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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

(NORTHERN IRELAND) 1972

[1] IN THE MATTER OF AN APPLICATION BY BOWDEN & OTHS (practicing as HARRISONS), BEATTIE, PRABERA & SABHERWAL

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[2] IN THE MATTER OF AN APPLICATION BY JGS SERVICES LTD, SIMON NC JONES and NIGEL TJ BROWN

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[3] IN THE MATTER OF AN APPLICATION BY SCALENE INVESTMENTS LIMITED

WEATHERUP J

[1] These applications concern the decision of the Department of Social Development (the respondent) of 7 November 2003 to make a Vesting Order in respect of properties at Victoria Square in Belfast, to take effect on 18 December 2003. This judgment represents an amalgamation of preliminary rulings made in each of the three applications, concerning the jurisdiction of the Court to entertain objections to the making of the Vesting Order, together with the final decision in the cases where the Court found that it had jurisdiction.

[2] The respondent contended in each case that the Court lacked jurisdiction to entertain the challenges to the validity of the Vesting Order. The following ruling was given on 17 December 2003 in the application of Harrisons and Others.

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

[4] The basis for the respondent's objection to jurisdiction arises under the Local Government Act (Northern Ireland) 1972. Paragraph 5 of schedule 6 makes provision for the validity and operation of Vesting Orders.

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

> "as soon as may be after a Vesting Order has been made the Department shall publish in the prescribed form and manner a notice, stating that the Vesting Order has been made……."

Paragraph 5 (1)(b) provides:

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

Paragraph 5 (1)(c) provides:

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

[6] The operation of similar statutory schemes has been considered in a number of authorities. *Smith & East Allo Rural District Council* [1956] A C 736 concerned the Acquisition of Land Act (Authorisation Procedure) Act 1946. It was provided that any persons aggrieved by a Compulsory Purchase Order may, within six weeks of the date on which notice of the confirmation or making of the Order was first published, make an application to the High Court. Further it was provided that otherwise the Compulsory Purchase Order "shall not be questioned in any legal proceedings whatsoever." It was held by the House of Lords that proceedings issued out of time should be struck out as there was a plain prohibition against questioning the validity of the Order and the jurisdiction of the Court was ousted.

[7] *R v Cornwall County Council ex-parte Huntingdon* [1992] All ER 566 concerned the making of a Public Right of Way Order by a County Council under the Wildlife and Countryside Act 1981. The Act provided that a person aggrieved by the making of such an Order could, within 42 days from the publication of the Order, make an application to the High Court. Further it was provided that otherwise the validity of the Order "shall not be questioned in any legal proceedings whatsoever." Mann LJ described the statutory provision as "a standard form of preclusive clause" and stated that when such paragraphs are used -

> "….the legislative intention is that questions as to invalidity may be raised on the specified grounds in the prescribed time and in the prescribed manner, but that otherwise the jurisdiction of the Court is excluded in the interest of certainty."

Mann LJ's approach was approved by the Court of Appeal [1994] 1 All E R 694.

[8] *R v Secretary of State for the Environment and the Secretary of State for Transport, ex parte Johnson & Benn* [1997] EWHC (Admin) 569 concerned the refusal of planning permission for the construction of a second runway at Manchester Airport. The Town and Country Planning Act 1990 provides that any challenge to the making of such an Order by the Secretary of State shall be made within six weeks by way of application to the High Court. Further it was provided that except by the making of such application the decision of the Secretary of State "shall not be questioned in any legal proceedings whosoever." An application was made by way of judicial review (rather than the prescribed method of statutory review) outside the six-week time limit. The applicant sought to amend the proceedings by converting the application for judicial review into a statutory review but that would have been to no avail because the application would have remained out of time. Tucker J dismissed the application.

[9] Finally, *R (on the application of Deutsch) v Hackney* [2003] EWHC (Admin) 2692 concerned a Designation Order under the Road Traffic Regulation Act 1984, where any challenge should be by application to the High Court within six weeks of the making of the Order. Further, it is provided that in the absence of such a challenge the Order "shall not, either before or after it has been made, be questioned in any legal proceedings whatsoever". Again an application had been made by way of judicial review, rather than statutory review, and in any event it was outside the six-week period. Hooper J followed the above authorities and concluded that a challenge to the authority of the maker of the determination was a challenge that must be made under the statutory procedure and within six weeks or else the Order can not be questioned in any legal proceedings.

The application of Harrisons and Others.

[10] The applicants issued an application on 5 December 2003 for leave to apply for judicial review and that application was served on the Department of Social Development, as proposed respondent, on 10 December 2003. On the basis of the above line of authorities Mr Straker QC, on behalf of the proposed respondent, submits that the applicant, not having applied in accordance with the statutory regime by way of Originating Notice of Motion under Order 55, is precluded from making any legal challenge to the Vesting Order now that the one-month time limit has expired. Accordingly, he argues, the High Court has no jurisdiction to deal with the matter by way of judicial review under Order 53.

[11] The issue is whether the application has been made in accordance with the rules of court as required by schedule 6, paragraph 5(1)(b) of the 1972 Act. Order 55 deals with statutory appeals and rule 13(1) provides that:

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

Rule 14(1) provides:

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

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

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

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

[14] Rule 1 applies where "there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules. …." That applies in

this case, because the thing done has been the issue of an ex-parte docket and an Order 53 Statement, which constitutes a failure to comply with the requirements of the rules that there be an application under Order 55 by way of an Originating Motion.
Rule 1 goes on, "whether in respect of time, place, manner, form or content or in any other respect…..". Clearly the requisite form of failure has arisen in this case, because it applies to a failure in any respect.
Rule 1 then provides that "the failure shall be treated as an irregularity and shall not nullify the proceedings, any step in the proceedings, or any document……" The stage is reached where, on analysis of the rule, if the steps that have been taken under Order 53 constitute "proceedings", they amount to an "irregularity".

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

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

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

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

[17] *Ex parte Johnston & Benn* (1997) concerned an application for leave to apply for judicial review to challenge a planning decision. The application was made on

13 March 1997 and the decision had been contained in a letter dated 15 January 1997. The relevant statutory scheme was the Town and Country Planning Act 1990 and it provided under Section 288 that applications should be made to the High Court within six-weeks. The application was within the judicial review time of three months, but outside the statutory six-weeks limit. The applicant sought to avoid this difficulty by applying to amend his application so as proceed by way of Originating Motion for a statutory review, which in effect is what Mr McCloskey seeks to do in this case by converting his present application into an application under the statutory scheme. Tucker J stated of the applicant that the -

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

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

[19] In *ex parte Johnston and Benn* [1997] there was no reference to the irregularity rule, which would have applied in England at that time. It would have been to no avail. To have established the irregularity would not have saved an application that was in any event outside the statutory time limit of six-weeks.

[20] It is necessary to consider the effect of the irregular proceedings having been issued within the statutory time limit.

Order 2, Rule 1(2) provides:

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

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

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

<u>The application by JGS Services Ltd and Others.</u>

[23] By an Originating Notice of Motion dated 22 December 2003 the applicant applied under the Local Government Act (NI) 1972 for an order challenging the validity of the Vesting Order made by the respondent on 7 November 2003 purporting to vest in fee simple the applicants' premises at 51 to 55 Victoria Square and 105 to 107 Victoria Street, Belfast.

[24] The respondent applied for an order striking out the application on the ground that it was not made within the time specified in paragraph 5 (1)(b) of Schedule 6 to the 1972 Act namely "within one month from the publication of the notice of the making of the Vesting Order make an application for the purpose to the High Court in accordance with the rules of Court……" The following ruling was given on 13 January 2004.

[25] Publication occurred in three newspapers on 11 November 2003 and was repeated in the same three newspapers on 18 November 2003. Under paragraph 5 a party who wishes to challenge the Vesting Order has one month in which to make an application to the High Court, otherwise it is provided that the Vesting Order shall not be questioned in any legal proceedings whatsoever. The statutory time limit had expired by the date of issue of the Originating Notice of Motion on 22 December 2003 and accordingly, the application was out of time. Any issue about the date of publication from which time began to run being 11 November 2003 or 18 November 2003 is of no consequence to the applicants as the application was out of time in any event.

[26] The applicants' Counsel accepts that the application was issued out of time but asks the Court to extend the time. The respondent, on the other hand, contends that the Court does not have power to extend the time as the one-month period is a mandatory requirement and that when one month has elapsed no legal challenge can be made to the making of the Vesting Order. The respondent relies on the authorities referred to above in the application of Harrisons and Others for the proposition that once the time limit expires no legal challenge can be mounted.

[27] The authorities do establish clearly that a statutory scheme in terms similar to that which is provided under the 1972 Act operates to require an application to be made in accordance with High Court rules within the specified period, in the present case one month, and that the jurisdiction of the Court to consider any legal challenge is ousted after the one month has elapsed. Mr Horner QC, on behalf of the applicants, seeks to avoid that consequence on a number of grounds.

[28] In the first place the applicants rely on the wording of paragraph 5 of schedule 6 as importing a right of legal challenge after the period of one month. It is argued that paragraph 5 (1)(b) provides that an applicant who desires to question the validity of a Vesting Order "may " apply to the High Court within one month. The use of the permissive "may" also applied in the authorities referred to above. The use of the word "may" is emphasised by the applicants on the basis that the word does not signify a mandatory requirement but rather signifies a permissive approach so that the Court may extend the time if an applicant applies outside the one-month period. However paragraph 5 (1)(b) must also be read with paragraph 5 (1)(c) which provides that unless an application is made to the High Court within one month a Vesting Order shall not be questioned in any legal proceedings whatsoever. When 5 (1)(b) and 5 (1)(c) are read together it is clear that although the word "may" is used in 5 (1)(b) the use of that word

cannot be interpreted in a way which alters the meaning of those provisions that a legal challenge must be made within one month.

[29] A further argument of the applicants in relation to the wording of 5(1)(b) concerns the requirement that an application to the High Court be made "in accordance with rules of court". Those words do not appear in the English statutory schemes but I do not consider the difference in wording to be of significance. However the applicants refer to the relevant rules of Court in Order 55. Order 55 Rule 13 provides that,

> "An appeal to the High Court pursuant to the provisions of any statutory provision must be brought in accordance with the rules of this part."

Rule 14 provides that,

> "Every appeal shall be brought by originating motion entitled in the matter of the relevant statute and shall specify the grounds on which the appellant relies."

[30] The applicant in this case complied with that requirement under Order 55 but made the application outside the statutory time limit. Mr Horner turns to Order 3 Rule 5 which provides that -

> "The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgement, order or direction, to do any act in any proceedings."

Accordingly Mr Horner contends that Order 3 Rule 5 gives the Court power to extend the one-month period and that it should do in this case. However, Order 3 Rule 5 does not allow the Court to extend the time in relation to a statutory time limit. Order 3 Rule 5 applies to times that are fixed by the Rules, a judgment, an order or a direction. That does not include the one-month time limit fixed by the 1972 Act. Order 3 Rule 5 therefore does not entitle the Court to extend the time within which this application can be made. Accordingly, I am satisfied that the wording of paragraph 5 does not have the effect of achieving a different legal consequence under the 1972 Act to that which arises under the English schemes.

[31] Next the applicants contend that the modern approach to interpretation of these paragraphs involves a focus, not on whether the one month period can be said to be mandatory or directory, but on parliamentary intention in the event of non compliance with paragraph 5. The applicants contend that a consideration of the parliamentary intention would indicate that the time limit is not mandatory, but rather is directory and can be extended. As support for this modern approach the applicants rely upon the dissenting judgment of Carswell LCJ the Court of Appeal in *Robinson's Application* [2002] N I 206. The Northern Ireland Act 1998 provided for a six week period for the

election of a First Minister and a Deputy First Minister, at the end of which period the Secretary of State was required to fix a date for an Assembly election if no First and Deputy First Minister were elected. On appeal to the House of Lords the decision of the majority of the Court of Appeal was upheld. Mr Horner contends that the decision of the House of Lords did not affect the general approach stated in the judgment of Carswell LCJ. Having reviewed the authorities Carswell LCJ stated -

> "Having started with the proposition that the paramount objective is to ascertain the intention of the legislature in enacting the provisions under construction, the particular task of the Court is to determine whether it is intended that the act in question could only be carried out within the prescribed time or whether it could validly be done after the expiry of that time."

[32] I adopt this approach for the purposes of the argument and look to what appears to be the parliamentary intention as to the consequence of non-compliance with paragraph 5 of schedule 6 of the 1972 Act. That is, what does the statutory scheme appear to indicate should be the consequence of non-compliance with the requirement to lodge the application challenging the validity of the Order within a period of one month? In my opinion the parliamentary intention in this case is clear. The statute provides for the consequence. It expressly states that if an aggrieved party does not comply with the statutory requirement the jurisdiction of the Court is ousted. It therefore seems that even adopting the approach advanced by the applicants the legislation cannot be interpreted as involving the Court in extending time. There is an express ouster of the jurisdiction of the Court and it has been the position for nearly 50 years since the House of Lords decided *Smith v Elloe* that this standard clause requires compliance or else there will be an ouster of the jurisdiction of the Court. The altered approach to statutory interpretation outlined by Carswell LCJ does not change that result.

[33] Further, the applicants rely on the Human Rights Act 1998 on the basis that this time limit has a disproportionate effect by reason of its impairment of the applicants' Article 6 rights to access to the Court. The general position in relation to the restrictions on access to the Court have been considered by the European Court of Human Rights in of *Perez de Rada Cavanilles v Spain [*1998] 29 EHRR 109 at paragraphs 44 and 45 -

> "Further it is apparent from the Court's case law that the 'right to a Court', of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 (1) if they do not pursue a

> legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be achieved.
>
> The rules on the time limits for appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainly. Those concerned must expect those rules to be applied. However the rules in question, or the application of them, should not prevent litigants from making use of an available remedy. "

[34] In reliance on that general position the applicants refer to F*oyle, Carlingford & Irish Lights Commission v Mc Gillion [*2002] NI 86. The case concerned a case stated by a Resident Magistrate. Article 146(9) of the Magistrates Courts (NI) Order 1981 requires that within 14 days from the date on which the Clerk of Petty Sessions dispatches the case stated to the applicant, the applicant transmit the case stated to the Court of Appeal and serve it on the other party. There was non-compliance with that 14-day time limit and the applicant sought to have time extended by the Court. Carswell LCJ stated at page 91g -

> "The case stated is to be transmitted to the Court of Appeal within 14 days of being dispatched by the Clerk of Petty Sessions to the Applicant. Within the same time he is to serve a copy on the other party. Its clear objective is to prevent possible delays in the process of appealing by way of case stated. That in our opinion is a legitimate aim. We do not find it possible, however, to accept that there is a reasonable relationship of proportionality when the applicant is altogether barred from presenting his appeal because he fails for a period to serve a copy of the case on the other party, even though no prejudice has accrued to that party. We consider that this would constitute a breach of Article 6 (1) of the Convention. It is incumbent upon us by virtue of Section 3 [of the Human Rights Act 1998] to read and give effect to legislation in a way which is compatible with the Convention Rights. This can be done by constructing Article 146(9) as directory rather than mandatory, contrary to the previous case law, whose binding authority is over-ridden by the 1998 Act.
>
> We would therefore hold that we should now interpret Article 1469 as directory rather than mandatory. When one does so, and it appears that no prejudice was caused to the respondent by the delay in serving upon it a copy of the case, it seems to us clear that we ought to extend the time for taking that step and allow the appeal to proceed."

Mr Horner on behalf of the applicants invites this Court to adopt precisely the same path as the Court of Appeal adopted in *Foyle* in order to extend the time in this case.

[35] *McLean v Kirkpatrick* [2003] NI 14 was a decision of the Court of Appeal in relation to statutory requirements under the Betting, Gaming, Lotteries & Amusements (NI) Order 1985. Schedule 2 to the Order required objectors to a licence to lodge a Notice one week before a Court hearing. Article 12(5) of the Order contained power to waive the statutory requirements that applied to applicants but there was no equivalent provision that applied in relation to objectors. The objector, who was out of time, claimed a breach of Article 6 on the basis that the statutory scheme was a disproportionate impairment of his right of access to a Court. He submitted that the Court should find that the provision in Schedule 2 was directory or else find that the waiver provision in Article 12(5) could be interpreted as applying to the objector as well as to the applicant. The Court of Appeal concluded at paragraph [13] -

> "We do not consider that it would be possible to construe Sch 2 as directory, even if we were persuaded that there had been a breach of Art 6 (1). The existence of Article 12(5) negates that - if the provisions of Sch 2 were directory there would be no need for Article 12(5). Nor, as we have already held, is it easy to see how Article 12(5) could be construed so as to include objections as well as applications."

[36] In *McLean v Fitzpatrick* the Court of Appeal was also concerned to determine whether there had been a breach of Article 6 and a disproportionate impairment of the right of access to the Court. It concluded that it was not unfair for objectors to adhere to a definite time limit in order to have their objections considered even though an objector who had a good case to put forward may be barred from presenting it if he was a very short time late and the applicant may not be at all prejudiced. The restriction on access to the Court was found to have the legitimate aim of preventing delay and uncertainty and to be proportionate.

[37] Accordingly, there were different outcomes in *Foyle, Carlingford & Irish Lights Commission v McGillion* and *McLean v Fitzpatrick*. I consider that in this context the principle of legal certainty requires that where there exists a statutory requirement to make a legal challenge within a specified time, there should be certainty that in the absence of such legal challenge within that time, none can be made. That principle I consider may not apply in the same manner to a requirement to take a step within a specified time <u>after the commencement of the legal challenge and during the course of that legal challenge</u>, which was the case in *Foyle, Carlingford & Irish Lights Commission v McGillion,* as it does to a requirement to take the step within a specified time <u>to commence the legal challenge</u>, as was the case in *McLean v Fitzpatrick*.

[38] The applicants' argument on this point has been considered in relation to equivalent legislation in England and Wales in *Matthews v The Secretary of State* [2001]

EWHC (Admin) 815. The Town and Country Planning Act 1990 requires a challenge to decisions to be made by application to the High Court within six weeks and provides that in the absence of a challenge within the statutory time limit no legal challenge whatsoever may be made. *Matthews v Secretary of State* concerned a challenge to an adverse planning decision by an inspector and the application to the High Court was made outside the six-week time limit. The applicant claimed a breach of the right of access to a Court and submitted that the Court should read the statutory provision in a manner compatible with the European Convention on Human Rights so as to give the Court power to extend the six-week period where appropriate. Alternatively, it was submitted that the Court should make a declaration of incompatibility. Sullivan J was satisfied that the fixed time limit pursued a legitimate aim, that is to ensure legal certainty and finality, and -

> "That is particularly important in the planning context, as a number of cases in the judicial review field have recognised, because it is of considerable importance that land owners and public authorities know exactly where they stand as soon as is reasonably possible. Moreover, and it should be borne in mind that in addition to the land owner who is seeking a determination of his rights in lodging his planning appeal, there will also be third parties who may well be affected by the outcome of an appeal." (Paragraph [33])

[39] In relation to proportionality (discussed at paragraphs [35] to [37]) Sullivan J found that the six week period could not be said to be so short as to raise any serious doubts as to whether it is a disproportionate response to the need for balancing the need for finality as against the need to give aggrieved applicants a reasonable opportunity to challenge a decision. He considered that a period of four to six weeks was commonly found as a period for challenging public law decisions, very often without any provision for extension of time by the appellate body. Further he found that it could not be contended that the period restricts or reduces access to the Court in such a way that the very essence of the right is challenged. The decision letter expressly referred to the right of challenge to the Secretary of State's decision and so gave notice to the party of the very short time limit. Such decisions were said not to come out of the blue, as might be the case with some public law decisions, as the claimant would have been aware of preceding steps leading to the decision that was challenged. The Court did not find any breach of the right of access to the Court. I agree with and adopt the approach of Sullivan J and consider that that approach applies to the present case with the same effect.

[40] Accordingly I find that it is not unfair to the applicants to have to adhere to a one-month time limit. I find that the imposition of that one-month time limit does not impair the very essence of the right to access to the Court. I find the time limit has a legitimate aim, that of preventing delay and uncertainty in relation to proceedings of this character and I find that the requirement of one month is not disproportionate in the circumstances. That being the case I find that none of the applicants' grounds of

challenge has been made out. I find that the 1972 Act requires an application to be made within one month. The applicants' application is admittedly out of time. The Court does not have power to extend the time. In the circumstances the Court does not have jurisdiction to hear the applicants' Originating Notice of Motion of 22 December 2003. I propose to make an order striking out the applicants' Originating Motion.

The application of Scalene Investments Ltd

[41] The applicant issued an Originating Notice of Motion in the Chancery Division on 17 December 2003, challenging the validity of the Vesting Order made by the respondent on 7 November 2003 in respect of premises at 53-55 Ann Street, Belfast. The respondent issued a notice seeking an Order that the application be struck out on the ground that it was not made within the time specified in paragraph 5(1)(b) of schedule 6 of the Local Government Act (Northern Ireland) 1972. The following ruling was given on 19 January 2004.

[42] I considered the operation of the legislation in relation to time limits in the application of JGS Services Ltd and Others (as set out above) and found that paragraph 5 of schedule 6 requires an objection to a Vesting Order to be made by application to the High Court within one-month of the publication by the respondent of notice of the Vesting Order, otherwise the jurisdiction of the Court is ousted. Further, I found that the Court does not have power to extend the time within which an application might be made and accordingly the application of JGS Services and Others, which had been issued on 22 December 2003, was outside the one-month time limit. The application was struck out.

[43] In the present case the applicant accepts the approach and the finding in JGS Services Ltd and Others, but contends that the period of one month from the respondent's publication of notice of the Vesting Order did not expire until 18 December 2003, and accordingly the application made on 17 December 2003 was within time. On the other hand, the respondent contends that the one-month period expired on 11 December 2003, so that the application was made out of time.

[44] The obligation on the respondent under paragraph 5(1)(a) of schedule 6 of the 1972 Act provides that "as soon as may be after a Vesting Order has been made the Department shall publish a notice……" The obligation on the objector under paragraph 5(1)(b) provides that those who wish to challenge the validity of the order "…. may, within one-month from the publication of the notice of the making of the vesting order, make an application…… "

[45] The Vesting Order was made on 7 November 2003. Notices were placed in three newspapers on 11 November 2003. That would appear to be sufficient to comply with the respondent's obligations under paragraph 5(1)(a). However, the respondent undertook what has been described as a 'publication scheme' and that resulted in the notices being placed in the same three newspapers one week later on 18 November 2003. The wording of paragraph 5 had been amended by the Planning

(Northern Ireland) Order 1991 to delete a requirement that the respondent publish a notice "in the prescribed form and manner", so publication is a matter for the respondent.

[46] What constitutes "publication" for the purposes of paragraph 5? The respondent refers to the requirement to publish "a notice", that is, it is expressed in the singular. The publication applies to a notice, but that does not determine the appropriate number of occasions on which there must be a publication of that notice. Further, the respondent contends that the scheme of paragraph 5 contemplates a single publication when compared to paragraph 2, which provides that a notice of application for a Vesting Order "shall be published ……on at least two occasions in the locality in which the land is situated". The contrast between paragraph 2 and paragraph 5 would suggest that what is contemplated in paragraph 5 is publication on one occasion.

[47] By letter dated 7 November 2003 the respondent wrote to the applicant and others indicating that a Vesting Order had been made that day. The letter described the effect of the Vesting Order as being to vest in the respondent, from the date it became operative, the ownership of the land to which the order related. It further provided that the Vesting Order would be first published on 11 November and would receive its second publication on 18 November, and that the Vesting Order would become operative on 18 December 2003.

[48] The effect of paragraph 5(1)(c) of schedule 6 is that a Vesting Order "shall become operative at the expiration of the period of one-month from the date on which the making thereof is published……" It is apparent therefore that the scheme of paragraph 5 contemplates that there be publication of a notice, and that within the period of one-month any legal challenge should be issued by those who wish to object, and at the conclusion of one-month the Vesting Order would become operative. There is continuity between the commencement of the challenge and the operative date of vesting. The respondent's letter of 7 November 2003 clearly indicates that the respondent considered that the relevant period of one month in which to issue legal proceedings would expire on 18 November 2003, as they provided for the Vesting Order becoming operative on that date, being one-month after the date of the second publication. Despite the letter Mr Straker QC, on behalf of the respondent, takes the position that the relevant period ended on 11 December 2003, being one month after the date the notice was first published.

[49] However the operation of paragraph 5 is a matter of legal interpretation. It is not a matter to be determined by the respondent. Mr O'Donoghue QC, on behalf of the applicant, criticises the respondent for having taken one position in the letter of 7 November and now taking the position, in response to the application, that the applicant is out of time. Affidavits have been filed on behalf of the respondent dealing with the circumstances in which the notice came to be published. The respondent received legal advice that led to the change of position. I do not accept

the criticisms that have been made of the respondent's approach. The respondent is obliged to act in accordance with what it considers to be the legal position.

[50] The applicant contends that when a notice is published on more than one day, time runs from the date on which the notice was last published. The respondent contends that there is what is described as "a window of objection" which runs from the date of publication for a period of one-month. Accordingly, an application cannot lawfully be made after the expiry of the one-month period from the date of publication, nor can it lawfully be made before publication. On that basis the respondent argues that the applicant's reliance on the last date on which the notice was published cannot be correct. The example is given of a notice first published on 11 November and the notice later published on 18 November, with an objector making an application on a date between 12 and 16 November. The respondent argues that, on the applicants approach, such an objector would not have made a lawful application, as he would be premature in applying before the date of publication. Such a result, contends the respondent, cannot be correct and the applicant's reliance on the last date on which the notice was published must be wrong.

[51] The purpose of the required publication by the respondent under paragraph 5(1) must be to give notice to all those who might be affected by the Vesting Order so that they may consider the position in relation to their right to challenge the Vesting Order. A number of matters follow -

First of all, it is to be noted that paragraph 5 leaves it to the respondent to determine the manner of publication in any particular case. In so doing, the respondent must consider what would be appropriate in order that notice might be given to those who may be affected. I consider that the respondent, in the exercise of its judgment in this regard, ought to decide what is "appropriate" rather than what might be said to be "necessary". The respondent's discretionary area of judgment should not be restricted to judging only what is the bare minimum of notice that might be given, but rather should entitle the respondent to consider what is appropriate notice in the circumstances.

Secondly, if the respondent decides to adopt a very limited circulation of the notice there will be circumstances where circulation would be so limited that it would not be considered to be "publication" for the purposes of paragraph 5.

Thirdly, the respondent might consider it appropriate to publish in more than one newspaper on the same day in order to reach those who may be affected. In those circumstances " publication" is not a single event but must include each incident of the notice being published. Publication in more than one newspaper may not be strictly required in certain cases in order to comply with paragraph 5, but it is not prohibited. The present problem would not arise when all the incidents of publication occur on the same day.

Fourthly, the respondent might consider it appropriate to publish on more than one day, in order to reach those affected. Publication on more than one day may not be strictly required, but it is not prohibited. It was probably not required in this case. The respondent considered it to be appropriate, and did so in good faith. I

consider that the requirement in paragraph 2 of the schedule to publish on more than one occasion does not require paragraph 5 to be interpreted as prohibiting publication one more than one occasion, if the respondent considers that that is appropriate in the circumstances. Similarly, I consider the wording of paragraph 5(1)(a) that publication should be "as soon as may be", does not prohibit publication on more than one occasion, if the respondent considers that to be appropriate.

[52] When the respondent considers that publication on more than one day is appropriate, what is the nature of the "publication" for the purposes of paragraph 5? In my opinion "publication" occurs over the period that the respondent considers it appropriate for the notices to appear. In this case publication commenced on 11 November and was completed on 18 November. Under paragraph 5(1)(b) time runs "from" publication, and if the notices appear over a period, "publication" for the purposes of paragraph 5 occurs at the completion of publication. If an application is made during the period of publication then times runs from the completion of the publication. Accordingly, I consider that the one-month period ran from 18 November 2003. The application made in this case on 17 December 2003 was within the one-month period.

[53] The respondent submits, correctly, that the respondent should not be entitled to determine the dates when the objector's application may be made. The interpretation of paragraph 5 outlined above does not permit the respondent to determine the time limits. The respondent is entitled to determine the character of publication, and paragraph 5 contemplates that it will be within the remit of the respondent to make such a determination.

[54] The applicant further contends that the respondent was estopped from relying on a publication date of 11 November 2003. Upon enquiry to the respondent by representatives of the applicant as to the date of expiry of the period for applications to the High Court by objectors to the Vesting Order, the applicant was informed by an official of the respondent that time ran from 18 November and expired on 18 December 2003. The applicant avers that reliance was placed on that information from the respondent in making the application on 17 December 2003. The issue of estoppel in proceedings concerning planning permission was considered by the House of Lords in *R (Reprotech Ltd) v East Sussex County Council* [2002] 1 WLR 348. A County Planning Officer advised the operators of a waste treatment plant that generating electricity on the plant would not amount to a material change of use requiring planning permission. A Council sub-committee received a report from the County Planning Officer that no material change of use was involved in the generation of electricity and it was resolved only to vary certain conditions of use. The operators applied for a declaration that the resolution amounted to a determination that no planning permission was required. The House of Lords held that it was inappropriate to introduce private law concepts of estoppel into the public law field of planning control, as planning law involved decisions which affected the public at large and remedies against public authorities had to take into account the interest of the general public which the authority existed to

promote. Lord Hoffmann stated that there is an analogy between a private law estoppel and the public law concept of legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. He concluded at paragraph 35 –

> "It seems to me that in this area, public law has already absorbed whatever is useful from the moral values that underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet."

It is not necessary for me to decide the issue of estoppel in order to reach a conclusion in this case. However, I would be of the opinion that the applicant was not entitled to rely on any estoppel, nor did any estoppel arise. This is a matter of statutory interpretation and not a matter to be determined by any mistaken view of the legal position that might have been advanced by any party.

[55] Accordingly, I find in favour of the applicant that the Originating Notice of Motion of 17 December 2003 is within the statutory time limit of one month and the Court has jurisdiction to hear the applicant's challenge. The application will be transferred to the Queens Bench Division to be heard with the application of Harrisons and Others.

The Statutory Review

[56] The applications of Harrisons and Others and Scalene Developments Ltd were heard together. AM Developments UK LTD and MDC Victoria Square Partnership, the developers of the site, were added as respondents. The Department directed that possession of the premises be given up on 18 February 2004.

[57] The Local Government Act (NI) 1972 schedule 6 paragraph 5 provides that any person aggrieved by the making of a Vesting Order and wishing to challenge its validity may do so on one of two grounds. First that it is not within the powers conferred by the Planning (NI) Order 1991 and secondly that there has not been compliance with the procedures specified in schedule 6 of the 1972 Act.

[58] If either of the grounds of challenge is established, and in the case of non-compliance with schedule 6 procedures there has been substantial prejudice by the requirement of the schedule not having been complied with, then the Court may quash the Vesting Order. The issue is whether the Vesting Order has been made within the powers of the 1991 Order.

[59] The character of the review to be conducted by this Court in relation to the decision to make this Vesting Order was described by Laws J in *Chesterfield Properties v The Secretary of State* [1997] 76 P & CR 117 as being, in effect, a statutory judicial review. I regard the challenge as a statutory judicial review that must reflect the

developments that take place within judicial review. However it remains a public law inquiry that is not concerned with the merits of the decision.

[60] Article 1 of the First Protocol to the European Convention on Human Rights provides for protection of property as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provision shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[61] The European Court of Human Rights has found that the Article comprises three distinct rules. First, the principle of peaceful enjoyment of property (set out in the first sentence of the first paragraph). Second, the principle against deprivation of possessions (set out in the second sentence of the first paragraph). Third, the right of the state to enforce laws to control the use of property (set out in the second paragraph). *Sporrong v Sweden* [1982] 5 EHRR 35 at paragraph 61.

[62] The second rule concerns deprivation of property and applies to this Vesting Order. It is necessary to establish justification for that deprivation and the onus is on the acquiring party to establish that the vesting is necessary in the public interest, that it is undertaken in accordance with conditions provided for by law and that it is in accordance with the general principles of international law.

[63] The Court must determine whether a fair balance has been struck between the demands of the general interests of the community and the requirement for the protection of the rights of the individual. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1. *Sporrong v Sweden* at paragraph 69.

[64] Fair balance requires that the interference has a legitimate aim and that it is proportionate. In determining this fair balance one relevant feature, as *James v United Kingdom* [1986] 8 EHRR 329 makes clear, is that if property is to be acquired in the public interest then it is appropriate that a reasonable compensation scheme be in place. There is such a scheme in this case. Further, as *Zwierzynski v Poland [2004] 38 EHRR 6* makes clear, the State has a moral duty to set a proper example in relation to acquisition procedures and the acquiring authority has a duty to follow the example which the State should set in relation to such acquisition.

[65] Also in the equation is the impact that such acquisition would have on the individual. J*ames v United Kingdom* established the importance of no disproportionate burden being imposed upon the citizen when the action is taken in the public interest. *Zwierzynsk v Poland,* has more recently expressed that view in terms that in the acquisition of property there must be no individual and excessive burden imposed on the citizen. There is of course a burden arising from the fact of dispossession. There is disruption of business in these particular cases as they involve acquisition of commercial property. There is the concern for the relocation of business, and this is an important aspect of these cases and is not always a matter that can be addressed merely by providing compensation.

[66] On the other side of the equation is the impact on the development of any interference with the scheme. Delays in the development could have considerable financial impact. There are the third party interests of those who are involved in the development, whose concerns are part of the wider public interest. Of course there is public interest itself, in securing what is judged to be necessary for the public good. All of the different planks must be fitted together in order to achieve, if possible, a fair balance between what the public interest requires and what the private interests require.

<u>The challenge of Harrisons and Others.</u>

[67] First of all there is the joint application of Bowden (and the other partners of the firm of Harrisons), and Beattie, Prabari and Saberhwal (being sole traders), with all four having separate interests in different properties. They raise issues about three particular aspects of this acquisition. The first complaint is that there has been no real effort by the Department to achieve agreement in the acquisition process. The second complaint is that there has been no real consideration of the individual cases by the Department. The third complaint is that the Department has imposed on the applicants an oppressive timescale for possession of the properties.

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[68] [The first and second complaints were rejected.]

The third complaint relates to the timetable for possession. A preliminary point arises as to the character of the challenge that might be made to the possession timetable. Schedule 6 of the 1972 Act provides in paragraph 5(1)(b) that parties aggrieved have the right to challenge the Vesting Order on specified grounds. In addition, paragraph 5(9) of the schedule provides for a decision in relation to possession, in that on or after the date of vesting the Department may enter upon and use the land to which the Vesting Order relates. The Department is granted a statutory discretion in relation to the date of possession.

[69] This statutory review is a challenge to the "Vesting Order". Does that include the decision made under paragraph 5(9) in respect of possession, or is that decision a separate matter from the Vesting Order? If so the statutory review would not apply to the possession decision, and if it were to be susceptible to any legal challenge it may then be necessary to undertaken such challenge by way of judicial review. I

conclude that when the possession decision is made as part of the Vesting Order decision, the paragraph 5(1)(b) challenge applies so as to include consideration of the possession decision. Any other conclusion would be much too cumbersome and would defeat the general statutory scheme, which is that challenges must be in place within a month of the operative date of the vesting. In this case I consider that the possession decision was part of the Vesting Order decision. It is apparent from the consideration of the papers and the final decision statement that possession was a part of the decision making in relation to the Vesting Order. Accordingly, I accept that this challenge applies to the decision in relation to possession as it does in relation to the decision on the Vesting Order. I make no comment in relation to a case where a possession decision is not part of the Vesting Order decision but is left aside and is addressed at a later date. Such a case will call for separate consideration if it arises. I would note on this issue, that the parties to the application proceeded on the basis that the possession decision was indeed part of the Vesting Order decision and liable to this challenge, and took no issue about it in the course of the hearing.

[70] I turn to consider the circumstances in relation to the possession decision. Possession is required on 18 February 2004 as far as all the applicants are concerned. The effective period from the date of the Vesting Order is some 3 months. The first challenge is one of unequal treatment, in that the Government occupiers have been given preferential treatment as possession is to be obtained in their cases on 15 May 2004, but preferably on 15 April 2004. The respondent's justification for this differential treatment is that in effect there is an additional three months allowed for what might be described as eviction time. The Department contemplates that it will secure possession by agreement from Government offices, and it contemplates that there may be cases where it will not secure that agreement from non Government occupiers and may have to take Court proceedings in order to obtain possession. For that reason they have made this distinction between two groups affected by this Vesting Order. I accept the explanation that the Department has given in respect of the differential treatment, and I consider that it is reasonable to allow for a period when it may be necessary to obtain orders for possession in advance of securing vacant possession so as to enable the scheme to commence. Whether the differential treatment should be accorded simply between Government and non Government occupiers is another matter to which I shall return.

[71] The second challenge is that the period allowed amounts to an excessive burden on the applicants. The question of the possession date emerged in the Department's papers in a submission from an official to the Minister dated 26 August 2003. Under the title "Key Decisions Timetable" it was stated at paragraph 8 that:

> "The amendment to the Planning Order in March 2003 now allows us to enter a development agreement before we own the land. A development agreement is likely to be in place by mid September and ideally given the size of the scheme the Department would like to have the

> funding agreement with the CGI in place before making a Vesting Order. However, this would mean delaying the final decision on the Vesting Order until mid to late October at the earliest. Therefore the Victoria Square landowners and tenants would not receive any certainty about what is to happen to them until late October at the earliest and would be unlikely to begin to make concrete plans to relocate until they have this certainty".

[72] A number of points emerge which reflect the considerations that the Department official was putting to the Minister two months before the final decision statement. First the Department was entering a development agreement before it owned the land. The Department was perfectly entitled to do that but it did mean that the making of that agreement was influential in the timetable. Secondly, the Department would have the funding agreement with CGI in place before making the Vesting Order. Again the Department was quite entitled to do that of course but it did provide an additional constraint. Thirdly, putting these matters in place would mean delaying the final decision on the Vesting Order. Fourthly, there was recognition that the steps to be completed would have the effect that the landowners and tenants would not receive any certainty and would be unlikely to begin to make concrete plans to relocate until they had this certainty.

[73] At paragraph 10 of the submission there are some comments about timetabling. They describe a preferred option that was put to the Minister that if the decision were in favour of vesting the final decision statement would state the intention to make the Vesting Order within 28 days. That meant a final decision in September 2003, once the development agreement was signed but before the funding agreement with CGI was finalised. "This option would have the advantage of enabling us to give concrete information to landowners and tenants several weeks earlier, giving them certainty in relation to the need to relocate, it would also make the relocation timetable more reasonable." No possession dates were mentioned at that stage.

[74] There was a submission to the Minister in October 2003 in advance of the final decision, and at paragraph 8, I draw attention to two matters. First there had been some slippage because of concerns about the completion of the development agreement and secondly the 28-day gap between the final decision statement and the Vesting Order had been removed. The proposed timetable then provided that on 23 October there would be the final decision, and the Vesting Order would be made the following day, that is 24 October. The Vesting Order was to become operative on 1 December and the notices to quit were anticipated for 31 January. The timetable concluded with this paragraph "We should aim to give as much information as possible to landowners and tenants as early as possible. This will give them more time to make alternative arrangements and will make the relocation timetable more reasonable".

[75] The final decision statement issued on 24 October and paragraph 2.2 sets out the timetable at that date. Again there had been slight slippage with the Vesting Order proposed for 30 October, to become operative on 7 December and possession on 7 February, the same three-month period. The actual timetable in the letter of 7 November was that the Vesting Order would be made on 7 November, it would be operative on 18 December and possession would be on 18 February.

[76] The respondents approach was that the timetable was adequate. The applicants' evidence was first of all in the affidavit of Mr Orr of BTW Shiels, Commercial Property Consultants. He did not believe that the relocation and refit could realistically be accomplished in the timescale envisaged but more particularly he believed that to identify and negotiate a lease for a suitable property would take perhaps six to eight months with possession following fit out requiring a further period of time. The evidence of Mr Laing of Nigel Laing & Co. included the opinions that –

"This case is not about compensation. It is about the unreasonable implementation of a scheme in an unnecessarily destructive and punishing manner. Compensation is not the answer."

"The only commitment came on the 24th October at the date of the FDS (final decision statement)".

"This imposed too short a timescale. Even on their own advisors figures, which I dispute, eight months is required for Harrisons to relocate".

"…… I would be utterly flabbergasted if any of them (the respondents advisors) advised that a three or four month period was reasonable to relocate the entire business population of a significant part of Belfast City Centre".

Mr Carruthers of Chartered Surveyors, Crothers, stated –

"Finally it is wholly unrealistic and unfair to expect applicants to deliver up possession by the 18th February 2004. It would not reasonably be expected that they would be able to acquire a suitable alternative premises in Belfast within such a restricted timescale".

[77] The fair balance of public and private interests is a question of the fair balance of the overall scheme and embraces the possession issue as well as the other parts of the Vesting Order. The respondents have concerns about anything in excess of a six month delay having a major impact on this development, threatening the viability of the development, threatening its finances; at best threatening the opening schedule and at worst threatening the whole enterprise. The effective commencement date of works on these premises appears to be April/May 2004 and any slippage from that date creates a six month delay because of the window that retailers apply in relation to the launch of such a project. It was necessary in this case to allow for a three-month eviction process.

[78] On the other side is the impact on the applicants. In the case of two of the applicants Mr Beattie and Mr Prabera, I find that the position has now been reached where it his been agreed that the vesting has resulted in the extinguishment of each business and relocation is not an issue. In relation to Mr Sabherwal's I find that

there is disputed extinguishment in that, as the result of this vesting, he regards himself as having suffered an extinguishment of his business and although the Department does not agree, relocation is not proposed. Each of these three applicants contends that the possession timetable was an excessive burden. However, as each case involves extinguishment, any added time in possession will be trading time and not time for relocation. Loss of trading will be dealt with in the compensation scheme.

[79] In relation to Harrisons the position is different as they are not an extinguishment case. They have alternative premises which will be available by November 2004 and they require intermediate premises. There will be a double move to the intermediate premises and then again to the final premises. The Department has accepted the need for the double move and the related costs. However the time available has not permitted a firm location to be identified for the first move, so the firm has no business base from 18 February 2004.

[80] The respondents rely on the statutory period of one month from the Vesting Order as an indicator of reasonable time for possession, and the actual time allowed is three months. In addition they refer to preparation time in excess of two years from the notice of intention of August 2001 when the first notice was issued in relation to this proposal for vesting. I do not accept the reliance on the preparation time of two years. It was not reasonable to expect a search for alternative premises from the issue of the notice of intention in August 2001. The Department should reasonably expect that there would be some resistance to the Vesting Order, and that it would be necessary to complete a hearing of the local enquiry in the absence of agreement between the parties. There were no grounds at that stage to anticipate that there would be such agreement. In the event the local enquiry that was held at the beginning of 2002 did not support the proposals, and it was certainly not reasonable to expect that at that time that there would be a search for alternative premises. The interim decision statement on the Vesting Order was issued in June 2003, and at that stage it might be said that it would be reasonable to expect efforts to begin, but there remained the lack of certainty in relation to the proposal. Harrisons and others were searching for alternative premises and indeed Harrisons secured their long term alternative in September 2003 before the final decision statement was issued. The submissions to the Minister make clear that until certainty is achieved by the final decision statement there cannot be commitments made in relation to alternative premises and that did not occur until October 2003.

[81] The issue is whether or not the three-month period imposed amounts to an excessive burden on the applicants. At the date of the final vesting decision it is apparent from the papers that relocation arrangements were critical, and the experts all refer to the critical need to make adequate provision for relocation. Any such arrangements will vary with the scale and location of the vesting, different businesses, different types of premises, the availability of premises, suitability of premises, the area where relocation might occur. All may change from case to case. In relation to this case the vesting effects a major transplant in Belfast City Centre.

[82] The respondents approach is that the applicants' position must be regarded within the whole scheme and there may be hard cases but the applicants have not suffered any excessive burden. The short possession period has to be balanced against the requirements of the scheme. In relation to the extended timetable for Government occupiers, extended possession was granted because of the reasonable assurance of possession from the Government occupiers.

[83] On the evidence I regard the possession timetable as imposing an excessive burden on some of those who are affected by the Vesting Order. I consider that the excessive burden represents a disproportionate effect under Article 1 of the First Protocol. I consider therefore that the decision is subject to a finding in public law that it is outside the powers of the Department.

[84] Article 5(1)(b)(2) gives the Court a discretion as to whether or not it will quash the Vesting Order if it is satisfied that there are grounds to do so. In the exercise of that discretion I look not to the date of vesting but to the present circumstances of the case. I find a number of considerations that I take into account in deciding whether to exercise my discretion to quash the Vesting Order. One is the impact on the public interest in the development scheme, which would be severe. Secondly, in relation to the private interests, I consider the double move that is involved in this case on the part of Harrisons and the short term remedial action that would be required to assist a first move, although to date it has not proved possible to identify that first move. Thirdly, I consider the extra time that is available in this scheme, as demonstrated by the latitude given to the Government offices to vacate by 18 April 2004 because of the reasonable assurance of possession at that date. Fourthly, I consider whether or not it is reasonable to require and to obtain an assurance of possession from non-Government occupiers, if they were to secure extended possession to 18 April 2004. I consider that it would be reasonable for the Department to be assured of possession if they were to grant any extension to 18 April, as they have done in relation to the Government offices.

[85] In relation to the Messrs Beattie, Pabari and Sabherwal, I find that their cases do not give rise to relocation issues as they involve extinguishment (in one case disputed extinguishment), and that extended possession is sought for the purposes of trading and that is not an acceptable ground on which to continue in possession. Harrisons are different in that they require relocation and seek intermediate premises. I consider that if there were an assurance of possession to the Department on 18 April 2004, as granted to the Government offices, that it would be reasonable for Harrisons to retain possession until that date. In relation to those who require possession for trading I find that that is not acceptable and there are no grounds for interference with possession in those cases. In the exercise of my discretion, and in the light of the above considerations, I will not quash the Vesting Order.

[86] If there were a reasonable assurance of possession to the Department on 18 April 2004 in the same manner as that which applies to the Government offices, that

would not represent an excessive burden on the applicant. I propose to seek a reasonable assurance to that effect to be given to the Court, subject to any other Court order to be obtained to the contrary. The excessive burden that I have indicated would not arise if Harrisons were placed in the same position as the Government Departments are placed. If Harrisons were to give the reasonable assurance of possession they would be placed in the same position. I would hold that the required possession date would not be an excessive burden if they were unable to give that assurance.
[Harrisons gave the undertaking and secured extended possession]

The challenge of Scalene Investments Ltd.

[87] Scalene challenged the Vesting Order on the basis that it was outside the powers of the Department to acquire compulsorily when, it was contended, the premises were not required in connection with the development scheme.
[The challenge was rejected]