LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF A REFERENCE

R/7/2017

BETWEEN

FIONA MARY McKEE AND JULIA FARKAS – APPLICANTS

AND

DINGLES BUILDERS NI LIMITED – RESPONDENT

Re: Boundary area to the front and side of the land at 43 The Priory, Dromore

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

Background

1. On 20th April 2017 Fiona M McKee and Julia Farkas ("the applicants") submitted a "Notice of Reference Pursuant to a Statutory Provision within Part VIII" to the Tribunal seeking "release of restrictive covenants in order for a boundary to be erected to prevent the continued trespass by neighbouring children and subsequent risk of property damage by their engaging in ball games on the public road and on the applicants' property".

2. At a subsequent mention on 12th May 2017 it was established that the "boundary area to the front and side of the land at 43 The Priory, Dromore" ("the reference property") was a service strip. The applicants were directed to approach any likely service providers and request their permission to construct some form of boundary which would not restrict access to the reference property.

3. In the meantime David Clulow of Dingles Builders ("the respondent") contacted the Tribunal to advise that, as the reference property was for service providers he did not have the authority or otherwise to consent to the application. The Tribunal agrees.

4. The applicants made various contacts with the service providers and on 19th September 2017 the Tribunal directed that the applicants provide a sworn affidavit summarising the outcome of their communications with the service providers. The Tribunal also suggested that the applicants should seek legal advice.

5. A further mention was held on 14th March 2018 and the applicants agreed to submit the requested affidavit, once they received further information from the Department for Infrastructure.

6. The applicants failed to submit the affidavit and on 1st May 2018, at the request of the applicants, the proceedings were stayed for six months.

7. The Tribunal subsequently wrote to the applicants on 6th November 2018, 4th December 2018 and 2nd January 2019 requesting an update but the applicants failed to respond.

8. On 31st January 2019 the Tribunal sent a final reminder requesting an update within four weeks and advising that if a response was not received the reference would be struck out for "want of prosecution". No response has been received.

The Legislation

9. Paragraph 39 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") deals with "delay in proceedings":

> "39.-(1) Where upon the application of a party it appears to the registrar that there has been undue delay in bringing proceedings to a hearing before the Tribunal or default in complying with any provisions of these rules the registrar may request any party to the proceedings to submit proposals for the completion of any procedural steps in the matter.
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> (2) The registrar may list any proceedings to be mentioned before the President or the Tribunal to enable one or other or more than one of the parties to apply for such order

as may appear to be necessary to fix the place, date and time for hearing of the matter in dispute, or to have the proceedings stayed or struck out.

(3) In any proceedings to which paragraphs (1) and (2) apply the President or the Tribunal may make an order putting one or other or more than one of the parties on terms for the further conduct to the proceedings (including terms as to costs) or may order the proceedings to be stayed or struck out, upon such terms as may seem fit."

Authorities

10. The Tribunal derives assistance from Hytec Information Systems Limited v Council of City of Coventry [1996] EWCA CIV 1099, (1997) 1 WLR 1666. In its decision the Court of Appeal for England and Wales held that each case had to be decided on its own facts but the underlying approach to "unless orders" might be encapsulated by the following:

"(1) An unless order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was the party's last chance to put its case in order.

(2) Because it was a last chance, a failure to comply would ordinarily result in the sanction being imposed.

(3) The sanction is a necessary forensic weapon which the broader interests of the administration of justice required to be deployed unless the most compelling arguments were advanced to exonerate the failure.

(4) It seemed axiomatic that if a party intentionally flouted the order he could expect no mercy.

(5) A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure.

(6) The judge would exercise his judicial discretion whether to excuse the failure in the circumstances of each case on its own merits, at the core of which was service to justice.

(7) The interests of justice required that justice should be shown to the injured party for procedural inefficiencies causing the twin scourges of delay and wasted costs. The

public interest in the administration of justice to contain those two blights upon it also weigh very heavily. Any injustice to the defaulting party, though never to be ignored, came a long way behind the other two."

Conclusion

11. Applying the guidance as set out by the Court of Appeal in Hytec, the Tribunal is satisfied that the Registrar's letter of 31st January 2019 was akin to an "unless order" which was an order of the last resort, issued after a history of the applicants failure to comply with other orders of the Tribunal. It was the applicants' last chance to "put their case in order" and they failed to do so. Because it was a last chance the failure to comply has now resulted in the sanction being imposed, that is the reference has been struck out.

ORDERS ACCORDINGLY

27th March 2019

Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)
Lands Tribunal for Northern Ireland