LANDS TRIBUNAL FOR NORTHERN IRELAND

The Lands Compensation (Northern Ireland) Order 1982
Local Government Act (Northern Ireland) 1972

IN THE MATTER OF A REFERENCE - R/37/2010

BETWEEN:

JOEL KERR - CLAIMANT

-and-

NORTHERN IRELAND HOUSING EXECUTIVE – RESPONDENT

ATTORNEY GENERAL FOR NORTHERN IRELAND
AND
DEPARTMENT OF FINANCE AND PERSONNEL INTERVENING

RE: 98 MOLTKE STREET, BELFAST

LANDS TRIBUNAL – THE RIGHT HONOURABLE LORD JUSTICE COGHLIN
AND
MR HENRY M SPENCE MRICS Dip Rating.

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[1] This is a reference by Mr Joel Kerr ("the applicant") to the Tribunal requiring the Tribunal to fix the amount of compensation payable to the applicant in accordance with the provisions of the Local Government Act (Northern Ireland) 1972 ("the 1972 Act") and Article 6(1) of the Land Compensation (Northern Ireland) Order 1982 ("the 1982 Order") in respect of the vesting of the applicant's property at 98 Moltke Street, Belfast ("the property") by the respondent. The applicant commenced this reference as a personal litigant but he has subsequently been represented by Mr Michael Humphries QC while Mr Patrick Good QC and Mr Sean Doran appeared on behalf of the respondent. During the course of the proceedings the Tribunal gave leave for Mr John Larkin QC, the Attorney General for Northern Ireland, and the Department of Finance and Personnel, represented by Dr McGleenan QC, to intervene. The Tribunal wishes to acknowledge the considerable assistance that it has derived from the well marshalled written and oral submissions of counsel and it is grateful, in particular, to the Attorney General whose detailed analysis of the relevant European jurisprudence has been of considerable assistance in illuminating that legal dimension in the course of these proceedings.

Background facts

[2] The applicant is 30 years of age and he has enjoyed secure employment during the whole of his adult life. He purchased the property, when he was approximately 25, for £152,500 the purchase being funded, initially, with an interest only 25 year term mortgage provided by the First Trust Bank. The mortgage was guaranteed by the applicant's father and subsequently converted to a variable mortgage. The purchase was completed in February 2007 and the applicant was required to make repayments of £589 per month. The applicant resided in the property as owner-occupier from February 2007 until June 2011 when he moved to private rented accommodation in respect of which he pays rental in addition to the mortgage repayments.

[3] In or about April 2008 the applicant became aware of the possibility that the property might be vested by the respondent for redevelopment. On 9 February 2010 the respondent applied for a Vesting Order and the applicant received formal notification of the making of the Vesting Order by letter dated 18 March 2010. The operative date of the Vesting Order was 19 April 2010.

[4] Since the operative date of the Vesting Order the applicant has continued to make monthly repayments of £589.11 to the First Trust Bank. From the date of the Vesting Order until June 2011, when the applicant vacated the property, the applicant paid a nominal monthly rent to the respondent of approximately £15 per week. The applicant's outstanding mortgage debt on 29 April 2012 was £145,665.61. The applicant remains liable to continue to make repayments of £589 per month to the First Trust Bank for the next 20 years.

[5] The applicant has been offered the sum of £91,000 by the respondent in respect of compensation for his interest in the property based upon open market value. In addition the applicant believes that he is entitled to a disturbance payment of £800 and an additional payment amounting to 10% of the above compensation amount. Thus, in total, the claim in respect of compensation would amount to approximately £100,900. The payment of such a figure would result in a shortfall of approximately £45,000 which the applicant, currently, remains liable to discharge in accordance with the terms of the mortgage. The applicant claims that such a degree of debt is likely to preclude him from being able to purchase an equivalent property in the current market and may prevent him from purchasing his own home during the remainder of the mortgage term. Should the applicant default in making the mortgage repayments both he, and his father as guarantor, face the risk of proceedings for recovery at the hands of the bank involving, ultimately, the possibility of bankruptcy. It seems that the vast majority of the 538 homes affected by the compulsory scheme are likely to be in "positive equity" as a consequence of vesting and that a residual mortgage debt, after payment of compensation, has resulted/ is likely to result in the cases of only some 54 landlords and 6 owner occupiers.

The agreed questions

[6] The two questions that the parties have agreed to refer to the Tribunal in the circumstances are as follows:

(*i*) Whether the applicant's loss and liability to his mortgage lender, (hereinafter referred to as his "negative equity") arising from the vesting of 98 Moltke Street, Belfast, can be recovered by the applicant under Rule 6 of the 1982 Order as "disturbance"?

(*ii*) In circumstances in which the applicant owned a property which comprised the family home and that property was made subject to a Vesting Order in circumstances in which the property is in negative equity and where vesting will result in personal insolvency and inability to purchase another property, whether the proper construction of the Land Clauses Consolidation Act 1845 ("the 1845 Act") and the 1982 Order should result in the applicant being offered compensation which allows him to clear the entire amount owing to the mortgagee taking into account the Human Rights Act 1998 and Article 8 and/or Article 1 of the First Protocol ("A1 P1") of the European Convention on Human Rights ("the Convention")?

The relevant statutory framework

[7] (*i*) Section 110 of the 1845 Act provides as follows:

> "*Sum to be paid when mortgage exceeds the value of the lands*
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> 110. If any such mortgaged lands shall be of less value than the principal, interest, and costs secured thereon, the value of such lands, or the compensation to be made by the promoters of the undertaking in respect thereof, shall be settled by agreement between the mortgagee of such lands and the party entitled to the equity of redemption thereof on the one part, and the promoters of the undertakings on the other part, and if the parties aforesaid fail to agree respecting the amount of such value or compensation, the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being so agreed upon or determined, shall be paid by the promoters of the undertaking to the mortgagee in satisfaction of its mortgage debt, so far as the same will extend; and upon payment or tender thereof the mortgagee shall convey or release

all his interest in such mortgage lands to the promoters of the undertaking, or as they shall direct."

(*ii*) Paragraph 6(1) of Schedule 6 to the Act of 1972 provides, inter alia, as follows:

> "…a Vesting Order shall operate, without further assurance, to vest in the Council, as from the date on which the Vesting Order becomes operative (in this Schedule referred to as 'the date of vesting'), an estate in fee simple or such other estate (if any) in, to or over the land to which it relates as is therein specified, freed and discharged from all claims or estates whatsoever (except as is specified in the order)."

(*iii*) The rules for assessing the level of compensation to be paid in consequence of a Vesting Order are provided by Article 6(1) of the 1982 Order which states, inter alia:

> "Compensation in respect of any compulsory acquisition of land, shall, subject to the provisions of this Order and any other enactment, be assessed in accordance with the following Rules:-
>
> (1) No allowance shall be made on account of the acquisition being compulsory.
>
> (2) The value of land shall, subject to Rules 3-6, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise;
>
> (3) …
>
> (4) …
>
> (5) …
>
> (6) The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land."

Relevant Convention articles

[8] (*i*) Article 8 provides that:

"1 Everyone has the right to respect for his private and family life, his home and correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and if necessary in a democratic society in the interests of national security, public safety to the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(*ii*) Article 1 of the First Protocol provides that:

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"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The submissions of counsel

[9] The Attorney General has advanced submissions relating to both questions to be considered by the Tribunal and those submissions have been adopted on behalf of the applicant. With regard to question 1 he noted that, prior to the coming into force of the Human Rights Act, "disturbance" had been narrowly interpreted although he also drew attention to the flexibility of the approach to interpretation adopted by Romer LJ in Harvey v Crawley Development Corporation [1957] 1 QB 485 at 494 and the remarks of Lord Nicholls in Director of Buildings and Land v Shun Fung Ironworks Limited [1995] 1 AER 846 at 853. He also accepted that, in its report No. 286 "Towards a Compulsory Compensation Code on Compensation (1) Compensation Final Report" published in 2003 the Law Commission decided that the rules for assessing compensation should not be changed to deal with negative equity but noted that the Commission had not expressly examined the impact of the Human Rights Act upon that specific problem although the Act and ECHR jurisprudence had been considered in appendix C paragraphs C18 to C23.

[10] The Attorney General argued that the severe financial hardship which the applicant is likely to suffer if he is not compensated will result in him bearing an individual and excessive burden due to the operation of the Vesting Order, thereby violating A1 P1 unless the respondent demonstrated that the compensation offered was proportionate to the aim pursued in the public interest. He drew the attention of the Tribunal to the decision in Lisa Smith v Secretary of State for Trade and Industry [2007] EWHC 1013 (Admin) as an example of a decision in which the Article 8 rights of travellers had been considered in relation to the compulsory purchase of caravan sites although, in practical terms, he accepted that the ECHR provision most relevant to the reference before the Tribunal was A 1 P1. Ultimately, the Attorney General argued that the Tribunal should rely directly on A1 P1 via Section 6 of the Human Rights Act 1998 to ensure that the applicant did not bear the individual and excessive burden of paying for property that he no longer occupied or interpret Rule 6 of Article 6 of the 1982 Order, in accordance with section 3 of the Human Rights Act, so as to provide compensation to enable the applicant to discharge his mortgage obligations or that the Tribunal should decide that the value of compensation for the land in Rule 2 of Article 6 of the 1982 Order should reflect the costs of removing an existing charge from the land.

[11] The respondent accepted that payment of compensation in accordance with Rule 2 of Section 6 will result in the applicant continuing to be responsible for a substantial debt to the First Trust Bank, a liability that he has no means of discharging which gives rise to potentially serious consequences. The respondent relied upon the decision of this Tribunal in O'Neill v Northern Ireland Housing Executive [2011] RVR 164 as authority for the proposition that, when making a Vesting Order, the respondent was not bound to discharge all of any mortgage debt secured on the property although it was accepted that the decision in O'Neill did not deal with the two questions posed for the Tribunal by this reference. Mr Good argued that the interpretation of the concept of "disturbance" in Rule 6 advanced on behalf of the applicant would be entirely at variance with the narrow interpretation adopted in Horn v Sunderland Corporation [1941] 2 KB 26 Francis and Paula Lindberg v Northern Ireland Housing Executive R/21/1995 BNIL [1997] 8/39 and the Harvey and Shun Fung decisions. He also relied upon the Law Commission Report of 2003 drawing the attention of the Tribunal to paragraph 4.29 and a footnote relating thereto in which the Law Commission had stated they regarded that a loss arising from negative equity as one "based on the value of the land" and therefore excluded from Rule (6). It was further submitted on behalf of the respondent that there was a clear and consistent line of Strasburg jurisprudence to the effect that the proportionality principle was not offended by the granting of compensation with reference to market value in the context of the compulsory acquisition of property by the State.

[12] On behalf of the Department Dr McGleenan pointed out that the vast majority of owner/occupiers of the 538 properties affected by the respondent's Vesting Order were likely to be in "positive equity" and would thus derive a benefit from vesting and the attendant DSD *Policy to Support Owner/Occupiers in*

Redevelopment Areas. In the domestic context Dr McGleenan submitted that the negative equity to which the property is now subject arose directly as a result of the drop in its market value and, as part and parcel of the value of the land, that was not compensable pursuant to Rule 6. With regard to the potential impact of A1 P1 upon the domestic law Dr McGleenan drew attention to the Strasburg jurisprudence confirming that A1 P1 did not guarantee a right to full compensation in all circumstances, that any interference with property rights must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights and that the State was to be accorded a wide margin of appreciation in respect of expropriation decisions.

Discussion

Article 6(1)(6) of the 1982 Order

[13] The first question referred to the Tribunal is whether the applicant's compensation for vesting should be increased to such an extent as to enable him to redeem his mortgage with the First Trust Bank on the basis that such an increase would compensate for "disturbance" or, as the argument developed, some "other matter not directly based on the value of land".

[14] The wording of Rule 6 clearly distinguishes compensation for the value of land from that payable in respect of disturbance or for any *other* (our emphasis) matter not directly based on the value of land and the domestic authorities cited by the parties indicate that, in the course of developing general principles, the courts have tended to adopt a fairly narrow interpretation of "disturbance" – see Horn v Sunderland Corporation; Harvey v Crawley Development Corporation; Director of Building and Lands v Shun Fung Ironworks Limited and the decisions of this Tribunal in Neilson v Northern Ireland Housing Executive (21 December 1995)and Francis and Paula Lindberg v Northern Ireland Housing Executive R/21/1995. Lord Denning made the practical distinction in Munton v Newham London Borough Council (1976) 32 P&CR 269 between the value of the land, which could be assessed while the owner was still in occupation, and compensation for disturbance which could not be properly assessed until the owner had moved out. Generally, these authorities tend to confirm that, provided that the loss is not too remote, "disturbance" may encompass such matters as legal and surveyors' fees, the cost of moving furniture, the cost of preparing land for the best market then available, incidental costs in connection with a business being carried on at the affected property and other similar costs flowing from disturbance of the claimant's occupation of the property – essentially, what it has cost the claimant to move. The general principle was articulated by Lord Nicholls in the Shun Fung case when, with regard to the equivalent provisions in England and Wales, he observed that:

> "The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a

> claimant's whose land has been compulsorily taken from him. This is something described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and the land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss."

[15] The wording and structure of the Rules set out in Article 6(1) of the 1982 Order specifically provide that the value of land shall be calculated in accordance with Rule (2) while "disturbance or any other matter" referred to in Rule (6) may form part of the assessment of compensation provided that it is not directly based on the value of land. According to the submission advanced by the Attorney General that exclusion of compensation for matters *directly* based on the value of land was significant in the circumstances of this reference. He argued that the applicant's loss constituted by negative equity has occurred as a direct result of vesting and is thus only indirectly related to the value of the land. He further submitted that the shortfall sustained by the applicant was directly related to the amount charged and that while every owner/occupier will have been affected by the drop in market value not every owner/occupier will have suffered the loss of the type sustained by the applicant. In such circumstances the Attorney General argued that to conceive of the applicant as a *willing seller* as required by Rule (2) would be essentially artificial.

[16] Mr Humphries took up a similar theme emphasising the personal nature of the applicant's mortgage contract with the bank and the residual debt which had been rendered unsecured when the loss had been crystallised by the Vesting Order. However it is important to bear in mind the fact that for some time prior to vesting the value of the applicant's property had ceased to provide adequate security for his mortgage debt. Whether and, if so, when, a hoped for rise in property values would eventually restore security is essentially a matter of speculation.

[17] The Tribunal is unable to accept this submission. The Vesting Order is the statutory trigger that operates to furnish the public body with good title converting all interests in the subject land into statutory rights to compensation. As Lord Nicholls observed in the Shun Fung decision, while compensation should be fair in accordance with the principle of equivalence, no allowance is to be made because the resumption or acquisition was compulsory and the land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. While the concept of the willing seller might be artificial if applied, in practice, to an owner/occupier in negative equity who wishes to wait for a hoped for upturn in the market, it represents a statutory objective standard in circumstances in which there is to be no allowance for the compulsory nature of the transfer. It is subject to those

qualifications that a claimant is entitled to be fairly and fully compensated. The Tribunal considers that the loss suffered by the applicant is directly based on the value of land. That loss in value had occurred well before vesting. The amount of the mortgage debt incurred by the applicant is directly based upon the value of the land at the time of purchase in February 2007. Unfortunately, that value had substantially declined by the date of vesting in April 2010. As the parties have noted, in its final report on compensation for compulsory purchase [Law Comm. No. 286 December 2003] the English Law Commission considered that a loss following from negative equity was based on the value of land and, therefore, excluded by Rule (6). The Attorney General submitted that the Law Commission conflated "the value of land" with "directly based on the value of land" but the Tribunal considers such a conflation to have been unlikely given the detail of the report and the extent of the consultation upon which it was based. Rule (2) of Article 6 provides a common date at which compensation for the value of land is to be calculated, namely the coming into operation of the Vesting Order, and Parliament cannot have intended that Rule (6) would provide those whose property was in negative equity at that time should be entitled to be compensated on the basis of the value of the land at the time of purchase potentially many years earlier in a different economic climate.

The impact of ECHR rights

[18] While the Tribunal appreciates the helpful submissions of the parties, it does not consider that Article 8 adds anything of significance to the substance of this applicant's reference and, accordingly, the Tribunal will concentrate upon the impact of A1 P1.

[19] Section 6 of the Human Rights Act of 1998 ("the 1998 Act") specifically provides that it is unlawful for the Tribunal to act in a way which is incompatible with a Convention right and Section 3 requires the Tribunal to read and give effect to statute and subordinate legislation in a way which is compatible with Convention rights "so far as it is possible to do so". As Lord Nicholls observed in Ghaidan v Godin-Mendoza [2004] 2 AC 557 Section 3 is a key section in the Human Rights Act 1998 and one of the primary means by which Convention rights are brought into the law of this country. However, at paragraph 33 of his judgment, he went on to observe:

> "33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the court should adopt a meaning inconsistent with a fundamental feature of the legislation. That would be to cross the constitutional boundary Section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention–compliant. The meaning imported by application of Section 3 must be

> compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that Section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

Earlier in the same judgment Lord Nicholls noted that Parliament had the primary responsibility for dealing with social problems such as national housing policy. The legislature had to hold a fair balance between the interests of tenants and landlords taking into account broad issues of social and economic policy. In such circumstances the court's role was one of review although the intensity of that review would depend on the rights involved and the factual context.

[20] A1 P1 in substance guarantees the right of property and, in that respect, in the Maxol decision this Tribunal considered it to be the equivalent of the prohibition of unjust attacks on the property rights of citizens contained in Article 43 of the Irish Constitution. In the leading case of Sporrong and Lonnroth v Sweden (1982) 5 EHRR 35 at paragraph 61 the Strasbourg Court observed that A1 P1 comprised of three rules:

> "The first rule, which is of a general nature, announces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subject to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."

However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (Lithgow and Others v United Kingdom (1986) 8 EHHR 329 para. 106; Tre Traktorer AB v Sweden (1991) 13 EHHR 309). It is accepted by the Attorney General on behalf of the applicant that the Vesting Order had a sufficient basis in domestic law and that the scheme proposed by the respondent served a legitimate aim in the public

interest. A1 P1 is an article explicitly qualified by references to the "public" and "general" interest.

[21] In such circumstances the remaining issue between the parties is whether the level of compensation offered by the respondent breaches the principle of proportionality. Inherent in the whole of the Convention and reflected in the structure of A1 P1 is the search for a fair balance between the demands of the general interests of the community and requirements of the protection of the individual's fundamental rights – see paragraph 69 of the judgment in Sporrong. Such a fair balance is not achieved where the individual has to bear "an individual and excessive burden" and the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which would not be considered justifiable in accordance with A1 P1. Compensation terms are material to the assessment as to whether a fair balance has been achieved. However A1 P1 does not guarantee a right to full compensation in all circumstances and legitimate objectives of "public interest" such as are pursued in measures of economic reform designed to achieve greater social justice may call for less than reimbursement of full market value (James and Others v The United Kingdom (1987) 8 EHRR 123 at paragraph 54) – see also the need to give special weight to the determination of the domestic policymaker in matters of general policy confirmed in the pensions case of Valkov v Bulgaria [2011] ECHR 1806 . In Lithgow, the case involving consideration of compensation for nationalised shareholdings, the Strasbourg Court upheld Parliament's choice in providing for compensation by reference to the value of shares on nationalisation rather than the value of the underlying assets. In the course of giving judgment the court said at paragraph 122:

> "Accordingly, the court's power of review in the present circumstances is limited to ascertaining whether the decision regarding compensation fell outside the margin of appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation."

In the same case the Strasbourg Court confirmed that the legislature has a wide discretion in fixing the date by which the property is to be valued (paragraph 131-135) and that it was free to choose not to index-link the compensation by reference to inflation but to provide for the payment of interest, with some payment being made on account (paragraphs 144-147).

[22] In James the Strasbourg Court again held that the legislature's judgment as to what was in the public interest was to be respected unless it was shown to be "manifestly without reasonable foundation" and went on to record at paragraph [51] that:

> "The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need for a "fair balance". Provided the legislature remained within these bounds, it is not for the court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in some other way."

The Court noted the argument that the enfranchisement legislation had permitted a significant number of individuals to benefit from "windfall profits"- the applicants' losses ranged from £1350.00 to £148080.00 - but stated at paragraph 69:

> "That was a policy decision by Parliament, which the court cannot find to be so unreasonable as to be outside the State's margin of appreciation. Neither does the operation of the legislation in practice……show the scale of anomalies to be such as to render the legislation to be unacceptable under Article 1."

[23] Some 20 years later these principles were again reviewed by the Grand Chamber of the Strasbourg Court in Scordino v Italy (No. 1) (2007) 45 EHRR 7. The court once more confirmed the need to strike a "fair balance" in respect of which the State enjoyed a wide margin of appreciation and continued, at paragraph 98, in the following terms:

> "98. In the case of James, the issue was whether, in the context of leasehold reform legislation the conditions of empowering long-term leasehold tenants to acquire their property struck the fair balance. The Court found that they did, holding that the context was one of social and economic reform in which the burden born by freeholders was not unreasonable, even though the amounts received by the interested parties were less than the full market value of the property.
>
> In the case of Lithgow v The United Kingdom the court examined an issue relating the nationalisation of companies engaged in the aircraft and shop building industries, as part of the economic, social and political programme run by the party that had won the elections, which was intended to provide a sounder

> organisational and economic footing and bring to the authorities a desirably greater degree of public control and accountability. The court held that, in this context, the arrangements for compensating shareholders concerned were fair and not unreasonable as compared with the full value of the shares."

The court also referred to the case of Papachelas v Greece (2000) 30 EHRR 923, a case concerning the expropriation of more than 150 properties, including part of the applicant's property, for the purposes of building a major road. While the court in Scordino ultimately held that the compensation awarded to the applicants was inadequate, in doing so, it took into account the fact that the case concerned a distinct expropriation which was neither carried as part of a process of economic, social or political reform nor linked to any other specific circumstances. The court was unable to discern any legitimate objective "in the public interest" capable of justifying less than reimbursement of the market value. Accordingly, the court held that the applicants had been compelled to bear a disproportionate and excessive burden which could not be justified by a legitimate aim in the public interest pursued by the authorities and that there had been breach of A1 P1.

[24] The concept of "margin of appreciation" reflecting the reluctance of the court to substitute its judgment for that of the domestic State authorities was articulated as early as 1976 in Handyside v UK (1976) 1 EHRR 737. It is regularly employed by the Strasbourg court, an international tribunal responsible for the judicial supervision of a large number of nation states with differing legal and historical traditions, to describe the ambit of discretion that the court recognises is available to State legislatures. The court recognises that national public authorities will be much more familiar with the "vital forces of their countries." Clearly such a lack of familiarity cannot exist in the case of domestic courts and tribunals.

[25] However, for some time domestic courts have employed a somewhat similar approach in the course of determining questions of proportionality when being requested to implement Convention rights. Various terms have been employed including "deference" and "discretionary area of judgment". The approach may differ somewhat with the nature of the right concerned and the particular circumstances of the case. In the course of giving judgment in R (Alconbury Developments and others) v Secretary of State for Environment [2003] 2 AC 295, a case involving refusal of planning permission, Lord Hoffman said at paragraph 71:

> "All democratic societies recognise that while there are certain basic rights which attach to the ownership of property, they are heavily qualified by considerations of public interest."

He then went on to observe, at paragraph 72, in relation to A1 P1:

> "Thus, under the first paragraph, property may be taken by the state, on payment of compensation, if the public interest so requires. And, under the second paragraph, the use of property may be restricted without compensation on similar grounds. Importantly, the question of what the public interest requires for the purpose of Article 1 of the First Protocol can, and in my opinion should, be determined according to the democratic principle – by elected local or central bodies or by ministers accountable to them. There is no principle of human rights which requires such decisions to be made by independent and impartial tribunals."

However in R (On the application of Prolife Alliance) v British Broadcasting Corporation [2004] 1 AC 185, a case involving the right to freedom of speech in accordance with article 10, the same member of the House robustly rejected the term "deference" as inappropriate and, emphasising that the question was one of law to be decided by the courts, he said, at paragraph 76:

> "76. This means that the courts themselves often have to decide the limits of their own decision–making power. That is inevitable. But it does not mean that their allocation of decision-making power to other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the court is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in article 6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise when a court decides that a decision is within the proper competence of the legislature or executive it is not showing deference. It is deciding the law."

[26] As so often proves to be the case, the exercise which the court has to carry out has been succinctly summarised by Lord Bingham in Huang v Secretary of State for the Home Department [2007] 2 AC 167 when he said at paragraph 16 of his judgment:

> " ….. it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

Huang, of course, related to an appeal from an immigration adjudicator while this reference is concerned with statutory compensation for expropriation of property under a statutory scheme. Primary and secondary legislation should enjoy no special immunity from ordinary constitutional standards. However, as Lord Hope has noted in R v DPP ex parte Kebilene [2000] 2 AC 326 at 379:

> "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

Lord Hope went on to observe that it would be easier to recognise such an area where the issues involve questions of social or economic policy – see also his observations at paragraph [32] in the course of his judgment in Axa Insurance v HM Advocate and others [2011] UKSC 46 as well as those of Lord Reed in the same case at paragraphs [124] and [131]. Those are areas in which, characteristically, there may be room for legitimate disagreement and different outcomes. Ultimately the constitutional arrangement implementing the separation of powers requires the domestic court or tribunal considering the impact of Convention rights in the context of primary or secondary legislation to give such weight as may be appropriate, in the circumstances of the particular case, to the legislative source of the decision, the legislative content, intent and purpose, the policy context and the nature of the specific right/s involved. However, in so doing, the court or tribunal discharges its functions within the democratically established framework of the Human Rights Act 1998 and must not lose sight of its independent responsibility to ensure that the interests of individual litigants are fully and fairly considered. In the much quoted words of Lord Steyn at paragraph [78] of his judgment in R (Daly) v Secretary of State for the Home Department 2 AC 532 "In law context is everything."

[27] "Negative equity" is certainly not a novel socio-economic phenomenon. It was one with which Parliament was clearly familiar in 1845 when debating the Act of 1845 and, subsequently, when bringing into force sections 108 – 114 of that legislation headed "Lands in mortgage." Section 110 was specifically headed "*Sum to be paid when mortgage exceed the value of the lands.*" In O'Neill this Tribunal held that those

provisions are still in force and that, as a result, the NIHE, as a promoter, was not bound to discharge all of the applicants' mortgage debt. However, in that context, it is important to bear in mind that the Act of 1845 was a consolidating statute rather than one which specified a particular form of compensation calculation. In the same decision the Tribunal referred to the treatment of the problem by the Law Commission which had expressed the view that the only truly effective solution would involve "a very considerable expansion of the current law of consequential loss." As noted above, in expressing that view, it is clear that the Commission had considered A1 P1.

[28] Having regard to the very real severity of the impact on and hardship faced by individual property owner /occupiers, it is perhaps not surprising that reference to the phenomenon is not restricted to the rarefied atmosphere of legal debate but has also made an appearance in literature. In his perceptive and trenchant pastiche of the famous Kipling poem "If" the poet Benjamin Zephaniah, who once enjoyed a residency in Tooks barristers' Chambers in London, has written in his poem "What If":

> "If you can make one heap of all your savings
> And risk buying a small house and a plot,
> Then sit back and watch the economy inflating
> Then have to deal with the negative equity you've got;"

[29] In seeking to deal fairly with the consequences of compulsory purchase Parliament has provided a statutory framework which has adopted as its core compensation philosophy the concept of open market value by a willing seller with no allowance to be made for the compulsory nature of the acquisition. Despite the fact that the legislation pre-dates the coming into force of the Human Rights Act 1998, that is consistent with Strasbourg authority. It is an approach intended to provide an objective standard applicable to all the properties to be vested irrespective of when or how they were acquired or the circumstances in which they are currently held. In many cases the results will be positive, as in the scheme under consideration. In some cases there will be windfalls – see James – but in others there will be losses. Some losses may be sustained by 'buy-to-let' landlords (as in O'Neill) while others may be owner/occupiers. While there is no suggestion that the applicant to this Tribunal embarked upon the same degree of economic risk taking as the applicants in Hakansson and Sturesson v Sweden (1991) 13 EHRR, no reasonable purchaser of real property would be unaware of the risk that such property could decline as well as increase in value. Parliament has also recognised the need to take into account specific individual circumstances but has limited such matters to disturbance and matters not directly based on the value of land. In the view of the Tribunal it is unarguable that negative equity is a situation 'directly based' on the value of land. The loss that has been sustained by the applicant resulted from the disastrous collapse of the property market which had occurred before, and independently of, the Vesting Order. The legislative framework seeks to provide a means of implementing a socio/economic

policy that affords a realistic balance between the public need for community redevelopment/regeneration and the individual needs of those who may be adversely affected but, in doing so in practical terms, it does not set out to resolve every anomaly and hardship. Unlike the Turkish authorities relied upon by the Attorney General there is no suggestion that the State has been guilty of unreasonable delay or has deliberately set out to gain an unfair advantage. We have not been persuaded that the scheme instituted by the relevant legislation is manifestly without reasonable foundation. Taking into account the policy content the Tribunal is satisfied, as was the Strasbourg court in James, that the 'broad sweep' of the legislation was designed to cover a large number of different cases and that, in such circumstances, the existence of some individual hardship and/or anomalies is acceptable without constituting a breach of the applicant's human rights under the Convention.

[30] For the reasons set out above the Tribunal must reject the claim by the applicant to require the respondent to discharge his mortgage debt as part of the compensation package. However, in arriving at this decision the Tribunal has taken into account the fact that this litigation involves questions of legislative social and economic policy and the balance between public and private interests. In the course of his submissions on behalf of the Department of Finance and Personnel Dr McGleenan relied, inter alia, on the support provided for those whose properties have been vested by the attendant Department for Social Development policy. It is clear from the contents of that policy that the Department has an appreciation of the need to support owner/occupiers in redevelopment areas although, currently, that policy is not designed to support such owner/occupiers in negative equity as a consequence of the market collapse. In view of the relatively small numbers concerned and the extent of the personal hardship revealed in the course of this litigation it might now be considered to be an appropriate time to review that aspect of the policy.

10th January 2013