LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

WATER & SEWERAGE SERVICES (NORTHERN IRELAND) ORDER 1973

LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

IN THE MATTER OF A REFERENCE

R/25/2014

BETWEEN

CLIFFORD DESMOND RODGERS AND HAZEL CAROLINE RODGERS – APPLICANTS

AND

DEPARTMENT OF AGRICULTURE AND REGIONAL DEVELOPMENT &

NORTHERN IRELAND WATER LIMITED – RESPONDENTS

Re: Lands of Ouley and Lands of Killynure, County Down

Lands Tribunal – Henry M Spence MRICS Dip.Rating IRRV (Hons)

Background

1. Clifford Desmond Rodgers and Hazel Caroline Rodgers ("the applicants") are the owners of lands of Ouley, registered in folio numbers 14715, 14728 and 14729, Co Down and lands of Killynure, registered in folio number 14380 Co Down ("the reference lands").

2. On 28th September 2001 the Department of Agriculture and Regional Development and Northern Ireland Water Limited ("the respondents") issued a Warrant of Entry under Article 50 of the Water and Sewerage Services (Northern Ireland) Order 1973 ("the Order") for the purposes of entering the reference lands and carrying out works thereon.

3. The applicants stated in their reference to the Lands Tribunal that the works commenced in the autumn of 2001 and completed in September 2002. These dates were not disputed by the respondents. On 27th January 2003 the applicants signed a "Reinstatement Certificate" advising the respondents that they were not satisfied with the reinstatement works carried out by the respondents' contractors. In February 2003 the respondents made a payment of

£18,200 to the applicants in respect of their interim entitlement to compensation under the Order.

4. It was accepted by both parties that there had been ongoing discussions and negotiations throughout the period from vesting up to November 2014, when the applicants made a reference to the Lands Tribunal citing: "the re-instatement of the lands has not been satisfactorily completed and the amount of compensation has not been agreed". The respondents were informed of the reference by letter from the Lands Tribunal dated 3rd November 2014.

5. The issue to be decided by the Tribunal in this preliminary hearing was whether the applicants' reference to the Lands Tribunal of its claim for reinstatement and compensation was statute–barred by reason of Article 4 of the Limitation (Northern Ireland) Order 1989 ("the Limitation Order") and/or Rules 4 and 7 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules").

Procedural Matters

6. Mr Mark Orr QC, instructed by Nelson Singleton Solicitors, represented the applicants. Mr Stephen Shaw QC, instructed by McKinty & Wright Solicitors appeared on behalf of the respondents. The Tribunal is grateful to the legal representatives for their helpful submissions.

The Law

7. The following Articles of the 1973 Order are relevant to the subject reference:

> "*Powers of Entry*
>
> 50.-(1) Subject to this Article, an authorised officer of the Ministry shall, on producing if so required some duly authenticated document showing his authority, have a right to enter any land or premises at all reasonable hours for the purposes of –
>
> (a) …

(b) inspecting, repairing, altering, renewing or removing any works executed under this Order in or on the land;

(c) …

(d) …

(e) taking any action or executing any work authorised or required by this Order to be taken or executed by the Ministry;

(f) …

(g) …".

And

"*Compensation etc. in respect of execution of works*

55.-(1) In executing any works under this Order, the Ministry shall -

(a) cause as little detriment and inconvenience and do as little damage as possible;

(b) make good, or pay compensation for, any damage caused by, or in consequence of, the execution of the works.

(2) …".

8. Article 4 of the Limitation Order states:

"4. Subject to Articles 5, 7 and 9, the following actions may not be brought after the expiration of six years from the date on which the cause of action accrued –

(a) …

(b) …

(c) ….

(d) an action to recover any sum recoverable by virtue by any statutory provisions …".

9. Rules 4(1) and 7(1) of the Rules provide:

> "4.-(1) Save where otherwise provided a person may institute proceedings by serving on the registrar a notice of reference as nearly as possible in accordance with Form 1 together with sufficient copies for service on each other party to the proceedings."

And

> "7.-(1) Subject to any statutory provision proceedings in any matter to be determined by the Tribunal shall be instituted within the time prescribed by these rules in respect thereof, and if no time is so prescribed then as soon as reasonably practicable after the day upon which the party making such reference becomes entitled to refer the matter to the Tribunal."

Authorities

10. The Tribunal was referred to the following authority from this jurisdiction:

Treacy v Down District Council R/15/2005

The circumstances in Treacy were that for a period of 23 years from 1982 there had been no negotiations between the parties until a reference was made to the Tribunal in 2005. In that case the Tribunal applied a 6 year time-limit, under Article 4 of the Limitation Order, to reject a claim for compensation.

The parties were agreed that the circumstances in the subject reference, whereby negotiations had been ongoing throughout the period from September 2002 up to the reference to the Lands Tribunal in 2014, were completely different. Mr Shaw QC also accepted that, on several occasions throughout the negotiating period, it was the respondent who had caused delays in the negotiations. Accepting that the circumstances were different, Mr Shaw QC submitted, however, that the principles and procedures outlined in Treacy should be applied in the subject reference. The Tribunal agrees and finds the following extracts from Treacy to be of relevance:

"9. It was not suggested that the 6-year limitation period in these circumstances was of itself a breach of the European Convention on Human Rights. The Convention recognises the need for reasonable time-limits in the pursuit of claims. See e.g. Bhattacharjee v Blackburn with Darwen Borough Council [2002] RVR 55 LT and Stubbings v United Kingdom (1996) 23 EHRR 213."

And

"29. … The reasoning is consistent with policy, namely to prevent stale claims, it has been approved by the Court of Appeal and is unaffected by the Human Rights Act (see Bhattacharjee v Blackburn with Darwen BC).

30. Article 2 of the Limitation (NI) Order 1989 provides that the word 'action' includes any proceedings in a court established by law. The Lands Tribunal is such a court by virtue of Section 1 of the Lands Tribunal & Compensation Act (NI) 1964.

31. The Tribunal concludes that this claim is an action to recover a sum recoverable by virtue of a statutory provision and so the six year limitation period runs from the date upon which the right to compensation (not the right to any particular amount of compensation) accrued, i.e. when the Vesting Order became operative.

32. In the present case the Applicant's land was vested in July 1982. Any claim now for compensation is statute barred by reason of Article 4 of the Limitation (NI) Order 1989.

Estoppel or Waiver

33. The statutory time-limit is procedural and so, after the time-limit, the Tribunal will hear a reference where estoppel or waiver applies. See Co-operative Wholesale Society Ltd v Chester-le-Street District Council [1998] CA 3 EGLR 11.

34. Compulsory purchase compensation negotiations can be lengthy, sometimes for good reasons. The statutory time-limit cannot be varied by the Tribunal. But it may be waived or extended by agreement, or parties may agree the relevance of the limit, or agree to extend it in case negotiations break down. To avoid unnecessary protective References before disputes crystallise, the Tribunal would encourage such agreements. But the Tribunal will always be reluctant to conclude that limitation is not available and will require clear evidence to that effect – any agreement must be clear and unequivocal, and any doubts held by a Claimant that the acquiring authority might rely on limitation should be carefully clarified. See Hillingdon London Borough Council v ARC Ltd (No. 2) [2000] 3 EGLR 97 and Sita (formerly Elenezer Mears (Sand Producers) Ltd) v Surrey County Council [2001] LT RVR 56.

35. There was no waiver by election. Firstly, there was no evidence to suggest that the parties had entered into an agreement under which the limitation defence was or could be waived. Secondly, there was no evidence to suggest that the parties had actually considered limitation and reached a common assumption that it did not apply. Instead once the case was referred to the Tribunal the Respondent promptly and expressly raised the limitation issue to both the Claimant and the Tribunal. That is the time by which the point must be taken and clearly there was no election to waive limitation. This claim was entirely stale and reliance on limitation is wholly consistent with the policy behind the provision. See Sita [2001] and Williams v Blaenau Gwent Borough Council (No. 2) [1999] LT 2 EGLR 195."

And

"37. After the Reference there were negotiations. Mr Purvis BL suggested that as the Respondent had entered into negotiations some 23 years after the Vesting Order and some 2 years after the reference to the Lands Tribunal the Claimant could reasonably assume that the Respondent had relinquished the limitation point;

the Respondent had waived its right to raise it and was estopped from doing so. The Tribunal does not agree. Attempts to resolve matters are always encouraged by the Tribunal and should not be held against a party attempting to do so. Long delay by a Claimant certainly should not be held against a Respondent. Negotiations alone do not preclude reliance on limitation and in this case, the Respondent had promptly indicated that it may rely on limitation. When their differences could not be resolved the Respondent triggered actual reliance on limitation. There had been no promise or assurance made to the Claimant that the limitation point would not be pursued if a settlement was not achieved; the Respondent had not changed its position that it may rely on the time-limit. See Hillingdon (No.2) [2000]; Llanelec Precision Engineering Company Ltd v Neath Port Talbot County Borough Council [2001] RVR 36; and Bridgestart (2004) CA.

38. Mr Horner QC suggested that there was nothing in this case that would make it inequitable for the Respondent to be allowed to rely on limitation. The Tribunal agrees.

39. The Tribunal concludes that the facts do not establish an agreement, or conduct, sufficient to amount to estoppel or waiver …"

In Treacy, therefore, the Tribunal directed that:

- Article 4 of the Limitation Order should apply to compensation references before the Tribunal [paras 31 and 32].
- the European Convention on Human Rights recognised the need for reasonable time-limits on the pursuit of claims [para 9] and application of the time-limit was unaffected by the Human Rights Act [paras 9 and 29].
- the limitation period ran from when the right to compensation accrued i.e. in Treacy when the Vesting Order became operative [para 31].
- the statutory time-limit was procedural and could not be varied by the Tribunal [para 33].

- the Tribunal would always be reluctant to conclude that limitation was not available and would require clear evidence to that effect. Any doubts held by a claimant that the acquiring authority might rely on limitation should be carefully clarified [para 34].

- after the time-limit the Tribunal would consider whether waiver or estoppel applied [para 34].

- negotiations alone did not preclude reliance on limitation [para 37].

- the facts must establish an agreement, or conduct, sufficient to amount to estoppel or waiver [para 39].

11. The Tribunal was also referred to the following authorities from the jurisdiction in England and Wales. These decisions are not binding on the Lands Tribunal in Northern Ireland but they are highly persuasive:

(i) Co-operative Wholesale Society Ltd v Chester-le-Street District Council [1998] 3 ELGR 11

In this case the Court of Appeal dismissed the appeal. The Estates Gazette Law Report summarises:

> "The provision relating to the six-year time-limit … is procedural, capable of being waived, or the subject matter of estoppel by and on behalf of the acquiring authority. There was ample evidence upon which the Tribunal could hold that it would be unconscionable for the acquiring authority to rely upon the six-year period of limitation having regard to the way in which they conducted the negotiations and to their reaction to the reference once it had been made. They sought an extension of time without referring to the fact that the reference was flawed from the outset."

The Tribunal considers the following extracts to be relevant:

> "The district valuer and Mr Bissett, according to the latter who gave evidence before the Tribunal, considered that their preference would be to avoid a reference to the Tribunal."

And

> "Then out of the blue, and it must have come as a bombshell to the society, by letter dated January 13 1995 solicitors acting for the authority applied to the Tribunal for dismissal of the reference, on the ground that it had been made out of time."

And

> "It is inherent in that finding of fact, together with the history I have endeavoured to outline briefly, that it was always of the essence of the meetings between the two valuers and plainly understood between them, that, so far as was possible, there should not be a reference to the Lands Tribunal, but the far more acceptable way forward from the point of view of both sides was that there should be a negotiated settlement. This is indeed the finding of the Tribunal …"

And

> "Miss Frances Patterson QC, for the appellants, readily acknowledged that there is ample authority for the proposition that in relation to a number of causes of action set out in Part I of the Limitation Act 1980, they can be overridden by, for example contract between the parties, by waiver or by estoppel or unconscionable conduct on the part of one of the parties to the dispute."

In this case it was established on the facts that, as far as possible, both parties agreed that they should reach a negotiated settlement and there should not be a

reference to the Lands Tribunal. On that basis the Court of Appeal held that it would be: "unconscionable for the acquiring authority to rely upon the six-year limitation period.".

(ii) Hillingdon London Borough Council v ARC Ltd (No. 2) [2000] 3 EGLR 97

The Estates Gazette summarises the findings in this case:

> "The appeal was allowed. (1) In relation to estoppel by convention, the acquiring authority were at all material times, entitled to the view that the claim being advanced was not a valid claim, as it was not supported by appropriate evidence. There was no shared common assumption, communicated one to the other, that were was a valid claim and that the limitation period was not a defence to be relied upon as a basis upon which negotiations proceeded post-April 1988. If a common assumption existed up to March 1994, a letter sent by the acquiring authority in that month, indicating that they considered themselves free to take the limitation point, entitled the claimant to only a few weeks to issue a reference to the Lands Tribunal; it did not do so. The claim to estoppel by convention failed. (2) In relation to promissory estoppel there was no clear and unequivocal representation by the authority that the claim was valid and that they would not rely upon the statutory limitation defence. (3) Although the question of unconscionability did not arise, it would be for a claimant to establish detriment. The acquisition of land for no payment was not unconscionable, as the claimant had ample opportunity to refer its claim to the Tribunal."

The Tribunal also refers to the following citations from the case:

> "Conclusions
>
> The principle issue raised by this case is an important one. It is clearly established that a party may waive the right to rely upon a limitation defence and that parties may enter into an agreement to waive the limitation defence: see, for example, Halsburys Laws of England 10/28 (1997) paras 842 and 843.

The courts will enforce any such waiver or agreement in an appropriate case from relying upon a limitation defence. However, no authority has been cited to us, apart from the decision of the judge in this case, whereby a party has been disentitled from relying upon a limitation defence merely because he had continued to negotiate with another party about the claim after the limitation period had expired and without anything being agreed about the manner in which the claim was to be resolved if negotiations failed".

And

"… The evidence simply does not establish a shared assumption, communicated, one to the other, that limitation was not a defence to be relied upon as a basis upon which negotiations proceeded post-April 1988 …".

And

"A shared assumption is not, on the authorities, sufficient to establish an estoppel unless it is communicated. It follows that if, in this case, there was no shared assumption to the effect that ARC had a valid claim that was not time-barred, there could be no communication by HLB that they were making any such assumption. It also follows from what we have said above that the communication required would, in any event, be not simply that ARC had a valid claim, but also that HLB would not take any defence that might be open to them on the basis of statutory limitation period.".

And

"… However, it follows from the above that, in our view, ARC would have to satisfy the court that there was some clear and unequivocal representation from HLB to ARC that its claim was a valid one, and, in addition, that HLB would not rely upon any statutory limitation defence.".

And

"Mr King relies upon the fact that if there is no estoppel, HLB will be able to acquire land compulsorily for no payment. We do not consider that is a strong point, because ARC had ample opportunity to refer its claim for compensation to the Lands Tribunal before the limitation period expired.".

And

"… In our judgment, Mr Harper's stronger point is that ARC did not rely upon any communication from HLB, and that its loss was not caused by any act of HLB.".

The Court of Appeal therefore established in this case that:

- negotiations alone were not a basis for estoppel. Rather, there must be a shared assumption, communicated one to the other, that limitation was not a defence to be relied upon.
- a claimant must establish detriment, based on some clear and unequivocal communication from the authority which caused it to suffer a loss.
- acquisition of land for no payment was not "unconscionable" as the claimant had ample time to refer its claim to the Lands Tribunal.

(iii) Sita (formerly Elenezer Mears (Sand Producers) Ltd) v Surrey County Council [2001] WL 332 172

The Tribunal refers to the following extract from this decision:

"22. The essence of election is that a person is confronted by two mutually exclusive courses of action. In the case of a limitation defence to a compensation claim it does not seem to me that an election would arise until the time when the acquiring authority had to decide whether to respond to the claimant's reference to the Tribunal (or, as it decided to do here, to take the

limitation point and to contend that the Tribunal had no jurisdiction), or, if it chose to make a reference itself, when it made the reference. To negotiate outside the limitation period involves no election because it is not inconsistent with maintaining a limitation defence.".

Again, this case established that negotiations alone, outside the limitation period, were not sufficient to establish estoppel or waiver.

Position of the Parties

The Respondents Submissions

12. Mr Shaw QC submitted:

(i) **<u>Outwith the Limitation Order</u>**

a) The statutory entitlement enjoyed by the applicants for damage caused by or in consequence of the execution of the works originated in Article 55 of the Order with the Lands Tribunal possessed of the jurisdiction to determine the amount of disputed compensation.

b) The institution of proceedings before the Tribunal occurred in or around 3rd November 2014 with the service of the Notice of Reference under Rule 4 of the Rules.

c) The time for instituting proceedings was addressed in Rule 7. Since neither the Order or the Rules prescribed a time for instituting the applicants' claim under the Order, Rule 7(1) required the applicants to institute proceedings "as soon as reasonably practical" after they became entitled to make the claim.

d) On the applicants' pleaded case the works were completed in September 2002. Their delay, therefore, in instituting proceedings until November 2014 was excessive and the claim should not be admitted, as per Rule 7.

e) Where there was delay in bringing proceedings to a hearing before the Tribunal or default in complying with the Rules, then Rule 39 envisaged the

strike out of proceedings as an appropriate remedy and the respondents sought that outcome in all the circumstances.

13. The Tribunal agrees with Mr Shaw QC, neither the Order or the Rules prescribe an exact time for the institution of proceedings under the Order. Rule 7 stipulates that proceedings must be instituted "as soon as reasonably practicable".

14. It was not disputed that, throughout the period September 2002, when the works were completed, up to the institution of proceedings in November 2014, the parties were engaged in meaningful negotiations to settle the amount of compensation. It was also not disputed that, on several occasions during the negotiating period, the respondents were responsible for delays in the proceedings. The Tribunal refers to paragraph 34 of Treacy in which it advised that it encouraged parties to try to resolve disputes and attempts to do so should not be held against a party. Also delays by the respondents should not be held against the applicants.

15. As there was still hope of a negotiated settlement right up to November 2014 the Tribunal considers that it was still "reasonably practicable" for the applicants to institute proceedings right up to that time. In these circumstances the Tribunal declines to strike out the proceedings under Rule 39, as requested by the respondents.

16. With regard to the Limitation Order Mr Shaw QC submitted:

(ii) **The Limitation Order**

a) Any claim to compensation enjoyed by the applicants was subject to a 6-year time bar under Article 4(d) of the Limitation Order since these proceedings amounted to "an action to recover any sum recoverable by virtue of any statutory provision".

b) In support of the applicants contention for the claim to be struck out they adopted the Tribunal's reasoning in Treacy and in particular to paragraphs 30 to 32 of that

decision, in which the applicants claim for compensation was statute barred by reason of Article 4 of the Limitation Order.

c) On the pleaded case of the applicants, the works were completed no later than September 2002 and although no payment had been made since February 2003, the outstanding claim of the applicants (if any) was not the subject of proceedings until November 2014. The respondents therefore invited the Tribunal to apply the sound policy recognised in Treacy that stale claims, such as the subject reference, should be prevented.

17. The Tribunal agrees with Mr Shaw QC, the applicants claim for compensation in the subject reference was statute-barred by reason of Article 4 of the Limitation Order [Treacy para 33]. The statutory time-limit was procedural, however, and after the time-limit the Tribunal will consider whether waiver or estoppel applied [Treacy para 33].

The Applicants' Submissions

18. In support of their submission that the amount of compensation should be determined by the Lands Tribunal, Mr Orr QC submitted that the applicants relied upon three principles (i) waiver, (ii) estoppel, (iii) Human Rights.

19. (i) **Waiver**

A person who was entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depended upon consent and the fact that the other party had acted on it was sufficient consideration. Where the waiver was not express, it may be implied from conduct which was inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefited by waiver but mere acts of the indulgence will not amount to waiver, nor may a party benefit from the waiver unless he has altered his position in reliance on it. The waiver may be terminated by reasonable, but not necessarily formal, notice unless the party who benefits by the waiver cannot resume his

position or termination would cause injustice to them. [See Halsbury's Laws Volume 47, para 250.]

20. (ii) **Estoppel**

Estoppel by convention arose where the parties proceeded upon a shared understanding or convention as to the basis of the arrangement into which they had entered. It was well-established that a party may envoke estoppel by convention not only where the convention or understanding related to contractual rights and obligations but also where it related to proprietary rights. A party may also envoke the doctrine where the convention or understanding related to the legal effect of the dealings between it and the other party (see Snell's Equity 12-007).

21. (iii) **Human Rights**

With regard to compensation for compulsory purchase, although this was not expressly mentioned in the ECHR, the reference in Article A1 of the First Protocol 2 "the conditions provided for by law at the General Principles of International Law" is taken to mean that compensation must be paid. States are given a measure of appreciation as to the basis upon which compensation was assessed and legitimate objectives of public interest may justify reimbursement at less than the financial equivalent to what the claimant had lost (see Lithgow v UK (1986) 8 EHRR 329).

Conclusions

22. It was clear from the decision in Treacy in this jurisdiction and the decisions in Co-operative Wholesale Society Ltd, Hillingdon and Sita in the jurisdiction in England & Wales that merely continuing to negotiate past the limitation period did not preclude the respondents' reliance on limitation. The facts in the reference must establish an agreement or "unconscionable" conduct by the acquiring authority sufficient to amount to estoppel or waiver. There must be a shared assumption, communicated one to the other, that limitation was not a defence to be relied upon (see Hillingdon). A claimant must also establish detriment, based on some clear

and unequivocal communication from the acquiring authority which caused it to suffer a loss (see Hillingdon).

23. In the subject reference the respondents' only actions were to continue to negotiate post the limitation period. There was no communicated agreement that the respondents would not rely on a limitation defence. There was no "unconscionable" behaviour on behalf of the respondents. The applicants had failed to establish detriment, based on some clear communication from the respondents, that caused them to suffer a loss. The Tribunal therefore finds that the respondents were not precluded by waiver or estoppel from relying on a limitation defence.

24. With regard to "human rights" it was clearly stated in Treacy (paras 9 & 29) that reliance on the 6 year limitation period was not a breach of human rights. In Hillingdon the Court of Appeal also found that the acquisition of land for no payment was not "unconscionable", as the claimant had ample time to refer its claim to the Tribunal. It was noted that the applicants had received an advance payment of £18,200 in February 2003. In the subject reference the applicants had ample time to bring a reference to the Tribunal and indeed, on 27th May 2008, within the limitation period, the applicants' agent advised the respondents that "compensation in respect of the wayleave was not acceptable". At that point, having rejected the respondents' offer, the applicants could have made reference to the Lands Tribunal.

25. The Tribunal considers that the facts in this reference do not establish an agreement or conduct, sufficient to amount to estoppel or waiver. The Tribunal concludes that it is not inequitable or "unconscionable" for the respondents to be allowed to rely on limitation and finds that the applicants' reference to this Tribunal is statute-barred by reason of Article 4 of the Limitation (Northern Ireland) Order 1989.

ORDERS ACCORDINGLY

14th February 2018

Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)
Lands Tribunal for Northern Ireland

Appearances

Applicants: **Mr Mark Orr QC, instructed by Nelson Singleton Solicitors.**

Respondents: **Mr Stephen Shaw QC, instructed by McKinty & Wright Solicitors.**