

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964
LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

IN THE MATTER OF REFERENCES

BETWEEN

R/36/2009

PATRICK MICHAEL & ROSALEEN SUSAN GOODWIN

R/37/2009

DESMOND McGARTLAND

R/46/2009

OLIVER COOTE

R/50/2009

LEO QUINN

R/9/2010

MICHAEL KELLY

- CLAIMANTS

AND

DEPARTMENT FOR REGIONAL DEVELOPMENT – RESPONDENT

PRELIMINARY ISSUE

Re: Lands at Drumnafern, Ballygawley, Dungannon and Dromore

Lands Tribunal - Mr M R Curry FRICS MCI.Arb Hon.Dip.Rating

Background

1. The claimants were owners of lands which have been vested by the respondent for the purpose of the construction of the A4 dual carriageway between Dungannon and Ballgawley. The vesting order was made on 11th January 2007 and became operative on 20th February 2007. In each case the vested lands had planning permission for a single dwelling.
2. Broadly speaking the respondent suggests that claimants may be able to obtain consent (procedurally by way of revocation) to use part of their own retained land as an alternative site

for the development for which planning consent had been granted and that in determining compensation the Lands Tribunal must have regard to this and to any increase in value of the retained land by virtue of the prospect of such consent.

3. The claimants have declined to make any application to the Planning Service in regard to revocation and the suitability or otherwise of these alternative sites and a preliminary issue has arisen in regard to expert evidence. The issue is this. The claimants have objected to the Tribunal receiving expert evidence from Mr S L Mathers, a member of the Royal Town Planning Institute, and Mr David McKinley, a Chartered Member of the Institute of Engineers in Ireland. Mr Mathers is a Senior Planning Officer in the Western Local Area Planning Office of the Department of the Environment Planning Service which would have a statutory role (pursuant to the Planning (Northern Ireland) Order 1991) in the determination of any planning applications submitted by the claimants. Mr McKinley is a Principal Engineer in the Department of Regional Development Roads Service which would be a statutory consultee, relating in particular to access to the alternative sites, in the event of such planning applications. The Claimants have lodged evidence prepared by Elevate, a planning consultancy firm.
4. The Tribunal was told that, in his declaration, Mr Mathers confirmed that his report complied with the requirements of "Chartered Town Planners at Inquiries, Practice Advice Note 4". That Advice Note provides, at paragraph 2, that expert evidence must be the planner's own professional opinion and must be first hand so that it can be tested in cross-examination.

Procedural Matters

5. In accordance with its usual practice the Tribunal has not, at the stage of this preliminary issue, considered the experts' reports.
6. The Tribunal received written and oral submissions from Mr Patrick Good QC and Richard Shields BL.
7. The submissions focussed on the position of Mr Mathers but it was suggested that similar considerations would apply to Mr McKinley's evidence.

Positions

8. Mr Shields BL suggested that the evidence of Mr Mathers and Mr McKinley was inadmissible.
9. Mr Good QC suggested that their evidence was admissible.

Discussion

10. The Tribunal was referred to:

- Regina (Factortame & Others) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA Civ 932;
- McTear v Imperial Tobacco Limited [2005] CSOH 69; and
- Primary Health Investment Properties Ltd and Others v Secretary of State for Health and Others [2009] EWHC 519 (Admin).

It also considered, for completeness:

- Neil Martin Limited v Commissioners of HM Revenue and Customs [2006] EWHC 2425 (Ch);
- Director of the Assets Recovery Agency v Lovell [2009] NICA [2009] NICA 27; and
- *Phipson on Evidence* 17th Ed; Sweet & Maxwell.

11. In the Tribunal's view the issue is whether it should treat the expert evidence as inadmissible:

- by virtue of its content; and/or
- fairness in all the surrounding circumstances.

The contents

12. Mr Shields BL told the Tribunal that Mr Mathers, in his report, had purported to express the view of the Planning Service - not merely his own opinion. In the experience of the Tribunal, experts sometimes express what appears to be a corporate view - a firm's view or a Department's view on a point - rather than the opinion of the individual expert. Sometimes it is a slip, and that may be corrected. At other times, the expert is referring, for example, to something like an applicable Departmental policy or practice on an issue. If so, it should be supported in the form of linkage to primary evidence - perhaps published material or an analysis of decisions. Mr Shields BL also told the Tribunal that Mr Mathers had not identified those within the planning office he had consulted with or communicated with about the Report's preparation. However the Tribunal agrees with Mr Good QC that Mr Mathers had completed a sufficiently satisfactory declaration and it follows that the opinion expressed must be taken to be first hand rather than that of others and therefore admissible unless that presumption is displaced, in respect of some or all issues, in the course of a hearing.

Fairness in all the surrounding circumstances

13. Commentators in textbooks, such as *Phipson* (see 39-34 and 35), suggest that, prior to the civil justice reforms in England & Wales, the courts generally disclaimed any general discretion in civil cases to exclude evidence on grounds of unfairness. It has been suggested that in England & Wales there now is such discretion as a result of the introduction of the Civil Procedure Rules and the reform of tribunals. Here any reforms affecting this Tribunal would

not appear to have included such a change. However the question of whether this Tribunal has any discretion to exclude legally admissible evidence was not raised and for the reasons set out below need not be addressed. If this Tribunal has a power to exclude evidence on the grounds of fairness, the question is whether the admission of the expert evidence would have such an adverse effect on the fairness of these proceedings that it ought not to be admitted.

14. In regard to a person charged with a statutory function of the type exercised by Mr Mathers, within an office in which he holds a senior position, Mr Shields BL suggested that admitting evidence from him in these cases offended the principle of openness, and also the connection between Mr Mathers and the other planners in the office was likely to be too close for justice to be seen to be done in regard to any related subsequent planning applications by the Claimants. He further suggested that it was no answer to say that Mr Mathers could step aside in some way when applications were received from any of these claimants; the connection between Mr Mathers and the other planners in the office is likely to be too close for justice to be seen to be done. Mr Shields BL also noted that Mr Mathers had not identified other persons who may play a role in any application that may be made. Mr Shields BL further noted that the respondent had asserted legal professional privilege in regard to some communications it had had with Mr Mathers and suggested that it offended the principle of openness for him to conduct private communication about potential planning applications by the claimants, and how those applications would be determined, to the exclusion of the claimants. Mr Shields BL suggested that Primary Health v Secretary of State [2009] demonstrated, in a different context, the difficulty that can arise when a body with statutory functions seeks to act on one side of a dispute. He suggested it was not an answer to the claimants' objection to say that any problems will arise only at a later stage; claimants were entitled to expect that the body exercising a public and statutory function in relation to planning applications was not allowed to abrogate those duties by being retained by one party to contentious proceedings.
15. It is important to bear in mind the context of this application. As Mr Good QC pointed out, the claimants were free to make prompt relevant applications, and thereby engage directly with the Planning Service and its consultees. It was their election, not to do so, that created the need for the planning issue to be addressed in this Tribunal. In the view of the Tribunal, in some respects, their complaint therefore is a consequence of their own free choice.
16. Mr Good QC accepted that there could be concerns in regard to the roles of Mr Mathers and Mr McKinley in any future planning applications but those would be a matter for consideration by the Departments at that time. As he pointed out, because these claimants had elected not

to make planning applications, as yet no conflict arises. It may or may not be impossible for the Departments to devise an arrangement to deal with any relevant future applicants in a manner that protects the integrity of the process but that is an issue for the Departments and not for this Tribunal in these claims. In the view of the Tribunal the fact that Primary Health v Secretary of State [2009] was in the context of a judicial review is important. It is a matter for the Department to decide whether to allow their experts to assist the Tribunal in this case and to the extent that, in effect, Mr Shields BL is asking the Tribunal to review those decisions, it does not have any jurisdiction to do so.

17. Mr Shields BL also pointed out that the claimants did not enjoy a similar ability to retain as their expert evidence a Senior Planning Officer or any Planning Officer from their local Planning Office and suggested that the purpose of the respondent in retaining Mr Mathers was presumably to lend weight to the content of the report thereby produced, to the disadvantage of the claimants. It was not suggested that Mr Mathers might be biased. The parties may rest assured that this expert Tribunal expects all experts to provide real support for their opinions and will facilitate the parties in providing a fair opportunity to fully test such support.
18. Briefly, in regard to Mr McKinley, the objections were that the Department of Regional Development Roads Service is a statutory consultee in any prospective relevant planning application relating in particular to access to the sites; Mr McKinley similarly appears to express a view on behalf of Roads Service (rather than his personal opinion); and the respondent similarly assert privilege in respect of communications with him.

Conclusions

19. The Tribunal is not persuaded that it should treat the expert evidence as inadmissible by virtue of its content. If this Tribunal has a power to exclude evidence on the grounds of fairness, it is not persuaded that receiving the expert evidence would have such an adverse effect on the fairness of these proceedings that it ought not to be admitted. The Tribunal is content to receive both reports but, at the substantive hearing, will of course also receive arguments about weight and admissibility of opinion evidence on each subsidiary issue and on the ultimate issue.

ORDERS ACCORDINGLY

30th January 2012

**Michael R Curry FRICS MCI.Arb Hon.Dip.Rating
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Claimants: Mr Richard Shields BL instructed by John Hoy Son & Murphy, Rafferty & Donaghy, C T McAlpine & Son, and PA Duffy & Co, Solicitors.

Respondents: Mr Patrick Good QC instructed by Departmental Solicitor's Office.