LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

LANDS TRIBUNAL RULES (NORTHERN IRELAND) 1976

PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF AN APPLICATION FOR COSTS

R/9/2015

BETWEEN

H GILLESPI (PROPERTIES) LIMITED – APPLICANT

AND

BRIAN WHITE AND JESSICA WHITE – RESPONDENTS

Re: 66 Church Road, Dundonald

PART 1

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

Background

1. H Gillespi (Properties) Limited ("the applicant") purchased the property at 66 Church Road, Dundonald ("the reference property") in or around 2007. The reference property was held under a lease, the freehold of which was owned by Brian and Jessica White ("the respondents") who reside next door to the reference property at 68 Church Road.

2. In 2009, following a lengthy planning process and consideration of various objections, the planning authority gave permission for the construction of 12 apartments on the reference property.

3. The lease, however, contained restrictive covenants of which the respondents were the beneficiaries and which prohibited building. Subsequently, on 21st July 2015, the applicant lodged proceedings before the Lands Tribunal under the Property (Northern Ireland) Order 1978 ("the Order") seeking modification of the restrictive covenants, in order to permit development in accordance with the planning permission already granted.

4. The following dates for mention occurred before the Tribunal:

(i) 27th August 2015

(ii) 6th October 2015

(iii) 3rd November 2015 (adjourned by written consent)

(iv) 1st December 2015 (adjourned by written consent)

(v) 1st February 2016 (adjourned by written consent)

(vi) 14th March 2016 (adjourned by written consent)

(vii) 3rd May 2016

(viii) 31st May 2016

(ix) 5th July 2016

5. Throughout this period attempts were made to negotiate a settlement but ultimately the negotiations failed to provide a successful conclusion.

6. Subsequently, on 5th July 2016 the Tribunal issued the following directions towards a hearing:

(i) report on facts to be submitted by Friday 30th September 2016.

(ii) expert reports to be submitted by Friday 28th October 2016.

(iii) legal submissions to be available by Thursday 10th November 2016.

(iv) hearing listed for Thursday 17th November 2016.

7. On 5th October 2016 the respondents lodged their report on facts and at the same time served it upon the applicant. On 25th October 2016, however, the applicant withdrew its application to the Lands Tribunal for "commercial reasons".

8. At a mention on 14th November 2016 the respondents' legal representatives sought an Order for costs from the Lands Tribunal which was not disputed by the applicant's solicitors.

9. The sum of costs sought by the respondent has, however, been disputed and the correct amount of costs to be paid is therefore for determination by the Tribunal.

Procedural Matters

10. At hearing the applicant was represented by Mr Douglas Stevenson BL, instructed by MKB Law, solicitors. The respondents were represented by Mr Keith Gibson BL, instructed by Crawford & Lockhart, solicitors. The Tribunal is grateful to the legal representatives for their detailed written and oral submissions.

Position of the Parties

11. Mr Stevenson BL considered the amount of costs being sought by the respondents to be unreasonable and disproportionate in the circumstances of the case which did not proceed to hearing.

12. Mr Gibson BL's position was that the amount of costs sought were reasonable and proportionate considering which was at stake in the reference and the subsequent impact on the respondents. The respondents had incurred considerable costs and to give effect to the Order of the Tribunal he submitted that these costs should be paid in full and should not be reduced as part of a "half way house".

Statute

13. The following sections of the Lands Tribunal Rules (Northern Ireland) 1976 are relevant to the reference:

> *"Disclosure and exchange of the evidence of expert witnesses*
>
> 10.-(1) Except as provided by paragraph (3) the Tribunal shall not hear more than one expert witness on valuation, or on any one issue involving expert evidence on behalf of a party.
>
> (2) Except where these rules otherwise provide, a party who intends to call an expert witness shall, within 28 days after being so requested by the registrar, send to the

registrar with sufficient copies for service upon each of the other parties to the proceedings:-

(a) a summary of the expert evidence to be given on behalf of such party at the hearing including all computations necessary to his case, and

(b) a copy of each map, plan, document or material disclosed in any list furnished pursuant to rule 9, and

(c) where the expert evidence involves a comparison of value with property not the subject of the proceedings, all relevant particulars of the situation, plan, area, and circumstances of that other property.

(3) An application for leave to call an additional expert witness or witnesses

(a) may be allowed by the registrar when made before the exchange of evidence under this rule, or

(b) may be allowed by the Tribunal before the hearing.

upon such terms as to costs or otherwise as the registrar or the Tribunal thinks fit.

(4) ….”

And

”33.-(1) Except in so far as section 5(1), (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act 1919[5] 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 registrar 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

14. The Tribunal was referred to the following authorities:

(i) Re Gibsons Settlement Trusts, Mellers v Gibson [1981] CH179, [1981], 1 All ER 233

(ii) McGrath & Anr v O'Neill & Ors R/41/2004

(iii) Patricia Francis Hunt and Hampton Properties Limited v The Trustees of Belvoir Park Golf Club R/86/2007 Part 2 Costs

(iv) Ready Use Concrete Company Limited v ALG Developments Limited BT/26/2013 Part 3

(v) Deuxberry & Ors v Department for Infrastructure R/22/2013

Discussion

15. Mr Stevenson BL submitted that the following issues required detailed consideration in relation to the costs payable in this reference. The Tribunal agrees:

(i) should the costs relating to the proposed joint development of the reference property and the adjoining lands be payable by the applicant?

(ii) should costs be payable for more than one expert?

(iii) are the costs, as submitted by the respondent, proportionate and reasonable in the circumstances of the reference?

Proposed Joint Development

16. Some time prior to the first mention of the reference before the Tribunal the respondents indicated that they would be willing to consider a joint development of the reference property and their adjoining property at 68 Church Road. It was therefore agreed by the legal representatives that the proceedings before the Tribunal would be effectively stayed to allow for detailed investigation of this option.

17. Between August 2015 and July 2016 various investigations relating to the proposed joint development were carried out and discussed by the parties. Mr Stevenson BL submitted that the surveyors involved in those discussions had agreed that the work on the proposed joint development would be done on the basis that each side would bear its own costs. However, neither surveyor was called to give evidence in relation to this point.

18. Mr Gibson BL submitted that in all of the documentation before the Tribunal there was no indication of an agreement for each side to bear its own costs in relation to the proposed joint development and there was no such agreement.

19. The Tribunal agrees with Mr Gibson BL. In the absence of any documentation to the contrary there was no formal agreement for each party to bear its own costs in relation to the joint development proposals.

20. Mr Stevenson BL further submitted, that notwithstanding any agreement for each side to bear its own costs, the joint discussion did not relate to the proceedings before the Tribunal. The respondents stood to benefit from any joint development and as such he did not consider these costs to be "costs of and incidental to the proceedings", as stipulated by Rule 33.

21. Mr Gibson BL submitted that from the respondents' point of view the whole exercise has been a complete and utter waste of time. He asked the Tribunal to note that the respondents had incurred significant costs in dealing with an issue, which had the applicant properly researched and considered it, would not have arisen. On that basis he considered that all of the costs incurred by the respondents were "costs of and incidental to the proceedings".

22. In Brooks v Northern Ireland Housing Executive R/27/2007 the Tribunal noted:

> "4. The point in time at which costs should be regarded as costs of and incidental to the proceedings is a matter of judgement in all the relevant circumstances. In many cases it will depend on the question of when the dispute took on the character of contentious litigation or when the parties might no longer be expected to bear their own costs. In some of the work of the Tribunal the issue has to be addressed in the context of presumptions – for example in applications for modification of restrictive covenants the applicant will be presumed to be liable for the reasonable costs of initial advice to the person entitled to the benefit."

23. And in Davies & Anr v Greene R/11/2008 it also noted:

"7. Generally in the ordinary case of this nature the Tribunal will assume that the respondents, though no fault of their own, would be put to some expense. There is a presumption that it will award them their initial reasonable costs up to the point where a case takes on the character of contentious litigation. From then on a losing party is at risk of having to meet a successful party's costs in the usual way.

8. There having been prior negotiations, this case took on the character of contentious litigation when the Davies applied to the Tribunal for extinguishment. Prior to that the Davies are presumed to be responsible for the respondents reasonable costs."

24. The Tribunal also derives assistance from Priestly v Brown BT/8/1996 which was a case under the Business Tenancies Order:

> "Once a tenancy application has been made, parties may continue to seek to resolve their dispute in a variety of ways before a hearing. The practice of settling disputes without recourse to a court hearing is to be encouraged but there is, of course, a cost application to that …"

And

> "On the other hand the parties may negotiate through their agents or solicitors in an attempt to settle some or all of the issues. Such negotiations are at a cost which must be recognised as costs which may be costs of or incidental to the proceedings."

And

> "The tenant elected to seek and obtained some protection from the Act. There was no agreement that each side would pay its own costs … The Tribunal is not persuaded that the desire of the tenant to achieve a settlement, to avoid the expenses of a formal hearing, is sufficient to displace the general presumption that the party seeking withdrawal should pay the others costs."

25. As in Davies and Brooks the Tribunal is satisfied that the proceedings in the subject reference took on the character of contentious litigation when the matter was referred to the Tribunal on 21st July 2015. Additionally, as in Priestly, the Tribunal is not persuaded that the desire of the applicant to achieve a settlement through the consideration of a joint development proposal with the respondent, was sufficient to displace the general presumption that the

party seeking withdrawal should pay the other party's costs. The Tribunal therefore considers the costs relating to the joint development negotiations and discussions to be "costs of an incidental to the proceedings", as stipulated by rule 33 and as such the applicant is liable for these costs.

More than One Expert

26. Mr Stevenson BL referred the Tribunal to rule 10 of the Lands Tribunal Rules which only permited "one expert witness on valuation, or on any one issue involving expert evidence on behalf of a party", without application to the Tribunal to call additional expert witnesses.

27. In their submissions the respondents had claimed the costs of several expert witnesses. No permission to call additional expert witnesses had been sought and Mr Stevenson BL therefore submitted that the Tribunal should only award the costs of one expert witness, as stipulated by rule 10.

28. Mr Gibson BL asked the Tribunal to note that all of the additional expert witness reports had been included in the respondents' Report on Facts which had been filed with the Tribunal on 5th October 2015, in accordance with the directions of the Tribunal. He submitted that all of these reports could have been accepted by the applicant and there would have been no reason to call more than one expert. There was no way of knowing, however, without receipt of the applicant's Report on Facts which was never submitted.

29. The Tribunal agrees with Mr Gibson BL and finds that all of the expert witness reports should be considered in relation to the costs of the reference.

Reasonable and Proportionate

30. Mr Stevenson BL submitted that in all the circumstances the respondents' costs, allegedly purporting to deal with their defence of the proceedings, were excessive and not reasonable or proportionate to the matters at issue. He asked the Tribunal to note that the only document (save for their submission on costs) lodged by the respondents in the proceedings was their Report on Facts.

31. Mr Gibson BL referred the Tribunal to Deuxberry in which the Tribunal had given guidance on the amount of costs to be awarded. The guidance was that the costs must be reasonable and proportionate and he submitted that, in the subject reference, the respondents were entitled to:

(i) both solicitor and counsel to ensure equality of arms.

(ii) retain an expert on planning as it was one of the considerations under the Property Order.

(iii) obtain a valuer to demonstrate the potential loss and impact on the respondents (in a monetary context) of the possible effect of the removal of the covenant

(iv) a surveyor to consider the remaining provisions of the Property Order.

(v) a mapping surveyor to establish the respective property boundary lines on the ground of the premises in relation to the respondents' house.

32. In conclusion he submitted that the costs reasonably incurred by the respondents were for considerably more than the production of a Report on Facts.

33. The Tribunal generally agrees with Mr Gibson BL in that, throughout the proceedings, the respondents would have incurred costs significantly over and above those for the production of a Report on Facts.

Individual Items of Costs

34. The Tribunal now considers the individual items of costs claimed by the respondents. The hourly rates for the expert witness and legal representatives were not disputed. As in other cases of this nature the Tribunal proposes to us a "broad principles" approach rather than taxation.

35. The Tribunal will also apply the principles outlined in Liam and Kate Cunningham v Sheila Fegan and Alan McArdle R/22/2010:

> "16. Mr Girvan BL did not challenge the time spent by the solicitors on providing the services that they did to their client Ms Fegan. However he contended that the costs claimed were disproportionate and excessive. He compared the complexity and possible value of the case with those of Throne v DRD [2011] and Limbo v DSD [2011]. The Tribunal agrees. Other factors may have affected the level of service provided to the client but the Cunninghams should not be held responsible for costs that exceeded what was reasonable in this case. The Tribunal accepts that the basic hourly rate claimed was reasonable but it is not persuaded that the Cunninghams should meet either the costs of the entirety of the time allocated to Ms Fegan's case or that it warranted an uplift for care, complexity and importance to her."

Expert Surveyor Fees

36. The expert surveyor, Mr Dunn had claimed fees totalling £4,981. These related mainly to his work on the proposed joint venture, the consideration the Article 5 issues in the Property Order, the production of a Report on Facts and his work on an "aborted" expert report.

37. As confirmed in numerous authorities, expert witness fees must be reasonable and proportionate. In relation to the subject reference, which involved the proposed modification of a restrictive covenant, a significant portion of Mr Dunn's work would have involved consideration of the issues outlined in Article 5 of the Property Order. However, the planning considerations in Article 5 had been dealt with by an expert planner and the valuation aspects had been dealt with by an expert residential surveyor. This would have significantly reduced the input required from Mr Dunn and the Tribunal considers a surveyor fee of £3,000 to be appropriate in the circumstances.

Residential Valuation Expert

38. Mr Martin had submitted a fee of £825 for his work on the residential valuation aspects of Article 5. This seems slightly high for a residential valuation and the Tribunal fixes a sum of £600 for this work.

Planning Consultancy

39. The planning consultant, Mr Donaldson, had claimed a fee of £1,300. Mr Stevenson BL submitted that the outlay of Mr Donaldson was totally unnecessary given the respondents had instructed a qualified surveyor to draft the Report on Facts.

40. The Tribunal agrees with Mr Gibson BL, however, planning matters were one of the issues which required to be considered under Article 5 of the Order and as such the respondents were entitled to seek the advice of a planning consultant. Mr Donaldson, however, was only required to consider one element of the Article 5 issues and in the circumstances the Tribunal considers a fee of £1,000 to be appropriate.

Counsel Fees

41. Counsel fees claimed were £4,500. Mr Stevenson BL considered the amount of fees to be excessive in the circumstances of the case and he referred the Tribunal to Cook on Costs "counsels fees/brief fees".

42. Mr Gibson BL considered the counsel fees to be reasonable in the circumstances:

    (i) there was a large body of complex case law to be considered in relation to the modification of covenants and Property Order issues.

    (ii) in addition counsel provided opinions, advice, directions of proof, consultations with experts, review of reports.

43. The Tribunal considers the counsel fee of £4,500 to be reasonable in the circumstances.

Solicitors Fees

44. The respondents had claimed total solicitors fees of £8,250. Mr Stevenson BL considered this amount of fees to be excessive for a case which never progressed to hearing.

45. The Tribunal agrees with Mrs Stevenson BL and considers the solicitor fees to be excessive in the circumstances. The Tribunal considers a fee of £6,000 to be reasonable.

Outlays

46. The respondents had provided details of additional "Outlays" which they had incurred in the reference. These totalled £4,671. Adopting a "broad brush" approach the Tribunal awards £3,000 for "outlays", some of which may have been unnecessary.

Conclusion

47. The Tribunal allows costs as follows:

1)	Expert Surveyor Fees	£3,000
2)	Residential Valuation Expert Fees	£600
3)	Planning Consultant Fees	£1,000
4)	Counsels Fees	£4,500
5)	Solicitors Fees	£6,000
6)	Outlays	£3,000
	Total	**£18,100**

48. Accordingly the Tribunal fixes a lump sum of £18,100 (plus VAT if any) as the payable costs.

ORDERS ACCORDINGLY

22nd March 2017

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

Appearances

Applicant: Mr Douglas Stevenson BL instructed by MKB Law, solicitors.

Respondent: Mr Keith Gibson BL instructed by Crawford & Lockhart, solicitors.