

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
LANDS TRIBUNAL RULES (NORTHERN IRELAND) 1976
RATES (NORTHERN IRELAND) ORDER 1977

IN THE MATTER OF AN APPLICATION FOR PROTECTIVE COSTS

VT/2/2023

BETWEEN

COMMISSIONER OF VALUATION – APPELLANT

AND

COLM MARK McATEER – RESPONDENT

Re: 3 Windmill Road, Newry

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

Background

1. This reference concerns an appeal by the Commissioner of Valuation (“the appellant”) from a decision of the Northern Ireland Valuation Tribunal (“NIVT”), delivered on 20th December 2022, determining that a property at 3 Windmill Road, Newry (“the reference property”) should be removed from the Capital Valuation List. The reference property comprises a detached cottage on the outskirts of Newry.

2. Mr Colm McAteer (“the respondent”) is the owner of the reference property and he has brought an application to the lands Tribunal for a Protective Costs Order (“PCO”) in respect of the subject proceedings. Specifically, the respondent seeks an order from the Tribunal that there will be no award of costs against him, should the appellant be successful in its appeal. The appellant opposes the respondent’s application for a PCO.

Chronological Background

3. The appellant has provided a useful chronological background to the proceedings which was not disputed.
4. In or around 24th July 2017 the respondent applied to the District Valuer to have the reference property removed from the Rates Capital Valuation List, on the basis that it was undergoing renovation. The District Valuer considered the reference property to be temporarily incapable of occupation and therefore removed it from the Valuation List in or around 9th October 2017, effective from 1st April 2017.
5. Planning permission was granted in respect of the reference property in or around 30th May 2018, for “single storey disabled adaptation and alterations to dwelling” (LA07/2018/0644/F). Further planning permission was subsequently granted on 22nd May 2019 for a “replacement dwelling and garage” (LA07/2018/0286/F).
6. The reference property was returned to the Valuation List in or around 25th September 2019 by the District Valuer and the Capital Valuer was assessed at £145,000 for rates purposes.
7. In or around 12th June 2020 the respondent requested that the reference property be removed from the Valuation List on the basis that it was incapable of beneficial occupation. On 8th October 2020 the District Valuer concluded that the reference property should remain in the Valuation List, following an inspection on 24th July 2020. The District Valuer, however, reduced the Capital Value to £105,000.
8. Planning permission LA07/2020/0565/F (“2020 planning permission”) was then granted on 5th August 2020 for a “replacement dwelling and retention of derelict house for conversion to garage/garden store”, in substitution for the previous planning permission. The 2020 planning permission contained a stipulation that, upon occupation of the replacement dwelling, the reference property could no longer be used or adapted for purposes of human habitation.

9. In or around 14th October 2020 the respondent appealed to the appellant requesting that the reference property be removed from the Valuation List. On 5th November 2020 the appellant determined that the reference property was capable of beneficial occupation and therefore held that it should remain in the Valuation List with no change to its Capital Value rates assessment.
10. The respondent subsequently appealed the appellant's decision to the NIVT in or around 10th November 2020. The NIVT decision was that the reference property should be removed from the Capital Valuation List.
11. The appellant then sought leave to appeal the decision of the NIVT to the Lands Tribunal in or around 4th January 2023. Leave was granted on 5th January 2023.
12. It is in the context of this appeal that the respondent's application for a PCO is to be determined.

Procedural Matters

13. The appellant was represented by Ms Louise Maguire BL attended by Ms Elaine Grier, Departmental Solicitor's Office. The respondent appeared and made submissions as a litigant in person. The Tribunal is grateful to both parties for their helpful submissions.

The Appellant's Grounds of Appeal

14. Ms Maguire BL outlined the appellant's grounds of appeal:
 - (i) In the appellant's application for leave to appeal, the appellant observed that the NIVT's decision to remove the reference property from the Capital Valuation List centred on the 2020 planning permission.

- (ii) The NIVT held, at para 28 of its decision, that the “legal effect” of the 2020 planning permission was that the reference property ceased to be a domestic dwelling, to be used as ancillary storage only. It further held that, at the date of the appeal, the respondent desired to proceed with the construction works in accordance with the 2020 planning permission (para 27.4), however, on the specific facts of the case, he had been legally constrained from doing so due to issues regarding access to the site, until the granting of an interim injunction in or around 1st December 2020. The NIVT held that these were relevant factors to be taken into account. Notwithstanding that construction had not commenced at the appeal date, the respondent was entitled to the benefit of the 2020 planning permission and therefore, the NIVT found it was “properly regarded as engaged, legally” (para 27.5). Applying the three stage test in Newbiggin v Monk [2017] UKSC 14, the NIVT held that the reference property was not a rateable hereditament at the date of the appeal, and therefore did not pass the first stage of the said tests.
- (iii) The NIVT therefore considered the date of the appeal to be the material or relevant date for the purpose of ascertaining whether the reference property comprised a rateable hereditament. The appellant respectfully contends that the NIVT is incorrect in its assessment. It is the appellant’s contention that the material date is in fact the date of the District Valuer’s certificate, namely 5th October 2020. It is contended therefore that the matters and circumstances which postdate the District Valuer’s certificate are irrelevant and ought to be disregarded. Hence, the appellant advances the grounds of appeal set out in its Notice of Appeal. Thus, it is in this context that the respondent’s application for a PCO must be understood and determined.

The Respondent’s Application for a PCO

15. The respondent has applied for a PCO on the following basis. Mr McAteer:

- (i) The guiding principles for a PCO are set out in R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192 and refined by McHugh’s application [2007] NICA 26.

- (ii) The issues raised in the subject reference are of general public importance, as stated by the President of the NIVT in granting the appellant permission to appeal:

“this appeal and the resultant decision made therein by the Tribunal (NIVT) raises issues of broader importance concerning the proper interpretation by the Valuation Tribunal of a number of matters of current law bearing upon appeals in this jurisdiction of the Valuation Tribunal. It is thus proper and appropriate that Leave to Appeal shall be granted in order to enable the Lands Tribunal to examine the decision and the determinations of law made therein and, consequently, to make any determination upon appeal in regard thereto.”

- (iii) The public interest requires that the issues be resolved, as determined by the President of NIVT in granting permission to the appellant to appeal the NIVT decision.
- (iv) The respondent accepts that he has a personal interest in the outcome of the case. However, this was considered in Re McHugh’s application and the Northern Ireland Court of Appeal indicated that it was permissible for someone with a personal interest in a case to be granted a PCO in an appropriate case.
- (v) It is the appellant who has made an appeal to the Lands Tribunal to challenge the decision of the NIVT on points of law. If the appeal is not able to proceed then these issues will be unresolved. It is in the interest of the appellant that the respondent remains a party to the proceedings and to achieve this the respondent’s application for a PCO should not be opposed.
- (vi) Having regard to the respondent’s financial resources and that of the appellant and to the amount of costs that are likely to be involved, it is fair and just to make a PCO as:
- (a) I have unsuccessfully sought to have legal representation pro bono.
 - (b) The appellant is a government body with access to the public purse and as individuals are not liable to costs.
 - (c) I am in ill health and retired due to disability. I have the following income:

- (i) Ill health pension £2,004.64 pcm
- (ii) Personal Independence Payment £691.00 4 weekly
- (iii) Industrial injuries benefit £581.28 4 weekly
- (iv) Employment Support Allowance £518.00 4 weekly

(d) I have savings of £29,342.75 which is set aside to settle a legal bill, purchase a disabled car and to offset a mortgage.

(e) I have a mortgage of £120,000.

(f) I have an outstanding legal bill from a High Court action in relation to McAteer v Keeley Neutral Citation No [2021] N1Ch 15.

(vii) If the Order is not made then I will have to discontinue the proceedings:

- (a) The value of the rates liability for this appeal is nominal and finite.
- (b) The estimated cost to obtain legal representation outweighs the value of the rates under appeal.
- (c) The risk of a costs order being made against me outweighs the value of the rates under appeal.

(viii) If I have to discontinue the proceedings:

- (a) The determination of the President of the NIVT on points of law in the NIVT decision will be overturned.
- (b) The points of law conceded by the appellant in the NIVT decision will be overturned.

(ix) For these reasons I ask the court to make a PCO in the following terms that there is no award of costs should the appellant be successful in its appeal.

The Law

16. The powers of the Lands Tribunal to award costs are to be found in Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 (“the Rules”) together with Section 8(7) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 (“the 1964 Act”). Section 8(7) of the 1964 Act provides:

“8(7) Subject to Sections 9 and 10 and any other transferred provision, the Lands Tribunal may order that the costs, or any part of the costs, of any proceedings before it incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under any such order or direct in what manner they are to be taxed or settled.”

17. Rule 33 of the Rules provides:

“33.-(1) Except in so far as section [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.

(2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed by the register on a scale specified by the Tribunal, being a scale of costs for the time being prescribed by rules of court or by county court rules.”

Authorities

18. The Lands Tribunal powers in respect of costs were considered in the case of Oxfam v Earl & Ors [1996] BT/3/1995. This decision confirmed the Tribunal’s discretion in respect of costs including that:

- (i) the Lands Tribunal must exercise that discretion judicially,
- (ii) the general “rule” is that costs should follow the event; and

(iii) special circumstances are required to justify departure from that “rule”.

19. In the case of Commissioner of Valuation v Elizabeth Doherty VT/4/2012 the then President of the Lands Tribunal, Coghlin LJ, detailed the principles applicable to the grant of a PCO:

“The Principles Applicable to the Grant of a PCO

[11] The principles to be take into account when considering the grant of a PCO were considered in a recent judgment prepared by Brooke LJ in the Court of Appeal in England and Wales in R (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 and are contained at paragraph 74:

’74. We would therefore restate the governing principles in these terms:

- (1) A Protective Costs Order may be made at any stage of the proceedings, on such conditions as the court thinks fits, provided that the court is satisfied that:
 - (i) the issues raised are of general public importance;
 - (ii) the public interest requires that those issues should be resolved;
 - (iii) the applicant has no private interest in the outcome of the case;
 - (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
 - (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
- (2) If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.
- (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.’

[12] The ‘Corner House’ principles have been considered and applied by the Court of Appeal in this jurisdiction in Re McHugh’s Application [2007] NICA 26. In delivering the

judgment of the court in that case Campbell LJ prefaced his reference to the principles at paragraph [17] by observing that:

‘It is only in exceptional circumstances that Protective Costs Order are made.’

However, he also went on to observe that the principles provided a guide only and that it did not follow that, for example, the fact that the applicant had a personal interest in the proceedings constituted a complete bar to making a PCO.

[13] Applying the principles as a guide and doing so in the context of the wide overall discretion available to the Tribunal ...”

The Application of the Principles

(1) Are the issues raised in the subject reference of general public interest?

20. Ms Maguire BL:

The NIVT was tasked with considering an appeal of the appellant’s decision which was in itself an appeal of the District Valuer’s decision to return the reference property to the Capital Valuation List. That decision was made on 5th October 2020. The appellant contends that it is, therefore, well established that the relevant or material date for assessment of the state of the property is the date of the District Valuer’s Certificate (Marks & Spencer PLC v Commissioner of Valuation [1990] VR/30/1986). The NIVT has therefore erred in treating the date of appeal as the relevant date. It is respectfully submitted that this is a simple error in the application of the law to the specific facts of this particular case. Quite simply, the Appellant considers that the NIVT got it wrong. The appeal therefore involves the application of established principles of law to the facts of this case. Therefore, notwithstanding the comments of the President in his decision to grant leave, it is respectfully submitted this appeal does not raise questions of import beyond the specific parameters of this case.

21. Mr McAteer:

- (i) The appellant has been granted leave to appeal the decision of the NIVT, dated 20th December 2022. This leave to appeal is under Article 54A of the Rates Order. The legislation does not allow the appellant to appeal part, or parts of the decision it does not like, in isolation from the whole decision.
- (ii) The appellant was granted leave to appeal by the President of the NIVT on 5th January 2023. The President was quite specific, at paragraph 4, that he wanted the Lands Tribunal to consider the appeal under Article 54 of the Rates Order as it raised issues of broader importance concerning the proper interpretation of a number of matters of current law bearing upon appeals in this jurisdiction.
- (iii) The President gave permission in order that the Lands Tribunal could examine the decision and determination of law made by the NIVT and consequently to make its own determination on those matters.
- (iv) The appellant has never disputed the leave to appeal.
- (v) It is therefore clear that this appeal relates to a decision that not just affects the respondent, but everyone in this jurisdiction. The issues raised are of general public importance. The President of the NIVT determined that those issues raised in the appeal under Article 54 of the Rates Order be resolved by the Lands Tribunal. The application for a PCO is therefore similar to the decision to grant a PCO in Commissioner of Valuation v Doherty VT/4/2012.

22. The Tribunal:

- (i) The Tribunal agrees with Ms Maguire BL, this is not a case of general public interest. There is no major point of law affecting a section of the general public.
- (ii) In any appeal under the Rates Order the material date for assessing the state and circumstances relating to a property is well established by case law in this jurisdiction. See for example Marks and Spencer PLC v Commissioner of Valuation [1990] VR/30/1986.

- (iii) The appellant's appeal is against the NIVT application of that well established case law to the particular circumstances in the subject reference.

(2) Does the public interest require that those issues be resolved?

23. Ms Maguire BL:

The appellant repeats the points above. As the case does not raise matters of public interest, it therefore follows that this question is obsolete.

24. Mr McAteer:

The public interest does require that these issues be resolved.

25. The Tribunal:

For the reasons given at paragraph 22 there is no general public interest in this reference.

(3) Does the respondent have a private interest in the outcome of the case?

26. Ms Maguire BL:

It is plain that the respondent does have a private interest in the outcome of this case. If the appellant succeeds, the reference property will be considered to be a rateable hereditament, the obvious consequence of this is that he will be required to pay rates. Whilst the existence of a private interest in the outcome of a case is not necessarily considered a bar to the granting of a PCO (pursuant to McHugh's Application [2007] NICA 26 and Weaver v London Quadrant Housing Trust [2009] EWCA), it is submitted that the existence of the said private interest is in itself a factor to be considered by the Tribunal in its determination of the respondent's application. Indeed, the outcome of the case will only affect the parties to this case. Therefore, for this reason and the reasons outlined above, the importance of this case does not stray beyond its own boundaries. This is not a test case, or a case of the sort envisaged by the court in Corner House.

27. Mr McAteer:

The respondent accepts that he has a personal interest in the outcome of the subject reference. However, in McHugh's Application the Northern Ireland Court of Appeal accepted that it was permissible for someone with a personal interest to be granted a PCO in an appropriate case.

28. The Tribunal:

It is clear and the respondent accepts that he has a private interest in the subject reference but in the right circumstances this is not a bar to him being granted a PCO, as per McHugh's Application.

(4) Having regard to the financial resources of the parties and the amount of costs that are likely to be involved is it fair and just to make the order?

29. Ms Maguire BL:

- (i) The respondent states that he is in receipt of benefits on a four weekly basis. Over the course of one year this comprises the sum of £25,273.64. The respondent also states that he is in receipt of a monthly pension of £2,004.64 per month, totalling £24,053 per year. The respondent is therefore in receipt of circa £47,327.32 per year. This is a significant yearly income. Indeed the respondent confirms that he has £29,342.79 in savings. Whilst the respondent contends that he has set his savings aside to settle a legal bill, he has provided no evidence in support of this and as he was successful in the case in question, costs usually follow the event. The respondent cannot, on any stretch and even discounting the capital sum, be said to be in straightened financial circumstances; he is not a man of straw. Indeed, by way of analogy, it seems unlikely that he would meet the financial threshold for the granting of legal aid.
- (ii) Moreover, the respondent's contention that the appellant has access to the public purse is not indicative of easy or free access to funds, but rather comes with great responsibility and accountability; it is not to be treated frivolously. Therefore, when one considers the parties respective financial positions, it is submitted that the

circumstances are strongly against the need for a PCO. The respondent is, after all, a mark for costs.

30. Mr McAteer:

- (i) I have been unsuccessful in obtaining legal representation pro bono.
- (ii) The appellant is a government body with access to the public purse and as individuals are not liable for costs.
- (iii) My savings are set aside to settle a legal bill, purchase a disabled car and to offset my mortgage of £120,000.

31. The Tribunal:

The Tribunal agrees with Ms Maguire BL, Mr McAteer is not in straightened financial circumstances. He has an annual income in excess of £47,000 and savings in excess of £29,000. He has adequate finances to oppose the applicant's appeal should he chose to do so.

(5) If the order is not made will the respondent discontinue his involvement in the proceedings and will he be acting reasonably in doing so?

32. Ms Maguire BL:

- (i) The respondent was without representation in his application to the District Valuer and on his application to the appellant. He appears to have engaged fully and ably, providing detailed submissions and argument. Moreover, as is outlined above, the respondent does not find himself in straightened circumstances. One would have thought he could obtain legal representation, and quite simply it appears to have been his choice not to do so – on the basis that it is uneconomical. It is therefore submitted that the respondent's contention that he will have to discontinue the proceeding if a PCO is not made, appears unreasonable and arguably self-serving for the purpose of this application.

- (ii) Moreover, the respondent's contention that the appellant conceded points of law in the NIVT decision that will be overturned is misplaced and not accepted. If the respondent were to discontinue his involvement, the appeal would proceed on an undefended basis in the absence of any agreement between the parties. The matter would therefore still require the consideration of and determination by the Lands Tribunal. It is not a foregone conclusion, as alleged, that the decision of the NIVT will be overturned.

33. Mr McAteer:

- (i) If the order is not made the proceedings will have to be discontinued.
- (ii) The value of the rates liability for this appeal is nominal and finite and the estimated costs to obtain legal representation outweighs the value of the rates under appeal.
- (iii) The risk of a costs order being made against me outweighs the value of the rates under appeal.
- (iv) If the proceedings have to be discontinued:
 - (a) The determination of the President of the NIVT on points of law in the NIVT decision will be overturned.
 - (b) The points of law conceded by the appellant in the NIVT decision will be overturned.

34. The Tribunal:

Mr McAteer has stated that he will discontinue proceedings if he is not granted a PCO. He considers that the risk of costs being awarded against him outweighs the monetary value of the rates under appeal. This, however, is a decision that all litigants have to take and decide, subject to the risks involved, whether they wish to continue with the proceedings.

Conclusions

35. Ms Maguire BL concluded:

It is only in exceptional circumstances that PCOs are to be granted. It is submitted that these are not exceptional circumstances. The appeal does not raise issues of public interest, but rather relates to the rateability of the respondent's property. It is an issue that affects only the parties and therefore cannot be said to be of broader import. Moreover, the respondent has demonstrated that he has adequate means and capability to engage in his defence of the appeal, should he choose to do so. This is a matter for him and not something that should be borne by the public purse.

36. Mr McAteer's conclusions:

- (i) Costs are a relevant consideration. I previously stated that though I have the financial resources it is not economical to pursue the appeal as the costs would outweigh the amount of rates raised.
- (ii) Similarly, the costs to the public purse of pursuing this appeal far outweighs the financial benefit to the Department of Finance. This would be contrary to the Civil Service Code of Ethics, integrity and efficient use of public money. Therefore the appellant must consider this a case worth pursuing as it is of general public interest. The alternative is that the appellant is using the public purse to pursue a course of harassment and bullying contrary to the Civil Service Code of Ethics.
- (iii) In paragraph 28 of the decision the President of the NIVT states that because the determination of the NIVT was to remove the property from the Valuation List it did not need to consider the further stages in the authorities or comparables. If it is the decision of the Lands Tribunal that it does not wish to comply with the permission of the President and only consider the appellant's point in isolation of the Article 54 appeal, then, if the appellant is successful, the appeal should be referred back, to the NIVT so it can consider these other stages and comparables.

- (iv) If the order is not made I will have to discontinue the proceedings. I therefore ask the court to make a PCO so that there is no award of costs should the appellant be successful.

37. The Tribunal:

The Tribunal agrees with Ms Maguire BL, PCOs are only to be granted in exceptional circumstances. The Tribunal considers that the circumstances in the subject reference are not “exceptional” in any way:

- (i) there is no general public interest in the reference;
- (ii) there is no point of law affecting a section of the public;
- (iii) the respondent has adequate finances to continue with the proceedings should he choose to do so; and
- (iv) should the respondent discontinue his involvement in the proceedings, the Tribunal will proceed to hear the appellant’s appeal even though it will be undefended. The appeal will, therefore, be ultimately considered and determined by the Tribunal.

Decision

38. The Tribunal, therefore, declines to grant the respondent a PCO in the circumstances of this reference.

27th February 2024

Henry M Spence MRICS Dip.Rating IRRV (Hons)

Lands Tribunal for Northern Ireland