LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL COMPENSATION ACT (NORTHERN IRELAND) 1964

PLANNING BLIGHT (COMPENSATION) (NORTHERN IRELAND) ORDER 1981

IN THE MATTER OF REFERENCES

R/21/2011, R/22/2011 & R/23/2011

BETWEEN

THOMAS O'NEILL & BARRY O'NEILL - CLAIMANTS

AND

DEPARTMENT FOR REGIONAL DEVELOPMENT – RESPONDENT

Re: 101, 103, 103C & 105 FOREGLEN ROAD, CLAUDY, CO LONDONDERRY

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

Background

1. The claimants, Thomas and Barry O'Neill are the owners of a complex of buildings and land at 101-105 Foreglen Road, Claudy, Co Londonderry. The complex includes a petrol filling station, forecourt shop, licensed restaurant, tyre and exhaust depot, other commercial units and dwelling house, and is located on the main Dungiven to Londonderry road. The properties lie within the line of the proposed A6 Londonderry to Dungiven Dualling Scheme and are scheduled for vesting by the Respondent.

2. In December 2005 the then Secretary of State announced that the A6 trunk road from Dungiven to Londonderry would be taken forward as a road dualling project to further the Regional Transport Strategy for Northern Ireland 2015. On 3rd July 2007 the Department for Regional Development ("the Department") announced that a preferred corridor had been established and a series of information events were held. On 24th April 2009 the Department advertised that they had selected a proposed route. It is common case that this proposed route will "wipe out" the subject properties.

3. The Planning Blight (Compensation) (Northern Ireland) Order 1981 provides that, in certain circumstances, persons whose property is affected by a scheme, may serve on an appropriate authority, such as this Department, a blight notice requiring it to purchase their interest. In order to succeed the owners must demonstrate that they have made reasonable endeavours to sell the property and that in consequence of the proposed scheme, they have been unable to sell that interest except at a price substantially lower than that for which it might reasonably have been expected to sell if there were no scheme.

4. In February 2010 an agent was instructed to market the subject complex of properties but was unsuccessful in his attempts to find a purchaser and in February 2011 they served blight notices on the Department in respect of 4 qualifying properties in the complex:
    - dwelling house at 101 Foreglen Road with a rateable capital value of £100,000.
    - a shop and petrol filling station at 103 Foreglen Road with a net annual value of £14,200.
    - a tyre and exhaust centre together with car sales area at 103C Foreglen Road. This property has a net annual value of £2,500.
    - a licensed restaurant and motel site at 105 Foreglen Road. This property has a net annual value of £7,050.

    The O'Neills claimed that they had made reasonable endeavours to sell their interests and in consequence of the proposed scheme they had been unable to do so. In April 2011 the Department served counter-notices objecting to the blight notices and in May 2011 the O'Neills referred the matter to the Lands Tribunal.

Procedural Matters

5. William Orbinson QC and Patrick Good QC appeared for the claimants instructed by Kelly & Corr, Solicitors. Donal Lunny BL appeared for the respondent instructed by the Departmental Solicitor's Office. The Tribunal received:
    - written and oral evidence from Mr Thomas Donaghy, an experienced auctioneer and valuer.
    - written and oral expert evidence from Mr Kenneth Crothers and Mrs Michelle Henry, both experienced chartered valuation surveyors.

Positions of the Parties

6. Mr Lunny submitted that the marketing exercise undertaken by Mr Thomas Donaghy on behalf of the O'Neills did not satisfy the conditions of Articles 5(1)(b) and (c) of the Order in that it failed to properly market each individual unit which was the subject of a blight notice.

7. Mr Orbinson's position was that the marketing of the properties in "one or more lots" without being prescriptive was both appropriate and conventional for this type of property. It was prudent to preserve and display a flexible approach to the means of sale in order not to exclude any potential purchaser. Issues of precise division of lots and required appurtenant rights should necessarily be left to the pre-contract stage of negotiations.

Statutory Framework

8. The relevant sections of the Order are:

"4(1) An interest in land qualifies for protection under this Order if, on the date of service of a blight notice in respect thereof, the interest:-

(a) is that of an owner occupier; or

(b) is that of an owner-occupier;

(i) in an agricultural unit or part thereof; or

(ii) in a hereditament if either of the following sub-paragraphs applies:-

(aa) the net annual value of the land does not exceed £19,685; or

(bb) the capital value of the hereditament does not exceed £2,100,000.

….

5(1) Where the whole or part of a hereditament or agricultural unit is comprised in land of any of the specified descriptions and a person claims that:

(a) he is entitled to an interest in that hereditament or agricultural unit which qualifies for protection under this Order, and

(b) he has made reasonable endeavour to sell that interest, and

(c) in consequence of the fact that the hereditament or unit or part of it was, or was likely to be, comprised in land of any of the specified descriptions, he has been unable to sell that interest except at a price substantially lower than that for which it might reasonably have been expected to sell if no part of the hereditament or unit were, or were likely to be, comprised in such land,

he may serve on the appropriate authority a blight notice in the prescribed form requiring that authority to purchase that interest to the extent specified in, and otherwise in accordance with, this Order."

9. The respondent is entitled to rely on the following grounds in seeking to reject the applicants' claims by virtue of Articles 6(2)(e) and (f) of the Order.

"6(1) Where a blight notice has been served under this Order, the appropriate authority may, within two months from the date of service of that notice, serve on the claimant a counter-notice in the prescribed form objecting to the notice.

(2) The grounds on which objection may be made in a counter-notice to a blight notice are:-

….

(e) that (for reasons specified in the counter-notice) the interest of the claimant does not qualify for protection under this Order;

(f) that the conditions in Article 5(1)(b) and (c) are not fulfilled;"

10. The burden of establishing compliance with Articles 5(1)(b) and (c) rests with the claimant by virtue of Article 7:-

> *"7(1) Where a counter-notice has been served objecting to a blight notice, the claimant may, within two months of the date of service of the counter-notice, refer the objection to the Lands Tribunal.*
>
> *(2) On any such reference, if the objection is not withdrawn, the Lands Tribunal shall consider the matters set out in the blight notice served by the claimant and the grounds of objection specified in the counter-notice; and, subject to paragraph (3), unless it is shown to the satisfaction of the Tribunal that the objection is not well founded, the Tribunal shall uphold the objection.*
>
> *(3) An objection on the ground mentioned in Article 6(2)(b), (c) or (g) shall not be upheld unless it is shown to the satisfaction of the Tribunal that the objection is well founded."*

11. The onus therefore is on the claimant [Article 7(2)] to demonstrate that he has made reasonable endeavours to sell [Article 5(1)(b)] and that in consequence of the proposed scheme, they have been unable to sell their interest except at a price substantially lower than that for which it might reasonably have been expected to sell if there were no scheme [Article 5(1)(c)].

12. In each of the counter-notices the respondent had objected on the grounds of Articles 5(1)(b) and (c). In respect of 105 Foreglen Road (the restaurant) the respondent had also objected on the grounds that the interest of the claimants were not that of an "owner-occupier" [Article 4]. This ground for objection was, however, withdrawn prior to hearing.

Claimants Case

13. Mr Thomas Donaghy gave factual evidence as to the marketing of the subject properties:

- marketing commenced in February 2010.
- notification of the pending sale was spread by "word of mouth".
- a map outlining the extent of the proposed road scheme was obtained from the DRD consultants.
- a 'for sale' board was erected on site (and is still erected to date).
- advertisements were placed in the local Derry Journal and the national Belfast Telegraph newspapers.

- a brochure was produced.
- an article about the sale also appeared in the local newspaper, the Derry Post.

14. All of these marketing tools offered the subject complex of properties for sale "in one or more lots" equally and listed each type of property:-

    - "Petrol Service Station"
    - "Forecourt Shop"
    - "Licensed Restaurant"
    - "Tyre and Exhaust Depot"
    - "Commercial Units"
    - "Dwelling House"

15. No method of "lotting" was proposed, however and nothing was produced by way of plans or drawings to indicate how the properties may be separated in lots and conveyed upon sale. No individual asking prices were allocated.

16. Mr Donaghy testified that he did not divide up the site at marketing stage as he felt it was better not to be prescriptive. He felt it was more prudent to let the market decide what it wanted in regard to individual lots. Access, services etc could have been engineered when market requirements were known.

17. The marketing generated some 20 initial enquiries, all of whom were interested in purchasing the entire complex of properties as one holding. Eighteen of those prospective purchasers subsequently enquired as to the reasons behind the claimants' sale of the properties and when advised of the pending roads scheme they withdrew their interest.

18. Mr Kenneth Crothers, an experienced chartered surveyor, was instructed as an expert witness on behalf of the claimants to comment on the marketing of the properties under consideration and to consider the grounds of the respondent's objectives to the blight applications that take issue with the claimants compliance with Article 5(1)(b) and (c). Mr Crothers had no previous involvement in the case, including the marketing.

19. In making an assessment of whether there had been reasonable endeavours to sell an interest in the subject properties he considered it essential to have regard to the context of the

proposed sale. In the subject case the sale of the properties was promoted against the backdrop of the A6 Scheme. This scheme affected the entirety of the subject properties and indeed would "obliterate" them in due course. Mr Crothers contended that severe degree of affection would have a bearing on the effects and costs to be reasonably expended upon marketing the properties.

20. In that context Mr Crothers considered that the marketing of the properties had been adequate and served its purpose. Having due regard to the nature of the property and its various components he felt the "non-lotting" approach was neither surprising or unreasonable. He felt it was prudent to preserve and display a flexible approach to the means of sale, so as to avoid excluding any potential purchaser. In his opinion it was right for the vendors to be open minded and retain their agility to react to whatever the market may demand. He considered it would have been imprudent to pre-judge the market and legislate, by way of mapping and so on, for the various ways of lotting the site. To do so would have incurred unnecessary costs, at least some of which were bound to be abortive.

21. Mr Crothers considered that it was a measure of the effectiveness of the marketing that in the order of 22 enquiries in total were generated. It was clear to him beyond doubt that it was due to the effect of the A6 Scheme that prospective purchasers declined to bid. He felt that any attempt to sell the properties was bound for failure and any marketing was clearly destined to be a hopeless exercise as the properties were so critically affected by the scheme that they could be sold for only a small fraction of what would be reasonably expected in the "no scheme" world.

22. He concluded that in his opinion the claimants had met the requirements of Article 5(1)(b) and (c) in that they had made reasonable endeavours to sell and that the properties could not be sold at any price as they were totally blighted by the scheme.

Respondent's Case

23. Mrs Michelle Henry, an experienced chartered surveyor from Land and Property Services gave expert evidence on behalf of the respondent. At the outset she agreed the marketing of the complex as one unit was not in question, rather it was the failure of the marketing to address the individual hereditaments which was in question. Blight notices were served for each of the 4 separate properties and Article 5 of the legislation refers to "a hereditament". Sale brochures did not have asking prices for each hereditament, did not show the extent of each and there was no evidence of how shared access, services or common areas would

interact. On that basis she felt it was impossible to say if reasonable endeavours to sell each hereditament had been made.

24. Mrs Henry felt it would not have been difficult to include separate asking prices, lotting, interaction of the units at marketing stage and this would have allowed the respondent to make a proper consideration as to whether the conditions of Article 5(1)(b) and (c) had been fulfilled in respect of each individual hereditament. In the absence of the above the respondent had objected to the claimants' blight notices.

25. Mrs Henry went on to suggest that due to the layout of the site and having only one access the properties were unsaleable in separate lots in any case.

Decision

26. The Tribunal must be satisfied that reasonable endeavours have been made to sell each relevant interest and that in consequence of the proposed scheme, they have been unable to sell that interest at a price substantially lower than that for which it might reasonably have been expected to sell if there were no scheme.

Have the claimants made reasonable endeavours to sell each relevant interest? [Article 5(1)(b)]:

27. The 1981 Order does not specify what constitutes reasonable endeavours and it is a question of fact and degree in each case.

28. The Tribunal was directed to two previous Lands Tribunal decisions:

> Churches' Youth Welfare Council v Department of the Environment for Northern Ireland (R/9/1977) "There may be cases where the circumstances are such that not much evidence is required to show that reasonable endeavours to sell the relevant interest have been made, and that its value has been substantially reduced within the sense of section 3(1)(b) and (c)…"

And

> Jeffers v Department of the Environment for Northern Ireland (R/7/1977) "The opinion of the Tribunal on this closely argued issue is that the condition in section 3(1)(b) is not a formality, and must be observed so as to qualify an applicant to serve a section 3 notice in respect of his blighted property. But blight is a matter of degree, and in extreme cases, especially where the date for compulsorily vesting is close at hand, and the surrounding

district is already showing large areas cleared for redevelopment, it may become obvious that the price will be gravely depreciated and even then the question for a possible purchaser is whether he can occupy long enough to recover his outlay …"

The references to section 3(1)(b) and (c) are the equivalent provisions of the Planning and Land Compensation Act (Northern Ireland) 1971 to the current Article 5(1)(b) and (c).

Also

In Rhodia International Holdings Ltd v Huntsman International LLC (2007) EWHC 292. Mr Justice Flaux QC concluded that the qualification of reasonable endeavour only required the performing party to take one reasonable course not all of those courses available.

29. In the subject case the claimants put the sale of the properties in the hands of a prominent local estate agent. The steps undertaken by the agent included the publication of a brochure, advertisement in the Belfast Telegraph and Derry Journal which attracted publication of an article in the Derry Post, the erection and maintenance of a sale board adjacent to the busy Foreglen Road. In each of the above marketing tools the agent clearly stated that the properties were for sale "in one or more lots" equally and further identified the separate interests within the complex:- "petrol service station, forecourt shop, licensed restaurant, tyre and exhaust depot, commercial units, dwelling house".

30. The respondent did not contend that it was unreasonable for the claimants to offer the entire complex to the market in one or more lots and that may well have been a commercially sound decision. The respondent did contend however, that the conditions of Article 5(1)(b) and (c) had not been satisfied. In respect of the 4 hereditaments subject to the blight notices the respondent considered there was a complete failure by the claimants to identify the physical extent of each property and how each would interact with other hereditaments on the site particularly in regard to access, sewers and car parking.

31. Mr Kenneth Crothers, a surveyor with extensive experience in the commercial property market testified that in his opinion it was prudent to preserve and display a flexible approach to marketing so as to avoid excluding any potential purchaser of the whole or parts of the complex. It was right for the vendors to be open-minded and to retain their agility to react to whatever the market may demand. He was sure that it would have been imprudent to pre-judge the market and legislate, by way of mapping and so on, for the various ways of lotting the site. To do so would have incurred unnecessary costs, at least some of which were bound to be abortive. Better to leave it until the need for lotting arose. Even though the marketing generated 22 interested parties no enquirer expressed interest in any part as a separate entity.

32. The Tribunal is satisfied that reasonable endeavours had been made to sell the 4 hereditaments subject to the blight notices and these endeavours satisfied the conditions of Article 5(1)(b) of the Order. The properties were offered for sale in "one or more lots" and the marketing clearly listed the separate elements within the complex. The Tribunal agrees with Mr Crothers that it was better to leave "lotting" to market demand and there was a risk that being prescriptive could put off potential purchasers. Indeed the Tribunal concludes that the properties were so blighted by the pending road scheme that no amount of marketing would have generated a sale and the marketing by the agent was entirely reasonable in the circumstances.

33. The respondent did suggest that due to the layout of the site and having only one access, the properties could not be sold in separate lots regardless of the scheme. The Tribunal does not agree and concurs with Mr Crothers that access and services etc to each lot could have been engineered when market demand was known. Indeed the District Valuer had valued all the elements within the site as separate hereditaments and he must therefore have concluded that each part was "capable of separate occupation" [Article 38(3) of the Rates (Northern Ireland) Order 1977]. Mrs Henry did not provide details of what the District Valuer considered to be the extent of each hereditament and how he considered each lot to be "capable of separate occupation".

Sale at less than what would have been expected if there were no scheme [Article 5(1)(c)]:

34. Mrs Henry, expert for the Department, agreed that due to the pending scheme interest would have been minimal, although she considered there may have been some interest. The Tribunal does not agree. The marketing generated some 22 enquiries none of which retained interest upon being advised of the pending scheme which would "obliterate" the complex. The Tribunal agrees with Mr Crothers, the fact that these enquiries came to nothing is clear evidence that the properties could not be sold at any price as a consequence of the effect of the pending A6 scheme upon the properties.

35. Accordingly it is the Tribunal's conclusion that the claimants have met the conditions of Article 5(1)(b) and (c) of the Order. The objections in the counter-notices are not upheld and the blight notices of the 11th February are declared to be valid.

ORDERS ACCORDINGLY

22nd January 2013 **Henry M Spence MRICS Dip.Rating IRRV (Hons)**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Claimants: William Orbinson QC and Patrick Good QC instructed by Kelly & Corr, solicitors.

Respondent: Donal Lunny BL instructed by the Departmental Solicitor's Office.