unless for special*

reasons he things proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the the offer was made.'

(Emphasis added)

38. When the language of the provision – and in particular the phrase '*sum awarded by an official arbitrator'* – is examined, it is clear that the argument thus advanced by the plaintiff is circular. The only award the arbitrator can make (and thus the only benchmark against which the acquiring authority's offer can be gauged) is an award in respect of the property he is legally mandated to value. The argument advanced by the plaintiff therefore has reality only if the property arbitrator is legally mandated to value less than the take giving rise to his appointment, and, as I have explained, he is not. Section 5(1) depends on the extent of the jurisdiction otherwise conferred on the arbitrator, it is not itself an independent source of that jurisdiction.

39. It follows that the plaintiff in this case has not been in a position to point to any language in the constituent statute conferring the jurisdiction for which it contends, nor to any plausible basis (whether by reference to case law or otherwise) on which that jurisdiction can be inferred. For the reasons I have just outlined, neither the language nor scope of the Act suggest any power of the kind contended. No authority was identified by the plaintiff suggesting otherwise. In these circumstances, it is hard to my mind to see how it can assert that the contention it advances is '*real and substantial'*.

40. The plaintiff did, however, place some reliance upon two decisions of the English Courts and one of the Court of Sessions, Inner House. While acknowledging that these were '*not directly on point'* counsel relied upon them to establish that in certain circumstances a local

authority may abandon or, with the agreement of the claimant, undertake not to enforce a compulsory purchase order.

41. The first is the decision in *Grice v. Dudley Corporation* [1958] Ch. 329. There, the plaintiff applied to the High Court for a declaration that a notice to treat served by the defendant under s. 123 of the Land Clauses (Consolidation) Act 1845 was invalid. The Court granted that relief, essentially on the basis first, that the defendant had abandoned its rights under the notice to treat, and second because in the circumstances of that case the defendant was seeking to exercise its powers of compulsory acquisition for purposes that had not yet been finally established. In the course of his judgment Upjohn J. made it clear first, that an acquiring authority must proceed to enforce his notice to treat within a reasonable period and that if it did not do so, it could be barred if its delay was not explained, and second that that authority (at p.339):

> '*may evince an intention to abandon his rights given to him by the notice to treat, in which case the owner is entitled to treat those rights as abandoned.'*

42. That proposition appears to me unexceptional. The same can be said of the other English case relied upon by the plaintiff, *Simpsons Motor Sales (London) v. Hendron Corporation (No. 1)* [1964] AC 1088. There, the defendant authority obtained confirmation of a compulsory purchase order pursuant to the provisions of housing legislation in respect of a commercial premises occupied by the plaintiff. That confirmation having issued in 1952, a notice to treat was served shortly thereafter and a notice of entry one year after that. The parties proceeded to provisionally agree compensation. The acquiring authority then decided to abandon the original plan for the property and proposed to acquire it instead as part of a larger site for a different development, subsequently advising a third party in 1958 that it no longer proposed

to proceed with the compulsory purchase. However, shortly after that communication it proceeded to seek to acquire the land for the sum provisionally agreed.

43. The plaintiff's claim for a declaration that the notice to treat and notice of entry were no longer effective was based on the acquiring authority's delay, abandonment by it of its rights, disablement by the acquiring authority from acting on the notice because its intentions were, by the time of the action, outside the scope of the purposes permitted by the notice and compulsory acquisition order and a general claim that in all the circumstances of the case it was contrary to principles of equity that the authority should be permitted to proceed on foot of its notice.

44. While the plaintiff failed on the facts, Lord Evershed (with whose judgment the other members of the court agreed) posited the following formulation of the relevant principle (at p. 1125):

> '*…in a case such as the present a local authority may abandon a right to purchase compulsorily land in respect of which a compulsory purchase order has been obtained : and that if such abandonment is accepted by the owner then the compulsory purchase order ceases to be effective …the quasi contractual relationship which the notice to treat has caused to come into existence is then determined. I also accept … that the private owner might not be willing to accept the abandonment but could proceed to enforce his claim under the notice to treat; and that in such event it would not be pen to the local authority to rely upon their own wrongful act of abandonment to defeat the private owner's claim.'*

45. The decisions in *Grice* and *Simpsons Motor Sales (London)* were both cited with approval by O'Hanlon J. in *Van Nierop v. Commissioners of Public Works in Ireland* [1990] 2

IR 189, to which reference was also made in submissions. There the Court granted declaratory orders that a notice of compulsory acquisition made pursuant to the Fishery Harbour Centre Act 1968 and a consequent notice to treat were invalid and of no legal effect. That relief was granted in circumstances in which the Court held that the defendants had abandoned the acquisition, the relevant orders for the acquisition of the property having been made in 1971 and 1974 (the latter expanding the area to be acquired), but in which the acquisition had still not proceeded when the proceedings were commenced in 1984. O'Hanlon J. held (at p. 198) that where a notice to treat has been served under a compulsory purchase order, the acquiring authority is under a duty to proceed to acquire the land within a reasonable time and, if they do not, that they may lose their rights to enforce the notice. This, it might be noted, was a case in which an arbitrator had been appointed under the 1919 Act to assess compensation in respect of the land the subject of the first notice.

46. The plaintiff further referred to the decision of the Court of Session, Inner House, in *Fox v. Scottish Ministers and Glasgow City Council* [2012] SLT 1198. There, the applicant sought orders by way of statutory appeal quashing the confirmation a compulsory purchase order. The decision appealed against was that of the Scottish Ministers and was made in October 2009. It took effect consequent upon its confirmation by Glasgow City Council in September 2010, and the proceedings were instituted a month later. While the case was pending, circumstances changed and the acquiring authority decided that it would withdraw from the appeal and take no further action in respect of the CPO process. However, while the compulsory purchase order expired three years after it took effect, there was no statutory procedure by which the Scottish Ministers who had made the challenged decision could rescind it, there was no procedure whereby the acquiring authority could withdraw a confirmed compulsory purchase order, and as a matter of Scottish law the Court did not have jurisdiction to quash the decision under the relevant appeal provisions even if all parties agreed to that course of action, unless

the Court was satisfied the statutory preconditions to such an order were met, which - it was held - they were not.

47. The solution suggested by the Council and Ministers - and accepted by the Court - was the proffering by the acquiring authority of an undertaking not to give effect to the order until it had expired. The judgment of the Court of Sessions, Inner House, does no more than confirm that this undertaking was an effective means of disposing of the proceedings (the issue arose in the context of what appears to have been an application for, effectively, costs).

48. I have addressed these decisions at a little length having regard to the emphasis placed upon them by the plaintiff. However, they appear to me to do no more than establish the principle (which I do not understand the first defendant to dispute) that an acquiring authority may by either positive action (such as the giving of an undertaking) or by default (as where it fails to act on foot of its legal rights within a reasonable period of time) forgo the right to proceed on foot of a compulsory purchase order. They also, incidentally, make it absolutely clear that the authority cannot abandon that process unilaterally once it has served a notice to treat – a proposition that must follow from the mutual entitlements arising from the taking of that step. The effect of the service of the notice to treat is to confer on the acquiring authority a right to acquire the lands, and a concurrent obligation to pay the proper and appropriate compensation (*Re Green Dale Building Company Ltd*). The right of the landowner thus arising cannot be removed by unilateral action of the authority without the landowner's agreement or, perhaps, his acquiescence in the new arrangements.

49. The plaintiff suggested in the course of his submissions that the only matter with which this Court had to be concerned in addressing this appeal was whether there was a real and substantial question of law presented by these decisions, the assumption being that once it was

accepted that a compulsory purchase order *might* be abandoned or modified by an undertaking, the jurisdiction of the property arbitrator to rule on that issue necessarily followed. However, none of this is sufficient to take the plaintiff to the point it needs to reach in this case. The issue is not merely that an undertaking may (if accepted by the landowner) be effective, but that the property arbitrator appointed under the 1919 Act has the jurisdiction to rule (a) whether such an undertaking has been accepted or indeed if there is otherwise a legally binding arrangement between the parties in the nature of a contract, (b) if so what its legal effect is, (c) if it is found effective, to determine compensation above the objection of one of the parties in respect of a smaller take than identified in the notice to treat and his appointment and (d) from there to penalise the landowner in costs because he did not accept the offer made by the acquiring authority in respect of the lesser take. In point of fact, in each of the cases relied upon by the plaintiff the effect of the actions of the acquiring authority were determined in the High Court and that, it seems to me, is where claims based upon such actions necessarily and properly belong.

Relevant authorities

50. There are two decisions, and two textbook commentaries which I think are of greater relevance. These reflect what appears to me to be the plain effect of the language used in the relevant legislation. In *Manning v. Shackleton* [1996] 3 IR 85, where the Supreme Court addressed itself to whether the property arbitrator had to give reasons for his or her decision, Keane J. (with whom O'Flaherty J. and Blayney J. agreed) explained the arbitrator's jurisdiction under the 1919 Act as follows (at pp. 94 to95):

'The purpose of the arbitration procedure prescribed by that Act is to enable an independent and suitably qualified person ***to determine what is appropriate compensation for land compulsorily acquired*** *where the owner and the acquiring authority cannot agree the amount. He then determines by his award the appropriate sum …*'

(Emphasis added)

51. This does not mean that the only matter in respect of which the property arbitrator can hear evidence or issue rulings is the compensation in dispute: there will be other ancillary issues that will arise in the course of the proceedings before him which may necessitate evidence or determination in order to rule on the compensation. Keane J. in *Manning v. Shackleton* instanced the situation in which the arbitrator is called upon to include in his award other headings of compensatable loss sustained by the claimant such as compensation for disturbance, severance and injurious affection (at p. 95). Indeed in argument before this Court counsel for the plaintiff suggested others – the efficacy of the unconditional offer for the purposes of s. 5 or issues around the applicability of noise regulations, or certain matters of planning. However, all of these afford examples of findings the arbitrator must make in order to discharge his statutory function: all advance the specific decision the arbitrator is required by the legislation to make, as all are directed either to the proper amount to be paid to the landowner as a result of the acquisition or the ascertainment of the costs of the arbitration as provided for in s. 5(1) of the Act.

52. The Supreme Court in *Manning* ultimately determined that there was no general obligation imposed on a property arbitrator to give reasons for the compensation he awarded.

That conclusion was driven in part by the limited nature of his function, Keane J. observing (at p. 96):

> '*The fact that the arbitrator does no more than determine the amount of the compensation and, if required, segregate it under different headings does not in any way inhibit the specific supervisory jurisdiction conferred on the High Court in respect of such arbitrations by the Act of 1919 …'*

53. This conclusion was taken up by Budd J. in the course of his analysis of the nature of the jurisdiction exercised by the property arbitrator in *Blascoid Mor Teo and ors. v. The Commissioners of Public Works in Ireland and ors.* [1998] IEHC 38. There, one of the questions before the Court was whether the incorporation into An Blascaod Mór National Historic Park Act 1989 of the procedure provided for under the 1919 Act for the determination of compensation for property compulsorily acquired on the Blasket Islands rendered the 1989 Act unconstitutional. Part of the case advanced in that regard was that the property arbitrator was engaged in an administration of justice within the meaning of Article 34 of the Constitution. Budd J. agreed with that argument, but also found the function of the property arbitrator to be a *'limited function and power of a judicial nature'* enabled by Article 37.1. What is relevant for present purposes is his description of the jurisdiction envisaged by the 1919 Act.

54. He variously described the legislation as '*concerned with establishing how compensation was to be measured and determined in default of agreement'* (at para. 303), and with '*assessing the amount of the market value of lands'* (at para. 320). Having considered the passages from the decision in *Manning v. Shackleton* to which I have referred, his conclusion was thus (at para. 369):

'*… in this State there is authority for the proposition that the assessment of compensation is a limited function and that this role can be carried out by experts acting in a judicious manner.'*

55. It is unsurprising that the relevant texts, without exception, frame the jurisdiction of the property arbitrator under the 1919 Act in similarly limited terms. Galligan and McGrath in '*Compulsory Purchase and Compensation in Ireland'* repeat the description in the first edition of that work:

"[26.22] The jurisdiction of the property arbitrator is limited to determining questions of compensation and of apportionment of rent arising under the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919 and appeals under the Finance (1909-1910) Act 1910 s.33 …

[26.24] A property arbitrator has no authority to consider collateral questions outside of those which he has been nominated to determine …"

56. Browne '*The Law of Local Government'* (1st Ed. 2014) is to the same effect (at para. 13-100):

'The arbitrator is confined to the determination of the value of land which is being compulsorily acquired and he or she has no function in determining disputes as to title or in monitoring or determining the efficacy of accommodation works which the acquiring authority commits to carrying out. The arbitrator has no jurisdiction to determine issues relating to the payment of interest or occupation of the claimant's lands by the acquiring authority.'

Some further issues

57. Four other issues arise from the various contentions advanced by the parties in the course of the proceedings. First, the plaintiff seeks to portray the finding of the trial Judge as having a dramatic practical consequence. It says:

> '*the effect of this judgment is that local authorities may not undertake or agree to acquire a modified varied or reduced area of land with the agreement or at the request of or with the acquiescence of the landowner and have compensation assessed by a property arbitrator if the Property Arbitrator has already been appointed.*
>
> *The absolute nature of this statement of principle in relation to property arbitrations contrasts with that in the UK. It also does not reflect the underlying practical reality of the situation on the ground, will result in local authorities incurring significant additional costs and will result in landowners being paid compensation for land which is not in fact acquired from them.'*

58. This is, with respect, to confuse the issues. The acquiring authority is free to define its take up to the point at which it serves a notice to treat, and it is free to withdraw that notice as permitted by s. 5(2) of the Act. It is also free to seek to reduce the take thereafter either by agreement or by means of an undertaking accepted by the landowner. Where it adopts this course of action it is possible that with the express agreement of the landowner the property arbitrator may be empowered to, and in ease of the parties may be inclined to, value the reduced take. What the legislation does not, however, envisage is a post notice to treat agreement to reduce a take being relied upon against the wishes of the landowner, to fix him with costs. If the acquiring authority wishes to gain the costs advantage envisaged by s. 5(2) of the Act, it

must offer for the entire take and the landowner must fail to beat that offer. Any agreement thereafter to reduce the take and allocate compensation and costs is a matter for negotiation between the parties.

59. Second, the plaintiff takes issue with one comment made by the trial Judge. At para. 38 of his judgment he said the following:

> '*The jurisdiction of the property arbitrator derives from his appointment and I can see no basis upon which it could extend to any question other than the questions he was appointed to hear and determine a fortiori any question that might arise after his appointment'*

60. The plaintiff points to a number of decisions in which cases have been stated in relation to events that have occurred or issues that have arisen after the appointment of the arbitrator. It refers to *ESB v. Boyle* [2018] IEHC 718 in which Quinn J. directed a case on an issue arising from the terms of unconditional offers sent after the appointment of the arbitrator, *Rossmore Properties v. Ffrench O'Carroll* in which a case was directed on the issue of whether an unconditional offer should have been accepted within a specified period, and *ESB v. Boyle and Payne* [2019] IEHC 475 where the issue was whether a payment made to the landowner should be taken into account in assessing compensation. Each of these clearly presented issues that arose after the nomination of the arbitrator, and to that extent the qualification to the language used by the trial Judge suggested by the plaintiff is well placed. However, the essential point made by Allen J. at the commencement of this sentence stands good: each of these cases involved issues that are clearly consigned to the jurisdiction of the property arbitrator either by the Act (insofar as they predicate costs of the arbitration on the effect of any unconditional offer made by the acquiring authority) or as a necessary adjunct to the power to assess

compensation (in whether or not to take account of other payments made to the landowner by the relevant authority).

61. Third, a significant proportion of the first defendant's submission is addressed to the proposition that the request for the statement of a case was premature as the property arbitrator had heard no evidence and therefore could make no findings of fact. In point of fact before the High Court her counsel submitted that the Court could not decide that there is a substantial point as to whether the parties can agree to vary the jurisdiction of the property arbitrator because deciding that issue rested on the hypothesis that there was such an agreement. To make any such finding would, it was contended, amount to a moot or a speculative exercise.

62. For as long as the plaintiff was predicating the issue of law it sought to have stated upon the existence of an agreement between the parties, the position as adopted by the first defendant was understandable. The case law makes it clear that the case stated procedure cannot be used to determine hypothetical issues and that any case to be stated must be based on a factual premise (see for example *Corley v. Gill* [1975] IR 313, *Martin v. Quinn* [1980] IR 244, at p. 250 and *O'Shea v. Westwood Club Ltd.* [2015] IEHC 24). However, as I have explained earlier, Allen J. correctly viewed the essential issue – particularly as reflected in the reformulated issue – as being more fundamental. In circumstances where there was in fact a dispute between the parties as to whether there had been any agreement between them of the kind suggested by the plaintiff, and in which the plaintiff sought to rely upon an undertaking which it was said had in some (unspecified) sense been accepted or acquiesced in by the landowner, the real question was whether the arbitrator had jurisdiction to rule on whether such an agreement had been entered into and/or whether such an undertaking was in the circumstances legally effective, at all. That was a jurisdictional issue, the only facts relevant to which were that the plaintiff said that there had been an agreement and/or an effective undertaking, and that the first defendant

said that there was not. The authors of *Compulsory Purchase and Compensation in Ireland: Law and Practice* observe (at para. 26.36):

> '*Generally speaking where the point at issue goes to the root of the reference e.g where it concerns the jurisdiction of the arbitrator or the entitlement of the claimant to compensation it is best to seek the court's decision straight away and adjourn the hearing pending the outcome of the special case.'*

63. The fourth and final issue related to whether the Court enjoys the jurisdiction to direct the stating of a case at all having regard to the provisions of the Arbitration Act 2010. That question arises because Article 5 of the UNCITRAL Model Law, adopted into Irish law by the provisions of s.6 of the 2010 Act, provides that a Court will not intervene in matters governed by the Model Law. However, in *ESB v. Payne* [2019] IEHC 475, Twomey J. decided that the Court retained the jurisdiction conferred by s. 6 of the 1919 Act having regard to the stipulation in s. 29 of the Arbitration Act 2010 that that Act shall apply to every arbitration under any other Act '*except in so far as this Act is inconsistent with that other Act'*. Since the entitlement of the High Court to intervene in a property arbitration under the 1919 Act is inconsistent with Article 5, Twomey J. felt it clear that Article 5 of the Model Law does not operate to, effectively, displace s. 6. While noting the force of his reasoning, in circumstances where this Court is refusing the plaintiff's application it is not necessary to rule on this issue and I would therefore reserve a consideration of the relationship between the 2010 Act and the 1919 legislation to a case in which that question necessarily arises.

Conclusion

64. Had both parties to this case agreed that the second named defendant need only determine the compensation payable in respect of a portion of the property the subject of the compulsory purchase order and notice to treat, there would have been a stateable issue as to whether the property arbitrator had jurisdiction, by virtue of that mutual consent and in a context where all the property to be valued by such agreement was comprised in the 'take' as originally envisaged, to issue such a valuation. That, however, was not the case and this was not the issue on this appeal. The issue was whether the property arbitrator had jurisdiction to hear evidence in relation to, and to determine whether, there had been either an agreement or undertaking having the effect that the plaintiff was legally required to take, and the first defendant to cede, less of the first defendant's property than referred to in the compulsory purchase order and notice to treat and to reach a decision as to the compensation payable in respect of that lesser take.

65. These are not matters in relation to which the property arbitrator enjoys jurisdiction, and the case that they are is neither real nor substantial. The property arbitrator is a creature of statute and his powers and functions arise only from the express terms of the applicable legislation or by necessary implication therefrom. He does not enjoy a wide ranging or general jurisdiction to superintend the process of compulsory acquisition. The legislation does not enable the property arbitrator to adjudicate upon whether there was an agreement of the kind, or an undertaking with the legal effect, contended for by the plaintiff. It is possible that by clear and unequivocal consent the parties could ask the property arbitrator to value less property than specified in the compulsory purchase order, but he does not have the power to determine whether there is an agreement or legally effective undertaking of the kind in issue in this case.

66. That being so it is my view that this appeal should be dismissed. It is my provisional view that the first defendant has had sufficient success on the net issues presenting themselves

in this case that the costs of the proceedings in the High Court and on this appeal should be awarded in her favour. If the plaintiff wishes to contend otherwise it should within ten days of the date of this judgment advise the Court of Appeal Office of that objection, whereupon the Court will fix a date to hear oral submissions on the issue of costs. In default of such a communication from the plaintiff within that ten-day period, the Court shall order that the costs of the proceedings and of this appeal shall be borne by the plaintiff same to be adjudicated upon in default of agreement.

67. Noonan J and Haughton J are in agreement with this judgment and the order I propose.