[2019] IEHC 661

THE HIGH COURT

[2018 No. 400 SP]

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919

BETWEEN

CORK COUNTY COUNCIL

PLAINTIFF

AND

SYLVIA LYNCH

AND

DESMOND J. BOYLE

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 10th day of October, 2019

Introduction

1. This is an application for an order pursuant to s. 6(1) of the Acquisition of Land (Assessment of Compensation) Act, 1919 directing the second defendant property arbitrator to state a question of law, in the terms as set out in the special endorsement of claim or such other reformulated question as the court may deem appropriate, in the form of a special case for the opinion of the High Court.

Facts

2. On 16th October, 2009 Cork County Council made the Cork County Council N22 Baile Bhuirne Macroom (Baile Bhuirne to Coolcour) Road Development Compulsory Purchase Order 2009. That order was confirmed by An Bord Pleanála on 7th April, 2011.

3. The proposed new road required the acquisition by the council of part of the first defendant's property at Ballyverane, Macroom, Co. Cork which was shown in two parcels, outlined in red, on a land acquisition map scheduled to the compulsory purchase order.

4. Plot 185a.201, comprising 0.175 hectares, was an area of the first defendant's garden, including part of the main entrance. Plot 185b.201, comprising 0.071 hectares, was a length of road bed between the physical boundary of the property and the median of the existing road.

5. By notice to treat dated 7th August, 2013 the council gave notice pursuant to s. 79 of the Housing Act, 1966 that it was willing to treat for the purchase of the lands authorised to be acquired by the compulsory purchase order, and which were more particularly described in the land acquisition map which had been extracted from the schedule to the compulsory purchase order and attached to the notice to treat.

6. On 21st November, 2016 the council served notice of entry pursuant to s. 80 of the Housing Act, 1966. The service of that notice, as the notice itself said, allowed the council to take possession of the lands in advance of the conclusion of the compensation and/or conveyancing aspects of the acquisition.

7. On 29th March, 2017 the first defendant submitted a claim for compensation. The council did not agree to pay the compensation claimed and on 15th May, 2017 the first defendant

applied to the Land Values Reference Committee pursuant to the Acquisition of Land (Assessment of Compensation) Act, 1919 and the Property Values (Arbitration and Appeals) Act, 1960 for the nomination of a property arbitrator.

8. On 26th July, 2017 the Reference Committee in exercise of the powers conferred on it by the Property Values (Arbitration and Appeals) Act, 1960 nominated the second defendant ("*the property arbitrator*") to be property arbitrator to hear and determine the questions set forth in the first defendant's application.

9. On 8th August, 2017 the property arbitrator gave directions for the delivery by the claimant of a statement of claim and by the acquiring authority of a reply and for the exchange of expert reports and any legal submissions.

10. On 4th September, 2017 the statement of claim was delivered, setting out the first defendant's claim for compensation in respect of the 0.175 hectares of land and the 0.071 hectares of road bed.

11. On 26th October, 2017 the council delivered its reply, putting the claimant on proof of everything, and pleading that the claim was calculated on an inconsistent basis, constituted double counting, and offended the principle of equivalence.

12. At the opening of the hearing before the property arbitrator on 1st February, 2018, the property arbitrator was asked by the council to assess compensation on the basis that it would not, after all, be acquiring 0.175 hectares of land and 0.071 hectares of road bed, but a total of 0.266 hectares. In very broad terms, the council's position was that the area of the first defendant's garden which was required had been reduced by 200 sq. metres, so as to exclude so much of the main entrance to the first defendant's property as had been captured by the land acquisition map.

13. It is not necessary to attempt to fight through the thicket of contested detail but in broad terms, the council's position was that at the first defendant's request it had redesigned the road to exclude her entrance and, by letter of undertaking of 26th October, 2017 sent by its solicitors to the first defendant's solicitors, reduced the required take.

14. The letter of undertaking of 26th October, 2017 (sent on the same day that the council's reply to the statement of claim was delivered) read:

> *"Dear Sirs,*
>
> *We refer to the above matter and to Notice to Treat served in respect of Plots 185.*
>
> *We are instructed to hereby undertake on behalf of Acquiring Authority to acquire, at the conveyancing stage, a reduced area of land comprising 0.226Ha (area of land plus road bed) as shown on drawing OB-185a-Rev2 dated 10th October, 2017 being a reduced area to that shown in the Schedule to the Notice to Treat.*

This reduced land take will align the acquisition with the entrance to the Claimant's residence.

This letter of undertaking will be conveyed to the Property Arbitrator and he will be asked to note same in the context of the claim for compensation."

15. On the same day, the council, by its solicitors, wrote a letter marked "*unconditional offer*", offering a sum of money for compensation for the acquisition of the 0.226 hectares, shown on the map dated 10th October, 2017, which was enclosed.

16. The property arbitrator doubted his jurisdiction to deal with the reference on the basis proposed by the council and directed an exchange of written legal submissions on the issue. In a letter of 30th March, 2018 he expressed the provisional view, subject to what might be said in the council's submissions which had not yet been filed, that he was confined to the notice to treat.

17. The council's submission to the property arbitrator was that:-

"1. The undertaking given by the respondent is valid as a matter of law and gives practical effect to the respondent's decision to exclude the claimant's entrance from the CPO.

2. The claimant has by her conduct consented to the reduction in the land take.

3. The reduction in land take is in ease of the claimant and she must mitigate her loss.

4. The respondent has been led to believe that a reduced area is acceptable and has acted accordingly without objection from the claimant until just before the hearing. In those circumstances the claimant is not entitled to maintain an objection at this time.

5. The unconditional offer of the council was prepared based on the events which have transpired. It includes the lands the subject of the notice to treat save those excluded by the valid undertaking and is legally effective."

18. The property arbitrator's ruling on his jurisdiction to deal with the proposed reduced land take was given by a letter sent to the parties' solicitors on 23rd May, 2018. He wrote:-

"My jurisdiction arises only as a result of a Notice to Treat where the parties have failed to agree on a figure of compensation. Therefore, as this is the fount of my jurisdiction, I cannot deal with anything other than that which is contained in the Notice to Treat. Dealing with the respondent's submission, I find in paragraph 2 that the fact that the claimant suggested that she would co-operate with the amendment is not relevant to the Notice to Treat and that which is contained therein. In paragraph 3 the letter from the Respondents, suggesting a letter of undertaking regarding the take is also immaterial.

The stated legal principles in Simpson's case and Fox, are, in my view irrelevant, as they deal with delay in serving a Notice to Treat."

19. I will come back to *Simpson's* case and *Fox*.

20. The property arbitrator's ruling went on to variously address and dismiss other arguments which had been made on behalf of the council upon which it is not necessary to dwell. The letter continued:-

> *"As I stated in my letter of 30th March, it is open to the parties to negotiate after the award is made. Indeed, it is a pity that sections 127 – 132 of the Land Clauses Act of 1845 are negated by the Housing Act 1966 (Acquisition of Land) Regulations of 2000. It is further interesting to note that in the UK there is a loose arrangement of rules called the 'Crichel Downs' Rules currently dating from 1992 which allow a land owner to buy back land surplus to the requirements of the acquiring authority.*
>
> *To sum up I can only hear evidence relating to the entire take as stated in the Notice to Treat."*

21. By letter dated 1st June, 2018 the Council, by its solicitors, requested the property arbitrator to state a case to the High Court as to:-

> *"Whether the Arbitrator was correct in his ruling that his jurisdiction was confined to assessing compensation for the lands specified in 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."*

22. The property arbitrator robustly refused to state a case, declaring that in his opinion there was no point of law in question.

23. There was a great deal of debate in the correspondence, the affidavits exchanged on this application, and in argument before me as to the first defendant's part in, or contribution to, the revision of the drawings.

24. The question of law as formulated is predicated on the existence of an agreement as to the reduced area and a "*consequent*" undertaking of 26th October, 2017. The grounding affidavit filed in support of this application referred to an exchange of e-mails in March 2016 "*wherein the parties appeared to agree a revised land transfer".*

25. The first defendant, in her replying affidavit, was adamant that she never made any agreement with the council and Mr. Bland, on her behalf, submitted that the evidence did not even support the assertion of the appearance of an agreement.

26. Mr. Kennedy, in reply, suggested that the question might be reformulated as:-

"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 the entire holding."

The jurisdiction to direct a case stated

27. In *J.J. Jennings Limited v. O'Leary* [2004] IEHC 318, Finlay-Geoghegan J. approved as a reasonable summary of the principles set out by Lord Denning M.R. in *Halfdan Grieg & Co. v. Sterling Coal* [1973] Q.B. 843 (often referred to as the *Lysland* case) as applied by Murphy J. in *Hogan v. St. Kevin's Company* [1986] I.R. 80, the following passage from Collins and *O'Reilly, Civil Proceedings and The State:-*

> *"The High Court will direct a case to be stated where a point of law which is real and substantial and is appropriate for determination by it arises in the course of an arbitration, although it may properly refuse to direct the statement of a case by an arbitrator on a point of law which is insubstantial or already covered by authority."*

The arguments

28. Mr. Kennedy, for the council, argues that this case raises a clear legal issue as to the jurisdiction of the property arbitrator. The test, he says, is that there must be a legal question which is required to be decided with the interpretation of statutes and case law. The property arbitrator, it is argued, rejected the council's submission by reference to UK authority that an undertaking may be given in respect of a notice to treat. The question of law, it is said (citing *Lyland*) is seriously arguable, substantial in the sense of being important for the resolution of the dispute and to the parties, and which is raised in good faith and not for the purpose of delay.

29. Mr. Kennedy submits that if the issue of law concerns the jurisdiction of a property arbitrator, the property arbitrator should accede to a request to state a question of law. He refers to a passage at p. 196 of the first edition of *McDermott and Woulfe, Compulsory Purchase and Compensation in Ireland: Law and Practice:*

> *"In some cases, it may be difficult for the arbitrator to decide whether the question of law is one that should be dealt with by stating a consultative case in the course of the reference or by stating the award in the form of a special case. 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".*

30. Mr. Bland, for the first defendant, identifies six issues to be determined in these proceedings in which he deals with, in outline, in 20 pages of close print. I think that it is fair to say that the thrust of the argument is that no legal issue as to the jurisdiction of the property arbitrator to assess compensation by reference to an alleged agreement for a reduced land take can arise until it has been determined, as a matter of fact, that there was such an agreement.

Discussion

31. In my view, the difficulty with the plaintiff's argument is much more fundamental. The proposition that the proposed question is hypothetical absent a finding of fact that there was an agreement between the parties is itself premised on an assumption that the property arbitrator has jurisdiction to decide that issue.

32. The property arbitrator based his decision as to his jurisdiction and his refusal to state a case to the High Court on the notice to treat. In my view the focus is sharpened if one looks at the nomination, and the statutory purpose of the nomination.

33. Section 1, sub s. (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919 provides, insofar as is material, that:-

> "*1. – (1) Where by or under any statute … land is authorised to be acquired compulsorily by any Government Department or any local or public authority*, any question of disputed compensation … *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.*" [Emphasis added.]

34. Section 4 of the Property Values (Arbitration and Appeals) Act, 1960 provides that:-

> *"4.- 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."*

35. The rules made by the Reference Committee under s. 4 of the Act of 1960 are the Property Values (Arbitration and Appeals) Rules, 1961 (S.I. No. 91) Article 7 of the rules provides:-

> *"7. (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, *and*

(b) shall, if he sends the application specified in paragraph (a) of this Rule, as soon as may be after such sending, send a copy thereof to every other party thereto, or affected by, the acquisition aforesaid.

(2) An application under this Rule shall be in writing and shall specify the parties to, or affected by the acquisition, the land to be acquired, the nature of the question to which the application relates, the statutory provisions under which the question arises and, if compensation is claimed, the interest in respect of which it is claimed." [Emphasis added.]

36. The scheme of the legislation is to provide for the determination of any question in relation to disputed compensation.

37. The scheme of the rules is that the property arbitrator is appointed to deal with a question which has arisen.

38. On its face, the nomination of 26th July, 2017 is a nomination to hear and determine the questions set forth in the claimant's application for the nomination of a property arbitrator. 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.

39. At the date of appointment of the property arbitrator the question that had arisen was a question of disputed compensation as the value of the two parcels of land the subject of the order and notice to treat, and that – and only that - is what the property arbitrator was appointed to hear and determine.

40. I do not believe that it can make any difference that the reduced area of the lands was part of the greater area encompassed by the original notice to treat.

41. The council submits that the jurisdiction of the property arbitrator is triggered by the service of the notice to treat. I do not believe that that is strictly correct. What is triggered by the service of the notice to treat is the claimant's entitlement to apply for the nomination of a property arbitrator. The jurisdiction of the property arbitrator derives from the Act of 1919 and is conferred by the nomination of the Reference Committee. It is the nomination, rather than the notice to treat, which is the fount of the property arbitrator's jurisdiction.

42. In support of his argument that there is a real and substantial point of law to be determined as to the jurisdiction of the property arbitrator, Mr. Kennedy relies upon two UK cases, which he urges should be taken as persuasive authority. Those authorities are said to establish that an acquiring authority may undertake not to enforce such rights as it has under a valid compulsory purchase order by giving an undertaking to the landowner. So they do, but it seems to me that it is a quite a leap to suggest that an acquiring authority may, by an undertaking to the landowner, vary the area of the land to be acquired.

43. The issue as to whether an acquiring authority – with or without the agreement or acquiescence of the landowner – can vary the area of the land to be acquired is interesting, but it is important not to be distracted by this from the issue identified by the property arbitrator: which is whether he has jurisdiction to deal with the value of anything other than the two parcels which were the subject of the notice to treat, or the issue, which became clear on the hearing of this application, as to whether the property arbitrator has jurisdiction to decide disputed questions as to the existence of an agreement, or disputed questions as to whether, or the extent to which, the proposed land take was reduced at the request of Ms. Lynch.

44. *Simpsons Motor Sales (London) Limited v. Hendon Corpn*. [1964] A.C. 1088 was a case in which a local authority had made a compulsory purchase order on 25th March, 1952 for the acquisition of about half an acre of land for housing. It is not necessary to dwell on the detail, but the acquiring authority dithered over its plan for the development of the site. On 21st August, 1959 the landowner instituted proceedings claiming that the compulsory purchase order was no longer effective and that a notice to treat which had been served in 1952 and a notice of entry which had been served on 22nd October, 1953 were invalid and ineffective.

45. The House of Lords found that in principle delay on the part of an acquiring authority might disentitle it to proceed on a notice to treat, and that an intention to abandon a notice to treat might invalidate it, but that on the facts there had been no abandonment, and that the acquiring authority had not been guilty of such inanition or procrastination as would disentitle it to enforce the notices.

46. *Fox v. The Scottish Ministers* [2012] CSIH 32 is a decision of the Inner House of the Court of Session. In 2008 Glasgow City Council made a compulsory purchase order to acquire a number of properties which it intended to immediately sell on to a developer, who was putting together a larger development site. The order was confirmed by the Scottish Ministers in 2009. The developer's obligations to Glasgow City Council were guaranteed by Anglo Irish Bank Corporation Limited. The landowners instituted proceedings seeking to quash the decision of the Scottish Ministers to confirm the compulsory purchase order. Again, it is unnecessary to go into the detail but by the end of 2011, before the challenge to the confirmation had been heard, the Anglo guarantee had expired, and the council decided to abandon the compulsory purchase order. This achieved the result which the landowners wanted, but there was debate as to whether there were proper grounds on which the confirmation decision might be quashed. The practical solution which was found by the parties was that the council would undertake to the court and to the landowners to take no further steps on foot of the order, and this was endorsed by the Court of Session as the best means that could be devised to give practical effect, with the agreement of the landowners, to the council's stated resolve no longer to implement the compulsory purchase order.

47. The Court of Session noted the decision of the House of Lords in England in *Simpsons Motor Sales (London) Limited* that a local authority might abandon a right to compulsorily purchase land by conduct and concluded that a *fortiori* it could do so by express words.

48. I do not understand *Simpsons Motor Sales (London) Limited* to be authority for the proposition that an acquiring authority can simply decide to abandon a compulsory purchase. Rather, the decision is that a landowner might rely on abandonment or delay to invoke the equitable jurisdiction of the court to interfere with the enforcement by the acquiring authority of its legal rights.

49. *Fox* is authority for the proposition that an acquiring authority, with the consent of the affected landowners, may resolve to abandon altogether the implementation of a compulsory purchase order. I do not understand it to be authority for the proposition that the compulsory purchase order can be varied or amended, with or without the agreement of the landowners.

50. In this case, the property arbitrator dismissed *Simpson Motor Sales (London) Limited* and *Fox* as irrelevant. I agree that they are irrelevant – not because they are not authority for the proposition that an acquiring authority may by undertaking vary a compulsory purchase order, which by the way they are not - but because the jurisdiction of the property arbitrator derives from his nomination and is confined to the question of disputed compensation which had arisen before his appointment and which he was nominated to hear and determine.

51. Mr. Kennedy relies on a sentence from the judgment of Henchy J. (with which Griffin and Kenny JJ. agreed) in *Re Green Dale Building Co.* [1977] I.R. 256, at p. 265 in support of a proposition that the property arbitrator is not prohibited from taking into account any subsequent agreement reached between the parties as reflecting the lands to be assessed for compensation purposes. The sentence relied on is:-

> *"The service of the notice to treat does not, of itself, pass any estate or interest in the land to the acquiring authority, nor does it constitute a contract; 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."*

52. In the sentence relied upon, Henchy J. was contrasting the legal effect on the land of a notice to treat, on the one hand, and a contract for the sale and purchase of land, on the other. In the immediately preceding sentence he dealt with the rights created by the service of a notice to treat.

> *"Generally speaking, the service of a notice to treat confers on the acquiring authority the right to acquire a land on the payment of the proper compensation which is to be assessed, if necessary, by the property arbitrator; and it confers on the landowner the right to have the compensation assessed and paid."*

53. The service of the notice to treat in this case triggered the council's entitlement to acquire the land identified in the notice, and the first defendant's right to have the compensation assessed. In exercise of that right, she applied to the Land Values Reference Committee for the nomination of a property arbitrator to assess her compensation, and the property arbitrator was nominated to do just that.

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.

Conclusion

55. For these reasons I find myself driven to the conclusion that the plaintiff has not established that there is a real and substantial point of law as to the jurisdiction of the property arbitrator, and I must refuse the application.