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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

2015/39800/01

Cooley's (Annette) and Rosaleen Cooley's Application [2015] NIQB 110

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

AND IN THE MATTER OF A DECISION BY THE DEPARTMENT OF FINANCE AND PERSONNEL [LAND AND PROPERTY SERVICES AGENCY] MADE ON OR ABOUT 24 OCTOBER 2014

MAGUIRE J

Introduction

[1] This application for judicial review concerns the issue of valuation of properties to be acquired by the Northern Ireland Housing Executive under the Scheme for the Purchase of Evacuated Dwellings, known commonly as the "SPED". Mr Sayers BL appeared for the Applicant; Mr Donal Lunny BL for the Respondent and Mr David Dunlop BL for the Notice Party. The court is grateful to counsel for their well composed written and oral submissions.

[2] It is agreed between the parties that for present purposes the edition of the SPED scheme which is relevant to these proceedings is the 2014 edition. Paragraph 3 deals with the subject of "Purchases of dwellings under SPED" and paragraph 3.1 is the provision which is at the centre of these proceedings. It reads:

> "The purchase price of a house acquired under SPED shall be determined by the Land and Property Services Agency … at a consideration assessed as though the sale were by a willing vendor, in an open market and without adverse security considerations".

[3] The words "assessed as though the sale were by a willing vendor, in an open market" do not in themselves present difficulty but the last clause of the sentence above "without adverse security considerations" gives rise to differing interpretations.

Background

[4] The applicants are mother and daughter. The former had lived at 106 Mountpottinger Road, Belfast whereas the latter had lived at 100 Mountpottinger Road. The area where each had lived may be described as an interface between Loyalist and Nationalist areas within east Belfast.

[5] Because of where their houses were each came under regular attacks on a sectarian basis. The extent of these was reviewed by the Lord Chief Justice in his judgment delivered on 12 February 2014 in the course of earlier litigation concerned with the issue of whether the Chief Constable's decision not to issue them with a certificate for the purpose of the SPED scheme was lawful. It is unnecessary to set out the details here but they can be found at paragraph [2]-[8] of the Lord Chief Justice's judgment (see [2014] NICA 18). The Court of Appeal in those proceedings quashed the Chief Constable's decision and as a result a new decision-making process was undertaken. This eventually led to an acceptance that the applicants qualified for purchase of their houses under the SPED scheme, the Chief Constable later having provided the relevant certification *viz* that it was unsafe for each to continue to live in their houses because each had been directly or specifically threatened or intimidated and as a result each was at risk of serious injury or death.

[6] In the course of argument, the applicants' cases were on all sides referred to as "O'Neill type" cases. This is a reference to the type of case dealt with by Weatherup J (as he then was) in Re O'Neill's Application [2008] NIQB 80. That case had been one in which the applicant had sought to take advantage of the then SPED scheme but had initially failed. The applicant had lived with a partner at an interface area where her house had come under regular attack by stones and petrol bombs thrown by Loyalists. There had been numerous incidents. The eligibility conditions for a Chief Constable's Certificate in that case were said to consist of the following ingredients:

> "(1) It is unsafe for a person to continue to live in the house.
>
> (2) The reason it is unsafe is that the person has been directly or specifically threatened or intimidated.

> (3) That the person is at risk of serious injury or death as a result of the threats or intimidation" (see paragraph [11]).

[7] A key issue in that litigation was whether the pattern of sectarian attacks (which was materially similar to that in the present case) meant that the applicant should be viewed as having been directly threatened or intimidated. On this issue Weatherup J stated:

> "[12] … One aspect of the approach to this ingredient was to examine the available intelligence, but there was no intelligence indicating any direct or specific threat or intimidation. Another aspect of the approach to this ingredient was to examine the nature of the incidents that had occurred in order to determine whether the applicant had been directly or specifically threatened or intimidated. Whilst 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. Whether targeting of that nature is such that it is unsafe for the occupier to continue to live in the house and whether the occupier is at risk of serious injury or death is a matter of judgment for the Chief Constable."

The impugned decision

[8] The impugned decision in this case was taken by Mr Robert McCann of Land and Property Services which is an agency within the Department of Finance and Personnel. Mr McCann is a valuer and it is his valuation of the two dwellings in

question which is challenged. He has filed an affidavit in these proceedings which sets out the way in which he conducted his valuation exercise. In essence, it was as follows:

(1) He inspected each of the dwellings in question.

(2) He sought to locate comparables.

(3) While he was unable to identify any sales of property at the interface, he was able to identify four properties of a comparable nature in a nearby area.

(4) He analysed the sales of these four properties.

(5) He made certain adjustments to the sale prices of each which are not in dispute.

(6) He then valued the subject properties in the light of the values of the comparables.

(7) This produced a figure for 100 Mountpottinger Road of £54,000 and a figure for 106 Mountpottinger Road of £53,000.

(8) He then adjusted these valuations. As the comparables were situated away from the relevant interface in which the subject properties were found, he deducted 25% of each valuation "to reflect the location of the subject properties at an interface". When this was applied it produced valuations of £41,000 for No. 100 and £40,000 for No. 106.

(9) The deduction of 25% was chosen as for rating purposes domestic properties in some interface areas received an allowance of 25% to reflect the adverse nature of their location.

(10) In the process he "disregarded the attack or intimidation that led to each applicant being eligible for the scheme".

[9] The elements in the methodology above which have been controversial are at (9) and (10), especially the 25% deduction because of the houses adverse location at the interface.

The applicants' argument

[10] The applicants' argument is that the methodology of the valuer was not consistent with the requirements of the SPED scheme when it came to determining the purchase price. It is submitted that Mr McCann failed to give effect to the consideration that the assessment was to be conducted as though the sale were

without "adverse security considerations" (as per paragraph 3.1 set out at paragraph [2] above).

[11] The thrust of the applicants' submissions is perhaps expressed most pithily at paragraphs 38 and 39 of the applicant's skeleton argument.

> "38. In the applicant's cases … adverse security considerations (such that the test of direct and specific threat of intimidation is met) are inherent in the location of the properties. An interpretation of the phrase *adverse security considerations* that is incapable of accommodating these matters robs the phrase of its plain meaning.
>
> 39. It is these adverse security considerations – not the location of the applicants' homes – that the assessment requires to disregard."

[12] In accordance with the above, it was 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?"

[13] It seems clear that for the applicants the answer to this question is that the property should be valued leaving out of account its interface position as it is that position which brings with it the attacks based on sectarian hostility. This is argued to be an outworking from the reasoning of Weatherup J in O'Neill which has been quoted above.

The argument of the respondent and notice party

[14] The respondent to the application is the Lands and Property Services Branch of the Department of Finance and Personnel. The notice party is the Northern Ireland Housing Executive. For present purposes their arguments are similar, if not the same.

[15] What they say is that the valuer is mandated by the words of paragraph 3.1 ("without adverse security considerations") to ignore the attacks or incidents involving the applicants and/or their family members living with them and any direct or specific threat or intimidation that can be inferred from the various incidents. Accordingly they are left out of account. 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 be "as though the sale were … in an open market" (*per* paragraph 3.1).

[16] The respondent and the notice party go on to argue that if the applicants' interpretation was to be accepted by the court this would lead to anomalous results.

[17] It is said that if the respondent had to disregard "adverse security considerations" affecting the value of a house, the anomalous effect would be that a person living at or near a sectarian interface who had been targeted for reasons entirely unrelated to the location (for example, a written death threat by dissident republican terrorists because he worked as a prison officer) would have his house valued as if it was not at or near a sectarian interface, even though the targeting of him had nothing whatever to do with the interface.

[18] Alternatively, if the respondent must disregard the actual location of the house at a sectarian interface provided the threat or intimation was of the O'Neill type, such an interpretation could lead to very different valuations of identical properties in the same location at the same valuation date, depending on the nature of the threat levelled against the respective owner-occupiers. For example, the threatened prison officer would receive a valuation which reflected the actual location of the house (the said location having played no part in the threat or intimidation against him) whereas an O'Neill applicant would receive a valuation which ignored the actual location of the house.

[19] Another such anomaly, it was argued, would occur as between an O'Neill applicant and a non-applicant neighbour who places his/her house on the open market at the same time. In the former case, location would be discounted whereas in the latter, if the applicant's argument is right, location would be taken into account. In effect, the O'Neill applicant would be the recipient of a windfall as he or she would be paid a figure which is in excess of open market value for a house in this location.

[20] A still further example, it was argued, would arise in a case where the party granted the SPED facility had only recently acquired the property on an open market sale. That purchase would have taken account of location as an element within the price but on a later SPED valuation, if was an O'Neill type case, if the applicants' argument is correct, location would be left out of account.

[21] The respondent and notice parties submit that such anomalies support their narrower approach to the meaning to be given to "without adverse security considerations". Their meaning, it is argued, can be applied without bringing about such anomalous results.

Assessment

[22] The court is of the view that the correct interpretation of paragraph 3.1 of the scheme is that put forward by the respondent and the notice party. Accordingly it is proper for the valuer to determine the purchase price on the basis that:

(i) There is an assumption that the sale is by a willing vendor;

(ii) The sale is to proceed as an open market sale; and

(iii) Adverse security considerations are to be discounted but these considerations are concerned with the direct or specific attacks or intimidation or threats which have rendered the applicant at risk of serious injury or death and which has rendered the continued occupation of her house unsafe. They do not stretch to exclude from consideration the location of the house at the relevant interface.

[23] The court reaches the above conclusion for the following reasons:

(i) It seems to the court that it must read the scheme as a whole having in mind its purpose.

(ii) The purpose of the scheme is to facilitate or assist owner occupiers who are forced to leave their homes in the defined circumstances which create eligibility. The assistance given is by means of a state agency acquiring the property as if the sale was a market value sale. The court does not believe that it was any part of the purpose of the scheme to enable a beneficiary of the scheme to achieve a value for their dwelling greater than open market value.

(iii) The court accepts that if the applicants' submissions are correct it would create the sort of anomalies referred to by the respondent and notice party discussed above. This suggests to the court that the applicants' interpretation is incorrect.

(iv) When one interprets the scheme as a whole, it is not difficult to link the finishing words of paragraph 3.1 to the particular acts of violence, threats and acts of intimidation referred to at paragraph 1.1 and the concluding words of paragraph 2.2 ("directly threatened or intimidated").

(v) Weatherup J's judgment in O'Neill, it seems to the court, must be read in its context. That context was how a person may be able to bring themselves within the concept of directly or specifically threatened or intimidated. His conclusion simply was that in certain circumstances (involving sectarian targeting at an interface) such targeting will be capable of being "direct or specific threat or intimidation of the occupier". This was a broad approach to eligibility under the scheme. It was not a conclusion about how the methodology of ascertaining the purchase price would be arrived at.

(vi) In the court's view, there is strength in the argument that to read the final words of paragraph 3.1 in the manner suggested by the applicant would undermine the intention evinced by the preceding part of paragraph 3.1 *viz* that the purchase price was to be arrived at as if it was an open market sale. It seems to the court that the removal or dilution of the concept of location would have this effect, as Mr Halliday, an experienced valuer, notes at paragraph 13 of his affidavit.

(vii) The court sees no injustice or unfairness in it taking this approach whereas there would be potential injustice and/or unfairness in at least some cases if it accepted the applicants' arguments.

Conclusions

[24] The court is unable to discern any illegality in the approach which has been taken in this case. It will therefore dismiss this application for judicial review.