LANDS TRIBUNAL FOR NORTHERN IRELAND

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE NORTHERN IRELAND VALUATION TRIBUNAL ISSUED ON 27 APRIL 2012

VT/4/2012

BETWEEN:

COMMISSIONER OF VALUATION

Appellant

and

ELIZABETH DOHERTY

Respondent

PROTECTIVE COSTS APPLICATION

COGHLIN LJ

[1] This is an application by Elizabeth Doherty ("the respondent") for a Protective Costs order ("the PCO") in respect of an appeal brought by the Commissioner of Valuation ("the appellant") from a decision of the Northern Ireland Valuation Tribunal (the "VT") delivered on 27 April 2012 confirming that the respondent was entitled to agricultural relief for rating purposes in the form of a 20% reduction in the capital value of her house. Mr Donal Lunny appeared on behalf of the appellant while the respondent was represented by Maria Mulholland. The Tribunal wishes to acknowledge the considerable assistance that it derived from the carefully constructed and well-presented written and oral submissions of both counsel.

The Factual Background

[2] The respondent is the co-owner, with her husband, of a dwelling house at 37 Ballymaleddy Road, Comber, County Down. At that location she also owns some 2.34 hectares of contiguous agricultural land. The respondent retired from part-time work as a Family Support Worker in 2002 and the lands are let in conacre for the grazing of animals. The respondent's husband is a Charity Worker earning a modest

income which is partially used to supplement the respondent's income from the conacre letting.

[3] The respondent derives an income from the lands of approximately £1,000 per annum made up of £480 in respect of rent, a single farm payment of £117.75 and harvesting of wood used to fuel the house for heating £400. The yearly outgoings for the farm are approximately £136 to include insurance and maintenance costs. The respondent estimates that she requires approximately £5,000 per annum for her living expenses and that, consequently, she relies on approximately £4,136 from her husband's income.

[4] The lands are the respondent's sole interest and her agricultural operations occupy 100% of her time. She carries out or directs the following operations on or in respect of the lands:

(i) hedge cutting; weed cutting; pruning and removing trees;
(ii) checking and renewing post and wire fencing;
(iii) checking and renewing drains and ditches;
(iv) annual negotiation and renewal of public liability insurance;
(v) arranging the letting of the land and liaising with the 'tenant';
(vi) administration of farm business including, for example, dealing with the Department of Agricultural and Rural Development ("DARD") circulars and annual applications for cross compliance.

[5] The respondent first made inquiries as to whether she was entitled to agricultural rate relief in accordance with the provisions of Schedule 12 Part II of the Rates (Northern Ireland) Order 1977 ("the 1977 Order") in respect of the lands in 2007 and she subsequently made application for the relevant relief. On 1 September 2011 the Commissioner of Valuation ("the Commissioner") refused to extend agricultural relief to the respondent. The respondent subsequently appealed that decision to the VT. The respondent conducted her application and subsequent appeal to the VT without legal assistance and the VT considered only the written representations of both parties and did not receive any oral evidence. The appeal hearing took place on 5 April 2012.

[6] The VT delivered a reasoned decision on 27 April 2012 setting out the factual background together with the submissions of both parties and recording that the only question which fell to be determined by the Tribunal was whether the respondent was a person whose primary occupation was carrying on or directing farming operations on the subject land. After a careful review of the relevant authorities the Tribunal rejected submissions advanced on behalf of the appellant that the respondent's administrative functions were insufficiently physical to constitute agricultural operations and that the area of land in question was too small to attract agricultural relief. The Tribunal concluded that the objective facts confirmed that farming was the respondent's sole occupation producing her sole source of income and that, in such circumstances, it was satisfied that she was a person whose primary occupation was that of carrying on farming operations and

that she was entitled to the agricultural relief sought. The appellant subsequently sought leave from the President of the VT to appeal the decision to this Tribunal in accordance with Article 54A of the Rates (Amendment) (Northern Ireland) Order 2006 ("the 2006 Order") and Rule 4 of the Lands Tribunal Rules 2007. The President determined that a point of substance had been raised on behalf of the Commissioner and, accordingly, granted the appropriate leave.

[7] It would appear that the essential submission that the appellant seeks to advance on appeal to this Tribunal is that, taking into account the small area of land and the limited functions carried out by the respondent, the totality of the agricultural operations carried out by the respondent could not constitute her *primary* occupation and that it is inescapable that her principle source of income lies elsewhere. In support of its submissions the appellant relies upon the provisions of Schedule 12 Part 2 of the 1977 Order which provide as follows:

> "The net annual value of a house occupied in connection with Agricultural land or a fish farm and used for the dwelling of a person –
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> (a) whose primary occupation is the carrying on or directing of agricultural, or as the case may be, fish farming operations on that land; or
>
> (b) who is employed in agricultural or, as the case may be, fish farming operations on that land in the service of the occupier thereof and is entitled, whether as tenant or otherwise, shall so long as the house is so occupied and used, be estimated by reference to the rent at which the house might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid.
>
> (2) The capital value of a house occupied and used as mentioned in paragraph 1 shall be estimated on the assumption (in addition to those mentioned in paragraph 1) that the house will always be so occupied and used."

The appellant also replies upon the interpretation of those provisions contained in a number of cited authorities. It would seem that the policy of the Land and Property Services Department ("LPS") is to allow a deduction of 20% in the capital value of a house that qualifies within the above provisions.

The Application for a PCO

[8] As noted above the respondent conducted her original application for relief and her subsequent appeal to the VT without the assistance of legal representation. For the purposes of the subsequent appeal by the appellant to this Tribunal the respondent has been represented by a solicitor and Ms Mulholland both of whom have been acting upon a pro bono basis in accordance with the relevant Law Society and Bar schemes. Ms Mulholland has grounded her application for a PCO upon the fact that the appellant regards this as a "test" case, that it is the appellant and not the respondent who is prosecuting this appeal that her restricted financial resources, taken with the limited personal benefit of outcome, render the continuing conduct of the appeal disproportionate for the respondent as well as leaving her vulnerable to a substantial award of costs against her should the appellant's appeal succeed. Ms Mulholland submitted that, as a matter of public policy, the respondent's inability to pay for legal representation should not bar her from effectively conducting an appeal in what the appellant considers to be a "test" case. In such circumstances Ms Mulholland seeks a PCO compelling the appellant to bear the respondent's costs of the appeal in any event and she relies upon the analogy with cases such as GW Railway v Willis [1917] AC 148 and R (on the application of Medical Justice) v Secretary of State for the Home Department [2011] 1 WLR 2852 in which leave to appeal was only granted upon condition that such orders were made.

[9] The powers of this Tribunal to award costs are to be found in Rule 33 of the 1976 Rules together with Section 8(7) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 ("the 1964 Act"). Section 8(7) provides as follows:

> "8(7) Subject to Sections 9 and 10 and any other transfer provision, the Lands Tribunal may order that the costs, or any part of the costs, of any proceedings before it incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under any such order or direct in what manner they are to be taxed or settled."

Rule 33 of the 1976 Rules provides as follows:

> "33(1) Except in so far as [Article 5 of the Land Compensation (Northern Ireland) Order 1982] applies and subject to paragraph (3) the costs of and incidental to any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President.
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> (2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settled the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed by the registrar on a scale specified by the Tribunal, being a scale

> of costs for the time being prescribed by rules of court or by County Court Rules."

[10] This Tribunal's powers in respect of costs were considered in the case of Oxfam v Earl & Ors (Northern Ireland Lands Tribunal 17 October 1996 BT/3/1995) a decision which confirmed the Tribunal's discretion in respect of costs including that:

(i) the Tribunal must exercise that discretion judicially;
(ii) the general 'rule' is that costs should follow the event;
(iii) special circumstances are required to justify departure from that 'rule'.

It is common case between the parties that the judicial discretion available to this Tribunal is wide enough to permit the granting of a PCO in an appropriate case.

The Principles Applicable to the Grant of a PCO

[11] The principles to be taken into account when considering the grant of a PCO were considered in a recent judgment prepared by Brooke LJ in the Court of Appeal in England and Wales in R (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600 and are contained at paragraph 74:

> "74 We would therefore restate the governing principles in these terms:
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> (1) A Protective Costs Order may be made at any stage of the proceedings, on such conditions as the court thinks fits, provided that the court is satisfied that:
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> (i) the issues raised are of general public importance;
> (ii) the public interest requires that those issues should be resolved;
> (iii) the applicant has no private interest in the outcome of the case;
> (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
> (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
>
> (2) If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.

> (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

[12] The 'Corner House' principles have been considered and applied by the Court of Appeal in this jurisdiction in Re McHugh's Application [2007] NICA 26. In delivering the judgment of the court in that case Campbell LJ prefaced his reference to the principles at paragraph [17] by observing that:

> "It is only in exceptional circumstances that Protective Costs Orders are made."

However, he also went on to observe that the principles provided a guide only and that it did not follow that, for example, the fact that the applicant had a personal interest in the proceedings constituted a complete bar to making a PCO.

[13] Applying the principles as a guide and doing so in the context of the wide overall discretion available to the Tribunal it seems to me that the following factors are of relevance to the circumstances of this particular application:

(a) In the course of her carefully constructed skeleton argument Ms Mulholland has emphasised the fact that the conacre system is unique to Ireland as a form of letting land and that approximately one-third of Northern Ireland's total farm land is let in conacre. Ms Mulholland further submitted that, while in many cases of such lettings the income may be relatively modest, the fact that landowners today continue to accept such modest income demonstrates the importance of this form of letting to farming in Northern Ireland. I further note that the decision of the President of the VT granting the appellant leave to appeal recorded that the appellant's request for leave, sent on 12 June 2012 included the sentence:

> "LPS consider this to be a test case as it applies to agricultural relief to a property with a minimal amount of land that is let on conacre but that is 'farmed' by an individual who is a retired person who is deriving a minimal income from the process."

Accordingly, it seems to me that a sufficient public interest has been established.

(b) The respondent, as the beneficiary of the relief sought, clearly does have a personal interest in the outcome of these proceedings. However, it is clear from the authorities that such a personal interest is not an inevitable bar to the making of a PCO – see the judgment of Campbell LJ in McHugh's Application and Weaver v London Quadrant Housing Trust [2009] EWCA Civ 235. In practice, as a consequence of a recent decision to plant the subject land as woodland, the maximum benefit of rate relief to which the respondent may be entitled is restricted to £745.14.

(c) This is not a case in which refusal of a PCO will result in a litigant being unable to pursue litigation and thereby be deprived of access to justice. The applicant is a respondent in this case who has enjoyed success at first instance and it is the public authority that is pursuing the litigation further in the course of an appeal. However, in my view, in circumstances in which a public authority seeks to prosecute an appeal in what it regards as a "test case" it would be equally damaging to the interests of justice if a respondent was to be deprived of the benefit of professional representation for the purposes of written and oral submissions by reason of his or her restricted financial means – see the judgment of Elias LJ in Weaver at paragraph 13(d). The fact that, to date, the respondent has been represented by counsel and solicitors upon a pro bono basis has the potential to enhance the merits of the respondent's application for a PCO (Corner House at paragraph 74 and Venn v Secretary of State for Communities and Local Government & Ors [2013] EWHC 3546 (Admin) at paragraph 40) as does the fact that the VT from which the appeal lies is a cross-free jurisdiction.

[14] As a public body the appellant has access to substantial material resources. I have recorded at paragraph [3] the respondent's original written statement confirmed that her income is made up to some £5000 pa by combining the income from the subject land with a dependency upon her husband. I have not had regard to the means of the respondent's husband who is not a party to these proceedings. The statement of means lodged on behalf of the respondent subsequent to the hearing confirms that she has a relatively substantial fund of capital currently held within a Savings and ISA account and a Fixed Term account. I understand that the respondent did not make a full statement of means to her own solicitor until directed by the court to provide such documentation and that is a matter that gives me some concern. Correspondence suggests that this may have been as a result of a failure by her solicitors to obtain full details of her means, which is rather surprising given the nature of this application. However this is not a case in which straightened circumstances alone justify a PCO. It is rather one of disproportionate circumstances similar to Morris v Wrexham County Borough Council, the National Assembly for Wales [2001] EWHC (Admin) 697. In that case the costs payable by the appellant, had he lost on appeal, would have far exceeded the cost of the repairs to the roof while in the instant case the monetary benefit of the proceedings to the respondent would not justify the financial risk of losing the appeal should costs simply follow the event. Accordingly, in my view, without the protection of a PCO the respondent would be justified in reaching a reasonable and common sense decision not to resist the appeal and the overriding objective contained in Order 1 Rule 1A of the RSC would not be observed.

[15] In the circumstances, after giving the matter careful consideration, I am prepared to exercise my discretion to make a PCO in favour of the respondent. As noted earlier, the particular form of PCO sought by the respondent is an order that the appellant bear the respondent's costs, together with its own costs, in any event. Such an order has been made on a number of occasions as a condition of giving leave to appeal – see, for example, Great Western Railway Co v Wills [1917] AC 148 and

Morris. In this case, no such condition was attached to the leave to appeal granted by the President of the Northern Ireland VT. However, it is also clear from the relevant authorities that a PCO may be made at any stage of the proceedings on such conditions as the court sees fit and that would include the type of order made in Morris – see, for example, the case of Weaver. After careful consideration, despite the concern expressed above, I am prepared to make an Order that the appellant should bear the costs of the appeal in any event. As I have noted earlier, to date, the respondent has been represented on a pro bono basis by both solicitor and counsel, such representation being in accordance with highest traditional standards of both professions.

30th January 2014