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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **13/09/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ANNETTE AND ROSALEEN COOLEY FOR JUDICIAL REVIEW

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Before: Morgan LCJ, Gillen LJ and Weir LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the dismissal of an application for judicial review of a decision of the Land and Property Services Agency of the Department of Finance and Personnel ("LPS") by which the appellants' properties were valued for the purposes of the scheme for the purchase of evacuated dwellings ("SPED"). Mr Sayers appeared for the appellants, Mr Lunny for the respondent and Mr Dunlop for the Northern Ireland Housing Executive (NIHE) who were joined as a Notice Party. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The appellants are a mother and daughter who lived at 106 Mountpottinger Road and 100 Mountpottinger Road Belfast, respectively. The Mountpottinger Road is an interface between nationalist and loyalist areas. Article 29 of the Housing (Northern Ireland) Order 1998 provides for a scheme to be approved by the Department and administered by the NIHE to acquire by agreement houses owned by persons who, in consequence of acts of violence, threats to commit such acts or

other intimidation are unable or unwilling to occupy those houses. SPED was approved by the Department and the relevant eligibility and valuation conditions were:

> "2.1 All the following conditions must be satisfied before an application will qualify for acceptance under SPED.
>
> (i) The house must be owner-occupied and must be the applicant's only or principal home.
>
> (ii) A certificate signed by the PSNI Chief Constable, or authorised signatory, must be submitted to the Executive, stating clearly that it is unsafe for the applicant or a member of his/her household residing with him/her to continue to reside in the house, because that person has been directly or specifically threatened or intimidated and as a result is at risk of serious injury or death.
>
> **Purchase of Dwellings under SPED**
>
> 3.1 The purchase price of a house acquired under SPED shall be determined by the Land and Property Services Agency of the Department of Finance and Personnel, at the consideration assessed as though the sale were by a willing vendor, in the open market and without adverse security considerations. "

[3] Between 2001 in 2011 there were approximately 20 different reports to police of incidents involving stone throwing at the appellants' houses, stone throwing between groups of youths close to the appellants' houses as a result of which they were damaged, damage to cars and damage to doors and windows on the properties. On 27 March 2011 the daughter found a bullet in the hallway of her home. Both attended their general practitioner as a result of mental health issues and in July 2011 the mother moved in with her daughter as a result of ill-health.

[4] On 20 April 2011 the mother and daughter made an application to the NIHE under the SPED scheme. The Chief Constable refused to provide a certificate under the scheme. It was accepted that the appellants satisfied the test for direct or specific threat or intimidation set out in Re O'Neill's Application [2008] NIQB 80 by Weatherup J in a case involving regular attack by stones and petrol bombs at an interface area:

> "While of course there may be attacks that are intended to be made on particular individuals in their homes, the general nature of incidents at interface areas may be more in the nature of attacks on the homes of residents within reach, based on a sectarian view of those residents. Such attacks may be undertaken by or on behalf of an illegal organisation, although that was stated by police not to be the present case, but there may be other instances where individuals have carried out their own attacks. The attacks will be made on all properties within range on the other side of the interface. Thus the threat or intimidation involved in targeting a group of houses will arise because of their proximity to a particular location or the convenience of a point of attack and will be based on sectarian hostility to the occupiers of such houses. This is capable of being a direct or specific threat or intimidation of the occupier, even though it is any house within range that is being targeted."

[5] The Certificate was, however, refused on the basis that although each had suffered psychological injury the evidence did not demonstrate serious injury or the risk of serious injury. That decision was judicially reviewed. On appeal in this court it was accepted that the bullet found in the hall of the premises of the daughter was a threat to kill her or a member of her household. This court quashed the decision to refuse the Chief Constable's Certificate on the basis that reasons should have been given explaining the assessment of the bullet incident and the risk to which it gave rise. We also considered that the state of the medical evidence was inadequate and the proper course would have been to invite the appellants to have supplemented that evidence.

[6] In light of our decision further medical evidence was requested and a Chief Constable's Certificate was issued in respect of both properties on 12 September 2014. An LPS valuer was appointed who inspected the properties and concluded that their market value ignoring their interface location was £54,000 in respect of 100 Mountpottinger Road and £53,000 in respect of 106 Mountpottinger Road. There is no dispute about those figures. The valuer then considered that he should reflect the interface location of the subject properties and reduced the capital values by 25% because he was aware that for rating purposes domestic properties in some interface areas received an allowance of 25% to reflect the adverse nature of their location.

Applying that downward adjustment his final valuations were £41,000 in respect of 100 Mountpottinger Road and £40,000 in respect of 106 Mountpottinger Road.

Submissions

[7] The appellants' case is that certification by the Chief Constable is dependent upon him being satisfied that:

(i) the householder has been directly or specifically threatened or intimidated;

(ii) the consequence of those threats or intimidation are such that there is a risk of serious injury or death; and

(iii) it is thereby unsafe for the applicant or a member of her household to continue to live in the house.

The O'Neill decision establishes that the first limb is satisfied where there are acts of threat or intimidation directed at a particular property on the basis that it is perceived to be occupied by those from a different community. The fact that the perpetrators of the attacks may well be ignorant of the identity of the persons within the property is not material to the issue of whether the threat or intimidation has been direct or specific to the householder. Where the house is targeted on the basis of the perception of the background of the occupants, that is sufficient.

[8] The valuation exercise is inevitably an artificial construct. This is not a case of a willing vendor and the sale is not being conducted in an open market. The appellants contend that the meaning of "adverse security considerations" within the context of the scheme must derive its meaning from the direct or specific threats or intimidation which formed the basis of the issue of the Chief Constable's Certificate. In an O'Neill type case that requires the valuer to leave out of account the history of attacks on the property.

[9] In this case the valuer has not disclosed the basis upon which he applied a 25% reduction. There are, undoubtedly, aspects of an interface area which might affect valuation. There may be defensive architecture by way of walls or fencing. The properties at the interface may, as in this case, face onto a major road. At various times of the year there maybe parades which require a substantial police presence or lead to restrictions on movement. From time to time there may be confrontations between members of the different communities which can lead to

stone throwing or other forms of violence. We do not understand Mr Sayers to take issue with the proposition that such matters can properly be taken into account so long as they are not part of the history of attack on the property which led to the issue of the Chief Constable's Certificate.

[10] The respondent, supported by the Notice Party, explained that in order to ensure that the valuer was not influenced by the events which rendered the property unsafe for the householder to live there he was not told anything of the history of the events affecting the property. He inspected the property and its location and formed his view accordingly. That is obviously perfectly appropriate in circumstances where the scheme is applied for the benefit of a person who has been specifically targeted not because of the location at which they live but because of their employment or some alleged wrongdoing on their part as a result of which it has become unsafe for them to continue residing in the property. The respondent accepted in this case, however, that it was not possible to say whether the valuer had taken into account the frequency and intensity of stone throwing and other attacks of that kind when considering the appropriate reduction for this interface area as compared to similar houses not on the interface. The respondent further submitted that since the Chief Constable's Certificate did not identify the acts constituting the direct or specific threat or intimidation it did not necessarily follow that it was the history of stone throwing attacks rather than the finding of the bullet which led to the issue of the certificate.

[11] During the hearing before the learned trial judge the appellant submitted that the question which the valuer should have asked was how much would this property be worth in this location if it were not subject to attack based on sectarian hostility to the occupier. The respondent and Notice Party submitted that such an approach could lead to significant anomalies. Where a person resident in an interface area where there was intermittent stone throwing and vandalism of cars was required to move because there had been a specific threat not associated with that activity, the approach of leaving out of account the precipitating factor would mean that the valuation of that person's property would take into account the disturbance associated with the interface area. Such a person, it was claimed, would then suffer a corresponding reduction in value which an applicant in an O'Neill type case would avoid.

[12] Accordingly, the Respondent and Notice Party submitted that the valuer is mandated to ignore the attacks or incidents involving the appellants and/or their family members living with them and any direct or specific threat or intimidation that can be inferred from the various incidents. The valuer, however, is not mandated to ignore the actual location of the property which is an essential and

indispensable element in the requirement that the valuation is as though the sale were in an open market. That is what is required by the words of paragraph 3.1 of the scheme.

The learned trial judge's conclusion

[12] The learned trial judge accepted the respondent's submission. He considered that the purpose of the scheme was to facilitate or assist owner occupiers who are forced to leave their homes in the defined circumstances which create eligibility. The assistance is by means of a state agency acquiring the property as if the sale was a market value sale. It was not the purpose of the scheme to enable a beneficiary of the scheme to achieve value for their dwelling greater than open market value. Any other approach would create the sort of anomalies referred to by the respondent.

[13] He considered that O'Neill must be read in context. It was dealing with how someone might bring themselves within the concept of being directly or specifically threatened or intimidated. It was not a case bearing on the methodology for ascertaining the purchase price. The intention evinced by the scheme was that the purchase price was to be arrived at as if it was an open market sale. That was the approach taken by the valuer. The appellant took issue with the proposition that the objective of the scheme was to arrive at the purchase price as if it was an open market sale since the purpose of the artificial exclusion of adverse security considerations was to arrive at an appropriate figure which did not reflect an open market sale.

Consideration

[14] There is no indication in the Chief Constable's Certificate as to the basis upon which the certificate was issued. It is clear, however, from paragraph [8] of the judgment of this court dealing with the judicial review of the refusal of a Certificate that the initial decision made in 2011 concluded that the appellants had been subjected to direct threats under the O'Neill test. That strongly suggests, therefore, that the frequency and intensity of these attacks was at least part of the material leading to the conclusion that there was a specific or direct threat justifying the issue of the present Certificate.

[15] The purpose of the exclusion of adverse security considerations is plainly to ensure that there is no diminution in the calculated valuation by reason of the factors which led to the home being one in which it was unsafe to live. In an O'Neill case, therefore, it is necessary to exclude from the valuation exercise the occurrence of attacks of such frequency or intensity that they constitute specific or direct threats having that effect. That does not, however, mean that one should exclude the

general features of the location. There is no dispute about the need for the valuer to take into account any defensive architecture, noise or other pollution from roads or the regular occurrence of marches or parades in the vicinity causing disruption to traffic flow, litter and noise. The valuer is also entitled to take into account that this is an area in which vehicles are sometimes vandalised and that from time to time stones are occasionally thrown as long as he leaves out of account such activity at an intensity or frequency that would lead to the premises being unsafe for a person living there. Those matters and other similar features do not, in our view, offend against the intention of the scheme that the matters which caused the applicant to vacate the property must be left out of account. Those factors do, however, properly describe the character of this interface area while excluding the adverse security considerations which led to the application.

[16] We accept that such an approach may give rise to some anomalies but that is almost inevitably a consequence of an artificial approach to the establishment of value in emergency circumstances. Mr Sayers relied on Fadeyeva v Russia (2007) 45 EHRR 10 for the proposition that there was an Article 8 obligation to provide compensation at a level which would enable the appellants to purchase an alternative house of the same type in a different location. We do not accept that submission. Fadeyeva was concerned with the provision of housing for those who were living within an area of pollution. It was not concerned with valuation.

[17] A number of issues developed in the course of the hearing which gave rise to some concern about the valuation exercise in this case. First, it is not at all clear what Mr McCann took into account when he considered what if any reduction he should impose as a result of the interface location of the subject properties. His affidavit indicated that he was aware that, for rating purposes, domestic properties in some interface areas received an allowance of 25% to reflect the adverse nature of their location. He then applied that reduction to these properties. On enquiry it appeared that there had been no rates reduction to either of these properties at any time. There had apparently been some application in relation to a neighbouring property at 104 Mountpottinger Road as a result of which the capital valuation was reduced from £85,000 to £75,000, a reduction of approximately 12%. We do not know anything about the circumstances of that reduction. We acknowledge, however, that it was no part of the appellants' case in this appeal to challenge the 25% reduction applied in this case since the focus of the submission was on whether the valuation exercise was lawfully conducted.

Conclusion

[18] We have concluded that in the absence of adequate reasons we cannot be satisfied that the valuation exercise was lawfully carried out in accordance with the approach set out in this judgment. Mr Dunlop for the NIHE indicated that as a responsible organisation it would ensure that the valuation exercise, which remains open, would be carried out in accordance with the principles set out by the court in the event that the appeal was allowed. In those circumstances there is no Order required from us other than to allow the appeal for the reasons given.