London Borough of Enfield v Lavender Garden Properties, Ltd

COURT OF APPEAL, CIVIL DIVISION

DANCKWERTS, DIPLOCK LJJ AND CAIRNS J

21, 22 MARCH 1968

Compulsory Purchase - Compensation - Purchase notice - Permission for additional development - Permission within five years of acquisition - Additional compensation - Land possessing certificate for residential development - Development at fifty-five habitable rooms per acre - Acquiring authority obtaining permission for one hundred rooms per acre - Increase constituting additional development - Land Compensation Act, 1961(9 & 10 Eliz 2 c 33), s 23(1), (2), s 29(1).

After several unsuccessful attempts to obtain planning permission for residential development of their 12.2 acres of land zoned for allotment purposes, the claimants were given in July, 1963, a certificate of alternative development by the Minister of Housing and Local Government under s 17 of the Land Compensation Act, 1961. The certificate was to the effect that "planning permission for the class of development specified in the ... [a schedule thereto] might reasonably have been expected to be granted in respect of the said land if the land were not proposed to be acquired by any authority", and the development specified was "residential development at a density comparable with that of neighbouring development". That density was agreed to be fifty-five habitable rooms per acre. The claimants made a further application for planning permission in respect of the land and on its refusal served a purchase notice on the council in December, 1963. The purchase notice was accepted by the council and a price of £240,000 was agreed in respect of the acquisition. The council resolved to develop the land for residential purposes and were given planning permission on 1 November 1965, by the Minister of Housing and Local Government for its development with twelve-storey tower blocks at a density of one hundred habitable rooms per acre. The claimants made a claim for further compensation under s 23 (1) of the Land Compensation Act, 1961, in respect of "permission for the carrying out of additional development" of the land granted within five years of the date of completion of the council's acquisition. The Lands Tribunal upheld the claim and assessed the compensation at £60,000. On appeal,

Held - (i) the development authorised by the Minister's decision of 1 November 1965, constituted additional development because the permission of 1 November 1965, extended to a density of one hundred habitable rooms per acre whereas the development permitted by the Minister's certificate of July, 1963 (permission being assumed pursuant to s 15(5) of the Act of 1961) was limited to fifty-five habitable rooms per acre (see p 405, letters *g* and *i*, and p 407, letter *a*, post).

(ii) it was a question of fact for the Lands Tribunal whether a buyer of land in the open market after the Minister's decision of 1 November 1965, would have estimated that his chances of getting planning permission at the most economical density above fifty-five habitable rooms per acre were higher than before the Minister's decision; the tribunal concluded that a buyer would have taken that view, and accordingly the claimants were entitled to additional compensation (by virtue of s 5, r (2)[a] and s 14(3) (For s 14(3), see p 404, footnote [b] of the Act of 1961) attributable to the estimated improvement (see p 405, letter *g*, p 406, letter *i*, to p 407, letter *a*, and p 407, letter *a*, post).

[a] (For s 5, r (2), see p 406, letter *a*, post

[b] (For s 5, r (2), see p 406, letter *a*, post

Appeal dismissed.

Notes

In relation to notices to treat served on or after 1 January

1967, Part 4 of the Land Compensation Act, 1961, which includes s 23, is repealed by the Land Commission Act 1967, ss 86, 101 and Sch 17. Claims under notices to treat served before that date in respect of decisions giving permission for additional development within five years from the date of completion of the acquisition remain unaffected.

As to additional compensation for new planning permission after acquisition, see Supplement to 10 *Halsbury's Laws* (3rd Edn), para 212F.

For the Land Compensation Act, 1961, s 5, s 14, s 15(5), s 23(1), (2) and s 29(1), see 41 *Halsbury's Statutes* (2nd Edn) 49, 57, 59, 68 and 74.

Case Stated

The London Borough of Enfield (herein called "the council") appealed to the Court of Appeal by way of Case Stated against a decision of the Lands Tribunal (Sir Michael E Rowe QC President, and John Watson, Esq) given on 4 April 1967, whereby the tribunal decided that the respondents, Lavender Garden Properties (herein called "the claimants") were entitled to compensation (£60,000) under s 23 of the Land Compensation Act, 1961, in respect of permission for carrying out additional development, such permission being given by a decision of the Minister of Housing and Local Government dated 1 November 1965. The piece of land concerned was at Lavender Hill in the borough of Enfield; its area was 12.2 acres, and it was owned originally by the churchwardens of the parish and let to the council for the purposes of allotments. The land was purchased by the claimants for the sum of £7,500 in July, 1961. It was zoned in the Middlesex County development plan for allotment purposes, with a school symbol. On 4 July 1963, the claimants obtained from the Minister of Housing and Local Government under s 17 of the Land Compensation Act, 1961, a certificate in the following terms:

"The Minister of Housing and Local Government in pursuance of his powers under s. 17 of the Land Compensation Act 1961, (i) cancels the certificate of appropriate development issued by the Middlesex County Council on 15 November

1962, in respect of the land described in Sch. 1; (ii) certifies that planning permission for the class of development specified in Part 1 of Sch. 2 hereto subject to the condition set out in Part 2 of the said schedule might reasonably have been expected to be granted in respect of the said land if that land were not proposed to be acquired by any authority to whom the Acquisition of Land (Assessment of Compensation) Act, 1919 applies. Schedule 1: Land situate on the north side of Lavender Hill fronting also on Cedar Road and Brigadier Hill, Enfield, Middlesex, being approximately twelve acres. Schedule 2: Part 1: Residential development at a density comparable with that of neighbouring residential development. Part 2: The siting, design, number of dwelling units, external appearance of the buildings and the means of access from the site to the highway shall be as may be agreed with the local planning authority, or, in default of agreement, as shall be determined by the Minister."

Paragraphs 11 to 19 of the Case Stated included the following:

"11. On 20 December 1963, the [claimants] served a purchase notice[c] on the council under s. 129 of the Town and Country Planning Act, 1962, based on the refusal of planning consent dated 13 December 1963.

"12. The council eventually decided to purchase the appeal site and by notice dated 5 March 1964, served upon the [claimants] under s. 130(1) of the Town and Country Planning Act, 1962, the council indicated its willingness to comply with the purchase notice which had been served.

"13. Thereafter lengthy negotiations took place between the valuers and eventually agreement was reached at a figure of £240,000 plus proper legal

costs and surveyors' fees for the appeal site. For the purpose of the negotiations the valuers agreed that the density referred to in the Minister's previous certificate could be assumed to be fifty-five habitable rooms per acre. The price of £240,000[d] was approved by the district valuer and the council completed its purchase at that figure on June 24, 1964.

"18. On 30 November 1965, the [claimants] served notice on the council under s. 23 of the Land Compensation Act 1961, claiming compensation from the council as the acquiring authority in respect of the increased value of the additional planning consent granted to the council.

"19. The council did not accept that the [claimants] had any such claim and were not prepared to negotiate any figure as a result of which on 30 March 1966, the [claimants] made the present reference to the Lands Tribunal."

The letter of 1 November 1965, from the Ministry, which is referred to in para 17 of the Case Stated, was in the following terms:

[c] The claimants had made several attempts to obtain planning permission for residential purposes in respect of the land, and had been refused permission

[d] By reason of some additional payments the price actually paid by the council amounted to over £253,000

"I am directed by the Minister of Housing and Local Government to refer to your letter of 8 October 1965, concerning the council's application of that date for planning permission for the development described in the heading of this letter, and to say that he has decided to approve the proposal. Accordingly he hereby grants planning permission for residential development on land at Lavender Hill, Enfield, in accordance with [a drawing No. 6, a copy of which was before the Court of Appeal] which accompanied the application dated 8 October 1965, subject to the following conditions: (i) that the design and external appearance of the building shall be as may be agreed with the local planning authority or, in default of agreement, as shall be determined by the Minister; (ii) facilities for the parking and turning of vehicles shall be provided within the site, as may be agreed with the local planning authority, or, in default of agreement, as shall be determined by the Minister."

At the hearing before the Lands Tribunal the contention of the council that there was not additional development was rejected. The tribunal stated the contentions as follows:

"First, the acquiring authority contended that no additional compensation at all was payable because as a matter of law the planning decision contained in the Minister's certificate of 1 November 1965, did not grant permission for any 'additional development'. Second, the authority further contended that upon the proper construction of s. 23(2) the valuation to be made in accordance with the requirements of that subsection must represent the value of the land for development in accordance, and only in accordance, with the Minister's letter of 1 November 1965. The claimants' contention was that the land should be valued at the price which it would have commanded in the market in the light of that decision. Third, what was the additional value of the land (if any) on either of these bases?"

At the hearing the claim put forward by the claimants was for about an additional £332,000. The tribunal held that there was additional development, and that the additional payment should be £60,000. From that decision the council appealed to the Court of Appeal by notice of appeal seeking that the decision of the tribunal should be quashed and dismissing the claimants' claim to additional compensation. The grounds of appeal were as follows: (i) that the tribunal erred on both points mentioned in the last paragraph of its decision, and that on a correct direction in law on either point it would have held that no compensation was payable (the points referred to in the decision were the tribunal's holding that the Minister's second certificate (or decision) did grant permission for

"additional development", and that the tribunal was not restricted to a consideration of any additional value which would accrue from a development by reference to a particular drawing which had accompanied the claimants' application to the Minister); (ii) that the Minister's decision of 1 November 1965, did not grant permission for additional development; (iii) that the tribunal misinterpreted s 29 of the Act of 1961, and misdirected itself in so far as it accepted the claimants' contentions on the purpose and effect of the section; (iv) that the permission of 1 November 1965, did not add to the value of the land and would not have done so if in force on the relevant date in 1964; (v) that the tribunal should have held that the amount referred to in s 23(2) of the Act did not exceed £240,000 (the amount of compensation originally agreed) and the council relied on the alternative finding to that effect in the last sentence of the decision; and (vi) that the valuation from which the tribunal derived its award of £60,000 additional compensation was not in accordance with s 23(2), but was based on a supposed permission, which had not been granted, at a density between sixty and eighty persons or habitable rooms per acre.

D P Kerrigan QC and J D James, for the council.

H Marnham QC and J A R Grove, for the claimants.

22 March 1968. The following judgments were delivered.

DANCKWERTS LJ

stated the nature of the appeal and, having read the passages from the Case Stated set out at p 402, letter *h*, to p 403, letters *c* and *g*, ante, and the Ministry's letter dated 1 November 1965, having stated the amount of the claimants' claim and the decision of the Land Tribunal, read s 14(3)[e] and s 23[f] of the Land Compensation Act, 1961, and continued: The contentions on behalf of the council are, first, that this was not a case of an additional development, because it was simply a case where some variation of the planning permission already received was allowed, and, secondly, that in any case, if it did come within s 23 and there was an additional development, there was no additional value which had been gained by the permission in question.

[e] Section 14(3) provides: "Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed; but, in determining whether planning permission for any development could in any particular circumstances reasonably have been expected to be granted in respect of any land, regard shall be had to any contrary opinion expressed in relation to that land in any certificate issued under Part 3 of this Act"

[f] Section 23, to which the marginal note is "Compensation for new planning permission granted after acquisition of land" provides, so far as relevant, as follows–"(1) Where (*a*) any interest in land is compulsorily acquired or is sold to an authority possession compulsory purchase powers and, before the end of the period of five years beginning with the date of completion, a planning decision is made granting permission for the carrying out of additional development of any of the land; and (*b*) the principal amount of the compensation which was payable in respect of the compulsory acquisition or, in the case of a sale by agreement, the amount of the purchase price, was less than the amount specified in sub-s (2) of this section, then subject to the following provisions of this section, the person to whom the compensation or purchase price was payable shall be entitled, on a claim duly made by him, to compensation from the acquiring authority of an amount equal to the difference. (2) The amount referred to in para (*b*) of sub-s (1) of this section is the principal amount of the compensation which would have been payable in respect of a compulsory acquisition of the said interest by the acquiring authority, in pursuance of a notice to treat served on the relevant date, if the planning decision mentioned in para (*a*) of the said sub-s (1) had been made before that date and the permission granted thereby had been in force on that date"

It is necessary, of course, first of all to ascertain what is additional development and, indeed, what is development. The meaning of "development" for present purposes is contained in the general definition section of the Land Compensation Act, 1961, s 39. That takes one, by reference, to s 12 of the Town and Country Planning Act, 1947, which is now to be found in s 12(1) of the Town and Country Planning Act, 1962. What it comes to is this, that "development" means the provision of buildings, engineering works, and that sort of thing. For present

purposes, therefore, it is simply a question of buildings. In the Land Compensation Act, 1961, the definition of "additional development" is contained in s 29(1) and is as follows:

> "In this Part of this Act: 'additional development', in relation to an acquisition or sale of an interest in land, means any development of the land other than the following, that is to say–*(a)* where the acquiring authority are a local authority, and acquired the interest for the purposes of any of their functions, development for the purposes of the functions for which they acquired it; *(b)* where the acquiring authority are not a local authority, development for the purposes of the project in connexion with which they acquired the interest."

It is plain that the present case does not fall within either *(a)* or *(b)*; *(c)*, only, was regarded as a matter of some interest. Paragraph *(c)* reads "development for which planning permission was in force on the relevant date". The relevant date is the date of the notice to treat, as is provided in the definition of "relevant date" in s 29(1). Paragraph *(d)* of the definition of "additional development" is the one on which I think counsel for the council really rely. That provides as follows:

> "(d) development for which–(i) in the case of compulsory acquisition, it was, for the purpose of assessing compensation in respect thereof, assumed (in accordance with the provisions of ss. 14 to 16 of this Act) that planning permission would be granted, or (ii) in the case of a sale by agreement it would have been so assumed that planning permission would be granted if the interest (instead of being sold by agreement) had been compulsorily acquired by the acquiring authority in pursuance of a notice to treat served on the relevant date."

Both counsel for the council relied on that provision for the argument which they put before this court. It is also said, with regard to para (c) that, unless it was of some relevance to the issue which we had to decide, it would be otiose. It may be that it is otiose, but I do not find that it has any compelling force merely by reason of that. The Lands Tribunal came to the conclusion that para *(d)* did not help the council, and, of course, if the council are not able to bring themselves within any of these exceptions then it becomes additional development under the definition. In my view, the tribunal reached the right conclusion, and I do not think that any of the exceptions contained in s 29 apply. Therefore, so it seems to me, there was additional development in the present case. Accordingly, the question whether there was any additional value arises for consideration. I think that the conclusion reached by the tribunal on that point, also, was correct, and accordingly I would dismiss the appeal from its decision.

DIPLOCK LJ.

I agree. So far as the first point is concerned, viz, whether the development authorised by the Minister's decision of 1 November 1965, was additional development, it seems to me that under the definition of additional development contained in s 29(1) of the Act, so far as is relevant to this case, the test was: would the development authorised by the Minister's decision of 1 November 1965, have been permitted under planning permission granted in the terms set out in the Minister's certificate of 4 July 1964? The development authorised by the Minister's decision of 1 November 1965, was a specific development relating to the buildings allowed to be erected on the land and provided for a density of one hundred habitable rooms per acre. The development referred to in the Minister's certificate of 4 July 1963, was limited to development providing for fifty-five habitable rooms per acre. Therefore it seems to me to be plain that the development permitted by the decision of 1 November 1965, was additional development. I agree, therefore, with the tribunal's decision on that point.

The second point raised by counsel for the council is whether or not that additional development entitled the claimants to further compensation on top

of that which they had already received. The general principle on which compensation is to be assessed is to be found in s 5, r (2) of the Land Compensation Act, 1961:

> "(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."

In the ordinary way if land is sold on the open market by a willing seller the price which the buyer is prepared to pay depends on the use which he thinks he will be able to make of it. If the land is already the subject of planning permission he knows that he will be able, if he wishes, to make use of it in accordance with that permission. He may also have an expectation that he may be able to get planning permission for a more profitable use and in so far as that expectation is a serious one then the price

which he is prepared to give for the land will be increased in order to allow for the chance, though not the certainty, of his being able to make the more profitable use of it.

That is what the position would be apart from the provisions of s 14 to s 17 of the Act of 1961. What those provisions do is to say that in valuing the land it may be assumed in certain circumstances that planning permission will in fact be granted for some development other than that for which planning permission already exists, ie, that what would otherwise be no more than a chance may be treated as a certainty. One of those circumstances is set out in s 15(5) of the Act of 1961 and provides that in valuing the land one may assume that planning permission would be granted for any development which is set out in a certificate obtained from the planning authority, or the Minister, under Part 3 of the Act of 1961.

At the time that this land was originally valued the position therefore was that the buyer of the land, for the purposes of compensation, was entitled to assume that he could use it either for its then present purpose, which, I think, was as allotments, or for housing development subject to the conditions set out in the Minister's certificate of 4 July 1963, ie, housing development at a density of fifty-five habitable rooms per acre. He would also be entitled to take into consideration the chance that he might be able to use the land for housing development at a higher density, but at that time the chance would no doubt have been treated as small having regard to the fact that the Minister had already set out in the certificate the limit of density which it is common ground was for fifty-five habitable rooms per acre.

What happened when the Minister's decision of 1 November 1965, was given was this: a revaluation on the assumption that that decision was already in existence involved making the assumption, first, that the land could be used for the particular development, the subject of the Minister's decision; secondly, that planning permission would be obtained for the development at a density of fifty-five habitable rooms per acre; and, thirdly, the chance, whatever it might be, that a permission could be obtained for a density between fifty-five and one hundred per acre, which would be the most economical development for the site. That one has to take into consideration the chance of getting permission for development, for which planning permission has neither been granted nor is to be assumed, is made clear from s 5(1) of the Act to which I have referred, and s 14(3) of the Act to which my lord has referred.

It therefore follows that, if the Lands Tribunal--and this was a question of fact for it--came to the conclusion that a buyer of the land, after the Minister's decision enabling specific development involving one hundred habitable rooms to the acre had been granted, would estimate his chances of getting a planning permission for a development at the most economical density more than fifty-five to the acre as being higher than before that planning permission was given, then the claimants were entitled to the added sum due to the estimated improvement of that chance in the mind of the intending buyer. The tribunal came to the

conclusion that a buyer on the open market would take that view. It was a question of fact for it and I, not without some regret, agree that this appeal must be dismissed.

CAIRNS J.

I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: Town Clerk, Enfield (for the council); H B Wedlake, Saint & Co (for the claimants).

F A Amies Esq Barrister.