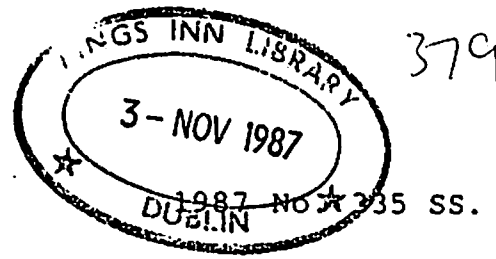


THE HIGH COURT



IN THE MATTER OF THE ARTERIAL DRAINAGE ACTS 1945 AND 1955  
AND THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT  
1919 AND THE PROPERTY VALUES (ARBITRATIONS AND APPEALS) ACT 1960  
AND THE ARBITRATION ACTS 1954 AND 1980

AND IN THE MATTER OF THE ARBITRATION BETWEEN

LEO UYETTEWAAL

CLAIMANT

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND

RESPONDENTS

IN THE MATTER OF THE BONET CATCHMENT DRAINAGE SCHEME AND  
CONFIRMATION ORDER DATED THE 23rd OF APRIL 1982

Judgment of Mr. Justice Gannon delivered on the 6<sup>th</sup> day of October  
1987

The Claimant Leo Uyettewaal is the registered owner of the lands comprised in Folios 17895, 2760, and 17893 of the Register of Freeholders County Leitrim through which the River Bonet passes. Appurtenant to the ownership of the lands the Claimant has exclusive fishing rights in the Bonet River. The numbers of fish in stock in his fishery is dependent from year to year upon spawning which takes place in the bed of the river upstream from his land where the river flows through the land of another owner. Pursuant to the provisions of the Arterial Drainage Acts 1945 and 1955 the Respondents, the Commissioners of Public Works in Ireland, prepared a drainage scheme for the Bonet River catchment area which was confirmed by the Minister for Finance on the 23rd of April, 1982. The works to be undertaken pursuant to the Bonet catchment drainage scheme involved inter alia removal of silt and obstructions from,

and some channel excavations, of the river as it passed through the lands of the Claimant and the upper reaches and so affecting the spawning beds of the fish stock of the river. The preparation of the scheme therefore had to take into account that this fishery, which is several and a corporeal hereditament which would remain in the Claimant's possession would be liable to injury by the execution by the Respondents of that part of the works authorised by the scheme which would be carried out on the lands of an adjoining owner insofar as it involved interfering with the fish spawning beds on such other land.

On the 3rd of April, 1985 the Claimant submitted a claim for compensation for interference with his fishery pursuant to Section 14 of the Arterial Drainage Act 1945. No agreement having been reached thereon Mr. Sean M. Mc Dermott F.R.I.C.S., F.C.I., Arb. was nominated as arbitrator by the Reference Committee pursuant to the Property Values (Arbitrations and Appeals) Act 1960 to hear and determine the issue as to the right of the Claimant to compensation and the amount of such compensation and to make his award thereon. The arbitration hearing before the arbitrator took place on the 11th of March, 1986 and on subsequent days. He made an interim award on the 16th of June, 1986, paragraph 11 (1) of which is as follows:

"I make interim award as follows:

- (1) That the compensation to be paid by the Respondents to the Claimant for the compulsory substantial interference with his lands, fishery and fishing rights is £27,720 (twenty seven thousand seven hundred and twenty pounds) made up as follows:

(i) Damage to lands and fisheries	£6,000
(ii) Disturbance	£21,720
Total	<u>£27,720</u>

This sum does not include compensation for:-

- (a) Loss suffered by the Claimant caused by works carried out outside his property, but under the drainage scheme, which did not cause direct physical damage to his lands or water but which could cause a reduction in the numbers of fish in his fishery in future years, or
- (b) Damage caused by maintenance works which may be carried out under Part V of the Arterial Drainage Act 1945."

The reason for subparagraphs (a) and (b) is to be found in paragraph 9 of the interim award which is as follows:

"9. The Respondents contended that the Claimant was not entitled to compensation for loss suffered by him caused by works carried out outside his property, but under the drainage scheme, which did not cause direct physical damage to his lands or water but which could cause a reduction in the numbers of fish in his fishery in future years.

I hold that the Claimant is entitled to compensation for such loss.

The Respondents have requested that I seek the decision of the High Court on the question in the form of a special case and I have acceded to that request.

The Claimant contended that he is entitled to compensation for damage caused by maintenance works which may be carried out under Part V of the Arterial Drainage Act 1945 and that I have jurisdiction to award such compensation.

I hold that I do not have jurisdiction to award compensation for such damage. The Claimant has requested that I seek the decision of the High Court on the question in the form of

a special case and I have acceded to that request."

Subsequently the Claimant withdrew his request for a question to the High Court in the form of a special case in relation to damage by maintenance works under Part V of the 1945 Act.

Section 35 (1) of the Arbitration Act 1954 enables the arbitrator to state his award in the form of a special case for the decision of the High Court and this he has done. His award is dated the 8th of June, 1987 and incorporates with it a case stated for the opinion of this Court. The arbitrator made his final award on the 8th of June, 1987 paragraph 9 of which is as follows:

"I hereby make my final award in the form of a Special Case:-

(a) The question for the opinion of the High Court is as follows:-

Is the Claimant entitled to compensation pursuant to Section 14 of the Arterial Drainage Act 1945 for loss suffered or expected to be suffered by him caused by works carried out outside his property but under the drainage scheme which did not cause direct physical damage to his lands, fishery or stretches of river over which he claims fishing rights, but which could result in the reduction in the population of fish in the said fishery and stretches of river over which he claims fishing rights?"

(b) If the answer of the Court to the question is in the affirmative I award:-

(i) That the Respondents pay to the Claimant compensation in the sum of £2,000 (two thousand pounds).

(ii) That the Respondents pay to the Claimant the Claimant's costs and expenses of and incidental to the taking up of this award which costs in default of agreement are to be taxed on a solicitor and client basis

by a Taxing Master of the High Court.

(c) If the answer of the Court to the question is in the negative I award:-

- (i) That the compensation to be paid by the Respondents to the Claimant is nil
- (ii) That the Claimant and the Respondents bear their own costs and expenses of and incidental to the taking up of this award."

The question submitted for the opinion of the High Court is as set out at paragraph 9 (a) of the final award. His findings based on evidence and submissions are set out in paragraph 4 of the case stated as follows:

"4. As a result of the said hearing, evidence and argument I find as follows:-

- (a) The Claimant claims a fee simple interest in possession in certain lands at Dromahaire together with a fishery and fishing rights on approximately 7½ miles of the River Bonet. The Respondents started work on the Bonet catchment drainage scheme on the 5th day of July, 1982 and in the course of the works they entered on and substantially interfered with the said lands, fishery and stretches of river over which the Claimant claims fishing rights.
- (b) The drainage scheme also involves interference by the Respondents with spawning beds upstream of the Claimant's said fishery. This interference will damage the spawning beds and is likely to lead to a reduction in the numbers of fish in future years.
- (c) The Claimant has suffered loss and is likely to suffer further loss because of the likely reduction in future years in the numbers of fish in his fishery and in the

stretches of river over which he claims fishing rights." Section 4 (1) of the Arterial Drainage Act 1945 is as follows:

"(1) Whenever the Commissioners are of opinion that the execution of arterial drainage works is expedient in respect of any catchment area for the purpose of preventing or substantially reducing the periodical flooding of lands in that area or of improving by drainage lands in the said area, it shall be lawful for the Commissioners to prepare a scheme (in this Act referred to as a drainage scheme) for the execution of such works and for that purpose to make such engineering and valuation surveys of the said area as shall appear to them to be necessary or expedient."

By subsection (2) of Section 4 the matters prescribed to be dealt with in the drainage scheme include among others at subparagraph (a) "the waters and watercourses proposed to be dealt with," and at subparagraph (e) "the lands proposed to be compulsorily acquired or substantially interfered with, the easements, fisheries, water-rights, navigation-rights, and other rights proposed to be compulsorily acquired, restricted, terminated, or otherwise interfered with, and the roads and bridges (whether public or private) proposed to be diverted, removed, or otherwise interfered with".

Sections 5, 6 and 7 prescribe the preliminary procedures of notices to affected parties and confirmation of the scheme by the Minister for Finance. Section 9 of the Act sets out the powers conferred on the Commissioners by virtue of the Minister's confirmation of the scheme. Among the powers conferred are the following:

"(c) to acquire compulsorily the several lands, easements, fisheries, water-rights, navigation-rights, and other rights proposed in the scheme to be so acquired, and, if the Commissioners think fit so to do, to enter on any such lands or exercise any of such easements, fisheries,

water-rights, navigation-rights, and other rights before the conveyance or ascertainment of price of such lands, easements, fisheries, or rights, and

(d) to interfere substantially with any land proposed in the scheme to be so interfered with and, if the Commissioners so think fit, to enter on and so interfere with such land before any ascertainment of compensation in respect thereof, and

(e) to restrict, terminate, or otherwise interfere with any easements, fisheries, water-rights, navigation-rights, or other rights proposed in the scheme to be compulsorily restricted, terminated, or interfered with, and to divert, remove, or otherwise interfere with any roads or bridges proposed in the scheme to be diverted, removed, or interfered with, and, if the Commissioners so think fit, to do any of the things aforesaid before any ascertainment of compensation in respect thereof....."

Section 10 of the Act relates only to fisheries and is as follows:

"10. (1) It shall not be obligatory on the Commissioners, when constructing drainage works in pursuance of a drainage scheme, to comply with the Fisheries Acts, 1842 to 1944.

(2) Notwithstanding the exemption conferred by the foregoing sub-section of this section, the Commissioners shall, when constructing drainage works in pursuance of a drainage scheme, take such precautions and make such provisions as the Minister for Agriculture may consider adequate for the protection of and avoidance of injury to fisheries during or in consequence of the construction of such drainage works, provided that the said Minister shall, in consultation with the Commissioners, satisfy himself that taking such precautions and making

such provisions will not cause substantial detriment to such drainage works or substantial hindrance to their construction."

Section 14 of the Act which makes provision for the acquisition compulsorily if necessary of a fishery provides for payment of compensation in the event of compulsory acquisition, and also makes provision for payment of compensation in the event of the restriction, termination or other interference with a fishery made compulsorily where no right of acquisition is exercised. Although the Commissioners are obliged by Section 14, subsection (1) to proceed "as soon as may be after the date of the order of the Minister confirming a drainage scheme" to acquire inter alia the fisheries "proposed in such drainage scheme to be compulsorily acquired" they are relieved of that obligation if it appears to the Commissioners that the acquisition of a fishery is not necessary for the purpose of carrying out the scheme. Likewise by subsection (3) of Section 14 the Commissioners are relieved of the obligation to make any interference with a fishery "proposed in the drainage scheme to be compulsorily made" if in the course of carrying out the works of the scheme it appears to the Commissioners not to be necessary. Subsection (4) of Section 14 as amended by the Property Values Act of 1960 reads as follows:

"(4) The amount of compensation payable to any person on account of the compulsory substantial interference with any land or the compulsory restriction, termination, or other interference of or with any easement, fishery, water-right, navigation-right, or other right or the diversion, removal, or other interference of or with any private road or bridge under or in pursuance of a drainage scheme, shall, in default of agreement, be fixed under and in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919, in like



manner as if such compensation were the price of land compulsorily acquired."

It is notable that the compensation to be payable under these provisions insofar as it relates to land is for "compulsory substantial interference". Insofar as the compensation payable is related to a fishery it is for "compulsory restriction, termination, or other interference". The express adoption by subsection (4) of Section 14 of the Rules for Assessment of Compensation set out in the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919 for the purposes of fixing the amount of compensation payable in default of agreement precludes resort to the provisions for ascertaining the amount of compensation contained in the unrepealed Lands Clauses Consolidation Act 1845. By subsection (5) of Section 14, however, Sections 69 to 83 of the Lands Clauses Consolidation Act are expressly adopted for the circumstances (not pertinent to this case stated) which they apply. The requirement that the compensation payable in default of agreement by compulsory interference with the fishery should be fixed "in like manner as if such compensation were the price of land compulsorily acquired" is not incompatible with, but on the contrary, is entirely consistent with the provisions of subsection (2) of Section 12 of the 1919 Act. The latter subsection of the Section of the 1919 Act prescribes "For the purposes of this Act, the expression "land" includes water and any interests in land or water and any easement or right in, to, or over land or water,..."

Section 2 of the 1919 Act sets out rules for the assessment of compensation to be followed by arbitrators. Of these rules those particularly significant to this case are rules (2) and (6) which are as follows:

"(2) The value of land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected

to realise: provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant:"

"(6) The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

It would seem that the expression "the value of land" in Rule 2 is particular to the land the subject matter of the acquisition whereas the same expression in Rule 6 appears to relate to land values in general as determined by the market. These rules have to be applied in this case to a fishery and not to land.

The application of these rules to the fixing of the amount of compensation in this case gets little, if any, assistance from consideration of Sections 63 and 68 of the Land Clauses Consolidation Act of 1845 which in my opinion do not apply in this case. However the authorities cited in the course of argument are helpful in illustrating the mode of interpretation of analogous statutory provisions. In the course of argument guidance was suggested from the speeches in the House of Lords in Metropolitan Bord of Works .v. McCarthy 1874 L.R. 7H.L. 243. In that report Lord Chelmsford is reported at page 256 as follows:

"Where by the construction of works authorised by the legislature there is a physical interference with a right whether public or private, which an owner of a house is entitled to make use of, in connection with the house, and which gives it a marketable value apart from any particular use to which the owner may put it, if the house, by reason of the works, is diminished in value, there arises a claim for compensation. I think the rule as thus stated may be accepted with this necessary qualification, that where the right which the

owner of the house is entitled to exercise is one which he possesses in common with the public, there must be something peculiar to the right in its connection with the house to distinguish it from that which is enjoyed by the rest of the world."

At page 265 of the same report Lord O'Hagan is quoted as saying in the course of his speech

"The policy of that Act (Land Clauses Consolidation Act 1845) I apprehend to have been to prevent private caprice or selfishness from interfering with the prosecution of works designed for the public benefit; but to do this with strict regard to individual rights by securing ample compensation in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplated that the community should profit at the expense of a few of its members, and, as the condition of redress, it only required proof by the owner of injury to his property."

The following extract from the speech of Lord Penzance at page 261 of the same report is apposite:

"There are many things a man may do on his own land with impunity, though they seriously affect the comfort, convenience, and even pecuniary value which attach to the lands of his neighbour. In the language of the law these things are "damna absque injuria" and for them no action lies. Why then, it may surely be asked, should any of these things become the subject of legal claim and compensation, because instead of being done, as they lawfully might, by the original owner of the neighbouring land, they are done by third persons who, for the public benefit, have been substituted for the original owners? It may reasonably be inferred that the legislature, in authorising the works, and thus taking away

any rights of action which the owner of land would have had if the works had been constructed by his neighbour, intended to confer on such owner a right to compensation co-extensive with the rights of action of which the statute had deprived him. But on no reasonable ground, as it seems to me, can it be inferred that the legislature intended to do more, and actually improve the position of the person injured by the passing of the Act."

It must be noted that in that case and in Edwards .v. Minister for Transport 1964 2 QB 134, also adopted for argument on this hearing, the subject matter of compensation was the land and not the appurtenant right which enhanced the value of the land. In the instant case the property the subject matter of compensation is the fishery, not merely as a right appurtenant to the land but as a several property subjected to interference. From the provisions of the 1945 Act already cited it is clear that the legislature gave recognition to the existence and special nature of a private several fishery as a property or interest or right to be taken into account as distinct from the land through or alongside which the river flows. The nature of the work of land drainage in the catchment area of a river is such that interference with a several fishery almost certainly would be unavoidable. The answer to the question of law submitted by the arbitrator is to be found by interpreting the provisions of the Arterial Drainage Act of 1945 consistently with the declared purpose of the Act and the state of the law as it had evolved following the English Land Clauses Consolidation Code since 1845. Much of the argument on the hearing of this case stated was directed to the issues of severance and injurious affection which derive from the provisions of Sections 63 and 68 of the Land Clauses Consolidation Act 1845. Because the Arterial Drainage Act of 1945 is comprehensive in its provisions and the nature of its purpose significantly specific

It must be recognised as a special Act rather than one of the general class of Acts comprehended in the first section of the 1845 Act. 391

The express incorporation of Sections 69 to 83 of the 1845 Act by Section 14 (5) of the 1945 Act relative to the application of compensation money is an adoption of the alternative limited incorporation provided for in Section 5 of the 1845 Act. The wording of the 1945 Act is so expressed that a fishery is recognised as a corporeal hereditament distinctive in character from an easement or other interest dependent solely upon the use of land.

In my opinion the compensation provisions of the 1945 Act designate a right to compensation for interference with a fishery as a matter of calculation distinctive from the ownership of and interference with the land through which the waters of the fishery flow. A requirement that the manner of making calculation of the compensation for interference with a fishery is the same as the manner of making calculation of the compensation for substantial interference with land does not, in my opinion, require the fishery to be treated as part of the land. No issue of severance of the fishery or of the fishery from the land arises as the fishery itself is the only subject matter of interference for which the calculation of compensation is being questioned. The provisions of the 1945 Act for making compensation for the restriction, termination or other interference, with a fishery give no indication that such interference to attract or support a claim for compensation must be attributable only to direct physical damage to the fishery within the area of or to the lands of the Claimant. There are many provisions in the 1945 Act which indicate that the legislature recognised that fisheries and the owners of fishing rights merited special consideration not dependent solely upon ownership of the land. The nature of the work proposed in the scheme involves as a matter of probability, by reason of interference with the spawning beds, a significant reduction for some years in

the stock numbers of fish in all stretches of the river including the stretch of river passing through the Claimant's lands. The consequent reduction in numbers of fish in the river by disturbance of the spawning beds would constitute an interference with the Claimant's exclusive fishery rights appurtenant to his ownership of the land through which the river flows. Such interference with his fishery is distinguishable from whatever interference would be caused by work involved in excavation and removal of silt and obstructions from the channel where it passes through his lands. In my opinion the position of the owner of a fishery is not improved beyond what it would have been if the like harm had been done by his neighbours. But even if it were, and if that were the correct test, it is demonstrably evident that the legislature did intend to compensate the owner of a fishery for an injury of a nature reasonably seen as a probability from the nature of the works necessary in the public interest.

Having considered the overall purpose and scheme of the 1945 Act and in particular the wording of Sections 14, 15, 16 and 17, it is my opinion that interference with a fishery necessarily caused by work carried out in the completion of a drainage scheme entitles the owner to compensation. In my opinion a loss "caused extraneously" by interference with a fishery by work to which the interference is attributable done on someone else's land, that is to say, in the terms of the case stated, "outside his property" entitles the owner of the fishery to compensation under Section 14.

The answer therefore to the question submitted in the case stated is in the affirmative.

Sean Gannon  
6<sup>th</sup> Oct-1987