**LANDS TRIBUNAL FOR NORTHERN IRELAND**

**LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964**

**LANDS TRIBUNAL RULES (NORTHERN IRELAND) ORDER 1976**

**LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982**

**IN THE MATTER OF A PRELIMINARY POINT OF LAW**

**R/6/2022**

**BETWEEN**

**LIAM McCLOSKEY – APPLICANT**

**AND**

**THE DEPARTMENT FOR INFRASTRUCTURE - RESPONDENT**

**Re: Right of Way at Ballyhanedin Road, Claudy**

**Lands Tribunal for Northern Ireland – Henry Spence MRICS Dip.Rating IRRV (Hons)**

## Background

1. This preliminary application made by the Department for Infrastructure ("the respondent") arises out of a claim for compensation by Mr Liam McCloskey ("the applicant") under the Local Government Act (Northern Ireland) 1972 and the Roads (Northern Ireland) Order 1993.

2. The applicant has submitted a claim for compensation to the Lands Tribunal for the loss of a right of way at Ballyhanedin Road, Claudy ("the reference property") which has been vested by the respondent under a Vesting Order made on 8th August 2018.

3. Following a series of mentions before the Tribunal the respondent has made a preliminary application requesting that the reference be struck out. This is the preliminary issue to be decided by the Tribunal.

**Procedural Matters**

4. The applicant was represented by Mr John Coyle BL instructed by Connolly & Bradley Solicitors. Ms Julie Ellison BL, instructed by the Departmental Solicitor's Office, represented the respondent. The Tribunal is grateful to counsel for their helpful submissions.

**Position of the Parties**

5. The respondent seeks:

   (i) A determination on a preliminary point of law pursuant to Rule 15 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") that the applicant has failed to provide a valuation that complies with the Land Compensation (Northern Ireland) Order 1982 ("the 1982 Order").

   (ii) That the applicant's case be struck out under Rule 39 of the Rules, on the basis that:

      (a) there has been undue delay in the proceedings due to persistent default in complying with the directions of the Tribunal,

      (b) notwithstanding the additional time afforded, the respondent remains unable to properly respond to the claim as presented.

6. The applicant's position is that the respondent's preliminary application is not properly constituted, is inappropriate as there is no point of law and, if successful, would negate the respondent's obligations and those of the Tribunal to adhere to and uphold, the applicant's statutory rights under the Human Rights Act 1998 and the European Convention on Human Rights 1950. For these reasons the applicant submits that the respondent's application should be dismissed and a timetable to final hearing mandated.

**The Respondent's Submissions**

*Ms Ellison BL:*

7. The respondent's summary of the history of the application:

(i) Review 12th April 2022 – First review before the Tribunal. The respondent raised deficiencies with the Notice of Reference to the Tribunal and that the dominant tenant had not been identified. The Tribunal directed a statement of case with proofs be filed by 24th May 2022 which was extended to 7th June 2022 by agreement. The applicant provided a letter dated 5th February 2021 from Alexander Gourley as its only valuation evidence.

(ii) Review 9th August 2022 – Directions made that the respondent should file its reply by 9th September. The respondent duly filed its reply highlighting that the valuation did not comply with the 1982 Order.

(iii) Review 13th September 2022 – There was discussion as to the main issues i.e. whether the right of way was pedestrian, the extent of use; and the valuation evidence. Mr Coyle BL sought time to consult with his client to determine the factual situation. There was agreement that the correct basis for valuation needed to be understood going forward.

(iv) Review 28th September 2022 – Mr Coyle BL sought further time as he had been provided with a deluge of material by his client to consider. The Tribunal granted an additional four weeks.

(v) Review 7th November 2022 – Mr Coyle BL indicated that additional photos and drone footage would be served that day. The review was adjourned to allow time for the respondent to consider the material. The additional evidence was served on 16th and 17th November, a short time prior to the next review date.

(vi) Review 18th November 2022 – Submissions were made on behalf of the respondent that the new material provided appeared to widen the claim to include agricultural use which did not form part of the original claim, and that any widening out of the case would be objected to. Mr Coyle BL was allowed further time to consult with his client about the case being made.

(vii) Review 29th November 2022 – Counsel for the respondent submitted that there was likely to be prejudice to the respondent as new valuation evidence would likely be required. The applicant was given three weeks, to 20th December, to file a statement setting out the position re the purported agricultural right of way aspect with the respondent to reply by mid-January. No statement was received until 11th January.

(viii) Review 23rd January 2023 – Counsel for the respondent raised the issue of the valuation evidence and the fact that the Alexander Gourley letter did not touch on the agricultural aspect. The applicant sought time to file additional valuation evidence and the Tribunal directed that same be filed by 14th February 2023.

(ix) Review 20th February 2023 – No further valuation evidence filed, extension granted to 8th March 2023 with review put back to 15th March 2023.

(x) Review 15th March 2023 – No further valuation evidence filed, extension sought and granted to 2nd May 2023.

(xi) Review 15th May 2023 – No valuation evidence filed. Submissions made on behalf of the respondent re inadequacy of the case as presented, the delay to date and prejudice caused to the respondent. The Tribunal directed that a "detailed itemised claim" be with the Tribunal by Monday 26th June 2023. This was not done.

(xii) Review 4th July 2023 – Tribunal was advised there would be no further valuation evidence and the applicant provided an email from OKT Estate Agents saying they would use the same valuation method. It is not clear what information OKT were given to prompt this response nor the legal basis for same. The case was then listed for hearing on the preliminary point.

**The applicant's notice of reference and statement of case**

8. The respondent further submits:

> The Notice of Reference dated 13th January 2021 and Statement of Case served on 9th June 2022 specify the nature of the compensation as "compensation for a reduction of the value retained by the applicant which does not have the advantage and value of the pre-existing right of way".

9. The description of land or other subject matter was stated to be "an established right of way to and from the A6 with access by concrete steps and handrail".

10. There is no mention therein of any route other than the concrete steps.

11. The claim in the Notice of Reference is for a "reduction in value" of the lands. The Statement of Case states that the value of the retained land is in respect of "the utility value of the land … retained by the applicant".

**The Applicant's Valuation Evidence**

12. The 1982 Order provides at Article 6(1) for compensation to be paid in respect of land that is compulsory acquired. It provides so far as relevant:

> "Rules for assessing compensation
>
> 6.-(1) Compensation in respect of any compulsory acquisition of land shall, subject to the provisions of this Order and any other enactment, be assessed in accordance with the following rules:-
>
> (1) …
>
> (2) The value of land shall, subject to rules 3 to 6, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise;
>
> (3) …
>
> (4) …
>
> (5) …
>
> (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 the land."

13. The valuation of Mr Gourley sets out that he was instructed to provide a valuation which:

> "relates to a footpath at the above address and has been severed by the new A6 road layout. This footpath leads from Mr McCloskey's property to a set of concrete steps which exit on to the east side of the old A6, these steps were provided by Roads Service

the last time the A6 was upgraded, it now appears no provision has been left to retain this Right of Way."

14. It is clear that Mr Gourley's valuation therefore deals only with the pedestrian right of way asserted in the claim as originally formulated. It makes no reference at all to the now asserted additional route used to walk animals.

15. Mr Gourley goes on to conclude:

> "This means the alternative route via the Ballyhanedin Road will be considerably longer and make it necessary to use some form of vehicle transport subsequently adding time and costs, assuming Mr McCloskey uses this route five visits per week which we estimate at £20 per hour e.g. £100 per week or £5,200 per year over a period of 10 years equates to £52,000."

16. Mr McCloskey in his affidavit dated 13th December 2019 does not assert anything like this level of usage in recent times but rather at paragraph 8 describes how he would have used the right of way when he was growing up, and then simply says in respect of more recent usage at paragraph 9; "More recently, my children and their cousins, use the right of way to get to the main road to visit their cousins or to feed the horses". Nothing is said as to the present use by Mr McCloskey nor is any specific frequency averred to.

17. This is in distinction to Mr Liam McCloskey's affidavit of 11th January 2022 that states he would walk the horses over the purported additional route "maybe 3 to 4 times per year".

18. Similarly, the affidavit of P J McCloskey dated 13th December 2019 makes no claim as to the frequency of present use of the primary right of way up the steps to the A6.

19. In any event, it is submitted that the approach taken by Mr Gourley is wholly erroneous. The 1982 Order specifies that compensation must be based on the value of the land.

20. Disturbance in Article 6(1)(6) is narrowly defined and does not apply to the value of the land, which can be assessed while the owner is still in occupation, but rather may include "such matters as legal and surveyors fees, the cost of moving furniture … essentially what it has cost the claimant to move": Joel Kerr v NIHE; AGNI Reference R/37/2010 per Coghlin LJ and Mr Spence at paragraph 14. This does not apply in the instant case.

21. As explained by Coghlin LJ and Mr Spence in Kerr v NIHE at [15]:

> "The wording and structure of the Rules set out in Article 6(1) of the 1982 Order specifically provide that the value of the land shall be calculated in accordance with Rule (2) which 'disturbance or any other matter' referred to in rule (6) may form part of the assessment of compensation provided that it is not directly based on the value of the land."

22. The Attorney General argued in Kerr that the applicant whose loss arose due to the vested property having been in negative equity, should be compensated as the loss only "indirectly related to the value of the land". This argument was rejected by the Tribunal.

23. It is clear in the present case that the applicant remains in occupation of the land which he says has been affected and therefore the correct basis for compensation is the amount by which the value of the land has been diminished by the loss of the right of way. This is manifestly opposite to the approach taken by Mr Gourley which has no basis in law.

24. Moreover, as a technical point, the valuation is not in the form of an Experts Report and has no expert declaration.

25. The outworking of the approach taken is that it would be difficult, if not impossible, for the respondent's valuer to meet such a claim, and for the Tribunal to determine the correct level of compensation arising from two entirely different methods. The valuations would be manifestly different.

**Objection to the Amendment of the Applicant's Notice of Reference**

26. Moreover, the applicant has not sought to amend his notice of reference as required by Rule 8 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules"). Rule 8 states:

> "8. Limitation of case and amendment of notice of reference
>
> (1) Subject to paragraph (3) a party shall not be entitled at the hearing of any matter to rely upon any ground not stated in his notice of reference except by leave of the Tribunal on such terms as to costs or otherwise as it thinks fit."

27. It is submitted that if the case is not struck out in, its entirety, and leave is sought by the applicant to permit the inclusion of the additional route as set out in Mr McCloskey's affidavit of 11th January 2023, said leave should not be granted, and the applicant should not be entitled to rely upon this ground at hearing. For the avoidance of doubt, the respondent objects to such a widening out of the claim which is symptomatic of the failure of the applicant to properly formulate and present his case despite having ample time to do so.

**Costs**

28. It is submitted that the application should be struck out under Rule 39 of the Rules that provides:

> "Delay in proceedings
>
> 39.-(1) Where upon the application of a party it appears to the registrar that there has been undue delay in bringing proceedings to a hearing before the Tribunal or default in complying with any provisions of these rules the registrar may request any party to the proceedings to submit proposals for the completion of any procedural steps in the matter.

(2) The registrar may list any proceedings to be mentioned before the President or the Tribunal to enable one or other or more than one of the parties to apply for such order as may appear to be necessary to fix the place, date and time for hearing of the matter in dispute, or to have the proceedings stayed or struck out.

(3) In any proceedings to which paragraphs (1) and (2) apply the President or the Tribunal may make an order putting one or other or more than one of the parties on terms for the further conduct of the proceedings (including terms as to costs) or may order the proceedings to be stayed or struck out, upon such terms as may seem fit.

29. Moreover, Article 5 of the 1982 Order provides, so far as relevant:

"5.-(1) Where either –

(a) the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Lands Tribunal to that claimant does not exceed the sum offered; or

(b) the Lands Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable it to make a proper offer, a notice in writing of the amount claimed by him containing the particulars mentioned in paragraph (2);

the Lands Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Lands Tribunal the notice should have been delivered.

(2) The notice mentioned in paragraph (1) shall –

(a) state the exact nature of the interest in respect of which compensation is claimed; and

(b) give details of the compensation claimed by –

(i) distinguishing the amounts under separate heads, and

(ii) showing how the amount claimed under each head is calculated."

30. As set out above, the Notice of Reference did not set out the amount claimed. The valuation provided has no basis in law and does not address the additional route that the applicant now seeks to include. The Tribunal gave the applicant a further opportunity to provide a detailed itemised claim at the review on 15th May 2023. This was not done.

**Conclusion**

31. The Notice of Reference is dated January 2021 and it was filed in March 2022. Since the application was filed there have been 12 reviews before the Tribunal at which the applicant has repeatedly sought time to gather evidence and file further evidence. However, notwithstanding this the applicant has to date failed to properly formulate and present his claim; the valuation evidence has no basis in law, the delay is causing prejudice to the respondent, and it is therefore submitted that the application should be struck out, and costs awarded to the respondent.

**The Applicant's Submissions**

*Mr Coyle BL:*

32. The application for a preliminary point has not followed the specified rubric in the Rules, for an application to the President on a point of law. There is no discretion which has been invoked under Rule 38, to resolve these problems [non-compliance with Rules 15(4) and 15(5)] and on that basis alone, the application cannot proceed. Indeed, the point of law has never been stated at all, never mind in clear, precise, defined terms:

> "*Preliminary point of law*
>
> 15.-(1) The President may, on the application of any party to proceedings, order any point of law which appears to be in issue in the proceedings to be disposed of at a preliminary hearing.

(2) The provisions of rule 12(2), (3), (4), (5) and (6) shall apply to an application under this rule with the substitution of references to the President for references to the registrar."

33. There is absolutely no evidence adduced of any prejudice to the respondent. The contention of prejudice never rises above the level of lawyers' unevidenced assertion. There is no evidence to claim to show that either documents are now not available, or witnesses who cannot give evidence of probative quality, so that the hearing which is likely to take place in the later part of this year would carry prejudice to the respondent. The respondent has had adequate notice of the claim. Indeed, it has in its possession an opinion from counsel for the applicant setting out the basis of the claim for several years.

34. The actual road scheme is now fully operational. This application has not impeded its progress, nor plainly does it create any continuing obstacle to the completion successfully of the A6 Scheme. This contention does not appear.

35. The authorities are replete warning against the hearing of a preliminary point in lieu of evidence. Treacherous short cuts severing the main hearing of evidence from a "preliminary point" are treated with great caution and with severe admonitions against. While Volume 1 of Supreme Court Practice (1999) assist in this regard, the Tribunal is referred to NI Water v Chivers [2016] NICA 22, per Weir LJ at paragraph 19. The learned Lord Justice [with the concurrence of Morgan LCJ and Weatherup LJ] held as follows:

"There seems to be no very good reason why the Lands Tribunal should have been asked to deal with this claim by way of 'split' hearings. That approach has prolonged the matter and will no doubt have added to its expense to an extent far exceeding the cost of preparing exert valuation evidence in respect of any claimed loss and presenting it at a single hearing. Had the matter been dealt with in a complete rather than a piecemeal fashion the entire matter could have received consideration. This court has said before and is now again obliged to repeat that 'split' trials ought not to be sought nor ought they to be permitted unless in exceptional circumstances and for very good cause."

36. There are no exceptional circumstances, and factors which constitute a very good cause, advanced by the respondent in its application. It is a two limb test set out by Weir LJ. Indeed, to date the respondent has adduced no evidence whatsoever, while having the entire corpus of the applicant's case. No reason has been advanced to date for this absence. This will potentially now add to the delay. It is the respondent who is impeding progress to a hearing with no explanation at all given. This very application by the respondent has and is now occasioning delay.

37. The gravamen of the application (if it were granted) would be to deny compensation to the applicant which would abnegate Article 1, Protocol 1 of the European Convention on Human Rights [1950]. If correct, this would necessitate a notice under section 7 of the Human Rights Act to the Attorney General. Legislative provision which cannot be resolved in line with the Convention requires such a notice to be served. There is no doubt that an easement or right of way constitutes "property", which enjoys protection under Article 1 Protocol 1. In consequence while a state may well vest lands, that entitlement to do so without a compensatory amount being paid would infringe the private property rights of the applicant. The facts, in this particular instance, are that other adjacent occupiers have been compensated or special measures taken to create right of way for them, bears upon this topic to demonstrate the potential illegality of what is proposed.

38. The applicant therefore contends that the respondent's instant application for a preliminary point should be dismissed. A full hearing should be scheduled, and the respondent put on terms as to when it should marshal any evidence by way of response with a review hearing prior to the full hearing. There is no clear and defined point of law set out for decision. There is only a lengthy complaint of delay with no articulation of any prejudice, at all, to the respondent. An incantation by assertion only of prejudice, does not make it real or tangible. All adjournments were moved and granted, even after protest. All deadlines for filing of evidence were adhered to, save one over a Christmas break when an affidavit was to be filed on 23rd December 2022, which rectified early in the New Year, 12th January 2023, no hearing was polluted or engendered unfairness to the respondent, by any of this. Notice of an

ongoing pandemic in terms of forward progress during the currency of the application, should not be lost.

39. In essence, this application is not properly constituted, it is inappropriate as there is no point of law and, if successful, would negate the respondent's obligations and those of the Tribunal to adhere to and uphold pursuant to the Human Rights Act (1998), the European Convention on Human Rights (1950). For those reasons it should be dismissed. A timetable to final hearing should now be mandated.

**The Tribunal**

40. The respondent has submitted that the reference should be struck out for the following reasons:

(i) *The applicant's Notice of Reference and Statement of Case*

The applicant now wishes an additional agricultural right of way to be included in his claim. This is not a valid reason for striking out the reference and the Tribunal can deal with this issue at a substantive hearing.

(ii) *The applicant's valuation evidence*

The validity or otherwise of the applicant's valuation evidence is also a matter for consideration at a substantive hearing and is not a reason for striking out the reference.

(iii) *Objection to the amendment of the applicant's Notice of Reference*

This is a matter to be decided by the Tribunal and is not a valid reason for striking out the reference.

(iv) *Costs*

Costs are at the discretion of the Tribunal and the Tribunal will allocate costs when the reference has been disposed of.

41. The Tribunal agrees with Mr Coyle BL, no point of law has been submitted to the Tribunal and the case, as put forward by the respondent, is not a valid reason for the Tribunal to deny the applicant his statutory right to claim compensation.

42. The Tribunal finds that the respondent has failed in its application to have the subject reference struck out. The Registrar will now organise a mention of the reference at which the Tribunal will issue directions for a substantive hearing. The Tribunal cautions both parties that these directions must be strictly adhered to.

**10th October 2023**

**Henry Spence MRICS Dip.Rating IRRV (Hons)**

**LANDS TRIBUNAL FOR NORTHERN IRELAND**