

LANDS TRIBUNAL FOR NORTHERN IRELAND
THE LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982
LOCAL GOVERNMENT ACT (NORTHERN IRELAND) 1972

IN THE MATTER OF A REFERENCE

R/49/2009

BETWEEN

DONAL & VIVIENNE O'NEILL – CLAIMANTS

AND

NORTHERN IRELAND HOUSING EXECUTIVE – RESPONDENT

Re: 57 Glenwood Street & 94 Battenburg Street, Belfast

Lands Tribunal - Mr M R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAMI

Background

1. On 3rd June 2004 the claimants were registered as owners of 57 Glenwood Street, Belfast ('the lands'). On 30th May 2007, an area that includes the lands was declared a Redevelopment Action Area under Article 47 of the Housing (Northern Ireland) Order 1981. On 15th November 2007 an application was made to the Department for Social Development for the making of a Vesting Order which included the lands. On 19th December 2007 an 'all monies charge' on the lands, in favour of the Bank of Scotland, Halifax Division, ('the mortgagee'), was registered. On 25th May 2009, the relevant Vesting Order became operative.
2. The agreed open market value of the lands at the time the Vesting Order became operative was £68,000 and the current mortgage debt is £71,216.
3. As the mortgage debt exceeded the market value of the lands, it follows that the Claimants were in what is commonly termed 'negative equity'. They sought to recover some or all of that negative equity as compensation, from the Respondent.

Procedural Matters

4. The mortgagee, the Bank of Scotland, was put on notice of the reference but elected not to take part in the proceedings.
5. The Tribunal received written and oral submissions from Mr Keith Gibson BL and from Mr Patrick Good BL.

Position of the parties

6. The Tribunal agreed to address a number of preliminary questions arising from that (the parties could not agree the questions). The first question was this:

Question (1) - Is the Northern Ireland Housing Executive, as a promoter pursuant to the Land Clauses Consolidation Act 1845, bound to discharge all or any of the mortgaged debts secured on each property where the assessed compensation falls below the current redemption figure?

7. Mr Good BL suggested that the Northern Ireland Housing Executive is not so required to discharge all or any of the mortgage debt. Mr Gibson BL suggested that it was. In the absence of a claim by the mortgagee upon the compensation fund the mortgagors remain personally liable to the mortgagee in respect of the mortgage debt.

8. On behalf of the respondent Mr Good BL posed two further questions:

Question (2) – Whether the determination of compensation payable upon the vesting of mortgaged lands is the value of the lands settled by agreement of the mortgagee, the party entitled to the equity of redemption and the promoters of the undertaking and in default of such agreement that amount may be determined by the Lands Tribunal?

9. Mr Good BL suggested that in the present case the value of the lands has been settled by agreement and the same must be regarded as the parties' determination of the value of land if sold on the open market as provided under Article 6(1)(2) of the Land Compensation (Northern Ireland) Order 1982 ('the 1982 Order').

Question (3) – Whether the determination of compensation payable upon the vesting of mortgaged lands is the sum of money required to redeem the mortgage or mortgages upon the lands assuming such sum is greater than that as agreed or determined by question (2) above?

10. Mr Good BL suggested that the amount of compensation payable in respect of the lands is that determined in accordance with the Rules under Article 6 of the 1982 Order and, in particular Article 6(1)(2); namely the amount which the land, if sold in the open market by a willing seller, might be expected to realise. That amount is unrelated to the sum required to redeem the mortgage or mortgages upon the lands.

Discussion

The Compensation Code

11. The Tribunal was referred to aspects of the compensation code as it is applied in Northern Ireland and also as it is applied in England and Wales. In England and Wales the common procedure is for acquisition to be made by Compulsory Purchase Order whereas in Northern Ireland acquisition is almost invariably made by Vesting Order (or Declaration).
12. A key difference between the Vesting Order and Compulsory Purchase Order approaches is described in *Roots QC et al: The Law of Compulsory Purchase 2008* at D [342]:

“The main advantage of [the vesting] procedure is that title automatically vests in the acquiring authority without any conveyance, thereby conferring an immediate right of entry against all those interested in the land, except certain minor tenants. Good title is therefore acquired without investigation and interests in land are simply converted into rights to compensation. As the general vesting declaration procedure does not rely on participation by the landowner, onerous formalities as to notification are prescribed.”
13. In Northern Ireland the powers for the acquisition of land by vesting order are contained in the Local Government Act (Northern Ireland) 1972 (“the 1972 Act”) and paragraph 6(1) of Schedule 6 provides:

“... a vesting order shall operate, without further assurance, to vest in the council, as from the date on which the vesting order becomes operative (in this Schedule referred to as “the date of vesting”), an estate in fee simple or such other estate (if any) in, to or over the land to which it relates as is therein specified, freed and discharged from all claims or estates whatsoever (except as is specified in the order).”
14. The following historical summary of aspects of the code is intended to provide a context for the arguments put forward on behalf of the parties. Much of it is based on reports produced by the Law Commission for England and Wales.
15. Arising out of the recommendation of the Compulsory Purchase Policy Review Advisory Group established by the Department of Environment Transport and the Regions, the Law Commission published four reports, between 2002 and 2004. These contain a great deal of helpful material including discussion of the background to the code as framed by the existing law. The reports are Consultation Paper No 165, Consultation Paper No 169, Final Report No 286 and Final Report No 291.

16. Both the Vesting Order and Compulsory Purchase Order approaches share a common origin and have been affected by many similar issues addressed by similar solutions. The origins are described in Consultation Paper No 165 at 2.2:

‘The origins of the modern law are to be found in numerous private acts, passed in the late 18th and 19th centuries, authorising the construction of canals, railways and harbours. These normally contained powers of compulsory acquisition, and provided procedures for implementation and determining compensation. Standard clauses were developed which were consolidated in the Land Clauses Consolidation Act 1845 [“the 1845 Act”]. This did not itself confer the power of compulsory acquisition, which was derived from the private act authorising the specific project (“the Special Act”). However, after 1845, any act authorising compulsory purchase was treated (unless otherwise provided) as incorporating the 1845 Act.’

17. The Paper (No 165) goes on to explain that, at that time, schemes were promoted for profit, rather than purely public motives, and that was reflected in the sympathetic treatment of dispossessed owners. But in the period leading up to the First World War the role of public authorities became much more important, for example the provision of public services including housing, highways and public health.
18. The Scott Committee was established 1918 to carry out an urgent review of the compensation laws in anticipation of the end of the war and the likely need for acquisition by public authorities of large quantities of land in the early stages of the reconstruction period. By this time the emphasis was on acquisition for public purposes, and the overriding rights of the community. The Committee made a number of specific recommendations for less sympathetic treatment of the assessment of compensation.
19. The new approach resulting from these recommendations was encapsulated in a set of six rules in Section 2 of the Acquisition of Land Act 1919 (“the 1919 Act Rules”), later replaced, in England and Wales, by Section 5 of the Land Compensation Act 1961 (“the 1961 Act”). The most often quoted case on the fundamental effects of the changes is Horn v Sunderland Corporation [1941] 2 KB 26. In Northern Ireland the Land Compensation (Northern Ireland) Order 1982 (“the 1982 Order”) consolidates the 1919 Act and certain other enactments.
20. The terms ‘value’ and ‘compensation’ are not interchangeable; the amount of compensation to which claimants are entitled is not necessarily confined to the market value of the lands acquired. In appropriate circumstances claimants also may expect to receive compensation for injurious affection to other lands; for disturbance on relocation; and for loss of goodwill. Article 6(1) of the 1982 Order provides:

“Compensation in respect of any compulsory acquisition of land shall, subject to the provisions of this Order and any other enactment, be assessed in accordance with the following rules:—

(1) ...:

(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:

(3) ...:

(4) ...:

(5) ...:

(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 land.”

21. Article 8 makes provision for compensation for severance or injurious affection where part only of a claimant’s lands is acquired.

22. In England and Wales most of the rules governing procedure and compensation remain as they were at the time of the 1961 Act. The Compulsory Purchase Act 1965 (“the 1965 Act”) re-enacted, without material change, the main extant provisions of the the 1845 Act, but did not repeal that Act. It was supplemented in 1981 by the Compulsory Purchase (Vesting Declarations) Act 1981, which enabled orders to be implemented by a vesting declaration.

Mortgages

23. In regard to mortgages, *Halsbury’s* 4th Ed. 2003 *Reissue*, at para 193 notes:

“It is a common practice, however, when the mortgagee is not in possession, for the undertakers or the acquiring authority to treat with the mortgagor for the full value of the land, and to leave him to pay off or otherwise discharge the mortgage out of the purchase money.”

24. *Halsbury’s* continues:

“They are entitled so to proceed, but unless the mortgagee agrees to this procedure, they must take care that his interest is provided for, as otherwise they may be restrained from prosecuting their works on the mortgaged land until the mortgage has been redeemed or provision has been made in accordance with the statutory provisions for payment of compensation to the mortgagee.

“If the undertakers or authority deal with the mortgagor only in respect both of his interest and of the mortgagee’s interest, and the amount assessed is less than the sum due in respect of the mortgage, and if they have entered and destroyed the buildings on the land, they may be treated as being in the same position as the mortgagor, and be

ordered to pay the total amount found due in respect of the principal, interest and costs. Nevertheless, the fact that they take possession as against the mortgagor does not deprive them of their statutory right to serve a notice to treat on the mortgagee and to proceed in due course to assess the compensation under that notice.”

25. Mr Gibson BL referred the Tribunal to Ranken v The East and West India Docks and Birmingham Junction Railway Company (1849) 12 Beav 298; 50 ER 1075. But both that case and the discussion in Halsbury’s relate to the Compulsory Purchase Order procedure. In contrast Schedule 6 of the 1972 Act provides that the Vesting Order procedure operates to vest in the acquiring authority the relevant lands “discharged from all claims or estates whatsoever”. The mortgagor and mortgagee have no residual property rights. All that remains for them is a claim on the compensation fund and, in regard to any rights against each other, the terms of their mortgage agreement.
26. Sections 108 to 114 of the 1845 Act make special provision for circumstances in which the lands are mortgaged and the Tribunal accepts that these provisions are still in force. They facilitate the process by providing for resolution of disputes in regard to compensation between the mortgagor, mortgagee and acquiring authority. Mr Good BL accepted that in as much as a mortgagee has an interest in the lands the landowners do not have an absolute title and in the event of a dispute about compensation the Lands Tribunal may be asked to determine the same.
27. Mr Gibson BL referred to Section 110 of the 1845 Act:

“Sum to be paid when mortgage exceed the value of the lands

110. If any such mortgaged lands shall be of less value than the principal, interest, and costs secured thereon, the value of such lands, or the compensation to be made by the promoters of the undertaking respect thereof, shall be settled by agreement between the mortgagee of such lands and the party entitled to the equity of redemption thereof on the one part, and the promoters of the undertaking on the other part, and if the parties aforesaid fail to agree respecting the amount of such value or compensation, the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being so agreed upon or determined, shall be paid by the promoters of the undertaking to the mortgagee, in satisfaction of his mortgage debt, so far as the same will extend; and upon payment or tender thereof the mortgagee shall convey or release all his interest in such mortgaged lands to the promoters of the undertaking, or as they shall direct.”

28. Mr Gibson BL suggested that the 1965 Act and the 1845 Act appear to envisage that at the very least part of the difference as a consequence of the negative equity will be paid by the authority. The Tribunal does not agree. It is clear from the language of Sections 109 to 114 of the 1845 Act that they are concerned with procedural and conveyancing matters. Section 110 makes clear that “compensation shall be paid” but that does not provide any measure for the amount of compensation. To make sense grammatically of the term “the same” in the expression “so far as the same will extend” it must clearly reflect back to “the amount of such value or compensation” and not the immediately preceding “in satisfaction of his mortgage debt”.
29. The 1845 Act and subsequent legislation recognise the important distinction between value and compensation. Mr Gibson BL quoted Shearman J in R v Clerk of the Peace for Middlesex [1914-15] All ER Rep 685 as an authority for the proposition that the acquiring authority must compensate the mortgagee fully. The Tribunal accepts that proposition in principle but the assessment now must accord with rules for assessing compensation. However although the case pre-dated the introduction of the 1919 Act Rules, the result might have been much the same. The particular circumstances were that the mortgagees claimed the market value of their interest in a terrace of houses but they also claimed injurious affection, owing to the working of the railway, to another terrace of houses, which were not taken. The Court held that they were entitled both to market value of the lands taken and to compensation for the injurious affection. The modern equivalent in Northern Ireland would be a claim under Article 6(1)(2) and Article 8 of the 1982 order. That does not support the proposition that the mortgagee is entitled to compensation based on the entirety or part of the mortgage debt if there is negative equity.
30. In this claim and in accordance with the usual practice, the mortgagee may be claiming, in effect, through the mortgagor. Mr Good BL also referred to para 14 of Schedule 6 of the 1972 Act which provides that the acquiring authority on paying any compensation to any person (whether the amount has been settled by agreement or determined by the Lands Tribunal), shall obtain from that person a receipt in a prescribed form
- “which shall be prepared by, and executed at the cost of, the council, and the receipt shall operate to release the compensation fund from all claims by the person giving it and all parties claiming through or under him”.
31. The Tribunal does not accept that a mortgagee’s claim is a claim through a mortgagor and does not accept that provision would be sufficient to exclude a mortgagee from being treated as a claimant.

32. Mr Gibson BL referred the Tribunal to Horn v Sunderland Corporation but the Tribunal finds nothing in that, with its emphasis on the 1919 Act rules, to support a view that negative equity is compensatable.
33. Mr Gibson BL also referred to the 1965 Act. Sections 15 to 17 of that Act re-enacted Sections 109 to 114 of the 1845 Act as they were formerly incorporated by the Acquisition of Land (Authorisation Procedure) Act 1946. Although the language may be more clear the Tribunal does not accept that these sections of the 1965 Act take the matter any further because the 1965 Act does not apply in this jurisdiction.
34. The problems arising from negative equity are not new. They were recognised in the 1845 Act. They also were considered in the Law Commission Reports. In Law Com 286 at 4.29:
“There was general support for this proposal from consultees. However, the terms of some of the responses have caused us concern that a reference to “personal circumstances”, unless more clearly defined, may introduce undesirable uncertainty. For example, one consultee welcomed the proposal as providing a possible means to compensation for the effects of negative equity for mortgagors. Another referred to compensating for the loss of land with “sentimental value”. A contrary view was that it was impractical for authorities to “budget for the personal circumstances of the claimant”. While we recognise the problems of negative equity, it was not our intention, and we do not think it appropriate, to find a solution by a significant widening of the law of consequential loss.”
35. And in Law Com 291 at 4.29:
“We considered the question of negative equity in the course of our work on compensation for compulsory purchase. In our Final Report on Compensation, we considered that the only truly effective solution to the problem of negative equity would involve a very considerable expansion of the current law of consequential loss. We do not consider it appropriate to re-open this issue now, as it is essentially a matter of compensation rather than procedure.”
36. For the reasons set out above the Tribunal responds to the questions as follows.

Question (1) –

Where the assessed compensation falls below the current redemption figure the Northern Ireland Housing Executive, as a promoter pursuant to the Land Clauses Consolidation Act 1845, is not bound to discharge all of the mortgaged debts secured on each property.

The issue of personal liability of the mortgagors to the mortgagee is not a matter for this Tribunal.

Question (2) –

The compensation payable upon the vesting of mortgaged lands is not limited to the value of the lands, as provided under Article 6(1)(2) of the 1982 Order. It may for example include compensation for disturbance or any other matter not directly based on the value of land (Article 6(1)(6)) and severance and injurious affection (Article 8).

The compensation may be settled by agreement of the mortgagee, the party entitled to the equity of redemption and the promoters of the undertaking and in default of such agreement those amounts may be determined by the Lands Tribunal.

Question (3) –

The amount of compensation payable upon the vesting of mortgaged lands is not measured by the sum of money required to redeem the mortgage or mortgages upon the lands.

ORDERS ACCORDINGLY

18th August 2010

Mr M R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances

Claimants: Mr Keith Gibson BL instructed by O'Reilly Stewart, solicitors.

Respondent: Mr Patrick Good BL instructed by Harrisons, solicitors.