

Neutral Citation no [2004] NICH 1

Final

*Judgment: approved by the Court for handing down*

*(subject to editorial corrections)*

Ref: **WEAB4524**

Delivered: **19/01/2004**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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SCALENE INVESTMENTS LIMITED

Applicant

AND

DEPARTMENT OF SOCIAL DEVELOPMENT

Respondent

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**WEATHERUP J**

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

[2] I considered the operation of the legislation in relation to time limits in the application of JBS Services Ltd v Department of Social Development (Unreported 13 January 2004) and found that paragraph 5 of schedule 6 requires an objection to a Vesting Order to be made by application to the High Court within one-month of the publication by the respondent of notice of the Vesting Order, otherwise the jurisdiction of the Court is ousted. Further, I found that the Court does not have power to extend the time within which an application might be made and accordingly JBS Services's application, which had been issued on 22 December 2003, was outside the one-month time limit. The application was struck out.

[3] In the present case the applicant accepts the finding in JBS Services, but contends that the period of one month from the respondent's publication of notice of the Vesting Order did not expire until 18 December 2003, and accordingly the application made on 17 December 2003 was within time. On

the other hand, the respondent contends that the one-month period expired on 11 December 2003, so that the application was made out of time.

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

[5] The Vesting Order was made on 7 November 2003. Notices were placed in three newspapers on 11 November 2003. That would appear to be sufficient to comply with the respondent’s obligations under paragraph 5(1)(a). However, the respondent undertook what has been described as a ‘publication scheme’ and that resulted in the notices being placed in the same three newspapers one week later on 18 November 2003. The wording of paragraph 5 had been amended by the Planning (Northern Ireland) Order 1991 to delete a requirement that the respondent publish a notice “in the prescribed form and manner”, so publication is a matter for the respondent.

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

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

[8] The effect of paragraph 5(1)(c) of schedule 6 is that a Vesting Order “shall become operative at the expiration of the period of one-month from the date on which the making thereof is published.....” It is apparent therefore that the scheme of paragraph 5 contemplates that there be publication of a notice, and that within the period of one-month any legal challenge should be

issued by those who wish to object, and at the conclusion of one-month the Vesting Order would become operative. There is continuity between the commencement of the challenge and the operative date of vesting. The respondent's letter of 7 November 2003 clearly indicates that the respondent considered that the relevant period of one month in which to issue legal proceedings would expire on 18 November 2003, as they provided for the Vesting Order becoming operative on that date, being one-month after the date of the second publication. Despite the letter Mr Straker QC, on behalf of the respondent, takes the position that the relevant period ended on 11 December 2003, being one month after the date the notice was first published.

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

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

[11] The purpose of the publication required by the respondent under paragraph 5(1) must be to give notice to all those who might be affected by the Vesting Order so that they may consider the position in relation to their right to challenge the Vesting Order. A number of matters follow. First of all, it is to be noted that paragraph 5 leaves it to the respondent to determine the manner of publication in any particular case. In so doing, the respondent must consider what would be appropriate in order that notice

might be given to those who may be affected. I consider that the respondent, in the exercise of its judgment in this regard, ought to decide what is “appropriate” rather than what might be said to be “necessary”. The respondent’s discretionary area of judgment should not be restricted to judging only what is the bare minimum of notice that might be given, but rather should entitle the respondent to consider what is appropriate notice in the circumstances.

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

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

Fourthly, the respondent might consider it appropriate to publish on more than one day, in order to reach those affected. Publication on more than one day may not be strictly required, but it is not prohibited. It was probably not required in this case. The respondent considered it to be appropriate, and did so in good faith. I consider that the requirement in paragraph 2 of the schedule to publish on more than one occasion does not require paragraph 5 to be interpreted as prohibiting publication one more than one occasion, if the respondent considers that that is appropriate in the circumstances. Similarly, I consider the wording of paragraph 5(1)(a) that publication should be “as soon as may be”, does not prohibit publication on more than one occasion, if the respondent considers that to be appropriate.

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

[13] The respondent submits, correctly, that the respondent should not be entitled to determine the dates when the objector’s application may be made. The interpretation of paragraph 5 outlined above does not permit the

respondent to determine the time limits. The respondent is entitled to determine the character of publication, and paragraph 5 contemplates that it will be within the remit of the respondent to make such a determination.

[14] The applicant further contends that the respondent was estopped from relying on a publication date of 11 November 2003. Upon enquiry to the respondent by representatives of the applicant as to the date of expiry of the period for applications to the High Court by objectors to the Vesting Order, the applicant was informed by an official of the respondent that time ran from 18 November and expired on 18 December 2003. The applicant avers that reliance was placed on that information from the respondent in making the application on 17 December 2003. The issue of estoppel in proceedings concerning planning permission was considered by the House of Lords in R (Reprotech Ltd) v East Sussex County Council [2002] 1 WLR 348. A County Planning Officer advised the operators of a waste treatment plant that generating electricity on the plant would not amount to a material change of use requiring planning permission. A Council sub-committee received a report from the County Planning Officer that no material change of use was involved in the generation of electricity and it was resolved only to vary certain conditions of use. The operators applied for a declaration that the resolution amounted to a determination that no planning permission was required. The House of Lords held that it was inappropriate to introduce private law concepts of estoppel into the public law field of planning control, as planning law involved decisions which affected the public at large and remedies against public authorities had to take into account the interest of the general public which the authority existed to promote. Lord Hoffmann stated that there is an analogy between a private law estoppel and the public law concept of legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. He concluded at paragraph 35 –

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

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

[15] Accordingly, I find in favour of the applicant that the Originating Notice of Motion of 17 December 2003 is within the statutory time limit of one month and the Court has jurisdiction to hear the applicant’s challenge.