LCA/170/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – planning permission – refusal of planning permission formerly granted by development order – time limit for claim – preliminary issue – validity of claim – successive applications for same development – claim based on second application refused – whether claim can be founded other than on first application refused – held claim valid – Town and Country Planning Act 1990 ss 107 & 108, Town and Country Planning General Regulations 1992, reg 12

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**MARK GREEN**	**Claimant**
	and	
	CITY OF DURHAM COUNCIL	**Compensating Authority**

Re: Pity Me Nursery
Pity Me
County Durham
DH1 5GZ

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 19 April 2007

Ian Ponter instructed by John O'Neill & Co, solicitors of Newcastle upon Tyne, for the claimant.
Graham Keen instructed by Lesley Blackie, Director of Legal and Administrative Services, City of Durham, for the compensating authority.

The following case was cited in argument:

Strandmill Ltd v Epping Forest District Council [1992] 2 PLR 154

DECISION ON A PRELIMINARY ISSUE

1. The claim in this reference is for compensation pursuant to sections 107 and 108 of the Town and Country Planning Act 1990, following the making by the compensating authority of a direction under Article 4 of the Town and Country Planning (General Permitted Development) Order 1995 and the refusal by them of planning permission. Under section 107 and regulation 12 of the Town and Country Planning General Regulations 1992 there is a time limit within which a claim for compensation must be submitted to the authority. The council assert that the claim was not made within the specified time and that it is therefore invalid. Whether this assertion is correct is the preliminary issue that I have ordered to be determined.

2. There is no dispute as to the facts. The claimant, together with his brother, owns the land that was the subject of the Article 4 direction and the refusal of planning permission. It is known as Pity Me Nursery, and since 1998 the two brothers have carried on there a nursery garden business. They erected on the land a polytunnel and a storage building under the permitted development provisions of the GPDO to serve the use. Under Article 3 of the GPDO development falling within specified classes is granted planning permission, and Class A(a) in Part 6 of Schedule 2 covers:

> "A. the carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of –
>
> (a) works for the erection, extension or alteration of a building…
>
> which are reasonably necessary for the purposes of agriculture within that unit."

Development is not permitted by Class A if the ground area covered by any building erected or extended or altered by virtue of Class A would exceed 465 sqm. The development is permitted subject to specified conditions.

3. On 6 April 1999 the council made a direction under Article 4(1) of the GPDO. The direction recited that the council were satisfied that it was expedient that development permitted under Class A(a) should not be carried out on the land unless permission was granted for it on an application, and it directed that the permission granted by the GPDO for Class A(a) development should not apply. The direction was confirmed by the Secretary of State on 14 May 1999.

4. On 26 January 1999 application for planning permission had been made for "Extensions to polytunnels by creating additional polytunnels measuring 345 sqm or thereabouts". It was accompanied by a unilateral obligation on the part of the applicant not to seek to develop the land under his permitted development rights. Planning permission was refused by the council on 16 April 1999 on highway safety grounds, and an appeal against this refusal was dismissed on 22 October 1999.

5. On 27 October 1999 the claimant submitted a second planning application for "Erection of polytunnels associated with horticultural business". On 17 December 1999 the council declined, pursuant to section 70A of the Act, to determine the application in view of the recent refusal on appeal of the application for similar development.

6. On 8 February 2002 the claimant made a third application. This was for "Erection of polytunnels (340 sqm) and storage building (125 sqm) associated with existing horticultural business." It was refused by the council on 30 April 2002.

7. On 3 September 2004 the claimant made a fourth application in the same terms as the third application. The council refused this on 17 November 2004. On 2 November 2005 the claim under sections 107 and 108 was made, referring to the Article 4 direction and the refusal of 17 November 2004. The council wrote on 8 May 2006 to say that the claim was invalid since it had crystallised in 2002 when the third application had been refused and more than 12 months, the time limit imposed by regulation 12 of the General Regulations, had elapsed since then. Following an unsuccessful application for permission to apply for judicial review, the claimant gave notice of reference to this Tribunal on 25 October 2006.

8. The relevant statutory provisions are as follows. In the 1990 Act section 108 provides:

> "Compensation for refusal or conditional grant of planning permission formerly granted by development order
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> 108. (1) Where –
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> (a) planning permission granted by a development order or a local development order is withdrawn (whether by the revocation or amendment of the order or by the issue of directions under powers conferred by the order); and
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> (b) on an application made under Part III or section 293A planning refused, or is granted subject to conditions other than those imposed by that order,
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> section 107 shall apply as if the planning permission granted by the development order –
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> (i) had been granted by the local planning authority under Part III or section 293A; and
>
> (ii) had been revoked or modified by an order under section 97.
>
> (2) Where planning permission granted by a development order or a local development order is withdrawn by revocation or amendment of the order, this section applies only if the application referred to in subsection (1)(b) is made before the end of the period of 12 months beginning with the date on which the revocation or amendment came into operation."

9. Section 107 provides:

> "Compensation where planning permission revoked or modified.
>
> 107. (1) Subject to section 116, where planning permission is revoked or modified by an order under section 97, then if, on a claim made to the local planning authority within the prescribed time and in the prescribed manner, it is shown that a person interested in the land or in minerals in, on or under it –
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> (a) has incurred expenditure in carrying out work which is rendered abortive by the revocation or modification; or
>
> (b) has otherwise sustained loss or damage which is directly attributable to the revocation or modification,
>
> the local planning authority shall pay that person compensation in respect of that expenditure, loss or damage."

10. In the 1992 General Regulations regulation 12 provides:

> "Claims for compensation and purchase notices
>
> 12. – (1) A claim for compensation made to a local planning authority under section 107 (including as applied by section 108), 114, 115, 144, 186 or 250 of the 1990 Act, or a purchase notice served on the council of a district or London borough or county or county borough in Wales under section 137 of that Act, shall be in writing and shall be served on that authority or council by delivering it at the offices of the authority or council, or by sending it by pre-paid post.
>
> (2) The time within which any such claim or notice as is mentioned in paragraph (1) is served shall be 12 months from the date of the decision in respect of which the claim or notice is made or given, or such longer period as the Secretary of State may at any time in any particular case allow."

11. For the council Mr Graeme Keen submits that the claimant's right to compensation crystallised with the refusal of the third application. Under regulation 12 the claim had to be made within 12 months of the date of this refusal. He draws attention to the commentary on the section in the Encyclopaedia of Planning Law and practice at P108.06, where this is said:

> "... The one-year period is intended to ensure that a right to compensation does not exist in perpetuity simply because a type of development was once permitted development, yet to allow compensation to a person who was in the process of undertaking a development and who may already have incurred expenditure in reliance on the development order permission."

12. Mr Keen submits in effect that there can only be one occasion in respect of any single Article 4 direction when a claim for compensation can be made, and that is within 12 months of the refusal of the first planning application made for development that the Article 4 direction has rendered no longer permitted development. Mr Keen says that the claimant's case would

enable repeated and unlimited claims for compensation to be made by the submission of further planning applications.

13. For the claimant Mr Ian Ponter says that under section 108 there are two requirements that have to be met before there is an entitlement to compensation. The first is the withdrawal of planning permission granted by a development order (whether by revocation or amendment of the order or by the issuing of a direction under the order); and the second is the refusal or conditional grant of planning permission. Both requirements were, he says, met here, and there is no justification for reading into the provision a limitation that only the first planning refusal after the making of an Article 4 direction could found a claim.

14. In deciding between these rival contentions it is in my judgment necessary to have in mind three matters. The first is that, where permitted development rights are withdrawn by an Article 4 direction, compensation is not payable under section 108 for the withdrawal of the permitted development rights. The effect of an Article 4 direction is to remove planning permission granted by the GPDO. It means that a person who previously had been able to rely on such planning permission to carry out development can no longer do so but must apply for and achieve planning permission under Part III of the Act. What section 108 does is to give an entitlement to compensation for the refusal of permission for development that was formerly permitted. It is the loss caused by the refusal of permission that is compensatable.

15. The second matter is that GPDO permitted development rights are general in nature. In the present case we are concerned with Part 6 Class A(a) development rights, and these extend to the erection, extension or alteration of any building that is reasonably necessary for the purposes of agriculture within the unit. Applications for planning permission are, by contrast, specific, and any refusal relates to the specific development for which planning permission was sought. Here the refusal related to polytunnels and a storage building of particular dimensions.

16. The third matter is there is no time limit within which a planning application has to be made following the making of an Article 4 direction in order to found a claim for compensation on the refusal. This is in contrast to the 12-month time limit for such an application where a planning permission granted by the GPDO is withdrawn or amended (ie by order made by the Secretary of State): see section 108(2). As I read the Encyclopaedia commentary relied on by Mr Keen, it was to this latter provision (and not the 12-month time limit for making a claim) that the observation was directed. It appears to be derived from a DOE consultation paper. Certainly it is understandable that there should be a time limit on such an application where a GPDO right is withdrawn generally by order, thus affecting land throughout England and Wales. In these circumstances there would be a need to allow those committed to development in reliance on the permission being withdrawn to claim compensation without giving a universal right to compensation in perpetuity. Where, however, the permission is withdrawn by an Article 4 direction, such considerations would not apply, and no time limit is therefore imposed. Of course, in order to show that the refusal of planning permission has caused loss – the material date for consideration of which would be the date of the refusal – it would be necessary for the GPDO permission that was removed in relation to the subject land by the Article 4 direction to be have been otherwise subsisting at the date of the refusal.

17. The only time limit that applies in a case such as the present, therefore, is the one imposed by regulation 12 on the making of a claim; and it is, I think, impossible to derive from the provisions of regulation 12 anything that might be thought relevant to the construction of section 108, both because it is a provision contained in a statutory instrument made under the Act and is not part of the Act, and because it applies not only to section 107 but also to a range of different compensation provisions contained in the 1990 Act.

18. In view of the three matters to which I have referred there is clearly good reason why the making of a claim pursuant to section 108(1), where there has been an Article 4 direction and the refusal of planning permission for a particular development, ought not to preclude a later claim in respect of the refusal of permission for some other development that, but for the Article 4 direction, would have been permitted. In the present case Mr Green has sought and been refused planning permission for polytunnels and a storage building. But he has been deprived by the Article 4 direction of planning permission for the erection, extension or alteration of any building that is reasonably necessary for the purposes of agriculture within the unit. If he or a successor at some future date applied for permission for a livestock building and this was refused, a claim could in my view be made, notwithstanding the earlier applications for permission for polytunnels and the claim made in respect of the refusal of such permission. Equally Mr Green could apply for permission for some different, perhaps smaller, polytunnel development and could pursue a claim if that was refused. All this seems to me to follow necessarily from the three matters that I have identified: that a claim for compensation lies in respect of the refusal of an application for permission and not the withdrawal of GDPO rights, that a GPDO permission is general in nature while planning applications relate to specific development, and that there is no time limit for making a planning application following the making of an Article 4 direction.

19. The question then arises – the question in the present case – whether section 108(1) is to be construed as precluding a claim for compensation in respect of the refusal of an application for planning permission where a previous application for the same development has been refused. The second of the two requirements to found a claim is that in paragraph (b), that on an application under Part II of the Act planning permission for development formerly permitted by the GPDO is refused. The plain words of this provision do not confine it to the first refusal of planning permission following an Article 4 direction, so that some qualification would have to be read elsewhere into subsection (1) if it were to be restricted in this way. What the provision does is to apply section 107, where the two requirements are met, "as if the planning permission granted by the development order – (i) had been granted by the local planning authority under Part III…; and (ii) had been revoked or modified by [a revocation or modification] order under section 97." I can see an argument that, since a planning permission can be revoked, or modified in a specific way, only once, the second requirement should be treated as arising only on the refusal of the first application for a particular defined piece of development. However, the provision is not structured in this way. It does not say, as it could have done, that if the two requirements are met, planning permission is deemed to have been granted under Part III and to have been revoked under section 97. It says that section 107 applies as if these two things had happened. I do not think, therefore, that section 108(1) is to be construed as confining the right to compensation to the first refusal of permission for a specific development. Nor can I see any particular need to strain for a construction that would

do this, since a claim would not thereby be excluded in respect of the refusal of permission for a slightly different development (smaller polytunnels, for instance).

20. The concern that Mr Keen expresses that repeated and unlimited claims for compensation could be made by the submission of successive planning applications is, I suspect, something that in practice is unlikely to be justified. It does not appear to have required judicial decision before now. It is moreover worth recalling that the provisions for compensation where planning permission was refused for Third Schedule development raised the same question as to whether claims could be founded on successive applications and refusals. Those provisions, introduced by the Town and Country Planning Act 1947 and ultimately contained in section 114 of the 1990 Act, were repealed after 44 years by the Planning and Compensation Act 1991. The Encyclopaedia of Planning still contains the comment, in italics like the rest of the repealed section 114 and its commentary, that: "The section does not limit the applicant to one single compensation payment. Whilst that may be of necessary implication into the section the point remains unclear and the threat of successive applications in respect of the same development remains." The fact that there is no reported authority on the point, under either section 108 or section 114 or their predecessors, does not suggest that the theoretical problem to which Mr Keen draws attention has been of sufficient practical significance to require judicial resolution.

21. The preliminary issue is decided, therefore, in the claimant's favour: the claim is not invalid. Directions as to the further conduct of the reference will be given in due course. The parties are now invited to make representations on the costs of the preliminary issue, and a letter on this accompanies this decision, which will become final when the question of costs has been determined.

Dated 26 April 2007

George Bartlett QC, President