

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

IN THE MATTER OF COSTS

R/2/2022

BETWEEN

COLIN MILLAR – APPLICANT

AND

DEPARTMENT FOR INFRASTRUCTURE – RESPONDENT

PART 1

Re: 50 Derrygowan Road, Randalstown

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

Background

1. On 17th August 2016 the Department for Infrastructure (“the respondent”) made a Vesting Order in relation to lands for the construction of the A6 North Western Key Transport Corridor Randalstown to Toome dualling scheme.
2. The Vesting Order became operative on 27th September 2016 and a small portion of Colin Millar’s (“the applicant”) land contained in folio AN198335 Co Antrim was vested under the Vesting Order. The vested portion formed part of the access to the applicant’s joinery workshop at 50 Ballygowan Road, Randalstown.
3. In 2016 the applicant submitted a claim for compensation to the Department for Infrastructure (“the respondent”) and in 2020 he provided a more detailed claim.
4. In 2022 the applicant’s solicitors filed a Notice of Reference to the Lands Tribunal on behalf of the applicant. The reference was never heard by the Tribunal as, on 4th April 2024, the parties reached settlement.

5. The parties have been trying to reach a costs settlement but the respondent takes issue with two items of the applicant's costs. All other costs issues have been agreed. The disputed items of costs are:
- a. In respect of Clyde Shanks the applicant's planning experts:
 - (i) work billed was duplicative of work done by the applicant's solicitor;
 - (ii) work billed was work not appropriate to be conducted by an independent expert witness; and
 - (iii) the fees marked are unreasonable, excessive and have not been adequately vouched and explained.
 - b. In respect of Senior Counsel:
 - (i) the instruction of specialist planning Senior Counsel at such a late stage in the proceedings when no issue of planning law existed between the parties was unreasonable and consequently the respondent should not be liable for those costs; and
 - (ii) in any event the brief fee of £10,000 plus VAT is excessive.

6. Those are the issues to be decided by the Tribunal.

Procedural Matters

7. The Tribunal received written submissions from Mr Keith Gibson BL, instructed by Boal Anderson Solicitors, on behalf of the applicant and from Ms Maria Mulholland BL, instructed by the Departmental Solicitors, on behalf of the respondent. The Tribunal is grateful to counsel for their helpful submissions.

The Law

8. Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") provides:

“33(1) Except in so far as sections 5(1) (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act 1919 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 Throne v Department for Regional Development R/70/2006 Costs, in which the Lands Tribunal quoted Potter LJ in Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1430:

“12. In Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1430, Potter LJ stated the presumption that, under the compulsory purchase code, a claimant should be entitled to its costs in the absence of some special reason to the contrary. A Tribunal not allowing such costs must be able to identify circumstances:

‘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 expenses of determining the amount of the disputed compensation.

....in which the claimant’s conduct of, or in relation to, the proceedings had 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.”

Submissions in Respect of Clyde Shanks' Fees

The Respondent

10. Clyde Shanks Planning Development has submitted 3 invoices:

- a. Invoice No. 117488 dated 17th October 2023 for £1,740 plus VAT.
- b. Invoice No. 117685 dated 15th February 2024 for £3,150 plus VAT.
- c. Invoice No. 117794 dated 15th April 2024 for £880 plus VAT.

11. Planning Consultant Gavyn Smyth (BSc) MRTPI of Clyde Shanks provided an expert witness report on behalf of the applicant, dated October 2023. Paragraph 1 of the report states:

“My instruction is to provide an independent expert report with regards to an on-going Lands Tribunal case relating to a site at 50 Derrygowan Road, Randalstown. Specifically, this report addresses the following key matters:

- “Details of the evidence presented within the Certificate of Lawfulness ('CLEUD') granted by Antrim and Newtownabbey Borough Council ('the Council').
- Set out the additional evidence that I have been provided with relating to the status of the building erected at 50 Derrygowan Rd, and the use of the building as a joinery works business, on and before the date of the vesting (27th September 2016) of lands associated with the construction of the A6 Randalstown to Toome Duelling Scheme by the Department for Infrastructure ('DfI'); and
- Provide an opinion on whether or not, on the balance of probability, the building and its use had been established and active for a period of at least five years on the date of vesting by DfI, and therefore lawful at the time of vesting.”

12. The report contains a signed expert's declaration by Mr Smyth, dated 11th October 2023.

13. The first part of the report summarises the evidence that had been placed before the Council in support of the application for the CLEUD. The second part of the report addresses additional evidence and at paragraph 15 it states “I have been provided with evidence in support of the plaintiff's case that the building was complete and the business was operating from it no later than 27th September 2011”. A list of evidence is then summarised and annexed to the report, which includes statutory declarations from individuals who each said, “I confirm the same joinery business has been operating and trading continuously at 50 Derrygowan Road since 26th September 2011”.
14. The respondent filed an independent expert planning report by Tony Sloan of AECOM dated 8th December 2023 and the respective experts met and signed a joint minute of their meeting on 21st February 2024.

Clyde Shanks First Invoice

15. The first invoice of Clyde Shanks is dated 17th October 2023 (6 days after filing their report) and is for £1,740 plus VAT. It contains the following description of work undertaken:

“Review evidence, parties expert witness reports, decision notices, case officer reports and liaison with Council and appointed surveyor. Research background documents, approved CLUED, valuer reports. Draft expert’s report. Review additional evidence, drafting of expert report. Complete report, email to GS.”
16. After repeated requests and application to the Lands Tribunal by the respondent, Clyde Shanks added to the invoice a breakdown of hours spent by various staff as follows:

“Professional fee (Gavin Rolston, Director 3 hours at £150/hour; Gavyn Smyth Associate Director 11 hours at £110/hour; Lauren Coulter, Senior Planner 1 hour at £80/hour).”

17. Whilst the hourly rate has now been added, the invoice is devoid of detail of the amount of time spent against each item and no corresponding time records have been provided. The invoice contains no dates at all (bar the date on the invoice).
18. In Throne (Part 2) the Lands Tribunal noted that the surveyor should have maintained a simple but careful record of his time and outlay on the case and went on, in that case, to note that:
- “...a professional person experienced in claiming compensation for compulsory purchase, he also would have known that his fees might reasonably be expected to be paid from the public purse and consequently liable to be subject to closer scrutiny. In such circumstances a higher standard of recording might perhaps be expected.”
19. It is submitted that a higher standard of recording is to be expected of a Planning Consultancy firm such as Clyde Shanks and in the absence of same the respondents contends that the fees marked in the first invoice are excessive and unreasonable.

Clyde Shanks Second Invoice

20. The second invoice dated 15th February 2024 is for £3,150 plus VAT and contains the same deficiencies as set out in respect of the first invoice. There is a second breakdown of hours spent but no dates or corresponding time records:
- “Professional fee (Gavin Rolston, Director 12 hours at £150/hour; Gavyn Smyth Associate Director 12 hours at £110/hour; Susannah Boyce, Assistant Planner 0.5 hours at £60/hour).”
21. The second invoice also contains entries which raise questions about the independence of Clyde Shanks and Mr Smyth’s role as an independent witness in this case. A lot of the work described in the invoice relates to work that either was or should have been conducted by the applicant’s solicitor. The description of the work on the invoice is as follows:

“Meeting preparation and attendance at meeting with client and MLA. Liaison with LPS re: fly over data concerning site. Liaison with Counsel re: availability for lands tribunal

hearing. Liaison with LPS re: fly over evidence, re-review Geoffrey Fleming correspondence, and drafting of statutory declaration. Liaison with client re: what is required re: stat dec content and invoices. Review draft of stat dec and provided advice re: content. Review draft stat decs and liaison with client. Review LPS fly over images. Liaison with client re: evidence. Liaison with client and colleague expert report. Liaison with Counsel re: representation at lands tribunal. Preparation of expert report. Liaison with client and liaison with Counsel to attend Lands Tribunal Hearing date call with client. Liaison with Counsel to attend Lands Tribunal Hearing. Liaison with KC re: hearing attendance. Liaison with Counsel re: land tribunal hearing. Liaison with client re: hearing. Review DFI Expert report. Re-review/consider response to planning expert report and liaison with client. Liaison with Counsel. Preparation for expert planner meeting with AECOM. Liaison with client re: appointment of Counsel. Preparation for expert planning meeting with AECOM. Attend meeting with AECOM and liaison with Counsel.”

22. It would appear from the description of the work on this invoice that it was Clyde Shanks (who was supposed to be an independent expert with duties to the Lands Tribunal) who instructed Senior Counsel and it was Clyde Shanks who directed the applicant to obtain the affidavits/statutory declarations annexed to Clyde Shank’s report including liaising with the applicant in respect of “what was required: re stat dec content and invoices”.
23. Clyde Shanks were clearly not acting in the capacity of an independent expert witness when they were instructing senior counsel and directing the applicant’s proofs. At paragraph 15 of Mr Smyth’s report he says “I have been provided with evidence in support of the plaintiff’s case that the building was complete and the business was operating from it no later than 27th September 2011” whereas it would appear from the description in the invoice that it was Clyde Shanks who directed the applicant to obtain the evidence and advised in relation to its content. This is something that the Lands Tribunal and the respondent should have been made aware of.

24. Furthermore, much of the work described and billed in this invoice appears to have been completed prior to the filing of Clyde Shanks' expert report, whereas Clyde Shanks had already billed for the report in its first invoice dated 17th October 2023.
25. Moreover, the applicant's solicitor has billed for "Drafting and completing Statutory Declarations (6 in total) and Attendances on Deponent to have same signed. 3 hours." It would appear there is a duplication of billing between Clyde Shanks and Boal Anderson in relation to the statutory declarations.
26. Oddly, the Boal Anderson breakdown makes no reference to Senior Counsel which again suggests it was Clyde Shanks who instructed them.
27. In view of the above the respondent contends:
- a. That fees billed by a supposed independent expert witness who has not been frank with the Lands Tribunal in his report about the origins of the evidence he used to form his opinion should not be allowed.
 - b. That fees for work conducted by a supposed independent expert which was, or ought to have been completed by the Applicant's solicitor, should not be allowed.
 - c. Any work relating to the preparation of the expert report is already included in the first invoice of 17th October 2023 and should not be allowed.
 - d. Of the work described in the invoice that could be said to be within the remit of an independent planning expert witness, for example, preparation for the meeting of experts with AECOM, this work is not adequately broken down by time spent and on contemporaneous time records have been shared. In the absence of same the Respondent contends that the fees marked are excessive and unreasonable.

Clyde Shanks Third Invoice

28. In respect of the third invoice dated 15th April 2024 for £880 plus VAT, the same issue applies in relation to the absence of a time breakdown for each item billed and contemporaneous time records. Moreover, similar concerns arise in respect of Clyde Shanks billing for instructing Senior Counsel and even liaising with the applicant in respect of Senior Counsel's fee. The description of the work on the invoice is as follows:

"Liaison with client re: delivery document evidence. Review delivery note as evidence from client. Liaison with client. Call logged for solicitor. Liaison with AECOM and solicitor. Liaison with KC. Update to client re: appointment of KC. Liaison with client re: KC fee. Liaison with KC re: instruction. Liaison with Counsel re: evidence. Liaison with solicitor re: instruction of Mr William Orbinson KC. Liaison with client and solicitor. Liaison with client following query. Preparation for Lands Tribunal Submission of further rebuttal to KC and solicitor. Liaison with Counsel re: lands tribunal case. Meeting note. Meeting note to Tony (AECOM). Reviewing AECOMS notes with GS re meeting minute. Updating meeting note with AECOMS amendments. Meeting note

29. For the same reasons set out above in respect of the second invoice, the respondent argues that fees for work done outside the remit of an independent planning expert should not be allowed nor should fees be allowed where a proper time and date breakdown has not been provided and in the absence of any contemporaneous time records, which a firm such as Clyde Shanks ought to have kept.

Conclusion

30. In respect of Clyde Shanks, it is respectfully submitted that the invoices raised by them highlight major issues with their independence. Work was clearly being completed by them which should have been completed by Boal Anderson who were the solicitors on record for the applicant, or that was completed by Boal Anderson in any event; no fee should be allowed for Clyde Shanks in relation to such work. Furthermore, in relation to work completed by Clyde Shanks within its remit as an expert planning witness, there has been a failure, despite various opportunities to provide a proper time and date costed breakdown and vouching

contemporaneous time records. Accordingly, the respondent contends that the public purse should not have to bear any of Clyde Shanks' fees.

31. In all the circumstances the fees marked by Clyde Shanks are not considered to be "compensation for losses fairly attributable to the taking of his land".

The Applicant

32. The applicant does not agree that work carried out by Clyde Shanks should have been carried out by the applicant's solicitor.
33. The applicant also does not agree that work billed was work not appropriate to be conducted by an independent expert witness, this work is presumably necessary to enable an expert to produce a report.
34. The applicant also advises that there will be no further submissions or evidence provided in relation to those matters and we trust the Tribunal is now in a position to adjudicate.

The Tribunal

35. The applicant's first invoice was for £1,740 plus VAT. The respondent submits that, despite repeated requests, the invoice is devoid of detail of the amount of time spent against each item and no time records or dates have been recorded. The Tribunal agrees and as in Throne "a higher standard of recording might perhaps be expected".
36. The main bulk of activity for this invoice was in preparing an expert report. The Tribunal finds the fee of £1,740 plus VAT to be excessive for this activity and awards £1,000 plus VAT.

37. The applicant's second invoice is for £3,150 plus VAT. Again it is lacking the detail that the Tribunal would have expected.

38. The respondent concluded that:

- (i) Clyde Shanks, the independent expert witness had not been frank with the Lands Tribunal in his report about the origins of the evidence he used to form his report.
- (ii) That fees for work conducted by a supposed independent expert which was, or ought to have been completed by the applicant's solicitor.

(i) Independence

39. Certainly, some of the work carried out by Clyde Shanks would have raised questions about the expert report, particularly as they appeared to have influence over the evidence that formed that report. The reference, however, did not proceed to hearing where the independence of the expert report would have been tested. Based on the bare facts of the written submissions the Tribunal could not find with certainty that the expert report was not independent.

(ii) Work that should not have been completed by the independent expert

40. The Tribunal finds that work items listed by Clyde Shanks should not have been carried out by them. On that basis, including the lack of detail and time recording, the Tribunal finds the second invoice of £3,150 plus VAT to be excessive. The Tribunal awards £2,000 plus VAT.

41. The Clyde Shanks third invoice is for £880 plus VAT. The same issues in relation to the absence of a time breakdown for each item billed and contemporaneous time records arise in this invoice. Again elements of this invoice, billing for instructing Senior Counsel and liaising with the applicant in respect of Senior Counsel's fee, are not within the remit of an

independent planning expert. For the third invoice of Clyde Shanks the Tribunal awards £500 plus VAT.

Submissions in Respect of Senior Counsel's Fee

The Respondent

42. Senior Counsel was involved in the case for less than a month. The Senior Counsel instructed specialises in planning law. The applicant had already received the benefit of its planning expert; Clyde Shanks, whose report was lodged with the Tribunal in October 2023. At the time of Senior Counsel's instruction there was no issue of planning law between the parties. The parties were ad idem in respect of planning law considerations; the issue was purely an evidential one in respect of whether the applicant could prove his workshop was in operation for more than five years prior to the operative date of vesting; this issue did not require the instruction of specialist planning counsel. The experienced Junior Counsel instructed by the applicant from the outset was more than capable of dealing with this evidential issue.
43. Apart from being involved in without prejudice negotiations with the respondent's counsel (which led to the case being resolved for the modest sum of £40,000 in relation to injurious affection) it is unclear what work Senior Counsel did. The applicant has been given the opportunity to provide detail of the work Senior Counsel performed but none has been provided. There is no evidence that Senior Counsel provided any input into any point of planning law. The applicant's very experienced Junior Counsel could have settled this case for £40,000.
44. In the circumstances the respondent submits that the instruction of Senior Counsel on behalf of the applicant was disproportionate and represented a "substantial escalation in costs over and above those costs which it was reasonable to incur in vindication of his right to compensation". Accordingly, the respondent contends that no sum should be allowed for Senior Counsel fee.

45. If any sum is to be allowed, which the respondent strongly argues against, the respondent contends that £10,000 is excessive and unreasonable given the lack of demonstrable work undertaken, the short time Senior Counsel was engaged, and the modest value of the claim, reflected in the settlement sum of £40,000. In this regard it is noteworthy that the applicant's experienced Junior Counsel, who was engaged from the outset, marked only £500 less than Senior Counsel who was in the case for less than a month.

The Applicant

46. This matter only progressed to settlement following the appointment of Senior Counsel. In accordance with the Department's submissions, four weeks prior to the scheduled hearing on 10th and 11th April 2024 (with the Easter break falling in between), the applicant instructed Senior Counsel who specialises in planning law, William Orbinson KC.
47. On 29th March 2024 the applicant issued a Calderbank Offer in the sum of £40,000 in full and final settlement.
48. On 4th April 2024 the parties reached a settlement in accordance with the Calderbank Offer, namely £40,000, in respect of injurious affection with costs to be assessed in default of agreement.
49. It is evidence that the instruction of Senior Counsel was instrumental in the settlement of the matter and the avoidance of a hearing. In light of this we are satisfied that Senior Counsel fee is entirely justified.

The Tribunal

50. The respondent submits that the instruction of Senior Counsel, on behalf of the applicant, was disproportionate and represented a "substantial escalation in costs over and above those costs which was reasonable to incur in vindication of his right to compensation" (Purfleet Farms).

51. These fees are paid out of the public purse and likely to be subject to audit within the Department. In support of the submission that the appointment of Senior Counsel late in the day was unreasonable the respondent asserts:

- (i) At the time of appointment of Senior Counsel no issue of planning law existed between the parties.
- (ii) The claim was for £40,000 and Senior Counsel fees are £10,000.
- (iii) The applicant had already employed a planning expert and experienced Junior Counsel from the outset.
- (iv) The applicant had failed to provide detail of the work carried out by Senior Counsel, despite being given the opportunity to do so.

52. The Tribunal agrees with all of the above. The applicant had stated that Senior Counsel was instrumental in reaching agreement but provided no detail to support this assertion. In addition, the applicant did not give any explanation as to why a similar settlement could not have been reached by the already employed planning expert and experienced Junior Counsel.

53. In the circumstances as outlined above the Tribunal finds that it was unnecessary and unreasonable to appoint Senior Counsel late in the day and at a cost of £10,000 (25% of the total claim of £40,000). It is incumbent upon a claimant not to unreasonably escalate costs.

54. The Tribunal therefore makes no award of costs for Senior Counsel fees.

The Aborted Hearing

55. The Tribunal had organised a hearing to consider submissions on costs but late in the day the applicant's legal representatives were unable to attend. The respondent seeks its costs in this aborted hearing. In that respect the Tribunal invites submissions in relation to the aborted hearing within four weeks of the date of this decision.

Conclusions

56. The Tribunal concludes:

- a. Fees due to Clyde Shanks are £3,500 plus VAT.
- b. No award is to be made for Senior Counsel fee.
- c. Submissions with regard to the aborted costs hearing are to be with the Tribunal within four weeks of the date of this decision.

13th October 2025

**Henry Spence MRICS Dip.Rating IRRV (Hons)
LANDS TRIBUNAL FOR NORTHERN IRELAND**