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Judgment: approved by the Court for handing down | *Delivered:* **24/11/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

JOHN KILLEN
and
CLARKE KILLEN
and
R J J KILLEN LIMITED

Plaintiffs;

-and-

DEPARTMENT OF REGIONAL DEVELOPMENT

Defendant.

_____

McCLOSKEY J

I Introduction

[1] By Notice of Motion dated 12th October 2010, the Plaintiffs seek injunctive relief against the Defendant in the following terms:

(a) A mandatory injunction compelling the Defendant to provide an underpass in accordance with an agreement with the Plaintiffs; or

(b) A mandatory injunction compelling the Defendant to provide an undertaking to provide the said underpass, providing specification, location and timing of same; or

(c) An order restraining the Defendant, their servants and agents from performing/carrying out any further works on the A2 Broadbridge

Dual Carriage Scheme at Campsie, County Londonderry, adjacent to the Plaintiffs' lane.

The Plaintiffs' solicitor, Mr. Downey, confirmed to the court that the relief sought is *interim* in nature and that the Plaintiffs seek only the third of the above injunctions at this stage.

[2] The litigation context in which this application is pursued is shaped by a Writ of Summons (undated, but bearing a Court of Judicature stamp of 13th October 2010) in which the Plaintiffs claim:

(a) Specific performance of a contract between the Plaintiffs and the Defendants arising out of the aforementioned road scheme.

(b) Damages for breach of contract and breach of statutory duty in relation to the provision of an underpass between the Plaintiffs' lands.

(c) Costs and interest.

(d) Further and other relief as the court sees fit.

The court was informed that the Defendant has entered an appearance to the Writ. At this juncture, I would observe that as this is an application for an interim injunction, it appears to me that Order 29, Rule 1 (although not invoked in the Notice of Motion) is engaged. This provides:

> "*1(1) An application for the grant of an injunction may be made by any party to a cause of matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's Writ, originating summons, counterclaim or Third Party Notice, as the case may be.*"

At this stage of the proceedings, the Plaintiffs' Statement of Claim has not been served. Both parties have exchanged relatively extensive affidavits, exhibiting a significant quantity of documents. The present application is made on notice to the Defendant and the legal representatives of both parties have advanced written and oral argument to the court.

II THE EVIDENCE

The Plaintiffs

[3] The application is grounded on the affidavit of John Killen, the first-named Plaintiff, who describes himself as a shareholder and director in the private limited company R J J Killen Limited, the third-named Plaintiff. According to this affidavit,

the Plaintiffs have been operating a family farming business at Campsie for over forty years. The principal activity is dairy farming and this generates most of the profit. There are 340 dairy cattle and 60 beef cattle. The Plaintiffs own some 80 hectares of farmland and operate another 70 hectares by conacre. The dairy farm consists of approximately 44 hectares, split into two divisions of 33 and 11 hectares respectively, divided by the existing road. It is asserted that the impugned scheme consists of the development of a dual carriageway, entailing replacement of this road.

[4] The Plaintiffs assert that the decision to construct a new dual carriageway was made in June 2008, resulting in the vesting of some of their lands. Exhibited to the Plaintiffs' affidavit is a report which, it is averred, was prepared by one Dr. McIlmoyle. It would appear that the author belongs to the firm of Faber Maunsell who were, presumably, specialist consultants engaged by the Defendant in connection with the scheme. The report appears to be entitled "A2 Agricultural Impact Assessment" and dated 26th October 2005. Paragraph 4.3 of this report, under the rubric "Access", states:

> "*Access to lands on the opposite side of the new dual carriageway will become a major impediment to the management of the Killen farm. At present, fields Nos. 9 and 10 (10.9 Ha) lie on the opposite side of the existing roadway from the farmyard. Access for livestock grazing these two fields or for silage cutting is directly off the current roadway. However, following the construction of the new dual carriageway, access will only be available via the roundabouts at either end of that section of dual carriageway leading to longer journey times, increased wear and tear on machinery and increased costs. The Killens feel strongly about access difficulties ...*"

While the syntax of the remainder of this passage is somewhat opaque, it records the Plaintiffs' view that "*… an underpass is essential to provide access from field No. 6, under the new dual carriageway, to fields Nos. 9 and 10*". The report articulates the following conclusion:

> "*The large number of livestock on this farm and the difficulties associated with moving stock to and from land cut off on the opposite side of the dual carriageway to and from the farmyard will present major difficulties for the future management and running of the farm. Additional costs will be incurred in transporting livestock to and from land on the opposite of the dual carriageway and transporting grass for silage back to the farmyard.* ***The provision of an underpass to provide direct access for livestock to fields Nos. 9 and 10, with sufficient dimension to accommodate a medium sized tractor,***

> ***would help to alleviate some of the management difficulties created by the new dual carriageway."***

[My emphasis].

[5] Chronologically, the next document of significance (exhibited to the Defendant's affidavit) is the Defendant's "Rebuttal of Objection", prepared in the context of the relevant public inquiry. It is clear from this document and certain surrounding letters that the Plaintiffs engaged the services of Brennen Associates, a firm of chartered civil engineers, to advise them and prepare a formal objection on their behalf. The latter is dated 17th January 2007 and includes the following passage:

> "*V6. Our clients formally object to the apparent intention to force them to use a 'cattle creep' as the principal means of accessing their lands on the north side of the proposed road."*

In the Defendant's formal rebuttal submission, which seems to have been prepared shortly thereafter, it is stated, *inter alia*:

> "*The Department believes that the proposed new road between Campsie and the roundabout represents the best solution by minimising the impact on the local community and the road was the subject of discussion at two meetings held in 2006 referred to above.* ***With a view to minimising the impact on the objector, Roads Service offered a 2.1M high cattle creep below the new dual carriageway for the exclusive use of the objector together with an access from the proposed left in/left out junction at the water treatment works.***"

[My emphasis].

It is evident from other exhibits that the public inquiry ensued in March 2007 and, further, that the Plaintiffs were represented by their consultant, Mr. Brennen, during proceedings. The Defendant's documentary exhibits include excerpts from a transcript relating to the questioning of one of the Defendant's main witnesses (Mr. Greig) by Mr. Brennen. It is clear from both questions and answers that the possible solution of a cattle facility for the Plaintiffs was at an embryonic stage, no final decision had been made by the Defendant and no final agreement had been made bilaterally. This assessment is reinforced by later passages in the Defendant's rebuttal submission [paragraphs 10 and 11].

[6] The first-named Plaintiff further avers that at a meeting on 17th September 2008, "*… we were advised by representatives of the Roads Service that an underpass would be provided to facilitate the transport of cattle from the main farm to the severed lands*". It is

also asserted that (apparently on the same occasion) the Plaintiffs were provided with two maps, dated November 2006 and June 2008 respectively, "*showing the location of the proposed underpass*". In the older of these two maps, it is possible to identify the Vesting Order line. There is also specific reference to "*land boundary between Mr. Killen's land and Department of Environment for Northern Ireland*". In the legend, there is a specific reference to a symbol denoting "*Underpass and ramps*". The latter is not easily identified on the map, which is of poor quality. The map is clearly produced by "Roads Service" and its title is "A2 Broadbridge Dualling – Cattle Creep Layout". The first-named Plaintiff's affidavit then describes the following sequence of events:

(a) On 26th March 2009, the Vesting Order became operative.

(b) In May 2009, there was an exchange of e-mails between the parties, in which Roads Service stated that no underpass would be provided.

(c) On 28th May 2009, a meeting was held during which one Mr. Hutchinson (a principal professional officer and the Defendant's deponent) "*… confirmed that an underpass had been offered but that it was beginning to look very expensive but that the matter was still being explored*".

(d) In June 2009, the scheme works were initiated.

(e) The Plaintiffs were then informed that an underpass would be provided at a different location and a new map was duly provided. This is exhibited and is described as "Proposed Plan Showing Arrangement of Cattle Underpass Adjacent Bridge at Faughan River". This is a "Roads Service" map which bears no discernible date.

(f) The Plaintiffs subsequently "*put a number of proposals to the Roads Service*".

(g) On 26th October 2009, there was a further meeting with Roads Service representatives.

(h) Subsequently, Roads Service made an offer to the Plaintiffs of compensation in lieu of an underpass.

(i) It is further averred that, ultimately, the Defendant refused to either provide an underpass or to compensate the Plaintiffs for disruption to their business and damage to their lands.

[7] The evidence before the court includes a document entitled "Killens Submission to Land and Property Services – Position Paper and Proposal", which, according to the deponent, was furnished to Roads Service around October 2009. While the authorship of this document is not disclosed, on the basis of other

documentary references it would appear to have been prepared by their accountant. Under the rubric "Purpose", the submission states:

> "*The purpose of this document is to set out the factual background to the matter, record the history of the engagement between the Killens and the Department* ***and to open discussions in relation to the ways in which compensation might be advanced ...***
>
> ***The claim that the Killens intend making will have several components including land lost as a result of the compulsory purchase, disturbance and damage caused to the lands on the opposite side of the new dual carriageway (fields Nos. 9 and 10). This document deals only with the lands at fields 9 and 10 approximately 10.9 hectares."***

[My emphasis].

The submission then adverts to Dr. McIlmoyle's report (recorded in paragraph [4] above) and notes, correctly, that this report concluded that the provision of an underpass "*… would help to alleviate* ***some*** *of the management difficulties created by the new dual carriageway*". Next, the submission rehearses the subsequent meeting between the parties, stating:

> "*It is understood that the Department explored other options including the relocation of the underpass* ***but inevitably the conclusion was drawn that an underpass would not be provided due to economic factors."***

[My emphasis].

The submission continues:

> "*As a result of the change of position, the Department representatives then discussed submitting a claim based on essentially three scenarios … .* "

The first of these is described as "*the assumption that an underpass was provided*" and the submission comments that while this was "*the preferred option … the Department has eliminated this at this point*". The second and third scenarios considered the contrasting alternatives of continuing to operate the entire farm in accordance with the pre-scheme business plan **or** abandoning fields 9 and 10 as no longer viable. The submission then invites the Department to "*consider compensation*" under a number of specified headings. Next, it is stated:

> "*The Killens' position is that with or without the underpass, a claim will be made for compensation (disturbance) relating to the additional costs incurred of transporting silage back to the farmyard …*
>
> *In the circumstances, we intend making a claim for injurious affection of this land. However, it also occurs that the claim would be more simple to calculate if it is made on the basis of severance, with a subsequent re-grant for an alternative (inferior) use.*"

This is followed by a contention that the Killens "*… are entitled to claim compensation in relation to the effective severance of the lands*", while reiterating the assertion of a promised underpass.

[8] It is appropriate to reproduce in full the concluding passage in the aforementioned written submission:

> "*The Killens' proposal in relation to fields 9 and 10 is straightforward and is as follows:*
>
> *(i) They abandon any rights to insist that the underpass is provided.*
>
> *(ii) The fields are considered severed and compensation is calculated on the basis of the value to the Killens.*
>
> *(iii) This compensation would be reduced by a value of the remaining inferior use.*
>
> *(iv) Compensation and a timetable for payment of same is agreed as soon as is practically possible in relation to this aspect of the claim.*
>
> *The Killens believe that this approach will not only avoid a potentially costly dispute but will also involve a substantial saving to the Department.*"

The deponent avers that, subsequent to presenting the aforementioned submission, Roads Service intimated that the cost of providing an underpass had again spiralled and requested the submission of a claim for compensation "*… and we were assured that if the underpass was not provided then we would be fully compensated for the disruption caused by the new scheme*". This was the impetus for the engagement of Mr. Arthur, a chartered valuation surveyor and estate agent, by the Plaintiffs and the preparation by him of a "Statement of Claim". This is a species of valuation report containing a particularised claim for compensation totalling £654,795, with certain minor additions and qualifications. The affidavit continues:

> "*Various exchanges have taken place between the Department and our agent which concluded in September 2010. The Department's position now is that they are refusing to provide the underpass and are refusing to compensate us for the disruption to our business and damage caused to our lands which have effectively become severed.*"

There are no exhibits relating to these discrete averments.

The Defendant's Affidavit Evidence

[9] In resisting the Plaintiffs' application for interim injunctive relief, a detailed affidavit has been filed on behalf of the Defendant, sworn by the aforementioned Mr. Hutchinson. This contains, in summary form, the following principal averments:

(a) The construction period for the impugned scheme is May 2009 to December 2010.

(b) Fields 9 and 10 did not form part of the Plaintiffs' dairy farming business. Rather, these fields were used by dry cows which, per Dr. McIlmoyle's report, would not need to be moved to other parts of the farm more than twice monthly. [I record that this assertion is disputed by the Plaintiffs].

(c) The Defendant fully acknowledges the Plaintiffs' statutory right to compensation and, but for the intervention of these proceedings, had been proposing to make an interim payment of £200,000.

(d) The Defendant *did* give consideration to the provision of a "*cattle creep*", with a height of 2.1 metres, which would facilitate the movement of cattle, quad bikes or small tractors.

(e) This was then considered in accordance with the "Roads Service Policy and Procedure Guide" and an exhibited schedule confirms that active consideration was being given to this possibility. This is further confirmed by an e-mail dated 3rd November 2006:

> "*It will be possible to provide an underpass/cattle creep to link the plots and we are currently investigating the head room that will be available. A sum of £350,000 is included in the risk register for such a link and an appropriate sum included in the cost estimate …*

We have not included the underpass on the base plans nor has it been mentioned in the ES, from memory it was concluded that it was something we could agree to if pressed and that presenting it on the plans could lead to a number of similar number requests from affected landowners."

(f) At this stage and for some time subsequently, construction of a cattle creep was the preferred option, subject to cost.

(g) At a meeting with the Plaintiffs on 1st December 2006, the deponent stated clearly that a cattle creep, but no underpass, would be provided, subjected to technical and financial feasibility. The aforementioned November 2006 drawing was provided to the Plaintiffs during this meeting.

(h) On 17th January 2007, the Plaintiffs' formal objections to the scheme were submitted by their agent (see paragraph [5] above) and these included:

"*Our clients formally object to the apparent intention to force them to use a 'cattle creep' as the principal means of accessing their lands on the north side of the proposed road.*"

(i) The Roads Service "rebuttal", prepared for the purposes of the public inquiry (see paragraph [5] above) outlined, *inter alia*, the reasons why an underpass could not reasonably be provided and continues, in paragraph 10:

"*(e) Unable to accede to the Objectors' request for an underpass, the Department offered a cattle creep with a headroom of 2.1 metres together with a connection from the left in/ left out access from the proposed access to the Water Treatment Works on the eastbound carriageway.*

(f) The Objector is under no obligation to accept the offer of the cattle creep and left in/left out access and is not being forced to adopt the cattle creep as his principal means of access to his lands to the north."

(j) The public inquiry was conducted on 27th and 28th March 2007 (also noted in paragraph [5] above). An exhibited excerpt from a transcript documents the Defendant's oral evidence about the difficulties associated with a cattle underpass. It is clear from the following reply from Mr. Greig that some facility for cattle was still being actively considered:

"*The underpass has not been designed in any great detail at this stage. We can certainly work with Mr. Killen quite happily and if asked we can accommodate.*"

The inspector then made an intervention, recording the willingness of Roads Service "*… to work with* [Plaintiff] *…* ***to try and accommodate their needs, within reason, of course***". [My emphasis].

(k) The inspector's ensuing report contains nothing of substance relating to this discrete issue.

(l) In an electronic communication dated 1st May 2007, the Defendant's engineering consultant (Mr. Daly) prepared a sketch indicating two possible locations for "*the proposed cattle creep for Mr. Killen*". This communication discusses certain engineering and topographical difficulties and is inconclusive in nature.

(m) In the minutes of the Land and Property Services ("LPS") "Compensation Issues" meeting held on 7th October 2007, it is recorded:

"*Plots 21, 21A and B: Underpass agreed - exact dimensions to be firmed up. Area to be vested is not good quality - £10K/£15K per acre. Underpass lessens the argument for depreciation of the area on the northern side of the carriageway.*"

I interpose the observation that a nexus was being forged progressively between the possible construction of a cattle facility for the Plaintiffs and the measurement of their claim for compensation pursuant to vesting. This theme is readily identifiable in much of the documentary evidence before the court.

(n) The consulting engineers then prepared the "Faughan Bridge Cattle Creep Options Report", apparently in June 2008. This advised that there were three options, the cheapest costing £304,000 and the most expensive in excess of £800,000. Option 3 was recommended as it was "*… the cheapest, involves the least construction work and is least likely to affect the construction programme*". This was also the Plaintiffs' preferred option.

(o) According to the Defendant's deponent, this cost estimate "*… did not take full account of the cost impact associated with the flooding issues …* ". The deponent and the engineers then discussed this topic further, giving rise to a decision that "*… there were too many risks associated with the flooding issue and as such we were unwilling to consider the cattle creep*

at the location preferred by the Plaintiffs". The other two options were excluded on the ground of cost. In support of these averments, the deponent exhibits the minutes of a LPS meeting held on 3rd July 2008. This document contains the following key passage:

"*At the public inquiry Roads Service gave a commitment that an underpass would be provided which at that time was estimated in the region of £200,000. Unfortunately, due to the poor soil quality, Colin* [the deponent] *has just been advised that the revised figure is now £800,000. Although the landowner asked that the proposed underpass accommodate tractor and silage traile, due to the height restriction of 2.3 M x 4 M wide, there would be limited use and certainly could only accommodate a small tractor and perhaps a cattle trailer. In light of this Colin was recommending a left in/left out instead and for Roy to make agent aware in due course that compensation monies will be reduced when everything is taken into account.*"

(p) In a letter dated 28th July 2008, LPS advised the Defendant that the Plaintiffs' estimated compensation, including an underpass, was £235,000, rising to £385,000 excluding the underpass.

(q) A subsequent exchange of internal e-mails confirms that the issue of flooding of the underpass remained a live one.

(r) On 17th September 2008, representatives of both parties attended a meeting. An exhibited rough note of the discussions includes the following:

"*2.1 metres max height of cattle crossing. Poor ground conditions. Requires piling. Economic viability.*"

It is averred that during this meeting, the Plaintiffs' agent (Mr. Brennen) advised them that "*… it would be better for them to proceed without the underpass as the costs of provision of the underpass would be deducted from their compensation meaning that they would get none or very little monetary compensation*". The deponent further avers that he expressed his probable intention of excluding the cattle creep from the tender documents.

(s) Amongst the exhibits is an e-mail dated 26th September 2008 (just over one week later) adverting to the aforementioned meeting and stating, *inter alia*:

"*Could I also ask you to remove the cattle underpass from the Charles Hurst Accommodation Works Drawing.*"

This was followed by the transmission of drawings which excluded the cattle creep, on 6th October 2008. Thenceforth, the accommodation works drawings relating to the Plaintiffs' lands did not include a cattle creep. The documentary evidence shows that these drawings were furnished to both Plaintiffs and their agent, during the period November 2008 to February 2009.

(t) On 26th March 2009, following due observance of the statutory requirements regarding advertisement, the Plaintiffs' lands were vested.

(u) In an exchange of e-mails in mid-May 2009, one of the Plaintiffs' professional representatives sought clarification about the underpass. This elicited the response:

> "*As a consequence of our discussions with our clients a decision was made not to proceed with the underpass.*"

It is averred that this was reiterated during a meeting between the parties on 28th May 2009. It is further averred that during this meeting the Defendant agreed to install a 300 mm pipe providing a link to the severed lands for slurry purposes. This is specifically mentioned in an e-mail dated 1st June 2009, to which was attached "*amendments to Killens' accommodation works drawings*". A further e-mail dated 9th June 2009 confirms that these drawings were forwarded to the Plaintiffs' agent (Mr. Brennen).

(v) During the period June to October 2009 there were further communications and meetings between the parties and their representatives. These confirm that the issue of constructing a cattle facility for the Plaintiffs had been reignited and the Defendant obtained from the contractor an updated cattle creep installation cost estimate. The note of a weekly site meeting, dated 16th September 2009, documents an estimate in the vicinity of £500,000.

[10] The evidence includes a documented record of a meeting conducted on 30th September 2009 attended by the Plaintiffs, their accountant, the Defendant's deponent and his colleague. This important document recites:

> "*Daniel* [Plaintiffs' accountant] *explained where they were at in respect of their claim. He listed three scenarios: one with an underpass, one without and one whereby they sell the severed lands to the Department.*

> *Colin again reiterated that following extensive work in relation to the underpass, Roads Service cannot justify the expense and that consequently the underpass was no longer feasible.*
>
> *A meeting was requested with LPS prior to them submitting their compensation claim.*"

An additional manuscript note records that one week later, on 7th October 2009, the envisaged LPS meeting ensued. The next development consisted of the submission of the "Discussion Paper and Proposal" by the Plaintiffs' accountant. This was forwarded under cover of an e-mail dated 22nd October 2009. I have already outlined its contents, in paragraph [7] above.

[11] The final piece of evidence is a letter dated 27th September 2020 written by the Plaintiffs' valuation agent, Mr. Arthur, to LPS. This records a disagreement between the parties relating to matters of valuation and compensation. It states, *inter alia*:

> "*My client has been repeatedly reassured that an underpass would be provided in line with the recommendations as made by Dr. McIlmoyle. At the meeting, the position was now made clear that this is not now on the table. My client is of the view that there has been a breach* [sic] *on behalf of the Department …*
>
> *My client believes that the underpass can be provided in line with the repeated assurances given and commitments made …*
>
> *In the circumstances my clients feel that your suggested offer is inadequate. It is my clients' opinion that a figure in the order of £500,000 would be more appropriate. I would ask you to reconsider your offer taking into account all the relevant circumstances.*"

I observe at this juncture that this letter reinforces my earlier observation about the demonstrable connection between the possible construction of a cattle facility for the Plaintiffs and the measurement of their claim for compensation. The clear thrust of this letter appears to be that if the Defendant were to offer an amount of compensation sufficiently high to satisfy the Plaintiffs' demands, this would signify the end of the *lis* between the parties, without *any* works of construction.

[12] Mr. Arthur's aforementioned letter was followed by the initiation of these proceedings, some two weeks later. I record that service of the Defendant's affidavit stimulated a rejoinder affidavit sworn on behalf of the Plaintiffs. It is unnecessary to rehearse this further affidavit, which I have considered in full. Its fundamental thrust is that from an early stage the Plaintiffs received repeated assurances from the

Defendant that a cattle facility would be provided, the Defendant failed to appreciate the likely cost thereof, such failure should not be detrimental to the Plaintiffs and, ultimately, the Defendant resiled from its assurances.

III THE PARTIES' MAIN CONTENTIONS

[13] On behalf of the Plaintiffs, it is submitted that the Defendants repeatedly *promised* that a cattle facility (my choice of a deliberately neutral term) would be provided and did so in unqualified terms. It is further submitted that this gave rise to a legally binding agreement between the parties. In the Plaintiffs' skeleton argument, it is stated:

> "*The Plaintiffs feel aggrieved by the Department's reneging on what they saw as a clear promise. They wish to hold the Department to their word … .*"

It is accepted on behalf of the Plaintiffs that the injunctive relief sought in paragraphs 1 and 2 of their Notice of Motion is final in nature and is not pursued at this stage. The present application is confined to the third of the injunctions sought. It is submitted that the evidence establishes that there is a serious issue to be tried, that damages are an inadequate remedy and that the balance of convenience –

> " *… lies with stopping work at the proposed location of the cattle creep at this stage but not the entire scheme until the issue is settled … .*"

[14] On behalf of the Defendant, it is submitted, firstly, that the evidence does not establish any legally enforceable agreement between the parties for the provision of a cattle facility. The fundamental requirements of offer, acceptance thereof, consideration and intention to create legal relations are missing. At its height, the evidence establishes only that the Defendant's servants/agents represented, in good faith, their intention and understanding, in the circumstances prevailing during a particular period, that a cattle facility would be provided for the Plaintiffs' benefit in the future. It is submitted, in the alternative, that if any legally binding agreement relating to the provision of this facility came into existence, it contained an express or implied term to the effect that the installation in question would be provided only if economically viable. Thirdly, it is submitted that the Plaintiffs' true remedy is compensation in accordance with the relevant statutory provisions (*infra*). Fourthly, it is submitted that the Defendant, being a Crown entity, cannot be restrained by injunction. Finally, it is submitted that, in any event, the well established preconditions for the grant of interim injunctive relief are not satisfied.

IV CONCLUSIONS

[15] The Defendant's powers to compulsorily acquire land are enshrined in Part IX of the Roads (Northern Ireland) Order 1993 ("*the 1993 Order*"). Therein lies the

central power, which is to make a Vesting Order. By Article 113(2), Schedule 6 to the Local Government Act (Northern Ireland) 1972 is imported, subject to the modifications specified in Schedule 7 to the 1993 Order. By paragraph 6 of Schedule 6 to the 1972 Act, a compensation fund must be established, while paragraph 11 provides that following the operative date of a Vesting Order, any question of disputed compensation between the divested landowner and the Department shall be referred to and determined by the Lands Tribunal. Further provision is then made about the measurement of compensation. In short, by virtue of this statutory scheme, Parliament has struck the balance between the public interest and the interests of private landowners by requiring the payment of compensation pursuant to vesting and establishing mechanisms for the assessment thereof. As Lord Blackburn stated in ***Ayr Harbour Trustees the Oswald*** [1883] 8 App. Cas 623, at p. 634:

> "*I think that where the legislature confer powers on any bodies to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good … .*"

I consider this statutory scheme to be a key element of the context of both the factual background to this litigation and the determination of the present application.

[16] The Plaintiffs' primary contention is that the evidence establishes a legally binding agreement between the parties giving rise to an obligation on behalf of the Defendant to construct a cattle facility for the benefit of the Plaintiffs' dairy farming operations. This submission is a reflection of the relief sought in their Writ, which is an order for specific performance of the agreement asserted by them and damages for the Defendant's alleged breach thereof. Having considered all the evidence before the court, I find it quite impossible to spell out the essential ingredients of a legally binding agreement between the parties. In brief compass:

(a) It is quite clear that the Defendant's representatives made a number of representations and gave several assurances to the effect that, at some future date, a cattle facility would be constructed. However, taking into account the uninformed basis on which these representations and assurances were made *and* the statutory context, I find that these representations and assurances were not contractual in nature. They were, rather simple statements of good faith relating to future intentions.

(b) I find no evidence of *acceptance* by Plaintiffs of these representations and assurances. Rather, in my view, the evidence points to a finding that the Plaintiffs at no times committed themselves unequivocally to any final position.

(c) There is no evidence whatsoever of *consideration*: this, *per se*, is fatal to the Plaintiffs' case.

(d) Taking into account particularly the statutory context, I find no mutual intention of the parties to strike a legally binding agreement.

(e) There is also a distinct lack of certainty, clarity and finality overshadowing the whole subject. This relates particularly to the issues of the precise location of the cattle facility, its dimensions, the engineering specification, drainage and flood measures and the date when it would be constructed. No finality was ever reached in respect of any of these self-evidently important issues. In the absence of sufficient clarity, certainty and finality of terms, the parties were at no time sufficiently *ad idem*, thereby precluding a legally binding agreement from coming into existence.

(f) I further find that, realistically and on an objective assessment of all the evidence, the Defendant at no stage intended to commit itself to construct the facility *come what may and irrespective of cost* and the Plaintiffs, who are clearly prudent and experienced businessmen, must have been aware of this.

These findings are readily made following a fair, reasonable and objective assessment of the totality of the documentary evidence assembled. As a matter of law, it seems to me that any of the above findings is, singly, sufficient to defeat the Plaintiffs' case that the parties struck a legally binding agreement whereby the Defendant was to construct a cattle facility: *a fortiori* in combination.

[17] Elaborating on the findings rehearsed above, I place some emphasis, firstly, on the statutory context and the Plaintiffs' entitlement to compensation in consequence of the Vesting Order. Reviewing all the evidence, I consider that these two factors overshadow and inform all of the events and communications under consideration. In my view, carefully and objectively analysed, the Defendant's representatives were at all times engaged in an exercise which entailed absorbing the Plaintiffs' gradually evolving claim for compensation and examining a concrete measure which could ameliorate the impact on the Plaintiffs of the Vesting Order and, simultaneously, affect their claim for compensation. Throughout this process, the Plaintiffs' right to compensation was constant and inalienable, characteristics which endure. It has been observed that where a statute confers a power to compulsorily acquire land, provision is "*invariably*" made for compensating the divested landowner [Halsbury's Laws of England, 5th Edition, Volume 18, paragraph 502]. There is a substantial body of case law relating to the assessment of compensation. The object of compensation is to fairly recompense a person whose land has been compulsorily taken from him. The dominant principle is frequently described, in shorthand, as the principle of "equivalence". Furthermore, compensation is assessed upon the basis of the value of the land to the owner and

may also be payable for disturbance, severance or other injurious affection [Halsbury, paragraph 753]. Where the loss or damage to the divested landowner can be mitigated, this will have consequences for his claim for compensation:

> "*Damage by severance may be aggravated by injurious works on the land taken or alternatively it may be reduced by beneficial works on or uses of the land taken …*
>
> *Some statutes compel the making of accommodation works to mitigate injury by severance, and otherwise the owner and authority may agree to construct such works which are not in restriction of their statutory powers and duties.*"

[Halsbury, paragraph 812].

In short, it is permissible for the acquiring authority to execute so-called "accommodation" works, pursuant to a vesting order, where these do not frustrate the statutory objects and are, therefore, *intra vires*.

[18] Further, common sense and experience dictate that in a vesting scenario, there will not infrequently be suggestions and demands from putative divested owners and proposed solutions on the part of the vesting authority. This will typically be an evolving scenario wherein the parties' positions will shift periodically. This scenario will also frequently involve the engagement of suitable professionals and the formal submission of compensation claims. The divested owner and his professional representatives will, typically, adopt certain strategic positions and make a number of strategic decisions as the process advances. At the conclusion of this process, absent a consensual outcome, the divested owner enjoys a statutory right to have his compensation determined by a specialised independent tribunal. All of these ingredients are detectable in the matrix of the present litigation. In my view, these various elements and considerations strongly contra indicate the Plaintiffs' contention that a legally binding agreement was made with the Defendant. While I would be reluctant to exclude altogether the possibility, in the abstract, that a contract could emerge from a comparable matrix in some other case, this seems to me highly unlikely.

[19] I consider that the context is properly analysed as having three main elements. The first is the exercise by the Defendant of public law powers. The second is the Plaintiffs' statutory entitlement to compensation. The third is the Plaintiffs' statutory right of recourse to a tribunal for the determination of their compensation. One may also view the Defendant's conduct through the prism of the principle that public officials have no legal power to make open-ended promises entailing the conferral of benefits on the promise unqualified by considerations of viability or cost. If a public authority were to make a decision of this *genre*, it would be vulnerable to quashing on the grounds of *ultra vires* and ***Wednesbury*** unreasonableness. Furthermore, such a decision, in my estimation, could not

generate, in public law, a substantive legitimate expectation on the part of the affected individual or agency. Reflection on all of these factors suggests powerfully that the context is one of public law, with no readily ascertainable private law ingredients. This analysis fortifies still further the court's rejection of the Plaintiffs' case, since the law of contract belongs predominantly to the realm of private law (prime examples of statutory intervention being the Consumer Credit Act 1974, the Landlord and Tenant Act 1985 and the Human Rights Act 1998).

[20] Thus, I do not simply conclude that the Plaintiffs have failed to establish a good arguable case that a legally binding agreement of the nature and substance asserted by them exists. I have, rather, concluded that, on the basis of all the evidence presently available, no such contract exists. Thus there is no serious issue to be tried. Since the Plaintiffs' claim for both final and interim relief is unmistakably and inescapably based on the contention that they have a legally binding agreement with the Defendant it follows that, in my view, the Plaintiffs have no reasonable prospect of securing any of the remedies sought in their Writ of Summons. I acknowledge that my assessment and conclusion are based on all of the evidence presently before the court and there has been no sworn oral evidence from either party. Thus I must recognise that if this litigation proceeds to trial, the final outcome could, conceivably, differ. This will lie exclusively within the province of the trial judge. However, bearing in mind the substantial importance of objective construction of documents in a dispute of this nature and absent any suggestion that the evidence presently before the court is in any material fashion incomplete, it is difficult, at present, to envisage the trial scenario and outcome differing to any significant extent.

[21] The principles to be applied by the court in its determination of this application are mainly encapsulated in the following passage in the speech of Lord Diplock in ***American Cyanamid –v- Ethicon*** [1975] AC 396, at p. 406 :

> "*The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the Plaintiff's need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiff's undertaking in damages if the uncertainty were resolved in the Defendant's favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies. In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It*

is given on affidavit and has not been tested by oral cross-examination …

[PP. 407-408] *The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that it aided the court in … abstaining from expressing any opinion upon the merits of the case until the hearing. So unless the material available to the court at the hearing of the application for the interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought. As to that, the governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages … ."*

While substantial quantities of judicial ink have been spilled in this territory subsequently, I consider that, bearing in mind the operation of the doctrine of precedent, these principles continue to apply fully in a litigation matrix such as that arising in the present case.

[22] Applying the ***American Cyanamid*** principles to the present litigation matrix:

(a) My primary conclusion, set out above, is that the Plaintiffs do not have a good arguable case against the Defendant and there is no serious issue to be tried.

(b) This conclusion is in no way dependent upon the resolution of conflicting averments in the parties' respective affidavits. It is, rather, based upon a balanced and dispassionate evaluation of all the objective documentary evidence, which is substantial in nature and is not suggested by the Plaintiffs to be in any way incomplete. The second central pillar of my primary conclusion is the statutory context.

(c) The propriety of the court considering in full all of the available evidence at this stage is reinforced by the Plaintiffs' failure to provide an undertaking in damages and is fully harmonious with the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature, since the investment of judicial and court resources at this stage of the litigation should, viewed panoramically, significantly reduce costs, delay and complexity.

(d) The Plaintiffs seek an injunction restraining the Defendant from continuing to execute and complete the road scheme works. The undisputed evidence is that the scheme is at a very advanced stage, some parts of the new dual carriageway have already been opened, completion will be achieved before the end of this calendar year and the construction of a cattle facility at this stage would be a complex operation and significantly more costly than the predecessor operation already rejected on the ground of excessive expense. Moreover, I consider that the injunction sought by the Plaintiffs would inevitably interfere with third party contractual rights and obligations and I readily infer that, quite apart from the cost of installation of the facility, an injunction would almost certainly entail other demands on the public purse. In sum, it would be manifestly contrary to the public interest to grant such an injunction. I conclude that the balance of convenience is overwhelmingly in favour of refusal.

(e) Finally, there is absolutely nothing in the evidential matrix or the Plaintiff's submissions which would sustain any suggestion that damages would not be an adequate remedy for the Plaintiffs. In my view, compensation is quintessentially the appropriate remedy in a vesting scenario.

[23] The final issue relates to the Defendant's contention that, being an agent of the Crown, it cannot be injuncted in any event. By virtue of Section 21 of the Crown Proceedings Act 1947, the court has no power to make an injunction against the Crown. Section 21 provides:

> *"(1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require-*
> *Provided that:-*
> *(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and*

> *(b) in any proceedings against the Crown for the recovery of land or other property the Court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.*
>
> *(2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."*

The operation of Section 21 is illustrated in ***Burke –v- Patterson*** [1986] NI 1. In summary, the 1947 Act substantially altered both the procedure to be observed in civil proceedings by and against the Crown and the substantive law governing the rights and liabilities of the Crown (see Halsbury's Laws of England, 4th Edition, Volume 8(2) Re-issue, paragraph 382 and following). The position in judicial review proceedings is different: there, injunctive relief, both interim and final, can be granted against a Minister of the Crown (see ***M –v- Home Office*** [1994] 1AC 377, per Lord Woolf, at pp. 420-422). The immunity of the Crown from injunctions does not extend to servants of the Crown, such as Ministers and public servants, who are personally liable for any injury or wrongdoing which they cannot justify by legal authority: see the discussion in Administrative Law (Wade and Forsyth, 10th Edition, pp. 698-710). In short, the governing constitutional principle is that Crown officers do not share the Crown's immunity. The impact of Section 21 is neatly summarised in Bean on Injunctions (10th Edition), paragraph 4.51:

> "*The effect of these Sections is that, save where EU law intervenes, or in judicial review cases, no injunction, interim or final may be granted against the Crown or an officer of the Crown."*

[24] In ***British Medical Association –v- Greater Glasgow Health Board*** [1989] AC 1211, Lord Jauncey articulated the rationale of Section 21(1) in the following terms (at p. 1225:

> "*The two primary objects of the Act were (i) to enable a Plaintiff in England to proceed against the Crown as of right instead of by petition of right and (ii) to subject the Crown in both England and Scotland to actions founded in tort and delict in the same way as other Defendants and defenders.*"

His Lordship adverted to the long title of the statute, observing that it is concerned with "*the civil liabilities and rights of the Crown*". He continued (at p. 1226):

> "*Section 21(2) is designed to ensure that subsection (1) is not circumvented by a litigant obtaining an injunction or interdict against an officer of the Crown which would have the effect of enjoining or interdicting the Crown.*"

The House held that the BMA petition against the Greater Glasgow Health Board did not constitute "*proceedings against the Crown*" within the meaning of Section 21(1).

[25] Fundamentally, the expression "*The Crown*" encompasses agencies and entities exercising governmental functions. It embraces "*… all elements of the executive government from Ministers of the Crown downwards*" [Bennion, Statutory Interpretation, 4th Edition, p. 164]. Section 21 of the 1947 Act has been considered by the House of Lords in two comparatively recent decisions. The first is ***M –v- Home Office*** (*supra*) where, in defiance of a mandatory interim injunction granted by the High Court, the Secretary of State for the Home Department authorised the removal of the Applicant to Zaire. This gave rise to contempt of court proceedings, the outcome whereof was that the Secretary of State had personally been guilty of contempt. Lord Woolf's conclusion that Section 21 prevents the grant of an injunction only in those situations where prior to 1947 no injunctive relief could be ordered was doubted subsequently by Lords Rodger and Mance in ***Davidson –v- Scottish Ministers*** [2005] UKHL 74, at paragraphs [93] and [102] especially.

[26] I am of the opinion that, whatever the correctness of Lord Woolf's conclusion (which represented the unanimous view of the House), the decision in ***M*** does not avail the Plaintiffs in the present case, as it was based on the analysis that prior to the 1947 Act an action could be brought against an officer of the Crown personally in respect of a tort committed or authorised by him even though acting in his official capacity, that Crown immunity could not be pleaded in such circumstances and that, accordingly, Section 21 did not preclude the making of interim or final injunctions. This analysis gave rise to the conclusion that such injunctive relief can be granted in judicial review proceedings. The notion of personal liability is reflected in the House's decision that the Secretary of State himself should be substituted for the Home Office as regards the finding of contempt. In short, the *ratio decidendi* of ***M –v- Home Office*** plainly lends no support to the Plaintiffs' case.

[27] The Defendant in the present case is a Department of central government, exercising statutory powers relating to the compulsory acquisition of privately owned lands, the consequential granting of compensation and the construction/improvement of a road. This is a private law action by the Plaintiffs against the Defendant, seeking exclusively private law. I conclude that Section 21 of the 1947 Act operates to prevent the grant of injunctive relief, interim or otherwise, against the Defendant. Furthermore, given the explicit terms of Section 21(1)(a), the same conclusion must apply to the principal remedy sought in the Writ viz. an order of specific performance.

Postscript

[28] At a stage when this judgment was substantially complete, the parties informed the court that, by consent, an order dismissing the application for an interim injunction, with no order as to costs *inter-partes*, could be made. On being notified of the imminence of delivery of the judgment, the parties expressed a willingness that it should be handed down. I had no hesitation in agreeing to this course, since my analysis and conclusions potentially have a bearing on the entirety of the proceedings (and might, possibly, provide some guidance in other comparable cases). It follows that this course is plainly harmonious with the over-riding objective and will hopefully energise the parties' attempts to reach agreement on the compensation to which the Plaintiffs are entitled by statute. It is stated in the Defendant's affidavit that an interim payment of £200,000 would have been made but for the intervention of this application. There would appear to be no reason for withholding such payment further. This step should have the additional merit of defusing the elements of mistrust and polarisation which, regrettably, appear to have materialised in this dispute.

[29] Subject to further argument, I observe, finally, that there may be compelling grounds for staying these proceedings pending exhaustion of the Plaintiffs' entitlement to have their compensation determined by the Lands Tribunal, in the event that this cannot be agreed between the parties. Alternatively, an application under Order 18, Rule 19 of the Rules of the Court of Judicature for an order dismissing the Plaintiffs' action as disclosing no reasonable cause of action against the Defendant could conceivably eventuate. I would add that these are provisional, rather than concluded, observations. There will be an opportunity to address further argument to the court and, to this end, an early post-judgment review has been arranged.

Footnote

Both parties having considered the judgment, the proceedings were brought to a conclusion on 06/12/10, when the court ordered, by consent, that the Defendant have judgment against the Plaintiffs, with the parties bearing their respective costs.