

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

**IN THE MATTER OF A REFERENCE**

**R/41/2004**

**BETWEEN**

**JOHN McGRATH & MARGARET MARY McGRATH – APPLICANTS**

**AND**

**KERRY O'NEILL, KIM O'NEILL, PETER O'NEILL & GARRY O'NEILL – RESPONDENTS**

**Re: Premises at 99 Coleraine Road, Portstewart, County Londonderry**

**PART II**

**Coleraine – 21<sup>st</sup> October 2005**

1. In the Part I decision dated 2<sup>nd</sup> March 2005 the Tribunal permitted modification of a restrictive covenant so as to give consent with effect from the date of the hearing for development in accordance with the planning permission that permitted replacement of a single dwelling with a pair of semi-detached townhouses. It was not disputed that the Respondents ('the O'Neills') were entitled to compensation and the Tribunal awarded compensation of £100.
2. The Applicants ('the McGraths') are seeking recovery of their costs, which although not finally quantified are said to amount to a claim of at least £4,700.
3. Mr Boyle of Rafferty & Boyle, solicitors appeared for the McGraths. Mr Kerry O'Neill appeared for the O'Neills.
4. It is immediately apparent that the substantive case was closely analogous to hostile litigation. Although the application was for extinguishment or modification and the Tribunal ordered modification only (in consequence of concessions by both parties) and although some modest compensation was awarded, it is clear that the successful party was the McGraths.

5. Mr Boyle suggested that the key feature in this case was the pre-proceedings offers of £750 and more made by the McGraths to have the covenant discharged (the responses from the O'Neills were at a level substantially greater) and the extent to which the O'Neills failed to achieve that sum. The Tribunal accepts that the amount achieved by the O'Neills was virtually nominal. Mr Boyle therefore suggested that the O'Neills should pay the McGraths' costs.
6. Mr Boyle referred the Tribunal to an offer that the O'Neills stated to be a Calderbank Offer. The Tribunal has reservations about whether in principle the extent to which an offeror's failure to beat his own Calderbank Offer, which is privileged with a reserved right to produce and which the offeror does not produce, should be a factor to be taken into account.
7. Mr O'Neill drew the attention of the Tribunal to the profit the McGraths would make but the Tribunal does not consider that to be a relevant factor (see the substantive decision at paragraphs 15-18).
8. Earlier in the proceedings, well before the hearing, the Tribunal had made it clear that in having regard to the way in which the case had developed, an unsuccessful party would likely be at risk in the matter of costs.
9. The Tribunal was referred to *County Court Procedure in Northern Ireland* Valentine (1985) SLS Belfast. However the Tribunal exercises a broad and flexible discretion.
10. If the deciding factors simply were a matter of who had won and whether offers to settle at a sum of money had been unreasonably refused, the Tribunal would award the McGraths their costs. However the circumstances were more complicated than that.
11. It is of minor importance but negotiations were based on extinguishment and the Tribunal ordered modification.
12. Of much more importance is the fact that the McGraths knowingly breached the terms of the lease. Development commenced and continued without the consent required and without modification by the Tribunal. That should not be ignored and the Tribunal

13. Taking a balanced view of the conduct of the McGraths and the offers to settle the Tribunal concludes that the applicants should receive one third of their costs.

**ORDERS ACCORDINGLY**

**14<sup>th</sup> November 2005**

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

**Appearances:**

**Applicants: Mr Paul Boyle of Rafferty & Boyle, solicitors**

**Respondents: Mr Kerry O'Neill.**