

**LANDS TRIBUNAL FOR NORTHERN IRELAND**  
**LANDS TRIBUNAL COMPENSATION ACT (NORTHERN IRELAND) 1964**  
**THE LANDS COMPENSATION (NORTHERN IRELAND) ORDER 1982**

**IN THE MATTER OF A REFERENCE**

**R/38/2012**

**BETWEEN**

**ROBERT HINDES - CLAIMANT**

**AND**

**NORTHERN IRELAND HOUSING EXECUTIVE – RESPONDENT**

**Re: 1 & 3 MONARCH STREET, BELFAST**

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

**Background**

1. The claimant purchased No 3 Monarch Street sometime around 1990. Approximately two years later he acquired an adjoining property, No 1 Monarch Street. This property was formerly a house but at a date unknown, prior to the claimant's acquisition of it, the buildings were demolished. From 1992 until the vesting by the respondent and subsequent decanting by the claimant in March 2012, the claimant used the rear yard of No 3 together with the adjoining land at No 1 to accommodate an outhouse and kennels for his greyhounds. For convenience the Tribunal will refer to this use as "kennel use".
2. This occupation by the claimant of, what was formerly No 1, for "kennel use" continued throughout his period of occupation and the claimant carried out additional works to the property including installing flag stones and erecting a shed in addition to the kennelling. Nos 1 and 3 were vested by the respondent in April 2010 and in March 2012 the claimant relocated to a new property where he installed similar flagging and kennelling.
3. On 17<sup>th</sup> April the claimant submitted a domestic disturbance claim to the respondent in respect of the claimant's displacement from Nos 1 and 3. The claimant has sought the following items of disturbance in respect of No 1:

Garden Shed –	£1,000
Greyhound Kennels –	£500
Flagging –	<u>£1,500</u>
	£3,000

The market value of No 1 has been assessed and agreed at £15,000 for compensation purposes and it is only the items of disturbance above which are the subject of the dispute.

### **Procedural Matters**

4. Keith Gibson BL appeared for the claimant instructed by Joe Allen, Chartered Surveyor. Richard Coghlin BL appeared for the respondent instructed by Harrisons, Solicitors. The Tribunal is grateful for the clear and well reasoned submissions advanced on behalf of both parties from which it derived considerable assistance.

### **Positions of the Parties**

5. Mr Coghlin submitted that the agreed compensation of £15,000 is based on the site value for housing use at No 1 Monarch Street. The valuation for the existing "kennel use" is assessed at £5,000 and as a matter of law if a claimant is receiving compensation for one use of a property he cannot get disturbance costs based on another use.
6. Mr Gibson submitted that, in addition to the market value for one use the claimant is entitled to recover the costs of his disturbance from another use and he is therefore entitled to the costs of similar adaptations at a replacement property. He further submitted that not to compensate for these adaptations offended the principle of equivalence and, if paid, would not go beyond the claimant's total loss.

### **Statutory Framework**

7. The jurisdiction of the Tribunal to assess compensation is founded in Article 3 of the Land Compensation (Northern Ireland) Order 1982 ("the 1982 Order") and the rules for assessing compensation may be found in Article 6 of that Order. Rules (2) and (6) are of particular relevance to this reference and provide as follows:

"(2) The value of land, shall, subject to rules (3) to (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;

(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."

### **Case Law**

8. The Tribunal was referred to the following case law:

Horn v Sunderland Corporation [1941] 1 All ER 480 ("Horn v Sunderland")

The facts in Horn v Sunderland were that the applicant was the owner of a farm known as Springwell Farm, which the Corporation were purchasing compulsorily as a building site under the powers given to them by the Housing Act 1936. The land had been used by the applicant in connection with his business of horse breeding. It was accepted that the land should be valued on the basis that it could be developed by building houses thereon and the market value was therefore assessed at £22,700 being a sum far in excess of its value for agricultural purposes.

Having assessed the market value for the purposes of compensation as its development value, the arbitrator declined to make an award for disturbance on the grounds that:-

“the sum so assessed could not be raised by a willing seller in the open market unless vacant possession were given to the purchaser for the purposes of building development”

The applicant referred the matter to the High Court where Atkinson J ordered that the award be remitted to the arbitrator for reconsideration, with direction to assess the loss occasioned by the disturbance of the applicant's business. The respondent appealed the decision to the Court of Appeal where the matter was considered by a panel consisting of Sir Wilfred Greene MR, Scott and Goddard LJ. The Court of Appeal held (Goddard LJ dissenting) since the value of the land as building land could only be realised by the removal of the business, compensation for disturbance could not be awarded because the value as building land exceeded the sum of the value of the land as agricultural land plus the loss by disturbance. If the sum of these items exceeded the value as building land, then the applicant would be entitled to the difference.

Scott LJ “Where, by reason of the notice to treat, an owner is enabled to effect an immediate realisation of prospective building value, and thereby obtain a money compensation which exceeds both the value of the land as measured by its existing use and the whole of the owners loss by disturbance, to give him any part of the loss by disturbance on top of the realisable building value is, in my opinion, contrary to the statutes.”

Scott LJ “The statutory compensation cannot and must not exceed the owners total loss, for if it does, it will put an unfair burden upon the public authority or other promoters, who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than his loss.”

Sir Wilfred Greene MR “The respondent could not farm and build as well. The only way he could realise the building value was by giving up farming on the land, and the only way in which he could enjoy the farming value was by refraining from realising its building value.”

Beaufort Developments (NI) Limited v Gilbert-Ash NI Ltd & Another [1977] NI 142 (“Beaufort v Gilbert-Ash”)

The following extracts from the case were submitted to the Tribunal:

“We are conscious, however, of the practice which the Court of Appeal in this jurisdiction has adopted in the past of following the decisions of the English Court of Appeal where it has pronounced upon a topic, even where we think another conclusion might be preferable.”

“This practice was set out in the judgment of Holmes LJ in the Irish Court of Appeal in McCartan v Belfast Harbour Commissioners [1910] 2 IR 470 at 494-495, where he said:

‘It is true that, although we are not technically bound by decisions of the co-ordinate English Court, we have been in the habit, in adjudicating on questions as to which the law of the two countries is identical, to follow them. We hold that uniformity of decision is so desirable that it is better, even when we think the matter doubtful, to accept the authority of the English Court and leave error, if there be error, to be corrected by the Tribunal whose judgment is final on both sides of the channel’.”

“The correctness of this principle has been regularly accepted since in Northern Ireland, as may be seen from Northern Ireland Railway Transport Board v Century Insurance Co Ltd [1941] NI 77 at 107 per Murphy LJ and McGuigan v Pollock [1955] NI 74. In the latter case Black LJ observed (at 107) that:

‘...perhaps this principle is especially one to be followed when the matter at issue is not one of any broad legal principle but is really a question as to the construction to be placed upon somewhat obscurely worded statutory provisions’.”

The Lord Mayor, Alderman and Burgess of the City of Dublin v Ivor B Underwood [1997] IR 69 (“City of Dublin v Underwood”)

In this case the Supreme Court in Dublin considered the impact of the “six rules” contained in their equivalent legislation; Section 2 of the Acquisition of Lands (Assessment of Compensation) Act 1919. These mirror almost in their entirety, the provisions of Article 6 of the 1982 Order.

The facts of City of Dublin v Underwood were that the Plaintiff intended to vest certain properties in the New Street, South/Clanbrassil Street lower area in or about 1984. The Defendant had two investment properties in this area, which he did not occupy. There was a dispute about the amount of compensation to be paid to the Defendant and the Property Arbitrator appointed by the Plaintiff posed a question by way of special case stated:

“Am I correct in law in holding that the Defendant is entitled to recover his reinvestment costs from the Plaintiff as part of his compensation for the compulsory purchase of his interests in the subject properties in circumstances where he was not in occupation of the properties and held them as an investment?”

Budd J, in the first instance, answered the case in the affirmative and the Plaintiff appealed. The matter was considered by Hamilton CJ, O’Flaherty & Keane JJ of the Supreme Court who reviewed over twenty two authorities. The Defendant’s losses in City of Dublin v Underwood were essentially the costs of reinvestment, stated to be at 0.5% of the purchase price, to include stamp duty, legal and agent fees.

The Supreme Court dismissed the appeal and affirmed the Order of the High Court. Budd J (in the first instance) referred to the essentials of a valid disturbance claim:

- “(i) The loss must have been sustained, or must reasonably be expected to be sustained in the future;
- (ii) The loss must flow from a compulsory acquisition;
- (iii) The loss must not be too remote;
- (iv) The loss must be the reasonable consequence of the dispossession of the owner.

Arising out of and underpinning these four criteria was the principle of equivalence. The owner should be able to recover personal loss imposed on him by the forced

sale; otherwise he will not be fully compensated; but he should neither recover more or less than his total loss”.

Budd J utilised an example whereby an imaginary octogenarian had greyhound kennels on his plot near his cottage on the outskirts of Galway. Under compulsory acquisition Budd J opined that he should not be penalised because the land had development potential. In order to ensure the principle of equivalence the Tribunal should accord with the notion of exact equivalent reinstatement in pecuniary terms when it comes to the settlement of compensation.

The Supreme Court did, however, add the proviso to the judgment of Budd J in that the question as to whether compensation for disturbance was recoverable in addition to the value of the land for development purposes did not fall to be resolved in the City of Dublin v Underwood:

“I would, however, add this proviso. While Budd J was of the opinion that the judgment of the majority in Horn v Sunderland Corporation, on the actual point at issue in that case – as to whether compensation for disturbance was recoverable in addition to the value of the land for development purposes – should not be followed, that precise issue does not fall to be resolved in these proceedings. I would, accordingly, reserve for an appropriate case the question as to whether the majority decision in Horn v Sunderland Corporation should be followed in this jurisdiction.”

### **Claimant’s Case**

9. Mr Gibson submitted that the claimant was entitled to the costs of similar “kennel” adaptations at a replacement property and if he was not compensated for these adaptations it would offend the principle of equivalence. He submitted that if paid it would not go beyond his total loss.
10. Mr Gibson suggested that the respondent had refused to pay compensation for disturbance in the subject case based on the decision in Horn v Sunderland. He contended, however, that the circumstances in the subject case were different and he relied on those in City of Dublin v Underwood.
11. Mr Gibson suggested the claimant’s case could easily be distinguished from Horn v Sunderland:-

- Mr Horn claimed as part of his compensation that the land which he was using had a much higher value because of its development potential. In the subject case no such contention is put forward by the claimant. He purchased the property at No 1 Monarch Street with the buildings demolished and the property was thereafter vested in the same state. The open market value of the claimant's property had not therefore changed by virtue of the possibility of a successful planning application nor did it have a use at the time of vesting which it did not originally have at the time of acquisition by the claimant.
  - The claimant is not contending that the property had a "hope" value or development potential. "Development value" only arises when planning permission is granted for a higher use value. The subject property therefore has no development value since there has been no change in its planning status.
12. Mr Gibson further submitted that if the Tribunal decided against the claimant's contention that the £15,000 did not represent development value, the Tribunal still had the authority to award the claimant development value (£15,000) and disturbance costs (£3,000). He referred the Tribunal to City of Dublin v Underwood and suggested that for "reinvestment costs" substitute "disturbance costs".
13. In conclusion he submitted the land was bought as residential land, vested as residential land and as such a disturbance claim follows, just as it would in Horn v Sunderland, if Mr Horn had sold his land for agricultural purposes only.

### **Respondent's Case**

14. Mr Coghlin confirmed that the market value of No 1 Monarch Street had been assessed at £15,000 for compensation purposes and this was based on its value for development as housing. He also confirmed the respondent's assessment of the market value of the property in its current "kennel use" to be £5,000. The claimant had requested an additional amount for the costs of removing kennels etc. It was the respondent's position, however, that as a matter of law, confirmed in Horn v Sunderland, that the respondent was not obliged to compensate the claimant for these disturbance costs, which were based on the "kennel use" of the land, where the market value of the property is assessed on the basis of housing use.
15. Mr Coghlin submitted that being an election, the position of the claimant prior to vesting, is that he can have either have the current "kennel use" or the development value thereof; he cannot have both. The cost of electing to realise the development value of the lands is the loss of the "kennel use" value, or he suggested put another way, disturbance costs as this was the principle confirmed in Horn v Sunderland.

16. Mr Coghlin submitted that the Tribunal was obliged to follow the decision in Horn v Sunderland and referred to Beaufort v Gilbert-Ash.

17. He further submitted the circumstances in City of Dublin v Underwood to be easily distinguished from the subject case:

- It did not involve a consideration of the same principles as were involved in Horn v Sunderland as the facts were different.
- In City of Dublin v Underwood the market value of the premises at issue did not require any change of use of the premises and there was no question therefore of the claimant's position prior to vesting being characterised by an election between two inconsistent uses.
- The Supreme Court in Dublin specifically stated in their judgement that the decision in City of Dublin v Underwood did not have any bearing on the principles established by Horn v Sunderland.

18. Mr Coghlin concluded:

- Prior to vesting the claimant had an election between continuing the current "kennel use" of the property and realising the development value thereof. If he elected to realise the development value of the property, the cost of doing so would be the loss of "kennel use".
- If the claimant were to be awarded compensation in the combined sum of the market value of his property as its value for some development of its current "kennel use" and disturbance, he would be overcompensated and the principle of equivalence would be transgressed because he would have the benefit of the election that he enjoyed prior to vesting but none of the costs of that election.
- The present case falls squarely within the rule in Horn v Sunderland and the claimant is therefore not entitled, as a matter of law, to the development value of the property and compensation for disturbance for "kennel use".
- City of Dublin v Underwood is entirely distinguishable and therefore unpersuasive. Insofar as Budd J formed the view in the first instance that Horn v Sunderland was wrongly decided, the expression of that view was obiter dictum and based on a crude analysis of the position occupied by a divested owner prior to vesting that would, if followed would transgress the principle of equivalence.



## **DECISION**

19. The Tribunal considers there are two key issues in the subject case:
- is the agreed market value of £15,000 for compensation purposes based on the development value of the land and;
  - if so, can the Tribunal award the claimant disturbance costs based on the “kennel use” of the land in addition to the market value which is based on development value.

### **Market Value**

20. At the outset of the hearing Mr Gibson advised the Tribunal that the issue was not about quantum. The market value of £15,000 for compensation purposes for No 1 Monarch Street had been agreed between the parties but it was the basis of this assessment which was unclear.
21. Mr Gibson submitted that the market value of the claimant’s property had not changed by virtue of the possibility of a successful planning application nor did it have a use at the time of vesting which it did not have at the time of the claimant’s acquisition of it. The claimant, however, did not provide the Tribunal with any evidence relating to the basis of his acquisition of the property at No 1 Monarch Street. He suggested development value only arises when planning permission is granted for a higher use value and he further defines development value as the difference between existing use value and a higher use value.
22. Mr Coghlin submits on behalf of the respondent that the market value of £15,000 is based on the development value of the site. He further submits that the market value of the property based on its current “kennel use” is £5,000. The claimant did not put any evidence before the Tribunal to dispute these figures.
23. As previously stated Mr Gibson defines development value as the difference between the existing use value and a higher use value. Mr Coghlin’s evidence, which is not disputed, clearly confirms there is a difference between the existing “kennel use” value of £5,000 and the development or “higher use” value of £15,000 in the subject case.
24. Based on the evidence before it, therefore, the Tribunal is satisfied the market value of £15,000 represents the development value of the property at No 1 Monarch Street.

### **Disturbance Costs**

25. Mr Gibson submitted that, based on the ratio in City of Dublin v Underwood, the Tribunal can award disturbance costs over and above market value in the subject case, even though the market value is based on development value. He referred the Tribunal to several extracts and in particular Budd J's opinion that a claimant should not be penalised because the land had development potential. He suggested that in order to ensure the principle of equivalence the Tribunal should accord with the notion of exact equivalent reinstatement in pecuniary terms when it comes to the settlement of compensation.
26. Mr Coghlin considered the subject case to be on point with the circumstances in Horn v Sunderland and on that basis, as a matter of law, the respondent is not obliged to compensate the claimant for the disturbance costs based on one use of the property where the market value is based on another use of the property. He referred the Tribunal to Beaufort Developments (NI) Limited v Gilbert-Ash NI Ltd & Another and suggested the Tribunal was obliged to follow the English Court of Appeal decision in Horn v Sunderland as a matter of practice and procedure even if there was doubt. He considers the subject case to be easily distinguished from City of Dublin v Underwood as in that case the market value of the premises did not require any change of use and there was therefore no question of an election between two inconsistent uses prior to vesting.
27. The practice and procedure as laid out in Horn v Sunderland has been the "bedrock" of compensation in this and other UK jurisdiction for over 70 years and that practice and procedure is still applied today. The case has been cited and accepted as authority in many decisions in this Tribunal.
28. The Tribunal agrees with Mr Coghlin that the principle as outlined in Horn v Sunderland should apply in this jurisdiction and on that basis the claimant cannot receive disturbance costs based on the "kennel use" of the property where the market value has been assessed on the basis of development value.
29. The claimant cites City of Dublin v Underwood as authority for the Tribunal to award disturbance costs in the subject case, even though the market value is based on development value. In other words set aside Horn v Sunderland. The Tribunal does not agree and as previously mentioned the Supreme Court in Dublin specifically caveated their decision in City of Dublin v Underwood that the precise issues in Horn v Sunderland did not fall to be resolved in their proceedings.

30. As confirmed by Horn v Sunderland, to realise the development potential of the premises in the subject case the existing “kennel use” would have to be abandoned. The development potential could not be realised without the claimant disturbing himself from the “kennel use” of the land. Where land has to be valued on the basis of a cleared site for development purposes compensation is not payable for disturbance from another use.
31. The Tribunal accepts that the claimant has spent money on kennel adaptations which may not be recoverable. Based on the evidence before it, however, the Tribunal confirms that the market value of the subject premises for development purposes to be £15,000 and the claimant’s disturbance costs should not be awarded.

**ORDERS ACCORDINGLY**

**25<sup>th</sup> April 2013**

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

**Appearances:**

**Claimants: Keith Gibson BL instructed by Joe Allen, Chartered Surveyor.**

**Respondent: Richard Coghlin BL instructed by Harrisons, Solicitors.**