

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
IN THE MATTER OF THE PROPERTY (NORTHERN IRELAND) ORDER 1978
R/1/1996
BETWEEN
SIR OLIVER JOHN NAPIER AND JAMES CHRISTOPHER NAPIER,
PERSONAL REPS OF SARAH FRANCES NAPIER DECEASED - APPLICANTS
AND
ALAN NURSE - RESPONDENT

Lands Tribunal - Mr Michael R Curry FRICS FSV A IRRV ACI.Arb

Belfast - 6th November 1996

This was an application made under Rule 34 of the Lands Tribunal Rules (Northern Ireland) 1976 to withdraw, without the Respondent's consent, an application under the Property (Northern Ireland) Order 1978 for extinguishment of covenants which affected residential property at 104 and 106 Earlswood Road, Belfast.

The Rule gives a discretion to "permit such withdrawal on such terms as to costs or otherwise as he may think fit". The only issue between the parties was that of costs ie whether the withdrawal should be permitted on terms that the Applicants pay the Respondent's costs.

Mr John R Comerton appeared for the Applicants. Mr Peter Reid appeared for the Respondent.

The application for extinguishment of the covenants was registered on the 2nd January 1996. It was mentioned before the Member on 22nd January 1996 and the parties agreed that it be mentioned again on 5th February and that expert witnesses should attend. They did and several issues were crystallised. These included a requirement to obtain planning permission for the proposed development. As this would take some time, it was left that the Registrar would request, and the parties would provide, progress reports. In March, the Tribunal was informed by the Applicants that an architect had been appointed, he had opened discussions with the Planning Office on a preliminary design and intended to lodge a formal application within two weeks. In May the Respondent informed the Registrar that they understood no further progress would be made until the planning application was determined.

Circumstances changed. The premises were sold and the Applicants no longer had any interest in proceeding with the application to the Tribunal. There was discussion between the parties and the Respondent indicated that he would not oppose an application to withdraw on terms that his costs were paid. The Applicants would not agree and on the 7th August 1966 made formal application to the Tribunal to withdraw. By letter dated 4th October 1966 the Respondent confirmed to the Registrar that he would consent to the withdrawal on condition that his costs were paid by the Applicants.

Mr Comerton submitted that, where the matter had gone to a substantive hearing, the usual practice in cases involving covenants on dwelling houses had been not to award costs and, in effect, this withdrawal would result in a significant saving in costs for the respondent. In response to the Tribunal, Mr Comerton agreed that, as a result of the sale, the substantive issue was now academic to the Applicants. The application to withdraw did not reflect the applicants' view of how the matter would have turned out had it gone the distance. It was not a case without merit.

Mr Reid underlined that the Reference had been initiated by the Applicants and the Respondent had been put to trouble and expense in consequence of that. It would be inequitable if the application were now withdrawn and his client left to foot the bill.

The general approach to costs

a. Applications which go to a substantive hearing

Preston & Newsom "Restrictive Covenants Affecting Freehold Land" 8th Edition at pages 345-350 gives an historical account of the way in which the Lands Tribunal for England and Wales has exercised its discretion in regard to costs. In 1954 the then President distinguished cases under the equivalent English legislation from normal legal actions and issued a statement to that effect. However, in 1982 the Tribunal made it clear that that statement had come to be regarded as a fetter on their discretion in awarding costs and underlined that each case would be dealt with entirely on its merits.

Although an historical perspective might lead to a perception in this jurisdiction that this Tribunal similarly would or did treat cases under the Property Order as being of a special character warranting a departure from the usual practice on costs, if that were so it is no longer the case. The Tribunal makes it clear that it does not take that view and that its approach, in general terms, in the Property Order cases will be no different from those in other cases and as for example, set out in its general views on liability for costs in Oxfam v Earl & Others BT/3/1995. That is to say, unless there are good reasons for a special award, such as no issue of fault nor principle, rejection of an offer to settle, extravagant or

unsatisfactory conduct of the proceedings or failure on an important issue, costs will follow the event so "the loser pays all". That being so, it is not correct to assume that if this matter had gone to a substantive hearing there would be no award as to costs.

For the avoidance of doubt, this Tribunal makes clear that, as a general rule it would not adopt the policy expressed by Judge Rich QC in the recent decision of the Lands Tribunal for England and Wales, reported in the Estates Gazette after the date of this Hearing, Re Kennet Properties Ltd's Application [1996] 45 EG 139, that:

"Unless an objector behaves unreasonably, a successful applicant should, in my judgment, usually bear its own costs and may in certain circumstances appropriately be required to pay objectors' costs."

b. Applications to withdraw

Technically, an application to withdraw in the Tribunal is closer to an application to discontinue than an application to withdraw, in the Supreme Court. The Tribunal sees no reason not to follow the general rule, as noted in the Supreme Court Practice, that a respondent is entitled to his costs if an application is discontinued. But there may be exceptions.

In J T Stratford & Son Ltd v Lindley & Others (No 2) [1969] 3 All ER, the Court of Appeal dealt with a more complex situation but recognised the most undesirable results from a public point of view of forcing people to litigate when they really have no desire to do so. In that appeal, as here, the only way of determining who would have won, if necessary to establish a liability for costs, would be to try the substantive issues. That appeal was referred to Barretts and Baird (Wholesale) Ltd & Others v Institution of Professional Civil Servants & Others, *The Independent*, December 9, 1988, in which Mr Justice Henry dealt with an exceptional case:

"Order 62, which set out the new regime as to costs, was based on, or at any rate consistent with, the general principles laid down in Stratford v Lindley. The wide discretion under Order 21, rule 3, entitled the tribunal exercising that discretion to make what order it liked in respect of an order of costs in cause."

and:

"In most cases, however, the discontinuance was effectively a defeat, or an acknowledgement of defeat or a likely defeat. Yet it was equally possible that discontinuance reflected not defeat so much as that the matter had now become academic save for the question of costs. In such circumstances, the plaintiffs asserted that the court should look at the matter to see whether the general rule should still apply.

His Lordship was satisfied that the general rule should only apply when the discontinuance could safely be equated with defeat or an acknowledgement of likely defeat".

On the question raised by the substantive issue being now a matter of academic interest only, the Tribunal accepts that, in exercising its discretion, it should look at the matter to see whether the general rule should still apply. However, although in this reference, that issue has become of academic interest only, that has come about because the Applicants have taken certain steps. They have sold the property. That distinguishes it from a case in which it is an independent action by some third party or event which results in the question becoming academic. The Applicants caused the change in circumstances and that being so, the Tribunal does not consider the fact that the question is now academic is sufficient justification to depart from the general rule.

Conclusion

In summary, the Tribunal considers that costs in the substantive issues in Property Order applications should be dealt with in the ordinary way. It cannot be assumed that the Tribunal will make no award as to costs.

If an application is made for withdrawal, costs are at the discretion of the Tribunal and, as a general rule, the party seeking the withdrawal will be assumed to have recognised that they were unlikely to succeed on the substantive issues and will be ordered to pay the other party's costs.

If the substantive issues have been rendered academic and there is no short way to determine the likely outcome on those issues, the Tribunal will look at what caused the matter to become academic and whether the cause was an external event outside the control of the parties. The Tribunal will not automatically regard the fact alone that it has become academic as sufficient reason to displace that general rule.

Here, the Applicants have not acted in recognition of likely failure but they have made the application academic of their own volition.

The Applicants are granted leave to withdraw on the payment of the Respondent's costs. Such costs to be on the County Court scale and taxed in default of agreement.

ORDERS ACCORDINGLY

28th November 1996

Mr M R Curry FRICS FSVA IRRV ACI.Arb

Appearances:

John R Comerton (Comerton & Hill, Solicitors) for the Applicants.

Peter Reid (King & Gowdy, Solicitors) for the Respondent.