LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/63/1990

BETWEEN

READY MIXED CONCRETE (ULSTER) LIMITED - APPLICANT

AND

DANIEL McCAFFREY - RESPONDENT

Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS

Omagh - 31st October 1990

This was an application for a new tenancy of premises at No 33 Kelvin Road, Omagh, Co Tyrone. The existing lease (dated 6th March 1970) between Patrick A O'Neill and the Applicant was for a term of 21 years from 1st March 1970 subject to a yearly rent of £250. That lease is being brought to an end on 28th February 1991 by a "Landlord's Notice to Determine Business Tenancy" under Section 4 of the Business Tenancies Act (Northern Ireland) 1964 ("1964 Act") dated 5th March 1990. The Applicant, by letter of 27th March 1990 gave notice that they were unwilling to give up possession and on 17th March 1990 made this application to the Lands Tribunal.

In the Notice to Determine the Respondent stated that he would oppose an application to the Lands Tribunal on "See grounds (a) (b) (c) (e) (f) (g); as attached overleaf". Those objections are contained in Section 10(1) of the 1964 Act. Mr F G McCrory of Counsel for the Respondent called Mr Francis Maguire (a Member of the Architects and Surveyors Institute) and Mr Daniel McCaffrey (the Respondent) to give evidence.

Mr Maguire testified that the Respondent owned land (including the holding and other commercial buildings to the north of the holding) amounting in all to about 6 acres. The Western Tyrone Area Plan 1979 to 1989 included these 6 acres in an area zoned for housing - that Area Plan is presently under review. In February 1980 an application for outline planning permission for the lands (excluding the holding) was initially refused but subsequently permission was granted for 8 sites to the south and adjoining an existing road (Cannon Hill). Those sites were subsequently sold by the Respondent. Mr Maguire further testified that the Applicant had trespassed by discharging stones and gravel on land -

indicated on a plan. (The Tribunal notes that that evidence is contradicted by later evidence given by the Respondent.) He also testified as to certain nuisances caused by water from the concrete plant and also water being put in a drain and leaving a trace of cement when the drain was dry. Following a request from the Tribunal Mr Maguire indicated on his plan the approximate position of an access road necessary to develop the entirety with houses.

Mr McCaffrey testified that he had purchased the entirety (subject to the lease of the holding) on 14th January 1985 - there had been a contract signed sometime in 1975 but there was lengthy litigation before the sale was finalised. He testified that the stones and gravel were dumped by a stranger who had asked permission, and was refused unless he paid a substantial rent. The trespass by the Applicant was by his large mixer lorries having to enter his land south of the holding in order to reverse under the discharging bins on the holding. He further testified that he had complaints from house owners in Cannon Dale that water was flowing into their back gardens.

The Tribunal finds the following facts proved or admitted:-

1. The Respondent purchased approximately 6 acres on 14th January 1985.

2. On that land was the holding occupied by the Applicant. That holding had been previously used by Mr Patrick O'Neill who was a civil engineering contractor who had carried on a similar business. He leased the site to the Applicant for a 21 year term from 1st March 1970 subject to £250 per annum on 6th March 1970. At the same time he sold his ready mixed concrete plant, vehicles and goodwill to the Respondent. Mr O'Neill had been on that holding for about 12 years prior to the lease.

   The lease included a vehicular right-of-way for the lessee over what was termed an access road adjacent to the west boundary of the site leased. The lease was also subject to a right-of-way reserved to the lessor over the leased site.

3. Also on the 6 acre site were some sheds/buildings near to Kelvin Road and north of the holding (and the vehicular right-of-way). The Respondent sold one part of those buildings to a purchaser who opened a chip shop, but the Respondent retained a right-of-way over what many years ago had been the forecourt of a petrol filling station. About two to three months ago a store had been let to the chip shop owner.

Also about four months ago a Mr Wilson leased other parts of these buildings for a term of 5 years. He was using the premises as a tyre depot and car wash.

4. The six acre site is zoned for housing in the Western Tyrone Area Plan 1979 to 1989 - that Area Plan is presently under review.

The six acres are not good building land, is low lying and because of contours would be comparatively expensive to develop. It has two-frontages to Kelvin Road - one of which contains the frontage of the buildings with the old forecourt of a petrol filling station. The second frontage is south of the first but divided from it by a detached house and garden. That second frontage could be used for an access road for development of the entire six acres but because of contours it would be expensive to construct an access road.

5. In or about 1980 a planning application for housing was refused because of inadequacy of access. The application excluded the applicant's holding. Permission was granted on 4th March 1981 for eight sites on part of the application land adjacent to Cannon Hill. Those sites were sold by Respondent. A letter dated 21st April 1986 from the Principal Planning Officer advised that a road improvement scheme for Kelvin Road it was hoped would be completed in 2 years and that when that scheme commenced favourable consideration for a planning application for housing would be given provided a technically satisfactory access was provided - sight lines might very well involve third parties.

A further letter from the same source dated 27th October 1986 hoped to commence the road improvement scheme before the end of the financial year.

6. On one occasion the annual rent of £250 was not paid on time. At or about the same time the Respondent had ordered concrete from the Applicant who in due course had sent a bill and subsequently a reminder. It was only when the Respondent claimed that the rent was outstanding that settlement of both bills was made.

There were two other occasions when the Respondent made a telephone call regarding rent but at the date of hearing no rent was outstanding.

7. (a) There has been no recent application for planning permission nor has anyone been instructed to prepare plans for submission to the planning authority.

(b) There has been no approach to finance houses or banks for provision of capital with which the development of houses could be carried out.

(c) There has been no application for approval for an access sufficient to allow estate development on the entire 6 acres. Given time by the Lands Tribunal, Mr Maguire indicated the roughly drawn position of an access. That generally followed the vehicular right-of-way on the western side of the holding but Mr Maguire explained that he had contacted the Roads Authority who required a roadway 5½ metres wide with a 1.8 metre wide pavement on each side. His rough drawing therefore showed that to conform with those requirements one pavement would encroach fully onto the holding.

(d) There has been no estimate of the cost involved in development nor has there been any approach to house builders.

Mr F G McCrory of Counsel (for the Respondent) submitted:-

1. The major objection by the Respondent to the application for a new lease is under Section 10(1)(f) of the 1964 Act. The Respondent intended to use part of the holding as an access to the remaining portion of his 6 acres of building land.

2. The objection under Section 10(1)(a) and (e) were not being pursued. The objection under Section 10(1)(b) was minor. The objection under 10(1)(c) was the nuisances caused by the hose washing of the Applicant's yard and thereby allowing the washings into a nearby open drain (not on the holding). On one occasion one of the buildings situated to the north of the holding was flooded and the Respondent discussed the matter with the Applicant's manager (who denied responsibility). Inter alia, there was a covenant by the lessee in the lease "not to create a nuisance on the site".

   Secondly, there was continuous trespass by the Applicant's large lorries in order that they may be reversed under the hoppers discharging to fill the rotating drums of those lorries.

   No arguments are being put forward under Section 10(1)(g) of the 1964 Act.

3. The Respondent's intention was clear.

4. If the Tribunal considered that the Respondent had not established his grounds of opposition to the application the Tribunal is requested to use its discretion under Section 11(2) of the 1964 Act to make a declaration that the date of termination of the lease be up to one year later.

Mr Mark Orr of Counsel (for the Applicant) submitted:-

1. Any objection founded on a breach of covenant must be based on a serious and continuing breach. In this case any such breaches are minor. Washing down the yard and flooding a nearby building only occurred once according to the evidence and other water has always flowed from time to time into the drain. Mr Maguire's evidence was that on his inspection sometime in August 1990 the drain was dry.

   If the breaches had been serious one would have expected that one, or more than one, Solicitor's letter would have been sent over a period, but the Applicant's evidence was that there was no correspondence and that although he had talked with Mr McQuaid, the Respondent's manager, relations with him were cordial.

2. Referred to Hill and Redman which gave the following authorities:-

   (a) Eichner v Midland Bank Executor & Trustee Company Limited [1970] 2 All ER 597 for breaches of obligation under the current tenancy.

   (b) Cunliffe v Goodman [1950] 2 KB 237, [1950] 1 All ER 720 on the question of landlord's intention.

DECISION

The major objection, to the grant of a new tenancy, by the Respondent was under Section 10(1)(f) of the 1964 Act which reads:-

"that on the termination of the current tenancy the landlord intends -

(i) to demolish or rebuild the premises comprised in the holding or a substantial part of these premises; or

(ii) to carry out substantial works of construction on the holding or part thereof;

and that the landlord could not reasonably do so without obtaining possession of the holding;"

The intention of the Respondent was stated in cross-examination and confirmed by a final question from the Lands Tribunal viz:- if planning permission had been granted for dwellings on the 6 acres, permission for access had been granted, the Lands Tribunal had upheld his objections and not granted a new tenancy, he would probably sell the entirety in the open market rather than develop it himself.

That is really the end of this matter. The Lands Tribunal has on a number of occasions adopted the words in the judgement of Asquith LJ in Cunliffe v Goodman [1950] 2 KB 237; [1950] 1 All ER 720. The learned Lord Justice spoke of a requirement that the project should have moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision.

On the Respondent's own evidence he does not intend to carry out the works (in Section 10(1)(f) of the 1964 Act) himself or by contractors under a development contract but will probably sell to someone else after getting all the necessary approvals. Thus his intention is well within "the sphere of the tentative, the provisional and the exploratory".

The Lands Tribunal does not accept that the Respondent has established that ground to its satisfaction.

Nor has he satisfied the Lands Tribunal that he has established any of what Mr McCrory called the "minor objections" - nor even if the Lands Tribunal looks at the Applicant's conduct as a whole by reference to all the minor objections stated in evidence. The Tribunal does not consider any of these matters (or all of those matters together) were seriously objected to - the evidence showed that even at the time each occurred the Respondent did not treat each as serious enough to do more than remonstrate mildly with the Respondent's representatives.

Consequently the Respondent's objections are not upheld and the Lands Tribunal grants a new tenancy. As this was a part hearing the Tribunal reserves the matter of costs until the plenary hearing as to the rent, duration etc of that new tenancy.

ORDERS ACCORDINGLY

28th November 1990

Mr A L Jacobson FRICS
Lands Tribunal for Northern Ireland

Appearances:-

Mr Mark Orr of Counsel (instructed by Messrs Robert Kelly & Son, Solicitors) for the Applicant.

Mr F G McCrory of Counsel (instructed by Messrs R H O'Connor & Co, Solicitors) for the Respondent.