

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

IN THE MATTER OF AN APPLICATION FOR COSTS

R/28/2014

BETWEEN

LESLIE CLARKE KILLEN – CLAIMANT

AND

DEPARTMENT FOR INFRASTRUCTURE – RESPONDENT

Re: Lands at Campsie comprised in Folio 3790 County Londonderry

PART 2 - COSTS

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

Background

1. On 26th March 2009 (“the valuation date”) the then Department for Regional Development (now the Department for Infrastructure) (“the respondent”) vested a portion of lands at Campsie comprised in Folio 3790 County Londonderry (“the vested lands”) which were in the ownership of Mr Leslie Clarke Killen (“the claimant”).
2. Compensation for the vested lands was agreed but the claimant also sought compensation for alleged injurious affection to his retained lands, caused by the scheme.
3. The parties were unable to agree the amount of compensation for the injurious affection. The claimant had sought £401,666 and the respondent’s position was that there was no injurious affection to the retained lands at the date of vesting.

4. The matter was referred to the Lands Tribunal and following a hearing on 23rd and 24th April 2018 the Tribunal awarded the claimant a sum of £67,250 to compensate for injurious affection caused to his retained lands.

5. Following the hearing the parties had been unable to agree costs in the reference and this is the issue to be decided by the Tribunal.

Procedural Matters

6. The Tribunal received written submissions from Mr Kevin Downey, solicitor of Downey Property Solicitors, on behalf of the claimant. Ms Jo-Anne Devine of the Departmental Solicitor's Office provided written submissions on behalf of the respondent. The parties were agreed that the issue of costs should be decided by way of the written submissions.

Position of the Parties

7. The claimant had sought total fees in the reference of £50,685 inclusive of VAT. The respondent considered that the amount of costs claimed was disproportionate and should reflect the level of the award by the Tribunal.

Statute

8. Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") details the Tribunals discretion with regard to costs:

"Costs

33.-(1) Except in so far as section 5(1), (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act 1919 (g) applies and subject to paragraph (3) the costs of and incidental to any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President.

(2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settle the amount of the costs by fixing a lump

sum or may direct that the costs shall be taxed by the registrar on a scale specified by the Tribunal, being a scale of costs for the time being prescribed by rules of court or by county court rules.”

Authorities

9. The respondent referred the Tribunal to Purfleet Farms Limited v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1430 in which the Court of Appeal decided that costs may not be allowed in certain circumstances:

“(a) in which the Tribunal considers that an item of costs incurred, or an issue raised, was such that it could not, on any sensible basis, be regarded as part of the reasonable and necessary exercise of determining the amount of the disputed compensation; or

(b) in which the claimants’ conduct of, or in relation to, the proceedings has led to an obvious and substantial escalation in costs over and above those costs which it was reasonable to incur in vindication of his right to compensation.”

10. In Purfleet Farms the claimant obtained an amount of compensation higher than any offer made by the acquiring authority but was awarded only 75% of his costs because he had relied on evidence on certain sales comparables to assess value which the Tribunal found unhelpful and which served to exaggerate his claim.

11. In Christopher Throne v The Department for Regional Development R/70/2006 the Tribunal stressed:

“7. Costs generally should be pursued with the greatest economy. ...”

12. The Tribunal also refers to Anthony Reilly & Madeline Jane Reilly v Department for Regional Development R/10/2011:

“Conclusion

16. In Oxfam the Tribunal concluded:

‘... the starting point on the question of costs is the general presumption that, unless there were special circumstances, costs follow the event, i.e. that in the ordinary way the successful party should receive its costs.’

And

‘The next question for a Tribunal is whether there were special circumstances which would warrant a departure from that general rule. But these must be circumstances connected with the proceedings, for example, to reflect an unsuccessful outcome on a major issue.’

17. It is clear the Reillys succeeded in the major interlinked issue of material detriment ... Section 8(7) of the Lands Tribunal & Compensation Act 1964 empowers the Tribunal to make an order for costs or any part of the costs of the proceedings.
18. The Tribunal concludes that the Department’s unsuccessful pursuit of this major interlinked issue is a special circumstance that warrants a departure from the general rule.
19. Taking a broad view the Tribunal therefore concludes that the Reillys should pay their own costs and one half of the Departments costs.”

The Allocation of Costs

13. As detailed in Oxfam costs follow the event and in the subject reference the claimant had been awarded compensation in excess of that offered by the respondent, which was Nil. However, were there any special circumstances which would warrant a departure from that general rule? The claimant considered there were none.
14. The respondent submitted that throughout the course of the subject reference it was unclear exactly what amount of compensation was being claimed and different figures were referred to. The Tribunal agrees. It was only at the opening of the hearing, when representations were made by the respondent and the Tribunal gave direction, that the claim was confirmed to be £401,666.

15. The respondent further submitted that although the Tribunal found that the claimant was entitled to a sum for injurious affection on the basis of loss of a share of key land value the amount awarded, £67,250, was significantly lower than that claimed. The Tribunal was referred to Purfleet Farms Ltd in which an amount of 25% was deducted for an excessive claim.

16. The Tribunal refers to the following extracts from its Part 1 decision in the subject reference:

“(v) The Treatment of Other Key Landowners

33. It was clear from the claimant’s submissions that, at no stage, had he made the other key landowners aware that they may be entitled to a share of any key land value, for which he had sought £300,000 in 2003. The claimant’s own expert, Mr Doherty, when asked by the Tribunal, gave evidence that if he had been professionally representing the other key landowners he would have advised them to seek a share of the key land value.

34. The Tribunal notes that the claimant only had verbal agreements with the other key landowners and only on the basis that they had not sought professional advice, nor had they been made aware that they may be entitled to a share of a substantial ransom value. The Tribunal considers that all of them, professionally advised, would have sought a share of the ransom value ...”.

17. The Tribunal concludes that, similar to the circumstances in Purfleet Farms Limited, it was the claimant’s pursuit of compensation, based on his misguided belief that he was entitled to all of the key land value, which served to exaggerate his claim and on that basis the Tribunal awards the claimant only 75% of his costs in the reference.

Discussion on the Amount of Costs

18. The main elements of the costs claimed comprised (exclusive of VAT):

Solicitors Professional Fees	£18,375		
Counsels Fees	£11,000		
The Late John Arthur Valuer Fee	£1,870		
James O’Doherty Valuer Fee	£2,000		
MKA Planning – 2 monies	£1,312	}	£1,812
	£500		
Carey Consulting – 4 monies	£1,237	}	£5,006
	£750		
	£842		
	£2,177		
PCI Consulting Limited (including travel)	£2,445		
Downey Property Solicitors Sundry outlay total	£642		

Solicitors Fees £18,750

19. The respondent considered these fees to be unreasonable and disproportionate and referred to the manner in which the case was conducted, which resulted in an escalation of the costs:

- (i) There was duplication of work relating to the valuation evidence. Two valuation reports were provided by the late Mr Arthur. The claimant subsequently instructed Mr O’Doherty to provide a further valuation report.
- (ii) The solicitors work in connection with the instruction of PCI Consulting as an expert in circumstances when the matter had been raised by the respondent and accepted by the Tribunal that PCI Consulting report was not an expert report.
- (iii) Most of the work detailed by the claimant’s solicitor in 2014 related to meetings with experts which predated the Lands Tribunal reference. This appeared to be a duplication of work as there were details of work in 2015 and 2016 relating to expert reports.
- (iv) The report prepared by Mr Kennedy dated 28th October 2014 was originally appended to the report dated 5th May 2015 by Carey Consulting. The respondent objected and Mr Kennedy subsequently provided a separate report with expert declaration in 2016.

20. Having considered the submissions, in the circumstances of the subject reference, the Tribunal considers that Professional Solicitors Fees of £16,000 is warranted.

Counsels Fees £11,000

21. The respondent considered that counsel's fees were not reasonable and were disproportionate to the sum awarded to the claimant and submitted that a fee of £5,000 was appropriate. Having regard to other similar cases which have come before the Tribunal, the Tribunal considers the counsel's fees of £11,000 to be reasonable.

The Late John Arthur Valuer Fee £1,870

22. The respondent accepted that the amount was reasonable.

23. The claimant's position was that the original work done by Mr Arthur had led to a narrowing of issues and resulted in a reduction in the overall costs. The Tribunal agrees and allows the late Mr Arthur's fee of £1,870.

Mr James O'Doherty Valuer Fee £2,000

24. The respondent accepted that the amount of this fee was reasonable.

MKA Planning £1,812

25. The respondent accepted that the invoice of 1st November 2018 for £1,312 was reasonable. With regard to the invoice for £500, dated 18th November 2018, the respondent submitted that it was not clear what this invoice was for and considered that it may be a duplication of work.

26. The claimant asked the Tribunal to note that MKA Planning were required to provide expert evidence in support of the options to confirm the existence of a “ransom” value and had been retained to supplement the reports submitted by Carey Consulting Limited. The Tribunal agrees and on that basis the Tribunal finds that the invoice for £500 is reasonable.

Carey Consulting £5,006

27. The respondent accepted that the invoices dated 25th May 2015 (£842) and 28th May 2018 (£2,177) were reasonable. The respondent submitted, however, that the invoices dated 9th June 2014 (£1,237) and 21st November 2014 (£750) predated the Lands Tribunal reference and provision of reports for that reference which were dated 5th May 2018 and 26th October 2017. As such the respondent’s position was that the invoices did not relate to the reference and/or were a duplication of work, confirmed by the invoice of 25th May 2018 which made reference to “preparation of redraft of earlier report”. The respondent considered, therefore, that these fees were not payable.
28. The claimant submitted that the earlier invoices were an essential prerequisite for the delivery of the original reports and the claim itself. The work prepared by Mr Carey was required to demonstrate that there were a number of feasible options in relation to a ransom strip in the no scheme world and the claimant considered that these fees should be paid in full. The Tribunal agrees, the work done by Mr Carey was an essential part of the claim. The Tribunal therefore finds the Carey Consulting fee of £5,006 to be reasonable.

PCI Consulting Limited £2,445

29. The respondent submitted that the fees of PCI Consulting were not properly payable as the respondent did not accept Mr McAteer of PCI as an expert and raised this issue at mentions on 26th April 2016, 28th September 2018 and 9th February 2017. The respondent subsequently wrote to the claimant’s solicitor on several occasions re-iterating that it did not accept Mr McAteer as an expert and that he could only give factual evidence. The respondent therefore considered that Mr McAteer’s fees, which were submitted on the basis that he was an expert witness, should not be paid.

30. The claimant's position was that Mr McAteer was an expert and his evidence was necessary to bring the claim forward. Whether or not Mr McAteer was considered an expert witness the claimant considered that his invoice should be paid as his presence was required by the claimant to prove his case.

31. The Tribunal refers to paragraph 28 of its Part 1 decision:

"28. Mr McAteer of PCI Consulting gave evidence that he had been involved in many multi-sector development projects. He advised the Tribunal that he had particular experience of the construction industry, including experience of how parties approached key land access issues. He provided three examples of where he had been involved. He asked the Tribunal to note that in all three of his examples the developer was prepared to 'put up' their share of the profit in order to secure a deal. It was also his opinion that, in a recessionary period, a developer would be prepared to accept a lesser profit."

32. On the basis of the evidence given by Mr McAteer the Tribunal considers him to be an expert in development projects in the Londonderry area and notes that his evidence was significant in relation to the outcome of the hearing. The Tribunal allows the PCI Consulting Limited fee of £2,445.

Sundry Outlay £642

33. This figure was accepted by the respondent.

Conclusion

34. The Tribunal therefore allows the following fees (exclusive of VAT):

Solicitors Professional Fees	£16,000
Counsel's Fees	£11,000
The Late John Arthur Valuer Fee	£1,870
James O'Doherty Valuer Fee	£2,000
MKA Planning	£1,812
Carey Consulting	£5,006
PCI Consulting Limited	£2,445
Sundry Outlay	<u>£642</u>
TOTAL	£40,775
Allocation to the respondent	<u>75%</u>
	£30,582
Say	£30,600

35. The Tribunal therefore awards the claimant a lump sum of £30,600 plus VAT, if payable.

28th May 2019

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