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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 (NI) 1972

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

WEATHERUP J

[1] By an originating notice of motion dated 22 December 2003 the applicants applied under the Local Government Act (NI) 1972 for an order challenging the validity of an order made by the Department for Social Development 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, and further purporting to require vacant possession of the premises by 18 February 2004.

[2] 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.
Paragraph 5 (1)(a) provides that,

> "as soon as may be after a Vesting Order has been made the Department shall publish a notice stating that the Vesting Order has been made……"

Paragraph 5 (1)(b) provides that,

> "if any person is aggrieved by a Vesting Order and 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 the rules of Court……"

Paragraph 5(1)(c) provides that,

> "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 exploration of a period of one month from the date on which the notice of the making thereof is published in accordance with the provides of head (a)."

[3] 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.

[4] 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 a number of authorities to support the proposition that once the time limit expires no legal challenge can be mounted.

{5} First of all *Smith & East Allo Rural District Council* [1956] A C 736 concerned the Acquisition of Land Act (Authorisation Procedure) Act 1946 which contained similar provisions to the 1972 Act. 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.

[6] *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."

That approach was approved by the Court of Appeal [1994] 1 All E R 694.

[7] *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.

[8] Finally, *R (on the application of Deutsch v Hackney* [2003] EWHC (Admin) 2692. A Designation Order under the Road Traffic Regulation Act 1984 should be challenged by way of 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 weeks. 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 .

[9] These authorities establish clearly that a statutory scheme in terms similar to that which is provided for 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.

[10] In the first place the applicants rely on the wording of paragraph 5 of the Schedule as importing a right of legal challenge after the period of one month. 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 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. 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 in 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.

[11] A further argument 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 that 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."

[12] 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."

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 <u>statutory</u> 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.

[13] 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 applicant relies upon the Judgment of Carswell LCJ in *Robinson's Application* [2002] N I 206. The Northern Ireland Act 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. The case went on appeal to the House of Lords and the decision of the majority of the Court of Appeal was upheld. Carswell LCJ dissented in the Court of Appeal but Mr Horner contends that the general approach stated in the judgment should adopted. 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."

[14] 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 in this case. 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 e 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 required compliance or else there was an ouster of the jurisdiction of the Court. The altered approach to statutory interpretation outlined by Carswell LCJ does not change that result.

[15] 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 applicant's Article 6 right 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 the case 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. "

[16] 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 with 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 all together 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 legislative 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.

[17] *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."

[18] In *McLean* the Court 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 was 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.

[19] There were different outcomes in *Foyle* and *McLean*. 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 after the commencement of the legal challenge and during the course of that legal challenge, which was the case in *Foyle*, as it does to a requirement to take the step within a specified time to commence the legal challenge, as was the case in *McLean*.

[20] The applicants 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* 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 -

> "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])

[21] 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 which it was sought to challenge. 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.

[22] 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 motion of 22 December 2003. I propose to make an order striking out the applicants' originating motion.