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 A REFERENCE

R/22/2017

BETWEEN

FRANCIS O'HARE – APPLICANT

AND

ROGER HALL AND JOSEPH HALL AS TRUSTEES OF THE HALL ESTATE - RESPONDENTS

Re: 1 Alexander Drive, Warrenpoint

PART 2 - COSTS

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

Background

1. The lands ("the reference lands") which incorporated 1 Alexander Drive, Warrenpoint ("the reference property") were subject to a covenant which required the lessees to seek the approval of the lessors if they intended to carry out building works on the reference lands. The reference lands have been developed over a period of some 20 years and it was accepted that plans etc. for the construction of the reference property had not been submitted to the lessors, as required under the covenant.

2. Mr Francis O'Hare ("the applicant") was the current lessee of the reference lands and he had constructed a pair of semi-detached houses, including the reference property, on 16th April 2014, without the consent of the lessors. The semi-detached houses had been "sold on" but it was a condition of sale of the reference property that an application would be made to the Lands Tribunal under the Property (Northern Ireland) Order 1978 ("the Order") seeking extinguishment or modification of the covenant restricting development.

3. At the start of the hearing the Hall Estate ("the respondents") had raised an issue concerning the "locus standi" of the applicant to bring the reference to the Lands Tribunal, as they considered him not to be an "interested party" as required under the Order.

4. The issues, therefore, to be decided by the Tribunal at the substantive hearing were:

   (i) The "locus standi" of the applicant.

   (ii) Should the Tribunal grant extinguishment or modification of the covenant?

   (iii) If so, what was the amount of compensation, if any, to be paid to the respondents?

5. The Tribunal decided:

   (i) The applicant had a sufficient "interest" in the sale of the reference property to bring the reference to the Tribunal.

   (ii) The impediment was unreasonable and granted modification of the covenant to allow for development of the reference property in accordance with the planning permission.

   (iii) No award of compensation was warranted.

6. The applicant, as the "winner", now seeks his costs in the reference.

Procedural Matters

7. The parties had agreed to deal with the issue of costs by way of written submissions. Mr Mark Orr QC provided a submission on behalf of the applicant. Mr Michael Lavery BL provided submissions on behalf of the respondents. The Tribunal is grateful to the legal representatives for their helpful submissions.

The Statute

8. Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") provides:

"Costs

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

9. In Oxfam v Earl & Ors (1995) BT/3/1995 the Tribunal clarified how it should exercise its discretion (at page 8):

> "The Tribunal must exercise that discretion judicially and the starting point on the question of costs is the general prescription that, unless there were special circumstances, costs follow the event, i.e. that in the ordinary way the successful party should receive its costs."

Discussion

The Applicant's Submissions

10. The applicant relied on the general rule that a successful party, the applicant in the subject reference, was entitled to his costs.

11. In addition to reliance on the general rule the applicant also relied on the following facts:

    (i) The Tribunal made no award of compensation to the respondent.

    (ii) The interest of the respondent was purely commercial. For example, this was not a matter in which the Tribunal had to consider loss of amenity to a residential property.

(iii) The Tribunal identified no public or third party interest in the subject matter of the reference.

The Respondents' Submissions

12. The respondents submitted that the Tribunal should have regard to the following facts:

(i) The applicant was no longer the registered owner of the property but rather the new purchasers were recorded as the registered owners and the application was effectively brought on their behalf.

(ii) The applicant, whether he had locus standi or not, did not engage with the process which effectively amounted to an application brought by his solicitors to mitigate losses in any potential claim against them.

(iii) Costs were always going to be incurred by the applicant, even if there were no objections, on the basis that the purchasers were insisting on extinguishment of the covenant and an application was always going to be necessary.

(iv) In considering the issue of costs the Tribunal should have regard to what was acknowledged in the judgement, that the applicant did not come with clean lands in so far as the houses should not have been built without the consent of the respondent. It was also accepted that the applicant had obtained his planning permission on an application which wrongly stated he held the freehold and thus the interest of the respondents was not disclosed and they had therefore no notification from the Planning Office of the application nor were they given an opportunity to object. The applicant's actions in this respect, which were accepted by his legal team, denied the respondent an opportunity to have any say in the planning application.

(v) The commercial interest of the respondent should be an immaterial consideration on the issue of costs, as should the fact that the Tribunal did not identify any public or third party interest in the reference.

(vi) In the event that the Tribunal is minded to award the applicant his costs, it was submitted that no costs should fall in respect of the applicant's expert, as she did

not submit any evidence on the Article 5(5) issues which the Tribunal agreed would have been relevant.

(vii) The first instance in which the reference was listed for a substantial hearing the applicant was represented by Mr Sullivan BL who applied on the morning of the hearing, with the respondents' witnesses and legal team present, to adjourn the case because neither he nor the applicant's expert were able to obtain instructions from the applicant and the Tribunal reserved on the issue of costs. The costs thrown away on this aborted hearing should be wholly set off against any costs which the Tribunal might be minded to hold that the respondents should have to bear.

(viii) The applicant also failed to provide discovery of his title or locus standi until very late in the proceedings and indeed such details were not ascertained until the resuming of the hearing and the giving of evidence. The very late availability of discovery by the applicant did not permit the respondent, therefore, the chance to properly consider the request/application for modification of the covenant and they had no choice to resist it with the lack of all such detail.

13. In conclusion Mr Lavery BL submitted that in the circumstances of the subject reference the appropriate decision should be no order as to costs otherwise it would be an unjust enrichment to the applicant for deliberate acts to proceed to build the houses in the knowledge, actual or imputed, that such was in direct breach of the covenants under the lease. He submitted this was especially relevant as given a number of years earlier a modification in the lease was made between the respondent and the then lessee, to allow the further buildings to be made, subject to an increase in ground rent and new terms being agreed between the parties.

Further Submissions

14. The Tribunal received further submissions on costs on behalf of the respondents in which they alleged that Mr Francis O'Hare was not the instructing client at the date of the hearing and on that basis costs could not be recovered from the respondents as they were not the personal costs of the applicant who could not have suffered any loss in such circumstances.

15. The Tribunal sought clarification from the applicant's now solicitor, Mr Kevin Neary who responded:

> "I have met with Francis O'Hare in person having sent him a copy of your (the Tribunal's) email and discussed its contents with him.
>
> I am instructed to confirm as follows:
>
> 1. Mr O'Hare was aware of the proceedings from the outset. In fact it was the fact that Mr O'Hare refused to accept the demand of £12,000 made by the Hall Estate that necessitated the proceedings. In fact there was a retention on a house sale of £5,000 that could not be released until the Tribunal had reached its determination and this was made with Mr O'Hare's knowledge and agreement.
>
> 2. Mr O'Hare was aware that there could be costs due arising from the proceedings in this matter in the event that the proceedings were unsuccessful. He has confirmed our instructions to seek those costs from the Hall Estate as it was their conduct that necessitated the proceedings.
>
> 3. Costs should follow the event as in the normal course of all proceedings in front of this Tribunal."

16. The Tribunal accepts Mr Neary's confirmation that the applicant was fully involved in the proceedings from the outset and also that he was fully aware that he could be liable for costs of the proceedings.

Conclusion

17. It was accepted that the applicant was the "winner" in the subject reference and as such he should be awarded his costs. As outlined in Oxfam v Earl, however, were there any additional special circumstances that the Tribunal was required to take into consideration in awarding costs?

18. The Tribunal finds the following factors to be relevant:

(i) The applicant failed to submit plans to the respondents as required under the covenants in the 1961 lease and he proceeded to construct the reference property without the permission of the respondents.

(ii) He had mislead the planning authorities by advising them that his title to the building lands was freehold. This denied the respondents an opportunity to comment on the planning proposals.

(iii) The applicant's expert did not provide any submissions on the Article 5(5) issues which were critical to the outcome of the reference.

(iv) The initial hearing was aborted on the morning of the hearing, due to the fact that the applicant's legal representatives and expert were unable to obtain instructions from him.

Award of Costs

19. Despite being the "winner" in the final outcome of the reference, the Tribunal is in no doubt that the applicant added significantly to the costs of the proceedings and in these circumstances, therefore, the Tribunal directs that each party should bear its own costs.

15th September 2021 **Henry Spence MRICS Dip.Rating IRRV (Hons)**

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