LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

IN THE MATTER OF A REFERENCE

R/28/2014

BETWEEN

LESLIE CLARKE KILLEN – CLAIMANT

AND

DEPARTMENT FOR INFRASTRUCTURE

(PREVIOUSLY TITLED THE DEPARTMENT FOR REGIONAL DEVELOPMENT) – RESPONDENT

Re: Lands of Campsie comprised in Folio 3790 County Londonderry

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

Background

1. Leslie Clarke Killen ("the claimant") is the owner of lands at Campsie comprised in Folio 3790 County Londonderry. Two portions of those lands, comprising 0.382 hectares and 0.36 hectares ("the vested lands"), were vested by the Department for Regional Development (now the Department for Infrastructure) ("the respondent") to facilitate realignment of a local road, known as the Cloghole Road and for accommodation works associated with the realignment. The operative date of vesting was 26th March 2009 ("the valuation date") and it was well established law that this was the correct date for the assessment of compensation.

2. The following compensation for the vested lands had been agreed in principle prior to hearing:

    a) £15,300 for the lands taken

    b) £9,000 for severance

    c) £2,000 for the claimant's time.

The remaining issue in dispute between the parties was one of alleged injurious affection to the portion of Folio 3790 which had been retained by the claimant ("the retained lands").

3. The claimant's request for compensation due to injurious affection to the retained lands was based on the following:

    a) Some 10 acres of lands which were owned by a developer ("the development lands"), Mr McGinnis, were located within the area plan development limit at Campsie and were therefore suitable for residential development. Any development of these lands, however, would require access from the Cloghole Road, which Mr McGinnis did not have.

    b) A roadway through a section of the claimant's retained lands was, in principle, one of the access options for the development lands. The claimant therefore considered that his retained lands were the key to opening up the development lands and as such the retained lands had an enhanced value over and above their value as agricultural lands.

    c) The creation of the new section of road, however, as part of the scheme, had provided the development lands with an enhanced frontage on to the Cloghole Road. There was therefore no longer any need for access through the retained lands and the claimant considered that he was entitled to recover the loss of enhanced value as compensation for injurious affection.

Procedural Matters

4. Mr Dessie Hutton BL, instructed by Mr Kevin Downey, Solicitor of Downey Property Services represented the claimant. The respondent was represented by Mr Andrew Brown BL, instructed by the Departmental Solicitor's Office.

5. Mr Eoin Doherty provided expert valuation evidence on behalf of the claimant and Mr Stephen Halliday provided expert valuation evidence on behalf of the respondent. Mr Doherty and Mr Halliday are experienced chartered surveyors.

6. Planning and Roads expert evidence was provided by Mr Brendan Carey on behalf of the claimant and by Mr Liam Canny on behalf of the respondent.

7. The Tribunal is grateful to all of the representatives for their helpful submissions and for their efforts to reach agreement on the main issues of dispute, prior to and during the hearing.

8. The claimant presented written and oral evidence on his own behalf and Mr Daniel McAteer gave evidence relating to his experience of development appraisals in the Londonderry locality.

Position of the Parties

9. The claimant's claim to compensation for injurious affection to the retained lands had been assessed by Mr Doherty at £401,666.

10. Mr Halliday acknowledged that a key to the release of development potential existed on the retained lands prior to the scheme. He considered, however, that the economic realities at the valuation date in 2009 were such that the development scheme, upon which any key value would depend, would not have progressed due to the severe economic circumstances at that time. It was his opinion, therefore, that there was no injurious affection to the retained lands at the valuation date.

The Law

11. The rules for assessing compensation in respect of compulsory acquisition of land are contained in the Land Compensation (Northern Ireland) Order 1982. Articles 6 and 8 are of particular relevance and they provide:

> "6(2) In assessing compensation to be paid in respect of the compulsory acquisition of any land no account shall be taken ….(b) of any increase or diminution in the value of the land which is attributable to the carrying out, or the prospect of the carrying out, of so much of any development on the land or on other land which has been, or is being or is

proposed to be acquired (whether compulsorily or otherwise) for the purposes of the same scheme or project of development for which the land is being or has been acquired, as would not have been likely to have been, or to be, carried out if the acquiring authority had not acquired or did not propose to acquire that land or that other land; ”

And

“8(1) In assessing compensation to be paid to any person in respect of the compulsory acquisition of any land, regard shall be had not only to the value of the land acquired but also to the damage, if any, sustained or which may be sustained by that person by reason of the severing of the land from other lands of that person held with that land, or otherwise injuriously affecting such other lands by the exercise of powers conferred on the acquiring authority by any transferred provision.

(2) Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation payable under paragraph (1) for injurious affecting of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him.

(3) Where for the purpose of assessing the amount of any compensation to be paid under this Article the value of any land is required to be determined, that value shall, except in so far as any transferred provision (whether passed before or made after the making of this Order) otherwise provides, be determined in accordance with rules (2) to (4) of Article 6.”

Authorities

12. The Tribunal was referred to the following authorities:

- Inland Revenue Commissioners v Clay; Inland Revenue Commissioners v Buchanan [1914-15] All ER Rep 882
- Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam [1939] 2 All ER 317

- Pointe Gourde Quarrying and Transport v Sub-Intendent of Crown Lands [1947] AC 565
- Stokes v Cambridge Corporation (1962) 13 P&CR 77
- Ozanne v Hertfordshire County Council [1988] 2 EGLR 213
- Batchelor v Kent [1992] 1 EGLR 217
- Wards Construction (Medway) Ltd v Barclays Bank [1994] 2 EGLR 32
- Waters & Others v Welsh Development Agency [2004] 2 EGLR 103
- Snook & Others v Somerset County Council [2005] 1 EGLR 147
- Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd [2007] 1 WLR 2167

13. The Tribunal was also referred to the following texts:

    a) Mr John Furber QC, "Stokes v Cambridge: What Does It Say? How Does It Help?"

    b) Farm Estates Limited Online "Ransom Payments Information Pack"

Discussion

14. In order to assess the correct amount of compensation payable to the claimant (if any) the Tribunal finds that the following issues require detailed consideration:

    a) The Roads and Planning Evidence

    b) The Claimant's Evidence

    c) The Evidence of the Valuation Experts

    d) The Developers Profit

    e) The Other Key Landowners

(i) Roads and Planning Evidence

15. In their original submissions the roads/planning experts had identified two possible access options for the development lands, options A & B.

16. During the hearing the experts reached significant agreement:

    a) Planning permission for option B would be granted and this is the option that would have been progressed.

    b) No footpath would be required under option B.

    c) Total cost of the road works to create access to the development lands under option B would be £103,000 to include:

        - the costs of demolition of 10 Cloghole Road;
        - the costs of demolition of "Sherrards" shed;
        - the construction of the access road; and
        - associated accommodation works.

17. Option B would require the acquisition of part of the claimant's retained lands, lands to the front of 5, 7 Cloghole Road and 71 Clooney Road and lands to the rere of 16, 18 and 20 Cloghole Road. The lands to the rere of 16, 18 and 20 Cloghole Road were all in the ownership of a Mr Sherrard and the proposal would require the demolition of an agricultural shed from which Mr Sherrard ran a business, known as "Emerald Lawns". The proposed access would also require the acquisition and demolition of the dwelling house at No. 10 Cloghole Road.

18. Mr Carey gave evidence that, in his opinion, the proposed new access road would provide "betterment" for the properties at 5 and 7 Cloghole Road and 71 Clooney Road, as it would improve their visibility splays, all of which were substandard. He agreed, however, that the

extent of improvements would not bring the visibility splays up to todays standard but he still considered that there would be significant improvement.

19. Mr Hutton BL submitted that this "betterment" needed to be taken into account in any assessment of compensation. The claimant, however, did not provide any market evidence to substantiate his claim that there would be an increase in the market value of the properties due to increased visibility. The Tribunal also notes that, as submitted by Mr Canny, numbers 2, 4, 5, 7, 9, 12 and 14 Cloghole Road had objected to the McGinnis planning application, A/2003/060/0, on the basis that they would lose frontage to their properties. These objectors therefore did not consider "betterment" to be of any significance. The Tribunal therefore considers that any betterment to Nos. 5 and 7 Cloghole Road and 71 Clooney Road due to increased visibility, would be insignificant in value terms.

(ii) The Claimant's Evidence

20. The claimant gave evidence:

a) He acquired his lands at Campsie in 1984 and these lands were mainly used for farming.

b) In September 2002 a Mr McGinnis, an experienced local property developer, approached him with a view to acquiring a portion of his retained lands which Mr McGinnis required for access to his development lands, totalling some 10 acres. At this point Mr McGinnis offered the claimant £80,000 for approximately one quarter of an acre, but this offer was rejected. Mr Brown BL submitted that no evidence had been produced to confirm this offer. The Tribunal agrees.

c) At this point Mr McGinnis advised the claimant that he required the entirety of No 10 Cloghole Road but that he had "done a deal" with the owner, Mr McCauley "for £125,000". The Tribunal notes that no documented evidence had been produced to confirm this "deal".

d) The claimant was also advised by Mr McGinnis that he would require some small plots of land from his neighbours. He provided the claimant with a map showing the development lands, the proposed access and appropriate site lines. He advised the

claimant that the map had been given the "thumbs up" from the roads/planners. Mr Canny gave evidence, however, that this McGinnis map had never been submitted to Roads Service and he had no knowledge of it having ever been given the "thumbs up". He was the Road Engineer for the Campsie area at that time and would have been consulted on any plans for that locality.

e) Mr McGinnis indicated that he had spoken to the claimant's neighbours about the scheme without success and asked whether the claimant would approach his neighbours with a view to having the plan agreed and progressed. The claimant advised Mr McGinnis that he would do so and in due course did so. He pointed out to Mr McGinnis, however, that he would require more than £80,000 for his plot. The claimant then mentioned a figure of £300,000 which was neither confirmed or rejected by Mr McGinnis. The Tribunal notes that the £300,000 was merely a figure mentioned by the claimant and there was no indication whatsoever that Mr McGinnis was prepared to pay this amount at any stage.

f) The claimant then contacted another developer, Mr Sean Devine of Devine Construction, to ascertain how valuable the land might be. During discussions the claimant advised the Tribunal that Mr Devine offered £250,000 for the portion of land which Mr McGinnis had offered £80,000. This was on the basis that the claimant could secure the co-operation of the neighbouring landowners. Mr Brown BL asked the Tribunal to note that there were no contractual documents or notes of meetings etc. in relation to the £250,000 offer and Mr Devine had not been called to give evidence. The claimant had submitted a letter dated 11th May 2013 in which Mr Devine confirmed his offer of £250,000. He conceded, however, that the letter, which was not served until the hearing, had been drafted by the claimant's solicitors and he accepted that it was not a sworn affidavit.

g) The landowners at Nos. 5 and 7 Cloghole Road and 71 Clooney Road advised the claimant that they would provide the required site lines to him for a "very modest sum", if any. Mr Brown BL asked the Tribunal to note that none of these purported agreements had been documented in any way and the same landowners had previously objected to the proposed planning application on the basis that they did not want to lose road frontage. The Tribunal also notes that the claimant did not make the landowners aware that, in transferring the required plots of land for a

"modest sum", they would be foregoing any share of the possible key land value, for which the claimant had asked £300,000.

h) In 2005 Mr McGinnis withdrew his planning application. In or around that time the claimant advised that there was "talk of a new dual carriageway towards the airport at Eglinton". It was now obvious to the claimant that Mr McGinnis would no longer require to pay an enhanced value for the retained lands to achieve access to his development lands and in his opinion that is why he withdrew his planning application. Based on his discussions with Mr McGinnis at that time, Mr Canny gave evidence that Mr McGinnis withdrew his planning application in 2005 on the basis that he could not acquire the lands required for access to his development lands. Mr Canny also asked the Tribunal to note that, in 2005, eleven options for the new road had been identified and only one of those options gave access to the McGinnis lands.

(iii) The Evidence of the Valuation Experts

21. The valuation experts had agreed that there was no market evidence by which to ascertain the value of the lands required for access and on that basis a residual approach to the valuation was appropriate.

22. Prior to hearing they had also agreed that, at the valuation date in 2009, a developers profit of 10%, at £1,070,000 and a residual value of £354,000 were the correct figures on which to base the assessment of compensation. The Tribunal had no input to these figures.

23. On that basis Mr Doherty had assessed compensation:

Developers Profit	£1,070,000	
Plus Residual Value	£354,000	
Total	**£1,424,000**	
Less Deductions		
(a) Roads Construction Costs		£103,000

(b)	Purchase No 10 Cloghole Road (based on £140,000 valuation and assessment that a site remained after roadworks to be sold for £30,000)	£110,000
(c)	Purchase of Sherrards lands to the rear of 16, 18 and 20 Cloghole Road)	£0
(d)	Payments to 5, 7 Cloghole Road and 71 Clooney Road (3 x £2,000)	£6,000
		£219,000

	£219,000
Total	**£1,205,000**
Claimants Share at ⅓ of the amount available (key land value)	x ⅓
Claim for Compensation	**£401,666**

In his post hearing submissions the claimant had advanced two further assessments of valuation for the Tribunal to consider. Mr Brown BL submitted that these valuations had not been part of the claimant's case at hearing nor had they been included in any of the expert reports tendered by the claimant and the respondent had not been afforded an opportunity to cross examine Mr Doherty in this regard. For the reasons outlined by Mr Brown BL the Tribunal disregards these additional valuations.

24. At hearing Mr Halliday accepted that, at the valuation date, Mr McGinnis would have been in the market for the claimants retained lands. He also accepted that Mr McGinnis would have a special interest in acquiring the retained lands as he had committed £750,000 to acquiring the development lands. Mr Halliday also agreed that, in the "no scheme world", Mr McGinnis would have required the claimant's retained lands for access.

25. Mr Halliday submitted, however, that in his assessment of compensation, the claimant had asked the respondent to accept that:

a) despite the weakened state of the market in 2009, the claimant would somehow have been able to negotiate an extremely preferential and exclusive deal for himself

in the sale of his land in isolation from any of the other lands required to proceed with the scheme.

b) the price payable to the claimant would apparently be based upon a substantial share of the purchasers speculative future development profits (greater in fact than the developers projected profit on the figures given).

c) this amount would be paid to the claimant in advance of actually being earned by the developer, even though it would have been entirely at risk at that stage.

d) all of this preferential treatment could be achieved to the exclusion of the other third party landowners whose land would have been just as essential to the delivery of the scheme, notably including the owner occupiers of the dwelling at No 10 Cloghole Road and the large agricultural building to the rere of Nos 16-20 Cloghole Road.

e) planning permission would have been obtained for the assumed development despite the history of objections by neighbours to similar proposals and the likelihood this resistance would have continued.

f) a sale on all such terms would be to a developer who would have had to be highly motivated to pursue this particular scheme as opposed to any other, in the light of the many land acquisition issues, planning and other problems to overcome, the poor state of the market at the relevant time, the long term nature of the scheme in question and the peripheral site location.

26. In summary Mr Halliday considered all of the above to be a far too speculative scenario upon which to base a compensation claim. It was his opinion therefore that no compensation was payable at the valuation date.

(iv) Treatment of the Developers Profit

27. Mr Doherty advised the Tribunal that over the years he had been involved in several housing development transactions in the locality of the reference property. His experience of the market was that everything was up for negotiation, including the developers profit and it depended entirely on the deal that could be struck.

28. Mr McAteer of PCI Consulting gave evidence that he had been involved in many multi-sector development projects. He advised the Tribunal that he had particular experience of the construction industry, including experience of how parties approached key land access issues. He provided three examples of where he had been involved. He asked the Tribunal to note that in all three of his examples the developer was prepared to "put up" their share of the profit in order to secure a deal. It was also his opinion that, in a recessionary period, a developer would be prepared to accept a lesser profit.

29. Mr Halliday's opinion was that the developer would require his 10% profit to even contemplate carrying out the subject scheme, with particular regard to the recessionary period and risky state of the market in 2009. He asked the Tribunal to note that the developer would have to earn his profit over a number of years and he submitted that the developer would not be agreeable to "putting it up for grabs" right at the start of a project. It was his opinion that the agreed residual value of £354,000 was the only amount available to purchase the required access lands.

30. Mr Hutton BL referred the Tribunal to the following extract from Stokes v Cambridge:

> "Now we come to the vexed question of access. We dismiss at once, as unrealistic, Mr January's suggestion that the owner of the brown strip would be willing to sell it to a prospective developer of the back land at no more than its bare price for housing or agriculture. Manifestly, the owner of the front land, aware that he held the only key to the development of the back land, would expect to receive a substantial share of the profit which, if he withheld the key, would be unobtainable."

31. Mr Brown BL asked the Tribunal to note that in Stokes v Cambridge the Tribunal deducted developer's profit at 15% prior to allocating one third to the purchase of the access. He did acknowledge, however, that there were instances where a developer may allocate a percentage of profits. He referred to Ozanne v Hertfordshire County Council which revealed such a scenario, but he submitted such instances were based on viable schemes where, in the

no acquisition world, there existed, as a matter of fact, a market for the reference land as a ransom strip.

32. The Tribunal notes the evidence of Mr Doherty and Mr McAteer which confirmed that "deals were still being done" in 2009. Both had extensive knowledge and experience of private sector housing development projects, and it was their firm evidence that a portion of the developers profit would be "up for grabs" in any negotiation involving a key landowner, particularly in the 2009 recessionary market. The Tribunal agrees. In 2009 there existed an unprecedented set of economic circumstance and in order to secure a development, the Tribunal considers that it was highly likely that Mr McGinnis would offer up a share of his profit, particularly, as in the subject reference, he had already committed £750,000 to acquiring the development lands.

(v) The Treatment of the Other Key Landowners

33. It was clear from the claimant's submissions that, at no stage, had he made the other key landowners aware that they may be entitled to a share of any key land value, for which the he had sought £300,000 in 2003. The claimant's own expert, Mr Doherty, when asked by the Tribunal, gave evidence that if he had been professionally representing the other key landowners he would have advised them to seek a share of the key land value.

34. The Tribunal notes that the claimant only had verbal agreements with the other key landowners and only on the basis that they had not sought professional advice, nor had they been made aware that they may be entitled to a share of a substantial ransom value. The Tribunal considers that all of them, professionally advised, would have sought a share of the ransom value:

a) **Nos 5 & 7 Cloghole Road and 71 Clooney Road**

If any one of the other landowners would have "held out" the development could not proceed. Indeed it was Mr Canny's evidence that Mr McGinnis' failure to secure all of the land required led him to withdraw his planning application in 2005. The Tribunal

considers that, properly advised, all of the above landowners would have sought an equal share of the key. In his closing submission Mr Hutton BL referred the Tribunal to Snook & Others v Somerset County Council as an example whereby multiple landowners sought different percentages of the key value. In that case, however, the percentages had been agreed by the landowners prior to going to hearing. As the Tribunal has already pointed out, if any of the subject landowners would have "held out", the development could not have proceeded. The size of the plot of land required had therefore no relation to its value. Indeed, the claimant's own witness, Mr McAteer, gave an example whereby he obtained £980,000 key land value for a plot of land measuring 12 square feet. The Tribunal therefore finds that the landowners of Nos 5 and 7 Cloghole Road and 71 Clooney Road would have been entitled to and would have sought an equal share of the key land value.

b) **No 10 Cloghole Road**

All of this property, including the dwelling house thereon, was required to provide access to the development land. Mr Doherty's assessment of compensation allowed for full market value to be paid for the dwelling house. The Tribunal again refers to Stokes v Cambridge:

> "He says it is unrealistic to assume that the owner of the brown strip, who by providing access can put a substantial profit in the pocket of the owner of the subject land, would sell land for this purpose at no more than market price for housing or agriculture …"

The owner of No 10 Cloghole Road would have to give up his entire holding including his dwelling house and find alternative accommodation, with associated removal costs etc. He would have required a substantial incentive to do so. The Tribunal therefore considers that, properly advised, this landowner would not only ask for the market value of his house but he would also seek a share of the key land value. All of the other key landowners were losing pieces of land at varying sizes, he was losing his home.

c) **Lands to the rere of 16, 18 and 20 Cloghole Road**

Mr Doherty gave evidence that Mr Sherrard, the owner of these lands, also held 3 acres which were within the development limit and any access to the McGinnis' lands would also facilitate access to the Sherrard development lands. This was not disputed by the respondent at hearing. Mr Hutton BL submitted that due to the considerable benefit to Mr Sherrard of providing access to the McGinnis lands, he would not seek a share of the key value. Mr Brown BL pointed out that, in order to achieve access, Mr Sherrard would have to demolish a substantial agricultural shed from which he ran a business. There was no evidence before the Tribunal to confirm that Mr Sherrard would not seek payment for giving up his land. In the economic circumstances pertaining in 2009 any development of the Sherrard lands would have been subject to considerable risk. The Tribunal therefore finds that, properly advised, Mr Sherrard would have sought a share of the key land value which was not subject to risk.

Assessment of Compensation

35. The task for the Tribunal was to assess the correct amount of compensation (if any) payable to the claimant in the "no scheme world". Mr Halliday had accepted at hearing that Mr McGinnis would be in the market at the valuation date to secure access and he had a particular interest in acquiring it, as he had already committed £750,000 to purchase the 10 acres of development land. The Tribunal considers that, in 2009, it was highly probable that he would have been the only party interested in acquiring the claimant's land for access. What would he have been prepared to pay to secure access at that time?

36. As previously stated, prior to hearing, the valuation experts had agreed that, in 2009, a developers profit of £1,070,000 and a residual value of £354,000 would have been realised by the McGinnis development scheme. Even though Mr Halliday's opinion was that no compensation was payable he had agreed that the above figures were achievable.

37. In line with the decision in Stokes v Cambridge. Mr Doherty considered that a 33.3% share of the key was appropriate in the subject reference. In Stokes v Cambridge the Tribunal also found that the "multiplicity of ownership" a developer faced would not reduce the overall

ransom percentage. The Tribunal has already decided that both the developers profit and the residual value would be up for negotiation in the circumstances of the subject reference. As submitted by Mr Doherty, the Tribunal agrees that 33.3% for the key land value was reasonable.

38. **Assessment of Compensation**

Developers Profit		£1,070,000	
Plus Residual Value		£354,000	
Total		**£1,424,000**	
Less Deductions			
(i)	Roads Construction Costs		£103,000
(ii)	Market Value of 10 Cloghole Road		£110,000
			£213,000
		- £213,000	
Total Amount up for Negotiation		£1,211,000	
Value of Ransom Lands		@ 33.3%	
		£403,263	
Split six ways (Nos 5, 7, 10 Cloghole Road, No 71 Clooney Road, Sherrard, plus the claimant)		÷ 6	
Claimant's Share		**£67,210**	
		Say £67,250	

It is worth noting that, in this assessment, the developer still retains a substantial profit, in the region of £800,000 and this seems reasonable in the circumstances of 2009.

Conclusion

39. The Tribunal awards the claimant £67,250 compensation for the injurious affection caused to his retained lands.

ORDERS ACCORDINGLY

10th July 2018 **Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)**
Lands Tribunal for Northern Ireland

Appearances

Claimant: **Mr Dessie Hutton BL, instructed by Kevin Downey, Solicitor.**

Respondent: **Mr Andrew Brown BL, instructed by the Departmental Solicitor's Office.**