SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 32
XA22/20

Lord Justice Clerk
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Appeal

by

THE SCOTTISH MINISTERS

Appellants

against

SCOTLAND'S RURAL COLLEGE (SRUC)

Respondents

AGAINST A DECISION OF THE LANDS TRIBUNAL

Appellants: Wilson QC, van der Westhuizen; Anderson Strathern LLP
Respondent: Burnet QC; Brodies LLP

23 June 2021

Introduction

[1] Over many years planners and road engineers sought to relieve traffic congestion in and around Aberdeen. They devised a scheme that had two further aims. First, to promote economic development in the northeast area. Second, to ensure enough housing for an expected population increase. The scheme's principal element was the "Aberdeen Western

Peripheral Route" ("the bypass"). It comprised a 46km stretch of dual carriageway, together with improved junctions.

[2] The bypass opened to traffic in 2019. One section was constructed on land at the Craibstone Estate to the north west of the city. The necessary parcel of land was acquired using compulsory purchase powers. Subsequently the owner, Scotland's Rural College ('the college') sought compensation for the loss of the land. It submitted that, if the bypass had not been built, the estate would have been allocated for housing development, which would have made it extremely valuable. It advanced three heads of claim:

i	development value	£22.8 million
(or alternatively hope value)		£925,000
ii	injurious affection of the retained land	£500,000
iii	disturbance	£75,000

[3] The Scottish Ministers refused to pay compensation. They contended that the bypass was an essential pre-requisite for development at Craibstone. In its absence, the site would not have been allocated for housing development, or received planning permission. Further, the land retained by the college had greatly increased in value. Any loss occasioned by the compulsory acquisition was more than offset. To require the Scottish Ministers to pay any sums would result in betterment.

[4] The college rejected that analysis. It raised proceedings in the Lands Tribunal for Scotland ("the tribunal"). Both parties recognised that the dispute turned on the correct planning assumptions. They invited the tribunal to hold a preliminary proof. They framed five questions for it to decide. The core issue was this, would the land at Craibstone have been allocated for housing if the bypass had not been constructed?

[5] The members of the tribunal held a site inspection before the hearing, which lasted seven days. The evidence ranged over many issues: planning, transport, economics, population growth, housing accommodation, and the environment. The witnesses spoke to their (often lengthy) reports and referred to a sheaf of technical documents.

[6] In its judgment, the tribunal found in favour of the college and ordered a proof on valuation. We shall narrate the content of the questions later in this opinion. At this stage, it is enough to say it answered questions (1), (2) and (5) in the affirmative and regarded questions (3) to (4) as redundant in light of their answers to (1) and (2).

[7] The Scottish Ministers now appeal. They seek orders quashing the decision and remitting the case back to the tribunal with a direction to reconsider questions (1) to (4). They take no issue with the answer to question (5). Accordingly it does not figure in the appeal. We understand that a number of other claims are pending before the tribunal and that this is a test case.

Background

[8] An overview of the facts will suffice. The tribunal has set them out in detail in its judgment.

Craibstone

[9] The college operates a campus at Craibstone. Following a review, a 2004 report recommended that it should dispose of surplus land at Craibstone. It then owned land extending to 208 hectares (515 acres) there. That recommendation bore fruit. Two years later the college entered into an option agreement with CALA Management Ltd to develop part of the Craibstone site for housing.

Compulsory purchase

[10] The Scottish Ministers published draft compulsory purchase orders to acquire the land at Craibstone in 2007. Various objectors (including the college) participated in a public inquiry that took place the following year. In a written submission, the promoters outlined the objectives of the bypass as being to:

> "Improve access to and around Aberdeen; Improve transport efficiency and support the industrial areas in the city and the area to the north and west of Aberdeen *(Economy and Employment)*; Provide traffic relief (including the removal of long distance heavy goods vehicle traffic) on the existing congested A90 route through and to the south of Aberdeen *(Environment and Accessibility)*; Reduce traffic on urban radial routes reducing noise and air pollution and creating opportunities for pedestrianisation in the City Centre *(Environment and Accessibility)*; Provide access to existing and planned park and ride and rail facilities around the outskirts of the City encouraging modal shift *(Integration)*; Increase opportunities to maximise bus lanes and other public transport priority measures *(Integration)*; and Improve road safety over a wide area through the reduction of traffic on local roads *(Safety)*."

[11] The Scottish Ministers issued final compulsory purchase orders in 2010 and took title on 11 January 2013, which is the relevant date for compensation purposes. After the vesting date, the Scottish Ministers held about 16 per cent of the site – 32.9 hectares (81.3 acres). The college retained the remaining land – 175.1 hectares (433.7 acres).

Planning policies

[12] Two documents had a major bearing on planning policies at the material time. The *Aberdeen City and Aberdeenshire Structure Plan* (2009) set 40,000 persons as the target for population increase by 2030. It proposed that fifty per cent of the associated housing development (72,000 houses) should occur within the Aberdeen City strategic growth area. The plan acknowledged that more than half of the required development within the Aberdeen SGA would have to take place on greenfield sites. The *Aberdeen Local Development Plan* (2012) contained the granular detail. It proposed to concentrate housing in the city and

close to main public transport routes. It allocated 4,400 new houses to the Newhills Expansion Area, which included Craibstone. That included 1,000 houses to be built on the retained land (i) 750 in the period 2007 – 2016, (ii) 250 to be built in the period 2017 – 2023, and (iii) the remainder in phases on two adjacent sites until 2030.

[13] There were many other relevant documents, for example the Scottish Government's *Firm Foundations* report, the *Cumulative Transport Appraisal*, the *Scottish Transport Appraisal Guidance,* and the *Modern Transport System for North of Scotland*. All had some bearing on potential development, the timeline and the relative claims of rival sites.

Planning permission

[14] In 2014 CALA made a planning application in respect of the retained land. Three years later it received permission in principle. The planning authority imposed a condition designed to address traffic safety concerns. It restricted development to 200 houses until a road junction was opened from the bypass to the Newhills Expansion Area.

Legal Framework

Legislation

[15] In order to acquire the necessary land from the college, the Scottish Ministers acted under the Roads (Scotland) Act 1984. It empowers roads authorities to "acquire land required in connection with the construction, improvement or protection of a public road": section 104(1)(a). It also governs questions of compensation. In assessing the amount due to be paid to the dispossessed owner, regard should be had to "the extent to which the remaining contiguous land belonging to the same person may be benefited by the purpose for which the land is authorised to be acquired": section 110(4)(a). Section 13 of the Land Compensation (Scotland) Act 1963 also comes into play: any increase or decrease in value

solely attributable to the underlying scheme of the acquiring authority should be disregarded.

Case law

[16] This area of the law has a compact body of leading cases: *Horn* v *Sutherland Corporation* [1941] 2 KB 26; *Pointe Gourde Quarrying & Transport Co Ltd* v *Sub-Intendent of Crown Lands* [1947] AC 565; *Director of Buildings & Land* v *Shun Fung Ironworks Ltd* [1995] 2 AC 111; *Waters* v *Welsh Development Agency* [2004] 1 WLR 1304; and *Bloor* v *Homes and Communities Agency* [2018] 1 All ER 817. They support the following propositions.

[17] Compulsory purchase is essential in a modern democratic society because it facilitates planned and orderly development. The corollary to that power is the obligation to pay compensation to the dispossessed owner. The overriding principle is equivalence - owners shall be paid fair compensation, neither less nor more than their loss. There is no magic formula which determines the correct amount in an individual case. The calculation involves applying the "no-scheme" rule (also known as "the *Pointe Gourde* principle"), which assumes that the scheme had not taken place. The tribunal's specialist experience and expertise makes it well-equipped to undertake the task. Its findings will not lightly be disturbed.

[18] Lord Nicholls of Birkenhead provided further guidance in *Waters* (at 1319H - 1320A). He formulated six "pointers" to assist tribunals and courts:

(i) The no scheme rule should be applied in a manner which achieves a fair and reasonable result; otherwise it would thwart, rather than advance, the intention of Parliament.

(ii) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible.

(iii) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which were not being acquired.

(iv)When applied as a supplement to the relevant legislation, which will usually be the position, the no scheme rule should be applied by analogy with the provisions of the statutory code.

(iv)Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority. But this formulation should not be regarded as conclusive.

(vi) When in doubt a scheme should be identified in narrower rather than broader terms.

[19] This short summary highlights that the relevant legal principles are far from being "hard edged".

[20] Ms Wilson cited several other cases as illustrative of the operation of these principles, but readily conceded that each case turns on its own facts.

Tribunal judgment

Five Questions

[21] The parties asked the tribunal to answer five questions, which we summarise as follows:

1. In the "no-scheme world", would the retained land have been allocated for housing development, or have received planning permission for such development as at the vesting date? Answer - *Yes*

2. In the "no-scheme world", would the acquired land have been allocated in the development plan or have received planning permission for 320 or fewer houses, in addition to any planning permission or allocation on the land retained land as at the vesting date? Answer - *Yes*

3. If the acquired land would not have been allocated for housing development in the development plan, or would not have received planning permission for such development at the date of vesting in the no-scheme world, would there nevertheless have been a hope of achieving such allocation and/or planning permission for any form of development in the future. Answer - *Superseded*

4. If the retained land would not have been allocated for housing development in the development plan or would not have received planning permission for such development at the date of vesting in the no-scheme world, would there nevertheless have been a hope of achieving such allocation and/or planning permission for any form of development in the future. Answer - *Superseded*

6. At the date of vesting, would the retained land/the acquired land have (a) been allocated for housing development, (b) received planning permission for such development, or (c) had a hope of achieving an allocation and/or planning permission for such development. Answer - *Yes*

The tribunal's task

[22] It's important to emphasise certain matters. First, the parties prescribed the scope of the preliminary proof. They invited the tribunal to answer specific (and narrow) questions. Second, the tribunal's task was a difficult one. It had to conduct "what if" lines of inquiry. What would have happened at Craibstone if there had been no bypass? Would any part of the land have been allocated for housing development? The task can be likened to counterfactual history.

[23] We have already referred to the volume of documents. In its judgment the tribunal provided a glossary of acronyms and abbreviations. It referred to some of the documents contained in that list, but not others. That is entirely unexceptional. All judgments involve the selection of material. The tribunal expressly states that it has attempted "to avoid discussing … in excessive detail" the witness reports, which themselves refer to these documents.

[24] We also observe that the tribunal's answers were in essence findings in fact. It had to evaluate many issues and reach a conclusion. That involved (i) identifying the extent and purpose of the scheme; (ii) determining the extent to which it acted as the key driver for economic growth in the region; (iii) having regard to the pre-existing housing requirement and transport constraints; (iv) predicting the outcome of any planning application; and (v) assessing the claims of rival sites.

Findings

[25] The tribunal concluded that, in the no-scheme world, the land at Craibstone (both acquired and retained) "would still probably have been allocated for development along with the Newhills Expansion Area". In arriving at that view it noted that Craibstone had a

number of advantages. It lies on the urban edge of Aberdeen, where the planners wished to focus development. The topography of the site lent itself to relatively unobtrusive development. It had good transport connections, which were capable of further improvement. Major employment areas lay nearby. A defensible greenbelt boundary could be created.

[26] In making its findings, the Tribunal adopted a nuanced approach. It took into account factors adverse to development. For example, it concluded that the planning authority's policies favoured development as part of the Newhills Expansion Area, rather than for a stand-alone site at Craibstone. It recognised that Transport Scotland would have had concerns about the ability of the existing A90 and A96 trunk roads to handle the proposed development. It acknowledged that an upgraded road junction would be required at some stage to accommodate increased traffic flows.

[27] Having reached its conclusion on housing allocation, the tribunal then took a step back and applied Lord Nicholls' third pointer as a cross-check. It decided that its decision would not lead to gross disparity between Craibstone and comparable adjoining properties.

The appeal

Grounds of challenge

[28] The Scottish Ministers submit that the tribunal erred in law in three respects. (1) It failed to discharge its duty under section 110(4) of the 1984 Act. (2) It made fundamental errors when concluding that in the no-scheme world both the retained land and the acquired land would have been allocated for development. (3) It reached an irrational and illogical conclusion in holding that the acquired land would have been allocated for housing

development. Each of those grounds is split into sub-headings. The grounds overlap to a significant extent.

Error of law?

[29] A query immediately arises. Do these grounds identify an error of law? Mr Burnet submitted that they do not. They are simply a quarrel with the tribunal's findings.

[30] Ms Wilson rejected that characterisation. She relied on *Advocate General for Scotland* v *Murray Group Holdings Ltd* 2016 SC 201 (at paras 42-43) as authority for the proposition that a tribunal may err in law in one of four respects. It may make a mistake on the general law, wrongly apply the law to the facts, make a finding for which there is no evidential basis, or adopt a fundamental error in its approach to the case (for example, by asking the wrong question, taking account of irrelevant considerations, or arriving at a perverse decision).

[31] It's convenient to decide this argument by examining the strand of each ground in turn.

Ground 1- Did the tribunal err in law in its general approach?

[32] Put short, the Scottish Ministers submit that the tribunal (i) failed to have due regard to all the relevant documents, (ii) failed to apply the relevant case law to the facts, and (iii) reached the wrong findings in fact.

[33] We are satisfied that the tribunal took into account the relevant documents. It listed most in its glossary. It did not require to analyse and discuss each one. Otherwise an already long judgment would have become unwieldy. It rightly exercised discrimination.

[34] Ms Wilson did not dispute the relevant legal propositions (see para 17 above). We discern no flaw in the tribunal's application of them. It rightly held that it had to focus on the facts of the present case. Recourse to other cases decided on different circumstances was unlikely to assist.

[35] As to the third strand, in our view the Scottish Ministers are attempting to convert a dispute with the findings of fact into errors in law. In effect they are seeking a rehearing.

[36] That's clear from a list of their contentions. They argue that the tribunal (i) did not properly address the evidence relating to the objectives and purpose of the bypass; (ii) made erroneous findings about the potential planning benefits; (iii) failed to address the inter-relationship between planning and transport; (iv) placed too much reliance on the objectives stated to the public inquiry; (v) conflated its findings on the purpose and extent of the bypass scheme with those as to the scale and location of housing allocations in the no-scheme world; and (vi) wrongly interpreted the 2017 planning condition restricting development until the construction of an access junction to the site.

[37] On a fair reading of the judgment the tribunal undertook a thorough evaluation of the evidence. It did not ignore documents. Questions of weight were pre-eminently matters for it to assess using its experience and expertise. We would also point out that planning policy documents are often drawn in wide (and sometimes aspirational) terms. We are not persuaded that the tribunal wrongly interpreted the 2017 planning condition.

[38] Accordingly we reject the first ground of appeal. We are satisfied that the tribunal properly applied the terms of section 110(4).

Ground (2) The fact finding process

[39] The second ground is essentially a reformulation of the first. The Scottish Ministers contend that the tribunal made fundamental errors in reaching its findings. We reject that submission for the same reasons that we reject the first ground.

[40] Here it's convenient to address two specific points made by the Scottish Ministers. First, they argue that the tribunal wrongly had regard to the third *Waters'* pointer. We disagree. As the term itself suggests, it is a guideline not a rule. In any event the tribunal

only used it as a cross check. Further, the Scottish Ministers themselves relied on the pointers (other than the fourth) in their closing submissions to the tribunal.

[41] Next they argue that the tribunal misinterpreted the condition attached to CALA's planning permission. Again we disagree. The tribunal was entitled to reach conclusions about the likelihood of development based on the interaction of a number of factors.

Ground of appeal (3) Housing allocation to the acquired land

[42] The thrust of this ground largely runs parallel to the earlier grounds. The Scottish Ministers maintain that the tribunal's decision was irrational.

[43] We arrive at the opposite conclusion. In our view, the tribunal's reasoning was securely based. It considered housing development in terms of the 2012 local plan. It concluded that the position of the retained land would not have altered in the no-scheme world. It was entitled to conclude that the acquired land would have been treated in a similar fashion. Its decision was logical and reasonable.

[44] We add this. The tribunal found that in the no-scheme world the contiguous retained land would have been allocated for housing development, so that its allocation for housing in the scheme world is not betterment. It remains possible that there are other respects in which the retained land benefited from the scheme. However, that was not an issue which the tribunal was asked to determine at the preliminary proof.

Conclusion

[45] We refuse the appeal, adhere to the decision of the tribunal and reserve all questions of expenses.