LANDS TRIBUNAL FOR NORTHERN IRELAND

LOCAL GOVERNMENT ACT (NORTHERN IRELAND) 1972

THE LANDS COMPENSATION (NORTHERN IRELAND) ORDER 1982

IN THE MATTER OF A REFERENCE

R/37/2011

BETWEEN

TOBY McMURRAY & JULIE McMURRAY - CLAIMANTS

AND

NORTHERN IRELAND HOUSING EXECUTIVE – RESPONDENT

Re: 141 Kitchener Street, Belfast

COSTS

Lands Tribunal - Henry M Spence MRICS Dip.Rating IRRV (Hons)

Background

1. The claimants were the owners of 141 Kitchener Street which was compulsorily acquired by the respondent. The operative date of vesting was 19th April 2010.

2. On 1st November 2010 a claim for £135,000 compensation was lodged by the claimants in respect of the vesting. Following several "freedom of information" requests by the claimants and applications to this Tribunal, additional information on advance purchase settlements within the scheme was made available by the respondent. On receipt of this additional information the claimants subsequently revised their compensation figure to £110,000.

3. A written offer to settle was made by the respondent on 25th November 2010 in the sum of £77,000, on a without prejudice basis. The claimants considered this offer to be inadequate and subsequently brought their application to the Tribunal in August 2011.

4. By a decision dated 3rd September 2013 the Tribunal fixed the amount of compensation due to the claimants in respect of the vesting at £79,000. This was the figure put forward at hearing by the respondent's valuation expert.

5. The Order of the Tribunal made no provision for costs but the respondent is now seeking its costs or a part of its costs.

Procedure

6. The Tribunal received written and oral submissions from Mr Stephen Shaw QC on behalf of the claimants and Mr Michael Potter BL on behalf of the respondent.

Position of the Parties

7. Mr Potter BL, although mindful that the reference was in respect of a compulsory purchase claim, considered that in view of the circumstances in the case it would be unjust for the respondent to bear the entirety of its costs in defending the claim. He submitted the presumption that the successful party is entitled to its costs or at least a part of its costs was not displaced by any other factor, notwithstanding this was a compulsory purchase case.

8. Mr Shaw QC noted that the draft Order issued by the Tribunal made no provision for costs and the claimants submitted to what they perceived as the Tribunal's views that each party should bear their own costs. In response to the respondent pursuing its costs the claimants were now seeking:

   i. the substantive costs of the claimants since they were compelled to bring and maintain the proceedings to secure the award obtained; and

   ii. the costs of this application, in any event.

Statute

9. Rule 33(1) of the Lands Tribunal Rules (Northern Ireland) 1976 provides:-

> "33(1) Except in so far as Article 5 of the Land Compensation (Northern Ireland) Order 1982 applies and subject to paragraph (3) the costs of and incidental to any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President."

10. Article 5 of the Land Compensation (Northern Ireland) Order 1982 provides:

> "5(1) Where either—
>
> (a) the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded to that claimant does not exceed the sum offered; or
>
> (b) the Lands Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable it to make a proper offer, a notice in writing

of the amount claimed by him containing the particulars mentioned in paragraph (2);

the Lands Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Lands Tribunal the notice should have been delivered.

(2) ....

(3) ....

(4) ....

(5) ....

(6) Where the Lands Tribunal orders the claimant to pay the costs, or any part of the costs, of the acquiring authority, the acquiring authority may deduct the amount so payable by the claimant from the amount of the compensation payable to him."

Authorities

11. The Tribunal was referred to the following authorities:

- Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1430

In Purfleet Farms Potter LJ at p374 stated the presumption that, under the compulsory purchase code, a claimant should be entitled to its costs in the absence of some special reason to the contrary. A tribunal not allowing such costs must be able to identify circumstances:

"in which the tribunal considers that an item of costs incurred, or an issue raised, was such that it could not, on any sensible basis, be regarded as part of the reasonable and necessary expenses of determining the amount of the disputed compensation.

… in which the claimant's conduct of, or in relation to, the proceedings has led to an obvious and substantial escalation in costs over and above those costs which it was reasonable to incur in vindication of his right to compensation."

And further at paragraph 37:

"(37) Turning to the question of expert evidence, if the amount of the 'exaggerated' claim is based upon the valuation, opinion and evidence of the claimant's expert witness, it will rarely be appropriate, in my view, to make an adverse costs order against a successful claimant.

Valuation is an inexact science. In any case, where, by reason or features of the subject site and/or the state of the market in respect of sites for similar development, there is no close or obvious comparable available, there is bound to be legitimate room for argument and difference of opinion as to the validity or usefulness of a proffered comparable, whether by reason of its location, nature or proposed use. If the Tribunal concludes that, on examination, or as a result of argument, the comparison between the comparable relied upon and the subject site is inapt or unhelpful, that should not ordinarily invite a penalty in costs on the grounds that its assertion or resultant discussion has taken up the time of the tribunal unnecessarily."

- Bell v South & East Belfast Health and Social Services Trust R/10/2002 Part II

- Watt v Northern Ireland Housing Executive R/21/2002 Costs

- O'Neill v Northern Ireland Housing Executive R/49/2009

- Murphy v Northern Ireland Housing Executive R/32/2012

- Robinson v Department for Regional Development R/10/2013

- The Tribunal was also referred to an article by Michael Barnes QC and Kate McClymont which appeared in 15th February 2014 edition of the Estates Gazette:

"As a result of these general considerations the rule has become established that a claimant for compensation is entitled to his costs of the proceedings before an assessing tribunal unless there are special reasons to deprive him of those costs."

And

"Inevitably the question arises of what are the special reasons that could result in a claimant not obtaining his costs or the whole of his costs in accordance with the above principle? The categories of such reasons are not closed but most instances

of a claimant failing to obtain his full costs will fall into one or other of two categories.

"First, a claimant may behave in some way that is procedurally unreasonable, for example, by not obeying an order of a court or by not disclosing his case fully at a time at which he should. This exception mirrors that applicable in all civil litigation and needs no further elaboration.

Secondly, a claimant may be faced with an offer made by the acquiring authority to pay him a certain amount of compensation. If the claimant does not accept the offer and proceeds with his case but then obtains an award of compensation that is equal to or less than the offer, it is likely that he will be ordered to pay the costs of the acquiring authority from the date of the offer or from a reasonable period after that date which he would have needed to consider the offer. He will generally still obtain his costs up to the date of the offer.

An example of the first category of special reasons arose in Purfleet Farms, in which the claimant obtained an award higher than an offer made by the acquiring authority but was awarded only 75% of his costs because he had relied on evidence on certain sales comparables to assess value that the tribunal found unhelpful and served to exaggerate his claim. However, it has now been said in the Privy Council in Blakes Estates Ltd v The Government of Montserrat [2006 1 WLR 297 at p307 that a claimant should only be deprived of the whole of his costs on the ground that his claim was excessive where the exaggeration has given rise to an obvious and substantial escalation in the costs over and above those which it was reasonable for the claimant to incur."

Discussion

12. As outlined in all of the decided authorities listed previously the starting point in compulsory acquisition references is the assumption that the cost of determining the disputed compensation should fall on the acquiring authority in the absence of some special reason to the contrary. Are there any special reasons in the subject reference to depart from that assumption? The Tribunal considers that two issues require further consideration:-

Offers to Settle

13. It is a matter of fact that in November 2010 the respondent forwarded a written offer of £77,000 to the claimants for their interest in the land being acquired. This offer was without prejudice, subject to contract and exclusive of agents and legal fees. It was also not disputed

that the offer indicated there may be scope for a slight increase and this was reiterated in a submission to the Tribunal in December 2011 and further correspondence in December 2012.

14. Mr Potter BL submitted that it was clear from the above correspondence that the respondent was always willing to settle for a figure in the "high seventies" and in excess of the £77,000 already on offer. He further submitted that the respondent's expert had valued the claimants' interest at £79,000 well in advance of the hearing. This was the amount awarded by the Tribunal at hearing and this amount would have been available to the claimants right up to hearing. The respondent's figure had been accepted by the Tribunal and on that basis Mr Potter considered the respondent should be awarded its costs or at least a part of its costs.

15. Mr Shaw QC submitted that the only offer ever made to the claimants was the offer of £77,000 in November 2010. He conceded that the possibility of an increased offer was hinted at on several occasions but no such increased offer was ever made by the respondent. The respondent's expert had valued the claimants interest at £79,000 for the purposes of the hearing but Mr Shaw did not consider this to be the same as an offer to settle.

16. Mr Potter BL conceded that no written offer of £79,000 was ever sent and on that basis he could not rely on Article 5 of the 1982 Order to have the respondent's costs paid, rather he relied on the discretion of the Tribunal under rule 33.

17. Mr Shaw QC reiterated that the only offer ever made by the respondent was the offer of £77,000. The claimants considered this offer to be inadequate and he submitted that by proceeding to hearing the claimants had increased their award of compensation to £79,000.

18. The Tribunal agrees with Mr Shaw QC, that by proceeding to hearing the claimants had increased their amount of compensation from that which was previously available to them.

The Claimants' Evidence

19. Mr Potter BL submitted that in view of the evidence put forward by the claimants in the subject litigation it would be unjust for the respondent to bear the entirety of its costs in defending the claim:

    i. Most of the information sought by the claimants throughout the proceedings was not material or relevant to the issues and subsequently the final determination of the claim. The claimants' interlocutory campaign for information was largely unnecessary, irrelevant and disproportionate. In particular the contract dates sought

by the claimants were simply not relevant as demonstrated by the Tribunal refusing to make the discovery order sought. Further the contract dates were not regarded as material in the ultimate adjudication.

ii. The claimants' case was not meritorious as it was based on an incorrect premise that in compulsory purchase claims the price at which the parties contract represents the value at that time. It should have been clear to the claimants' expert from all the other evidence available, such as open market sales and advance purchase agreements, that the contract date prices represented market values at "handshake" dates some considerable time prior to the contract date and the date of vesting. This mistake led to the claimants putting forward an exaggerated claim for £110,000.

20. Mr Shaw QC submitted that these were not proper reasons to deny the claimants their costs:

i. The respondent only increased its valuation of the claimants' interest to £79,000 after the requested information on advance purchase settlements was provided to the claimants.

ii. The Tribunal expects there will be debate on the appropriate figure and a mistaken argument is not a reason to deny a claimant his costs as referenced in paragraph 37 of "Purfleet". The claimants were entitled to put their argument to the Tribunal. The respondent was behaving in a manner which did not reflect normal market practice in that usually the contract price reflects market value in or around the contract date. The claimants' expert was merely trying to make sense of the market and his quest for information was reasonable and professionally required to advise his clients.

21. The Tribunal agrees with Mr Potter BL, it should have been clear to the claimants' expert at a much earlier point in the proceedings that his evidence was flawed in that the contract prices which he relied on did not reflect market values at the contract dates or the date of vesting.

Conclusion

22. The Tribunal accepts that by proceeding to hearing the claimants secured a higher compensation figure than that which was previously on offer. The Tribunal, however, in arriving at that compensation figure derived no assistance from the evidence put forward at hearing by the claimants. On balance the Tribunal concludes that it is fair to make no award of costs.

ORDERS ACCORDINGLY

5th March 2014

Henry M Spence MRICS Dip.Rating IRRV (Hons)
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Claimants: Stephen Shaw QC instructed by Crothers, Chartered Surveyors.
Respondent: Michael Potter BL instructed by Geo L Maclaine & Co, Solicitors.