

**LANDS TRIBUNAL FOR NORTHERN IRELAND**  
**LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964**  
**PROPERTY (NORTHERN IRELAND) ORDER 1978**

**IN THE MATTER OF A REFERENCE**

**R/40 & 41/2002**

**BETWEEN**

**JOHN RAYMOND McMAHON & SAMUEL ANDREW CYRIL McMAHON – APPLICANTS**

**AND**

**KINGSMOAT DEVELOPMENTS LIMITED – RESPONDENT**

**PART II**

**In the matter of Costs**

**Re: 89 Kings Road, Belfast**

**Lands Tribunal – Mr Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI**

**Belfast – 9<sup>th</sup> December 2003**

1. By a decision dated 19<sup>th</sup> June 2003 the Tribunal declared that the subject land is affected by an impediment and the nature or extent of that impediment. The Tribunal also concluded that the covenants do not unreasonably impede the enjoyment of the subject land.
2. At this stage the only issue is the allocation of costs and in particular whether a proportionate award is to be made. The party have suggested that they may be able to reach agreement on actual amounts, once such guidance has been given.
3. Mr Horner QC suggested that there were the two events; the respondent had won both of them. Mr Orr QC broadly accepted that but suggested that the applicants had been successful on a number of issues – self-certification; a proportionate enquiry; the suggestion of an imprudent investment; the conclusion that self-certification was only just unreasonable; the covenants did not contemplate the proposed development; and the conclusion that their value was limited. Mr Orr QC did not suggest that the

4. Mr Horner QC suggested that the respondent was entitled to its costs. Mr Orr QC suggested that a proportionate award should be made.
5. The Tribunal was referred to *Taking Issue with Events* – a published commentary about awarding costs by a well-known commentator - Mr Tony Bingham; Lipkin Gorman v Karpnale Ltd & Another [1989] 1 WLR 1340 CA; *Land Covenants* by Scammell 1986 Edition at pages 485-486 in which the editor suggests “that the Order (if any) which the Tribunal will make is likely to be closely related to the degree of success or failure of any given party on the contested issues”; Halsbury’s Laws of England 4<sup>th</sup> Edition 2003 Reissue Vol 8(1); and the Tribunal considered Purfleet Farms Limited v Secretary of State for Transport, Local Government and the Regions [2003] 1 P&CR 324 – costs in the context of compulsory acquisition.
6. In Oxfam v Earl & Others [BT/3/1995] [1996] (discussed with approval by the learned Editors of the *Handbook of Rent Review* - loose-leaf) the Tribunal referred to its discretion in costs:

“The Tribunal must exercise that discretion judicially and the starting point on the question of costs is the general presumption that, unless there were special circumstances, costs follow the event, i.e. that in the ordinary way the successful party should receive its costs. The next question for the Tribunal is whether there were special circumstances, which would warrant a departure from that general rule. But these must be circumstances connected with the proceedings, for example, to reflect an unsuccessful outcome on a *major issue*.”

*Tribunal’s emphasis*

7. The introduction of the new costs regime of the CPR in England and Wales has triggered a reconsideration of established principles including whether, or to what extent, that developing jurisprudence, reflecting a “new-found freedom” (per *Greenslade on Costs* – loose-leaf) in the allocation of costs, should inform what might be described as a more robust approach in other regimes. In this case, having

Oxfam.

8. The terminology of “issues, events and (per Mr Bingham) sub-issues” can be confusing and the Tribunal finds it convenient (but at the risk of heaping confusion upon confusion rather than clarifying) to adopt the terminology of ‘ultimate questions’ and ‘subsidiary questions’. Here the respondent has been successful on the two ultimate questions. Further, this is not a case in which the ultimate questions were matters of degree (for example an application for 9 houses but a modification permitting only 3) and it is clear that the matters on which the applicants did enjoy a degree of success were subsidiary questions.
9. There may be circumstances in which a subsidiary question is of such great significance that it merits a departure from the general rule (a “major issue” per Oxfam) but the Tribunal is not persuaded that the subsidiary questions in this case qualify.
10. The Tribunal concludes that costs must follow the event, the Respondent is entitled to its costs and it is not appropriate to make any percentage deduction.

#### **ORDERS ACCORDINGLY**

**22<sup>nd</sup> December 2003**

**Mr M R Curry FRICS IRRV MCI.Arb Hon.FIAMI  
LANDS TRIBUNAL FOR NORTHERN IRELAND**

#### **Appearances:**

**Mark Orr QC instructed by Cunningham & Dickey appeared for the Applicants.**

**Mark T Horner QC instructed by Carson McDowell appeared for the Respondent.**