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*(subject to editorial corrections)**

2014/112652

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

Between:

PORTAVO ESTATES LIMITED

Plaintiff;

-and-

NORTHERN IRELAND WATER

Defendant.

_____

HORNER J

Introduction

[1] The plaintiff is Portavo Estates Limited. The driving force behind the plaintiff is Mr Derek Tughan, a well-known property developer. The plaintiff's predecessor in title owned a major part of the land which Donaghadee Urban District Council ("the Council") acquired pursuant to the Donaghadee Urban District Council (NI) Act 1931 ("the 1931 Act") to form Portavo Reservoir ("the reservoir lands"). Northern Ireland Water ("NIW") has acquired the title to the reservoir lands in succession to the Council.

[2] The reservoir lands acquired pursuant to the 1931 Act have been used to create a reservoir which has in the past supplied drinking water to the inhabitants of Donaghadee and its locality. There are seven successors in title to the reservoir lands acquired under the 1931 Act. It is agreed that the plaintiff's predecessors in title owned the lands which now form the substantial part of the reservoir lands and of the manmade lake itself. The plaintiff's predecessor in title appears to have owned the land on which the embankment has been constructed. It forms a boundary with land owned by the National Trust and consequently may be jointly owned. In any event this issue is not relevant to the matters which this court has to decide.

[3] The original proceedings identified many disputes between the plaintiff and the defendant. However, the parties and their legal teams have worked tirelessly and sensibly to narrow these issues. They have been able to agree a number of matters, which include the following:

(a) The reservoir lands acquired under the 1931 Act and which include the reservoir are "superfluous" to the requirements of NIW.

(b) The reservoir lands were acquired under the 1931 Act and are subject to the provisions which were incorporated under the Lands Clauses Consolidation Act 1845 ("the 1845 Act").

(c) The plaintiff is the successor in title to the former owners of a substantial portion of the reservoir lands including approximately 80% of the reservoir itself.

[4] Two central issues however divide the plaintiff and NIW. They are:

(i) Firstly, the plaintiff claims to be entitled to rely on section 128 of the 1845 Act as giving it a right to pre-emption in respect of a substantial section of the reservoir lands now that they are superfluous to the NIW's requirements. NIW denies the plaintiff enjoys any right of pre-emption. ("Issue 1").

(ii) Secondly, NIW says that even if section 128 does apply, the plaintiff cannot rely upon it because so far as the reservoir lands are concerned they are "lands built upon" and therefore no pre-emption rights can arise under section 128 of 1845 Act ("Issue 2").

Background Information

[5] As I have recorded the reservoir lands are situate close by Portavo House which is owned by the plaintiff. These lands had been owned by the Reverend Hamilton Chichester Ker and Kenneth Charles Weldon and are comprised in Folio No: 21972 Co Down. Prior to the acquisition of the lands by NIW's predecessor in title, the Council, the lands appeared to have been used for agricultural purposes. They comprise an irregular shaped depression formed by the confluence of North/South trending interdumlin hollow with a fault control valley trending East/North/East to West/South West. The underlying Ordovician and Silurian grit and shale is covered by a veneer of boulder clay of varying thickness, with some isolated patches of glacial sand and grit and gravel.

[6] The two streams met in the depression and flowed North/East under the Orlock Bridge which carries the coastal road and which lies some 300 metres to East/North/East of the dam constructed subsequent to the acquisition of the

reservoir lands. This coastal road connects Groomsport to Donaghadee. To the South/East the depression is bordered by Shore Hill and Kearney's Hill.

[7] After the acquisition of the reservoir lands in 1933 pursuant to the 1931 Act the water course was impounded using a 135 metre long straight earth embankment aligned North/West to South/East. This encased a concrete core wall .3 metres thick and which terminated in a trench 4 metres below the rock level. The reservoir has a surface area of 12.75 hectares at a top water level of 9.45mOD. It has a capacity of 269 millilitres. It has 262 hectare of direct catchment area and 357 hectares of indirect catchment area.

[8] There were various works of construction carried out on the reservoir lands after they had been acquired by the Council. These include:

(a) Inlet and outlet pipe work and valving arrangements.

(b) A 9.14 metre long broad crested spill weir located at the South/East end of the embankment.

(c) A 505mm diameter valve which discharges scour flows from the Chamber located at the top of the embankment into the spill way.

(d) An inspection platform.

(e) A pumping station.

(f) A house and two small car parks.

[9] The reservoir fell into desuetude in 1992 when its water quality was considered not to be up to the necessary standard. The DOE told Ards Borough Council on 13 January 1994 that it was uneconomical to upgrade Portavo Reservoir to ensure compliance with the EC Drinking Water Directive. Apparently the reservoir is well-maintained. It is inspected every 10 years. It is estimated it would cost almost £140,000 to decommission the reservoir. Such action would also raise environmental hydraulic, planning and social issues. North Down and Ards Borough Council had expressed an interest in the past about exercising a joint stewardship of the lands and in particular the reservoir lands. The National Trust has also expressed an interest. But over the years it has been Mr Tughan of the plaintiff who has put pressure on the politicians on a regular basis to allow him, through the plaintiff, to buy a substantial part of reservoir lands back and to incorporate them into his estate. I have studied the correspondence from Mr Tughan in particular, and from the solicitors acting on his behalf, seeking an opportunity to purchase the reservoir lands over at least the past 20 years. It is clear that this is a project which the plaintiff has pursued with considerable determination.

[10] If there are pre-emption rights attaching to the reservoir lands which the plaintiff is able to exercise, then it will end up owning only a substantial proportion of the manmade lake itself. There will be others who will be entitled to smaller shares of the reservoir. It is physically possible to drain the lands into the sea. However the drainage of the reservoir may require the agreement of all the owners of the reservoir lands. There will also be planning and environmental issues to be overcome. It is possible therefore that the reservoir cannot be drained lawfully. If it is to be drained there may have to be a substantial commitment of capital to reinstate the lands and remove the sludge which is left after the reservoir is drained. If the manmade lake is not drained, then the owners will have to agree a scheme to ensure that it is properly maintained. The cost of this is likely to grow as the physical structures impounding the water decay. So there are obvious practical problems if there are rights of pre-emption and should these be exercised successfully. Any parties who acquire the reservoir lands will necessarily have to be prepared to invest in the future of these lands whether as an open stretch of water or farmland or simply wetland.

[11] I had an opportunity to inspect the reservoir lands. It gave me an opportunity to see the topography and to view the structures erected upon the reservoir lands. It is likely that if the reservoir is drained there will be a considerable problem caused by the deposits of sludge and mud which will be left. At present the lands are used by locals for the purpose of walking and there is an angling club which fishes in the reservoir. These activities are supervised by DCAL. The court is unclear what plans the plaintiff has for the lands. However, I have no reason to doubt the assertion that has been made that approximately 1% and perhaps even up to 2% of the reservoir lands have physical structures built upon them. The rest comprises fields, open water, shrubbery and vegetation.

Relevant Statutory Provisions

[12] Section 1 of the 1845 Act provides:

> "This Act shall apply to every undertaking authorised by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, **save so far as they shall be expressly varied or excepted by any such Act**, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act." (Emphasis added)

Clearly the provisions of the 1845 apply as part of an all-encompassing code for the acquisition of land unless "expressly varied or excepted".

[13] Section 127 of the Act entitled "Sale of superfluous land" has the headnote:

> "And with respect to lands acquired by the promoters of the undertaking and the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:
>
> **Section 127**
>
> **Lands not wanted to be sold, or in default to vest in owners of adjoining lands**
>
> "Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase money arising from such sales to the purposes of the special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

[14] This section deals with the situation where lands acquired become superfluous to the promoter of the undertaking. In such a situation and within 10 years or after the time limited by the special Act for the completion of the words (if no period is prescribed) the promoter has to sell the superfluous land and apply the purchase monies from such sales to the purposes of the special Act. In default, the superfluous lands remaining unsold at the expiration of such period, become the property of the owners of the lands adjoining them. In other words the promoter is under an obligation to "use or lose" any superfluous lands by offering them for sale. If the lands are unsold at the end of the prescribed period, then it loses them and they become the property of the owners of the lands adjoining them.

Section 128 provides:

> "**Lands to be offered to owner of lands from which they were originally taken or to adjoining owners**

> Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situated within a town, **or be lands built upon** or used for building purposes, **first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed**; or if such person refuses to purchase the same, or cannot after diligent enquiry be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable to entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit." (Emphasis added)

This provides a right of pre-emption to the previous owners or their successors in title.

[15] Section 129 provides that the right of pre-emption must be claimed within 6 weeks of the offer of sale. Section 130 provides that any differences as to the price are to be settled by arbitration. The costs of the arbitration are to be at the discretion of the arbitrators. Section 131 deals with the obligation of the promoters to convey such lands to the purchasers by deed.

[16] It is important to remember that section 2 of the Public Health (Ireland) Act 1878 provides that Land Clauses Acts means the 1845 Act as the same is amended by the Land Clauses Consolidation Acts Amendment Act 1850, the Railways Act (Ireland) 1851, the Railways Act (Ireland) 1860, the Railways Act (Ireland) 1864 and the Railways Traverse Act 1868.

[17] The 1931 Act was an Act to "to confer powers on the Urban District Council of Donaghadee in the County of Down as to borrowing money, construction of water works, acquisition of lands compulsorily or by agreement and for various other purposes". The pre-amble made it clear, inter alia, that the Council were authorised to construct the water-works described and to appropriate the waters in the streams impounded by the intended water-works. It is also clear that it was envisaged that £22,000 was to be spent on, inter alia, the reservoir pumping station and other works requiring capital investment and £3,000 on the actual acquisition of the lands.

[18] Section 3 states that "(so far as the same were applicable for the purpose of and are not inconsistent with the provisions of this Act) are hereby incorporated with this Act (namely) –

The Land Clauses Acts as defined by the Public Health (Ireland) Act 1878, as amended by this Act."

[19] Therefore the 1931 Act incorporated the 1845 Act save in so far as the same was inconsistent with the provisions of the 1931 Act. It will be noted that Section 96(3) of the Local Government Act (NI) 1972 provides:

> "Section 127 (disposal of superfluous lands) of the Lands Clauses Consolidation Act 1845 shall not apply with respect to any acquisition of land by a council, and sections 128 to 131 of that Act (right of pre-emption of former owners) shall not apply with respect to any land acquired by a council by agreement."

It is thus clear that Parliament sees no difficulty in operating the code for the acquisition of land without section 127 being in force.

[20] Section 5 gave power to the Council to proceed with "an Impounding Reservoir" at Portavo together with, inter alia, a pumping station and filters, pipelines and other subsidiary works.

[21] Section 14 makes it clear that the erection of buildings was restricted to offices and buildings for persons in their employ "and such buildings and work as may be incident to or connected with their water undertaking".

There may be some debate about whether the construction of two car parks, albeit of a modest size, was necessary for the undertaking or was made necessary simply to accommodate those now using the reservoir lands to fish or walk their dogs or otherwise use the lands for recreational purposes. However such a determination is not relevant to my decision.

[22] Section 33 provided that for the purpose of taking lands "compulsorily under this Act and the Acts incorporated therewith and of determining the amount of compensation payable by the Council for the same and the provisions of the Lands Clauses Act shall be deemed to be amended by various Acts". Section 34 provided that if there was any difference between the Council and the owner lessee or occupier of any lands taken under the compulsory powers of the Act, an arbitrator appointed pursuant of section 33 may "award a sum or sums of money to be paid to such owner …".

[23] Section 38 provided that the powers of the Council for the compulsory purchase of lands under this Act shall cease after the expiration of 3 years from the passing of the Act. Section 39 specifically disapplies section 127 of the 1845 Act and makes it clear that it shall not apply to any lands purchased by the Council under the powers of this Act. It also makes clear that the Council can with the consent of the

Ministry of Home Affairs dispose of or appropriate to any public purpose "any lands acquired by them under the powers of this Act and not for the time being required for the purposes therefore".

[24] Section 42 gives the Council powers to borrow for the purchase of the lands in construction of the Act reservoir etc. Section 51 provides that the proceeds of any sale of any surplus lands under the powers of this Act shall be used "to pay off borrowed monies".

[25] It is clear that the 1931 Act had a scheme to acquire lands for the impounding reservoir, including the power to borrow money, and the obligation to use the sums received from sales of surplus/superfluous land to pay off the money it had borrowed. It is also clear that the 1931 Act incorporated, inter alia, the 1845 Act but expressly stated that this did not include section 127 of the 1845 Act. As I have already noted the Local Government Act (Northern Ireland) 1972 by section 96(3) seeks to achieve similar ends.

[26] Craies on Legislation (11th Edition) 17.1.1 states:

> "The cardinal rule for the construction of legislation is that it should be construed according to the contention expressed in the language used."

Tindal CJ said in Warburton v Loveland [1832] 2 D&Cl (HL) 480, 489:

> "Where the language of an act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that the words of statute speak the intention of the legislature."

In this case the words are, I consider, clear. If they are not clear, then the court can look to the true intention of the legislature in construing the relevant provisions: e.g. see Hawktins v Gathercole [1855] C 6DM&G1 at 21.

Both Mr Humphreys QC for the plaintiff and Mr Dunlop for NIW quite candidly admitted to being unable to find any real guidance as to the true intention of the legislature in imposing these three exceptions under section 128 and the "lands built upon" exception in particular.

[27] The words used are plain and obvious. There will be certain cases in which it will be obvious if the lands are "built upon". There will be other cases in which it is obvious that the lands are not built upon. Obviously if the entire lands are covered in buildings, they will be "built upon". This will also be the position if the lands are used for houses, even though they are not within a town, and even though the houses contain gardens or even if there is a square, because those gardens or that square are necessarily ancillary to the housing accommodation. There may be cases

when it is difficult to draw the line, but that does not make the natural meaning of "lands built upon" difficult or impossible to define or understand. The difficulty lies in applying these clear words to the facts and circumstances of particular superfluous lands.

The arguments made by the parties on the issues

[28] The following provides but the briefest of summaries of the arguments made on behalf of the plaintiff and NIW. Such a brief synopsis cannot hope to do justice to the carefully thought-out and nuanced arguments made to the court and in no way is intended to represent all the points urged on the court by each of the parties.

Issue 1

[29] The plaintiff argues that with section 127 expressly excluded, the natural and ordinary meaning of section 128, which is incorporated along with the other relevant sections of the 1845 Act, is that before the promoters dispose of any superfluous land, and there is no time limit on this requirement to dispose of superfluous lands, they shall first offer to sell "the same to the person then entitled to the lands (if any) from which the same were originally severed". This person, the original owner's successor in title, is the plaintiff. Accordingly the plaintiff is entitled to a right of pre-emption in respect of a substantial part of the reservoir lands.

[30] NIW claims that although section 127 is expressly excluded by the 1931 Act both section 127 and section 128 must work in tandem. When section 128 is read together with section 39 of the 1931 Act then it becomes clear that the plaintiff at this stage does not enjoy any pre-emption rights in respect of any part of the reservoir lands because the opportunity to purchase the reservoir lands has long since passed.

Issue 2

[31] The plaintiff asserts that the exception does not apply because the lands have not been "built upon". There are buildings on 1% approximately of the total lands (and certainly not more than 2%) and what has occurred has simply been the damming of a stream and the flooding of a valley to form an artificial lake which can be drained, if required. This is not land which anyone could reasonably understand to be described as "built upon". Further, and in the alternative, the de minimis principle applies given the scale of buildings constructed upon the reservoir lands.

[32] NIW argues that regardless of whether the plaintiff is correct in its construction of section 128, no pre-emption rights can arise because the lands have clearly been "built upon" and such lands are expressly excluded. The Council has constructed a reservoir on the lands with associated works such as the embankment and the spill weir. There is no way that such capital investment could be described as "de minimis".

Discussion

Issue 1

[33] In Freedman and Others v British Railways Board and National Carriers Limited [1994] 68 P and CR 25 Hoffmann J set out the basis upon which a private Act such as the 1931 Act here should be construed. Although the Court of Appeal did not endorse his decision completely, there is no doubt that it was supportive of his approach to construction of a private Act. He said at page 29:

> "There are two important and undisputed principles of construction which apply to sections 57 and 102. The first is that they form part of a private Act which should in case of ambiguity be construed against the promoters. The second is that they shall be construed in their legislative and historical setting. The railway Acts of the early Victorian age read like inscriptions from an ancient civilisation; to understand them, it is necessary to try to reconstruct the relevant legal culture of the day."

[34] He drew attention to the statement of Lord Tenterden CJ in Stourbridge Canal Limited v Whelley 109 ER 1336 at 1337 where he said dealing with a Canal Act:

> **"**This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not clearly given to them by the Act."

[35] In Parker v Great Western Railway 135 ER 107 at 121 Tindal CJ dealing with the Railway Act said:

> "And it is to be observed, that the language of these acts of parliament is to be treated as the language of the promoters of them. They ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances, should be construed against the parties obtaining them, but liberally in favour of the public."

[36] Clearly in this case while the NIW is not an adventurer, it is the successor in title to the promoter, the Council. Accordingly it still follows that any ambiguity in the 1931 Act should be construed against NIW, the successor in title to the Council.

[37] Hoffmann J then went on to discuss in considerable detail the legislative and historical setting for the passing of the Great Northern Railway Company Act 1846. There is no need to repeat what he said because, it is accepted by NIW, that the land under consideration in this case is superfluous and there is no need to consider the issue of abandonment and "Pickin" clauses. It is however important to note that he relied upon Lord Cairns' comments in Great Western Railway Company v May [1874-75] LR7 HL 283 where Lord Cairns said at page 294:

> "No doubt it would be part of the policy and consistent with that policy, for Parliament to accompany and watch over a railway during the whole of its existence, and from time to time, not only during the first ten years of its existence but during its whole life, to take care that whenever any land became unwanted for the purpose of the railway, that land should be taken from railway companies, either by forcing them to sell it, or by providing for its return to the original owner. But practically that is a course which could hardly be adopted. It would be impossible practically to make any legislative provision which should hang about a railway in this manner for the whole of its existence."

Mr Dunlop calls in aid these dicta in his submission and says that Parliament could never have intended to grant pre-emption rights to the owners, or the owners successors in title, without there being a prescribed period. Parliament, he says could never have intended that such a legislative provision should hang about the neck of the Council or its successors in title.

[38] In North British Railway Company and Others v Birrell and Others 1918 SC (HL) 33 the House of Lords had to consider sections 120 and 121 of the Land Causes Act of 1845 which applied to Scotland and which are equivalent to sections 127 and 128 of the 1845 Act. Lord Dunedin said at page 47:

> "Lands, whether superfluous or not, which have been purchased by the Railway Company are their property. But section 120 of the Land Clauses Act imposes a duty on the Company to sell such lands as are superfluous within a certain period, with the sanction of forfeiture if they do not do so. Section 121 then says that, if there be a sale, there shall be a right of pre-emption in the person from whose property the

lands were taken, or failing him to the contiguous owner. But they, after a set of statutes, which prolonged the period fixed by section 120 and which had the effect of keeping that period still unexpired, there was passed section 41 of the North British Railway Act of 1913. That section provided that, notwithstanding any previous Acts, certain lands, viz, lands belonging to the Company and adjoining railways or stations belonging to the Company, and not immediately required for the undertaking of the Company, should not be required to be sold, but that the company might retain, hold, and use, or lease, or otherwise dispose of the same on such terms as they thought fit. That seems to me in plain words to stop all effect, quoad the lands specified, of sections 120 and 121 of the Lands Clauses Act. It only remains to see whether the lands in question (1) belong to the Company, (2) are adjoining the Company's railway or stations, (3) are not immediately required for the Company's undertaking."

[39] Lord Atkinson said at page 49:

"It is well established that the point of time at which the lands so to be forfeited are decided to be superfluous lands is the precise time at which the forfeiture operates, namely, the expiration of the time within which the promoters are bound to sell or dispose of them. If the promoters are relieved from this statutory obligation they are no in default; the forfeiture never takes place. In further pursuance of the same policy in favour of landlords a condition is, by the terms of the 121st section of the Act of 1845, added as to the mode and manner in which the obligation imposed by the preceding section is to be discharged. The latter section is merely ancillary to the former. It prescribes that, before the promoters of the undertaking dispose of any such superfluous lands (that is, clearly, those particular superfluous lands which the preceding section required them to be disposed of), unless the lands be situate in a town, or be built upon, or used for building purposes, they shall offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed. It then makes further provisions in case this person should refuse to purchase. If the

> promoters, or, which is the same thing in this case, the appellant Company, within the period fixed, proceed to sell or otherwise dispose of the original lands acquired for the purposes of their undertaking, they must be in a position to establish that these lands are then superfluous lands."

[40] The 1845 Act provided a code to deal with the acquisition of land. When sections 127 and 128 both were in operation then after ten years the promoter in the absence of any other specified prescribed period had to sell such lands as were superfluous with the threat of the lands being forfeited if it did not. Section 128 provided that if there was to be a sale (and the same time limit applied) then the previous owner (or his successor in title) was entitled to a right of pre-emption under section 128.

[41] In this case section 127 has been deliberately omitted. It is noted that in the recital to the 1931 Act there was a book of reference deposited with the Clerk of the Peace for the County of Down setting out the names of the owners and lessees or reputed owners and lessees of the lands that had been taken. The purpose of this, it may be inferred, was to have a record of the previous owners, should the lands acquired become "superfluous". The draftsman must have appreciated that regardless of the demand at that time, there was a risk that the lands containing the reservoir might, for a variety of reasons, become superfluous to the requirements of the Council.

[42] The draftsman has expressly omitted section 127 of the code and the code has necessarily to be interpreted according to the provisions remaining. I do not find that the 1931 Act in general or section 39 in particular provide a gloss to section 128. I do not accept that in this particular case it would be "impossible practically to make any legislative provision which should hang about a railway (Council) in this manner for the whole of its existence".

[43] The draftsman deliberately excluded section 127. There is therefore no requirement to use or lose the lands acquired by the Council under the 1931 Act within any prescribed period. What happens is that the Code has been amended to provide for the disposal of superfluous land **at any time**. However before the reservoir lands are disposed of they must first be offered to the original owners, or their successors in title. The words are clear and there is no way that any provision in the 1931 Act changes the natural or ordinary meaning of section 128. If I entertained any doubt that the 1931 Act created some ambiguity in the clear meaning of section 128, which I do not, the matter is settled by the requirement to construe such ambiguity against NIW.

[44] Further the policy of the Government in respect of the disposal of surplus lands, which were originally acquired compulsorily or under a private Act, is to favour the former owner (or his successor in title) who will have a legitimate

expectation that he will be given the first refusal in respect of the land which he or his predecessor in title previously owned e.g. see section 7 of the document entitled "Central Advisory Unit disposal of Surplus Land Public Sector Property in Northern Ireland". This policy accords with what is just and fair. Bennion on Statutory Interpretation (6th Edition) says at section 265:

> "It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislature intended to observe this principle. The court should therefore strive to avoid adopting a construction that leads to injustice. The courts nowadays frequently use the concept of fairness as a standard of just treatment."

[45] Accordingly, I find that on the first issue, that prima facie the plaintiff enjoys the right of pre-emption in respect of a substantial part of the reservoir lands. This leads on to whether or not the pre-emption right is lost because the lands are "built upon".

Issue 2

[46] The case made by NIW is that even if , prima facie, the right of pre-emption is engaged for the previous owners or their successors in title of the reservoir lands, no right of pre-emption can arise because such lands are "built upon".

[47] These lands are not situate within a town. Nor has any argument been made that the lands are used for building purposes. The sole issue is whether or not these lands are "built upon", and therefore are excluded from the right of pre-emption granted by section 128. Neither counsel was able to put forward any evidence, historical or otherwise, to explain these three exceptions to the right of pre-emption under section 128. Mr Humphreys QC tentatively suggested that most land acquired by the railways would have been agricultural. It would have been too demanding to offer superfluous land back to every householder in a town. But that does not explain the exceptions for "land for building purposes" or "lands built upon" which may well have singular owners. Mr Dunlop suggested that the right to pre-emption did not apply to lands built upon because of the capital investment that had been expended. But this does not necessarily apply to lands within a town and certainly not to "land for building purposes". In any event, any party seeking to acquire any lands "built upon" would have to pay the market price which will normally reflect the capital investment of the promoter. Both counsel agreed that the relevant legal authorities do not provide any reason as to why "lands built upon" had been excluded from the right of pre-emption under section 128.

[48] The Oxford English Dictionary defines build as "construct (something, typically something large) by putting parts of material together over a period of time". The word comes from the old English "bydlan" which is derived from "dwelling" which is of Germanic origin.

[49] Halsbury's Laws of England Volume 18 (5th Edition) at paragraph 629 (Footnote 2) states that:

> "**Town** is used in its popular sense and **built upon** means continuously built upon, as in town".

[50] The cases provided only limited guidance. In Falkner v Somerset and Dorset Rly Co [1873] LR 16 Eq 458 the Lord Chancellor, Lord Selborne concluded that a piece of land with a cottage on it was not "built upon". He said:

> "The main question in this case appears to be, whether this piece of land is a field or a garden: and, as between the two, I am of the opinion it is a field and not a garden."

[51] In Lord Carrington v Wycombe Rly Co [1868] 3 Ch App 377 Lord Cairns LJ in giving the main judgment of the Court of Appeal agreed that land situate within the limits of a borough but at some distance from the mass of houses forming the town on which there were two cottages did not constitute "land in a town" nor "land built upon or used for building purposes". He said at page 383:

> "Is it, then, land **built upon**? These words, no doubt, are not very precise, but I think we have quite sufficient means of judging of the intention of the Legislature in using them. It appears to me that the words **built upon** must mean to describe something which, though it cannot be called land in a town or part of a town, is land covered with continuous buildings **eodem modo**, as the **solum** of the town. The Legislature cannot have meant that, because a piece of land in the open country as a building upon it, it is **land built upon** within the meaning of this section. In the sense in which the Legislature must be taken to have used those words, I think that this land clearly does not come within them. Then, is it land **used for building purposes**? That may be determined by the evidence of the Defendants themselves. I observe that all their surveyors, when they speak of the land, abstain from asserting that it is land built upon, but they vary their expression in a

> way in which entirely removes it from the operation of this section. They say that it is land suitable for building purposes, and was valued at a high price because it might become at some time building land. But what the Act of Parliament requires, in order to bring a case within the exception, would be not that it should be capable of being used as building ground, but that it actually and **de facto** should be land used for building purposes, which this land clearly is not."(Emphasis added).

[52] In The Directors of the London and South Western Railway Company and George Clement v Richard Doddridge Blackmore [1870] LR 4 HL 610 the Lord Chancellor said at page 616:

> "I think when you take the words **built upon** you have a clue at once to what is meant by the other words, which follow **or used for building purposes**. It means simply this, it seems to me that if the land is actually built upon, that is not a case in which the Legislature conceived that the adjoining owner should have this special right conferred upon him; but after considering the case of land being '**built upon**' it was thought that there might be land not actually built on, which still, nevertheless, would stand exactly in the same position with reference to the propriety of conferring upon the adjoining owner the right of purchasing the property, and therefore disturbing that which was done in the course of the user of the land for building purposes. For instance, it would occurred to all men, naturally, that there might be an intention to erect a square, such as Grosvenor Square, or any other square, and that there might be two sides of the square finished, or three sides of the square, and the third or fourth side might not be finished, or even all the four might be finished, and yet there might be a central portion of land on which there would be access by the street that exists at the corners of most squares. And the land, if the Legislature had used the words '**built upon**' alone, would not have been within the expressions contained in the Act, and might have been therefore claimed by the adjoining landowner to the great detriment to the buildings which existed all around it, and for the use and recreation of the inhabitants of which this central space or square had been

> appropriated. So, again, there might be a space **used for building purposes** in the shape of gardens of a reasonable size, or in the shape in a reasonable amount of curtilage for houses about to be erected. That might be land which the Legislature might well conceive as land **used for building purposes**, that is to say, connected with the purposes of the erection of the buildings, and therefore to be protected in the same manner as land actually built upon."(Emphasis added).

[53] There are certain cases in which it will be obvious whether or not the land is "built upon". It should also be clear that a lake which has been created naturally by the damming of a river could never be described as land which has been "built upon". What the position is when the lake is created artificially by damming a valley and impounding the river(s) depends on all the circumstances of the construction. The answer to the question as to whether or not it is land "built upon" must necessarily be fact specific. For example Turnberry golf course was used as an airport during the Second World War. It had a control tower and aeroplanes landed on what previously were the fairways of the golf course. Although the land was being used as an airport, it could never be described as land which had been "built upon". Belfast City Airport, in its present situation comprises, a main airport building with runways which have been constructed in tarmac on the ground. There is no difficulty in saying that Turnberry golf course as used during the war was not "built upon" even though it was being used as an airport and there was a control tower. Further, there is no difficulty in saying that Belfast City Airport as it is presently constituted, is land which it is "built upon" given the construction of the runways and buildings on the airport land.

[54] I had the opportunity of visiting Portavo reservoir and of inspecting the works which had been constructed upon the reservoir lands. I also was able to take into account the fact that some of those structures are necessarily subterranean. I do not consider that what I observed could be considered by any reasonable observer to be lands which were "built upon". I do not consider a manmade lake together with the buildings which I observed had been constructed thereon, and which occupy a very small percentage indeed of the total land space together with the underground works, are sufficient to allow NIW to claim that the lands are "built upon" and excluded from the pre-emption obligation under section 128. If I was in any doubt as to whether the pre-emption obligation under section 128 extended to the reservoir lands, which I am not, and there was an ambiguity, then this should be construed against NIW.

C**onclusion**

[55] In respect of Issue 1, I find that the plaintiff does enjoy a right of pre-emption in respect of the lands of his predecessors in title. In respect of Issue 2, I find that the lands are not "built upon".

I will hear the parties on the issues of what is the appropriate relief I should grant and on the issue of costs.