

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
ROADS (NORTHERN IRELAND) ORDER 1993

IN THE MATTER OF A REFERENCE

R/14/2022

BETWEEN

HENRY DONNELLY – APPLICANT

AND

THE DEPARTMENT FOR INFRASTRUCTURE - RESPONDENT

Re: Lands at Glensbrae Road, Rathkenny, Ballymena

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

Background

1. Mr Henry Donnelly (“the applicant”) is the owner of lands at Glensbrae Road, Rathkenny (“the reference property”), located on the western side of the road.

2. The applicant’s claim is for damage to the reference property as a result of flooding, which he alleges was caused by the Department for Infrastructure’s (“the respondent”) failure to dig out and clean a drain on the eastern side of the Glensbrae Road. The Glensbrae Road is adopted and maintained by the respondent.

3. The applicant is claiming £2,400 damages in total, £2,100 to restore the reference property and £300 costs for time off in preparing evidence etc.

4. The respondent rejects the applicant’s claim for compensation as it claims it had an appropriate system for cleaning the drains, verges and gullies on the Glensbrae Road.

5. The amount of compensation due, if any, is the issue to be decided by the Tribunal.

Procedural Matters

6. The applicant was represented by Mr John Carey, a lay person. The respondent was represented by Mr Hayward BL, instructed by the Departmental Solicitors. The Tribunal is grateful to both parties for their helpful submissions.

The Statute

7. Article 45 of the Roads (Northern Ireland) Order 1993 (“the Order”) provides:

“Drainage of Roads

45.-(1) The Department may, in a road or in land adjacent to or adjoining a road –

- (a) construct and lay road drains,
- (b) construct and lay drains for the purpose of preventing surface water from flowing on to the road;
- (c) erect barriers to divert surface into or through any existing drain.

(2) The Department may –

- (a) scour, cleanse and keep open drains;
- (b) scour, cleanse and keep open drains constructed and laid by the Department under paragraph (1)(b);
- (c) for the purpose of relieving the flooding of any road, scour, cleanse and keep open any other drain in land adjacent to or adjoining a road.

(3) The power under paragraph (1) –

- (a) to construct and lay a drain; or
- (b) to erect barriers to divert surface water into or through any existing drain,

Includes power to discharge water through that drain into any inland waters, whether natural or artificial, or any tidal waters.

(4) If the owner or occupier of any land suffers damage by reason of the exercise by the Department of any power under paragraph (1), (2) or (3), the Department shall pay compensation therefor.

(5) Any question as to whether compensation is payable under paragraph (4) or as to the amount of any compensation so payable shall be determined by the Lands Tribunal.”

The Applicant's Submissions

Mr Carey

8. On behalf of the applicant Mr Carey submitted:

- (i) In 2020 the applicant changed the use of the reference property from grazing to potatoes. At that time he noticed that, during periods of heavy rain, the plateau area of the impervious road surface on the Glensbrae Road was not draining properly. Water was building up on the plateau, cascading down the hill and entering the reference property via a gate access, which was lower than the level of the road.
- (ii) He contacted a Mr McQuillan, an employee of the respondent, on several occasions, requesting that the respondent dig out the open ditch along the eastern side of the plateau to avoid a build up of surface water. Despite his phone calls no action was taken by the respondent.
- (iii) After the potatoes had been harvested in Autumn of 2020, the ground lay fallow until Spring 2021 when the applicant ploughed and harrowed the reference property, having sowed it out with grass seed and fertilizer to return it to grazing. At this point, knowing that the reference property was at its most vulnerable to flooding due to the loose nature of the surface, the applicant again contacted the respondent to have the drains cleaned but there was no response.
- (iv) In May 2021, after a heavy rainstorm, when the new grass was starting to grow, the reference property was severely flooded by cascading water coming from the road. This water caused deep rivulets in the fields and washed the loose topsoil downwards, depositing it against fences and stone walls. The grass on the

reference property was required for haylage for the applicant's stock later in the year and he was forced to employ a grounds contractor to reinstate the damaged ground.

9. Mr Carey contended that Article 45 of the Order covered where the respondent used a power to construct a drain adjacent to a road for the purpose of preventing surface water from flowing on to the road, which was the case in the subject reference, with 140 metres length of open ditch the respondent had constructed on the eastern side of the road.
10. He further submitted that the drain must be fit for the purpose for which it was intended, that is, it must be open and clean to take away the surface water.
11. By their in-action in failing to maintain the drain, Mr Carey contended that the respondent failed in its duty of care to prevent damage occurring to the reference property and as such the full amount of the restoration works should be awarded to the applicant, along with any other expenses and bank interest incurred.

Mr Donnelly

12. The applicant gave evidence that following the damage he again contacted Mr McQuillan and as a result, a representative from the respondent department, Mr Richards, inspected the damage the following day.
13. Mr Hayward BL asked the applicant if the clay and surface water could have come from his lands on the other side of the road. He responded that the lands on the other side of the road were mountain lands with no clay and in addition there was a stone ditch which would have prevented water from flowing those lands on to the road.

The Respondent's Submissions

Mr Richards

14. Mr Richards gave evidence that he was a professional and technical officer (PTO) employed by the respondent Department, covering the Ballymena area where the reference property was located. He had been dealing with "claims" for almost one year and he had been with the Department for some 22 years in total.

15. Mr Richards gave details of the respondent's inspection regime and referred to an inspection record dated 24th March 2020 which recorded that the subject drain was subject to "one and three monthly inspections".

16. He confirmed that the latest inspection was carried out on 28th April 2021, some two weeks before the alleged damage to the reference property. At this inspection it was recorded "verge outlet overgrown" and was allocated a "low priority", meaning that it would be several months before any action was taken.

17. Mr Richards confirmed that he had inspected the reference property the day after the alleged damage but it was his opinion that the damage had been caused by the downpour with perhaps some coming from surface water on the road.

18. He also asked the Tribunal to note that, under Article 45 of the Order, his duty of care was to the road, not the applicant's lands.

19. Under questioning by Mr Carey, Mr Richards advised:
 - (i) He accepted that there was no mention in the respondent's reports of the drain ever having been cleared and it was possible that inspectors did not know it was there as it was so overgrown.
 - (ii) He ensured that the drain was cleared after the alleged damage and confirmed that no flooding had occurred after that.

Mr Hayward BL

20. Mr Hayward BL referred the Tribunal to the provisions of Article 45 of the Order:

- (i) Article 45(1), the Department **may** ... construct and lay road drains. He submitted that the word “may” did not impose a legal obligation on the respondent to construct road drains. Rather they could exercise a power to do so if they wished or considered it necessary “for the purpose of preventing surface water from flowing on to the road” and there was no duty of care imposed by the Order to the adjoining lands.
- (ii) Article 45(4) of the Order only allowed for compensation to be paid if damage was caused by the respondent “in exercise of a power”. He submitted that in the subject reference the respondent had not exercised any said power.

The Tribunal

21. The Tribunal notes that these submissions from Mr Hayward BL had not been in the hearing bundle and had not been included in the respondent’s skeleton argument, prepared by Ms Lunny BL.

22. The Tribunal agrees, however, with Mr Hayward BL, that, under the terms of Article 45 of the Order:

- (i) There was no legal obligation on the respondent to clean out drains etc., even though they had a periodic programme for doing so. The word “may” in the Order gave the respondent a permissive choice or discretion to act or not. There was, therefore, no statutory obligations on the respondent to clean and keep open drains.
- (ii) The respondent’s duty of care was to prevent surface water from flowing on to the road. There was no duty of care to the adjoining lands.
- (iii) The Order only allows for compensation to be paid if there was an exercise of the respondent’s power under the Order. For example, if they caused damage

when laying a drain. There was no such exercise of a statutory power in the subject reference, rather there was a failure to clear out a drain.

23. There is, therefore, no legal basis under the Order for compensation to be paid to the applicant and his claim is dismissed. The applicant's remedy, however, may lay elsewhere.

16th February 2023

Henry Spence MRICS Dip.Rating IRRV (Hons)

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