UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 128 (LC)
LT Case Number: ACQ/23/2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – preliminary issue - valuation of land with lawful use certificates and planning permission - claimant operating without necessary waste management licence - Land Compensation Act 1961, section 5(4) - whether any increase in value due to unlawful use that should not be taken into account.

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**SAMUEL ANDREW TAFF**	**Claimant**
	and	
	HIGHWAYS AGENCY	**Acquiring Authority**

Re: 760 m^2 part of scrap yard
and half width Wharf Lane (D168)
South of Chasetown,
Staffordshire
(Part OS 1132,0139) (O, Q)

Before: His Honour Judge Mole QC

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 7 July 2009

Mr Richard Kimblin, instructed by David Anderton OBE, Ansons LLP, for the Claimant
Ms Kate Selway, instructed by the Treasury Solicitor for the Acquiring Authority

The following cases are referred to in this decision:

Hughes v Doncaster Metropolitan Borough Council[1991] 1 A.C. 382 (House of Lords)
Epping Forest District Council v Philcox [2002] Env L.R. 2
Roberts v South Gloucestershire DC [2003] 1 P&CR 26, p.411

DECISION ON PRELIMINARY ISSUE

1. This is the determination of a preliminary issue under rule 43 of the Lands Tribunal Rules 1996, in accordance with the order of the President made on the second of June 2008. The issue is:

> "Whether the use made by the claimant of the subject land at the valuation date is a lawful one for the purposes of Section 5(4) of the Land Compensation Act 1961, and should be taken into account in the assessment of compensation."

2. This matter relates to 2760m² of land off Wharf Lane, Chasetown, south of Burntwood, Staffordshire. This land was compulsorily acquired by the Highways Agency for the construction of a slip road, part of the M6 Toll Road, originally promoted as the Birmingham Northern Relief Road. The new M6 Toll Road runs to the south of the land in question between Burntwood and Brownhills. A notice to treat was served on 27 June 2000. Notice of entry was dated 25 August 2000 and possession actually taken on the 26th of February 2001. The relevant valuation date is therefore 26 February 2001. A claim for compensation was made by Mr Taff but, not being agreed, was referred to the Lands Tribunal for determination on the 14th of February 2007.

3. The land acquired formed roughly half of an area that has been used as a scrap yard by Mr Taff since 1980. Mr Taff occupied the land under a series of leases, the last of which expired on 30th November 1997. Since then he has been holding over under a protected business tenancy.

4. Like many such uses, the planning and licensing history of the site has been long and complicated. It is not necessary to set it all out in detail. So far as the planning status of the land is concerned it appears that in 1980 enforcement action was taken by the Planning Authority against scrap yard use but the notice was quashed on appeal. The use as a scrap yard then continued without interruption for more than 10 years and became immune from further enforcement action. On the 21st of March 1996 Staffordshire County Council certified that the use on an area of land closest to Wharf Lane was lawful within the meaning of section 191 of the Town and Country Planning Act 1990. A further area of land, immediately to the south of that covered by the first certificate of lawful use, was certified on the 21st May 1998 as having a lawful use for the storage and dismantling of scrap cars, including storage of recovered parts on part and the use for parking on another part. With the benefit of those lawful use certificates a planning application was made in 1998 over the area covered by both certificates for the operation of a metal recycling and scrap vehicle business and the operation of a waste transfer station. Planning permission was finally granted, subject to conditions, on the 13th of June 2000.

5. Throughout that period and thereafter the issue arose as to whether Mr Taff had the licences required to carry on such a business under increasingly demanding environmental regulation. The detail does not matter for this case. It is sufficient to note that it is agreed that by the 30th of September 1995 it had become necessary for Mr Taff to apply for a waste

6. It is important to be clear that by no means all the activities carried out by Mr Taff on the site required or require a waste management licence. This is agreed by the parties. Certain activities, crushing materials for use in building, for example, are the subject of an exemption under the regulations. Other aspects of the business, such as the storage of vehicles pending their export for re-use abroad, do not involve either "waste" or "end-of-life" vehicles.

7. The preliminary issue arises under the rules for assessing compensation in section 5 of the Land Compensation Act 1961. This provides, so far as material:

> 5(2) the value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise:
>
> ...
>
> (4) where the value of land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account:
>
> ...
>
> (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.

8. The Environmental Protection Act 1990, section 33(1) provides that a person shall not:

> "(a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence;
>
> (b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of --
>
> (i) in or on any land, or
>
> (ii) by means of any mobile plant except under and in accordance with a waste management licence."

9. It is an offence punishable by fine or imprisonment to contravene section 33(1). There is no dispute that much of the material on the land in question was "controlled waste" within the

10. In answer to the claim for compensation Ms Kate Selway, counsel for the acquiring authority argued that at the relevant valuation date Mr Taff needed a waste management licence to operate a substantial part, at least, of his business on the site. He did not have such a licence. He was therefore in breach of section 33(1) of the Environmental Protection Act 1990. Such an operation was both contrary to law and could have been restrained by a court. That operation therefore fell within rule (4). The use made of the land was unlawful and no increase in the value of the land due to that operation should be taken into account in assessing compensation.

11. I comment that reading Ms Selway's skeleton on behalf of the acquiring authority it certainly seemed to me that the argument was the comprehensive one that because of s. 5(4) no value due to a scrap yard use should be attributed to the land. I think that there was a softening in that position in the course of submissions. It was acknowledged that while the effect of the permissions on market value could be taken into account in the assessment of compensation, section 5(4) would apply with full rigour to rule out disturbance compensation so far as it was based on operations without the benefit of a licence. This may be significant, given the nature of the claimant's tenure.

12. Mr Richard Kimblin, counsel for the claimant, responded that at the material date in February 2001 the land had the benefit of two certificates of lawful use for scrap yard uses and a planning permission for metal recycling, a scrap vehicle business and the operation of a waste transfer station. The effect of a lawful use certificate is that "the lawfulness of any use, operations or other matter for which a certificate is in force shall be conclusively presumed." (See section 191(6), Town and Country Planning Act 1990.) The scrap yard activity was thus lawful, ran with the land and established its basic value, regardless of the licensing status of the particular occupier. Section 5(4) had no effect on that. The matter could be tested by considering the position if Mr Taff had ceased to operate before the notice to treat. The effect of the certificates of lawful use and the planning permission would have endured; it is only in extreme circumstances that a lawful use can be abandoned. In the open market the value of the land to a purchaser would reflect those lawful uses. Whether or not Mr Taff had a waste licence would be of marginal or no interest to a potential purchaser of the land. A waste management licence does not run with the land, although an existing licence might be transferred to a 'fit and proper' purchaser, rather than requiring him to obtain a new licence of his own.

13. Counsel showed me the case of *Hughes v Doncaster Metropolitan Borough Council*[1991] 1 A.C. 382 (House of Lords). It is fair to say that one of the points decided in that case, namely that when a use of land had become immune from enforcement action it was not "contrary to law" within section 5(4), was rapidly overtaken by section 191(6) of the Town and

> "Thus, although compensation in respect of the market value of land acquired and compensation for disturbance must in practice be separately assessed, the courts have consistently adhered to the principle, both before and after the present rules were first introduced by the Act of 1919, that the two elements are inseparable parts of a single whole in that together they make up 'the value of the land' to the owner..."

He continued (at page 393C):

> "If, as I take to be obvious, it is just and right that the owner of land acquired compulsorily should not receive in compensation any enhancement of the market value of the land attributable to a use of the land in any of the categories to which rule 4 applies, I can conceive of no reason why the legislature should nevertheless have thought it just and right that he should be compensated for being prevented from continuing any such use."

Of course, it is the nature of disturbance compensation that the claimant seeks to be "compensated for being prevented from continuing" the use he has made of the land.

14. I was also taken to the case of *Epping Forest District Council v Philcox* [2002] Env L.R. 2, which showed that where an activity had been continuing without planning permission for 10 years it was no obstacle to obtaining a certificate of lawful use that the activity had been illegal because it had been carried out without a waste management licence. But that is of little assistance in this case where certificates of lawful use have actually been granted, as has planning permission. Section 5(4) was more recently considered by the Court of Appeal in *Roberts v South Gloucestershire DC* [2003] 1 P&CR 26, p.411. Again, that case does not seem to me to be directly on point although it does offer some useful guidance from Carnwath LJ (at page 423) in dicta to the effect that the word "use" in section 5(4) is to be given an ordinary meaning.

Conclusions

15. As was pointed out by Lord Bridge in *Hughes* the rules in section 5, including rule (4), have a long lineage. The rules must be read as a whole. The basic starting point is rule (2) which focuses upon the market value of the land taken. That market value is to be determined by examining all its circumstances, including the buildings and other infrastructure on it and, importantly, its lawful use.

16. The purpose of rule (4) is to disallow an increase in market value due to use in a particular manner if that particular manner of use is unlawful or could be stopped. This reflects the reality that no reasonable potential purchaser of land would offer any extra for it in the market on account of a manner of use that he could not be confident could be sustained. It must not be forgotten that rule (4) was enacted as a means of achieving a fair and proper

17. What was unlawful and capable of restraint was Mr Taff's operation of the scrap yard without a waste management licence. The question is whether that unlawful operation can be said to have increased the value of the land over and above the value it got from its lawful planning status and other circumstances. The answer, I consider, is clear: it did not, except, perhaps, so far as disturbance compensation is concerned. The basic market value of the land at the valuation date depended upon its physical circumstances and its lawful use as a scrap yard. Whether or not Mr Taff was actually operating the scrap yard would not, it seems to me, be likely to increase that basic value at all. No suggestions were advanced, in the present case, as to how it might, except for the possibility of disturbance compensation.

18. I turn then to disturbance compensation. It is clear from the speech of Lord Bridge in *Hughes* that compensation for disturbance is "part of the value of the land". Disturbance compensation has the effect of bringing about, in the hands of the claimant, an increase in the value of land. It is also clear that if disturbance compensation were founded upon a business use that could be stopped or would be unlawful, the increase in the value of land due to that element of compensation would be ruled out by section 5(4). Whether or not in the present case any substantial part of Mr Taff's claim is for disturbance of a business use that, being unlicensed, fell within section 5(4) and should be disallowed for that reason, I cannot say. It seems to me and I think both parties agreed, that is a factual issue that was not capable of resolution in the present hearing and which the parties would wish to consider further.

19. I therefore answer the preliminary issue in this way:

1. The use made by the claimant of the subject land at the valuation date was a lawful one so far as it was covered by the certificates of lawful use dated 22 April 1996 and 22 June 1998 and the planning permission dated 13 June 2000 and should be taken into account in the assessment of compensation.

But –

2. If and so far as increased compensation claimed for disturbance is based upon business operations that could not lawfully have been carried on without a waste management licence, then, by virtue of section 5(4), that element of compensation should not be taken into account in the assessment of compensation.

Costs

20. Submissions in writing on costs are to be filed within 14 days of the receipt of this decision.

Directions

21. At the invitation of the parties I make the following directions for the continuation of these proceedings:

1. Within four weeks from the date of this decision the claimant is to file revised valuation evidence and revised waste management evidence (if so advised) or notification that no revision is intended;
2. Within eight weeks from the receipt of the claimants revised evidence or notification, the respondent will file valuation and waste management evidence;
3. Within four weeks of the receipt of the respondent's evidence the claimant will file evidence in reply (if so advised).

Both parties have permission to call two experts each if necessary; one expert dealing with valuation and an one expert dealing with waste management issues

Dated 10th July 2009

His Honour Judge Mole QC