

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

LANDS TRIBUNAL RULES (NORTHERN IRELAND) 1976

ELECTRICITY (NORTHERN IRELAND) ORDER 1992

IN THE MATTER OF AN APPLICATION FOR COSTS

R/19/2018

BETWEEN

WILLIAM ALAN CLARKE – APPLICANT

AND

NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED – 1ST RESPONDENT

GRID TEAM SERVICES LIMITED – 2ND RESPONDENT

FOX BUILDING AND ENGINEERING LIMITED – 3RD RESPONDENT

OWENS CONTRACTS LIMITED – 4TH RESPONDENT

Re: Lands at Curr Road, Beragh, County Tyrone

Part 2 - Costs

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

Background

1. In the Part 1 reference to the Lands Tribunal, William Alan Clarke (“the applicant”) brought claims against Northern Ireland Electricity Networks Limited (“1st respondent”), Grid Team Services Limited (“2nd respondent”), Fox Building and Engineering Limited (“3rd respondent”) and Owens Contracts Limited (“4th respondent”), in respect of damage allegedly caused to his lands at Curr Road, Beragh, County Tyrone (“the reference lands”) during installation of the 1st respondent’s equipment on the reference lands.
2. The applicant’s original claim, dated 13th November 2018, to the Tribunal was made under Article 18 of the Land Compensation (Northern Ireland) Order 1982. The 1st respondent and the 3rd respondent contended that the Lands Tribunal did not have jurisdiction to adjudicate on the applicant’s claim.

3. By a decision dated 16th May 2019, the Tribunal directed that it did not have the statutory authority to act in the subject reference.
4. The 1st respondent now seeks its costs.

Procedural Matters

5. The Tribunal received written and oral submissions from Mr Douglas Stevenson BL on behalf of the 1st respondent and from Mr Martin McDonnell BL on behalf of the applicant. The Tribunal is grateful to counsel for their helpful submissions. The Tribunal did not receive any submissions on costs from the other named respondents.

Position of the Parties

6. The 1st respondent's position was that costs should follow the event, that is costs should be awarded to the "winning party". On that basis Mr Stevenson BL submitted that the Tribunal should make a costs award against the applicant in favour of the 1st respondent.
7. The applicant considered that there were exceptional circumstances in the subject reference which would warrant the 1st respondent not receiving its costs. Mr McDonnell submitted that each party should bear their own costs.

The Statute

8. Rule 33(1) of the Lands Tribunal Rules (Northern Ireland) 1976 provides:

"33.-(1) Except in so far as section 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 direction of the Tribunal, or the President in matters within his jurisdiction as President."

Authorities

9. The Tribunal was referred to the following authorities:

- Oxfam v Earl & Ors BT/3/1995

Mr Stevenson BL referred the Tribunal to the following extracts at pages 8 and 18 of the decision which outline the Tribunal's discretion in allocating costs:

"The Tribunal must exercise that discretion judicially and 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

"Unless there are good reasons for a special award, such as extravagant or unsatisfactory conduct of the proceedings (including the role of expert witnesses) or failure on an important issue, costs will follow the event so 'the loser pays all'."

- Campbell v Finegan & Finegan BT/57/1998 Part 2 Costs
- Brickkiln Waste v NIE R/41/2009 Part 2 Costs
- Beaverbrooks v Portland BT/65/2012 Part 2 Costs

The 1st Respondent's Submissions

10. Mr Stevenson BL asked the Tribunal to note:

- (i) The applicant's claim was originally made under Article 18 of the Land Compensation (Northern Ireland) Order 1982. The 1st and 3rd respondents contended that the Lands Tribunal did not have jurisdiction to determine the dispute under that statute.
- (ii) The 1st respondent then filed written submissions on jurisdiction. As a result of these submissions the applicant sought to recast his case, seeking to rely instead on section 6 of the Lands Tribunal and Compensation Act (Northern Ireland) 1964.

- (iii) The 1st respondent then filed further submissions disputing that the Tribunal had jurisdiction under section 6 of the 1964 Act. Following an oral hearing the Tribunal decided that the 1st and 3rd respondents' arguments were made out, and it did not have jurisdiction.

11. Mr Stevenson BL submitted therefore:

- (i) Costs lay within the discretion of the Tribunal as per rule 33(1) of the Lands Tribunal Rules. He referred the Tribunal to Oxfam v Earl and Campbell v Finegan in which the Tribunal directed "in the absence of exceptional circumstances, costs follow the event". Campbell v Finegan was quoted with approval by the Tribunal in Beaverbrooks v Portland. The cases quoted were business tenancies cases but the Tribunal had applied the same approach in non-business tenancies cases such as Brickkiln Waste v NIE.
- (ii) The position therefore was that costs should be awarded to the winning party in the absence of exceptional circumstances. The 1st respondent had succeeded against the applicant and it was therefore entitled to its costs unless there were exceptional circumstances.
- (iii) There were no exceptional circumstances in the subject reference, the 1st respondent had maintained that the Tribunal did not have jurisdiction. It had explained the reason why both in response to the applicant's case as originally presented and as recast, it had argued these points at hearing and had succeeded in its arguments.
- (iv) The Tribunal should therefore make a costs award against the applicant in favour of the 1st respondent.

The Applicant's Submissions

12. Mr McDonnell BL submitted:

It was crucial to consider the document which governed the legal relationship between the parties and which directed the applicant to the Lands Tribunal. This was the document produced by the 1st respondent, the Wayleave Agreement Number 683655 which was signed by the parties on 30th March 2016. Throughout the proceedings the 1st

respondent had never repudiated its wayleave or denied it had signed it. Therefore, the terms of the document produced and relied on by the 1st respondent to gain access to the applicant's lands for itself and its agents was of crucial importance.

13. He referred the Tribunal to the following terms of the wayleave agreement:

- "6. The grantee shall throughout the continuance of this Agreement be liable for all just and fair claims for damage or loss sustained by the grantor, his tenants, agents or servants in respect of their livestock, crops or other property by the erection of the electric line or through any defect in or breakage thereof, provided always that:
- (a) Such damage or loss is not caused by the wilful conduct, default or neglect of the grantor or his tenants, agents or servants; and
 - (b) A statement in writing of the claim is received by the grantee.
7. Save as otherwise provided herein, the grantee shall indemnify the grantor from and against all actions, claims, costs and expenses incurred by reason of the erection of the electric line.
8. The grantee and its contractors and its and their respective agents and servants and workmen or any person authorised by the grantee shall, for the purpose of the erection of the electric line, be at liberty either with or without vehicles to enter on to the lands of the grantor ..."

And

- "15. If any dispute or difference shall arise between the parties concerning the interpretation of this agreement, it shall be referred to a single arbitrator being a practising barrister of at least six years standing to be appointed jointly by the parties hereto or failing agreement to be appointed on the application of either party by the Chairman for the timebeing of the Bar Council of Northern Ireland and in any case the Arbitration Act 1996 or any statutory modification or re-enactment thereof for the timebeing in force shall apply to the reference and **any other dispute or difference shall be referred to and determined by the Lands Tribunal for Northern Ireland.**" *(Mr McDonnell BL's emphasis)*

And

“16. Nothing herein contained shall be deemed to take away, diminish or abridge the rights and powers conferred upon the grantee by the Electricity (Northern Ireland) Order 1992 or any statutory modification or re-enactment thereof for the time being in force.”

14. Mr McDonnell BL further submitted:

- (i) It was entirely reasonable and proper for the applicant to rely on the 1st respondent's document and take it at face value. The applicant and the 1st respondent were unable to reach an agreement and, naturally and logically the applicant turned to the 1st respondent's wayleave document.
- (ii) Prior to the issue of the application herein, the applicant's solicitors made it clear that they were relying on the wayleave and would claim on the basis thereof. There was no dispute coming from the 1st respondent and no indication that they regarded the Lands Tribunal as being an inappropriate venue to resolve any differences between the parties and at no time before the submissions in this matter did the 1st respondent write and say it was taking issue in relation to the terms of the wayleave and, in particular, its terms that any dispute or difference should be referred to and determined by the Lands Tribunal.
- (iii) The applicant's reference was dated 13th November 2018 and was correctly served on the respondent. The matter was then listed for mention on 18th December 2018, at which date the applicant was legally represented but the respondents did not attend. The matter was relisted on 14th January 2019. At a further mention on 11th February 2019, the 1st respondent relied on the terms of the Electricity (Northern Ireland) Order 1992 and also on article 18 of the Land Compensation (Northern Ireland) Order 1982. The 1st respondent also submitted that the applicant was contending that the respondents had not done the work properly and had caused the applicant to suffer loss. The 1st respondent maintained therefore that the issues to be decided were complicated and included matters such as breach of contract, liability, negligence and apportionment of damages between the four respondents. Accordingly it argued that these were not issues for the Lands Tribunal and the Tribunal found in favour of the 1st respondent.

- (iv) One must bear in mind, however, that it was the 1st respondent's document which led the applicant to apply to the Lands Tribunal; clause 15 "shall be referred to and determined by the Lands Tribunal for Northern Ireland". Had the applicant attempted to seek relief in the Commercial Court, it would have been entirely open for the 1st respondent to apply for a stay of these proceedings on the basis of the wording in clause 15.
 - (v) The subject reference had been brought because the applicant reasonably relied on the 1st respondent's wayleave document. The surveyors for the applicant and the 1st respondent, although they had not been able to reach agreement met presumably on the basis of the wayleave agreement. There was no warning to the applicant that differences were likely to lead to proceedings in the Commercial Court. It was only at a mention on 14th January 2019 that the applicant became aware of the interpretation that the 1st respondent had put on its wayleave agreement.
15. In conclusion Mr McDonnell BL submitted that there were exceptional circumstances in the subject reference:
- (i) The wording of the 1st respondent's wayleave agreement compelled the applicant to seek relief in the Lands Tribunal.
 - (ii) It would be unfair to punish the applicant for relying on a document produced by the 1st respondent. One would reasonably expect the 1st respondent to withdraw that clause from future wayleave agreements or alter the wording so that other farmers were not misled in the way that the applicant had been.
 - (iii) It was not until 14th January 2019 that the 1st respondent had raised the issue of interpretation of clause 15, even though the wayleave had been signed on 16th March 2016.
 - (iv) It had been necessary to have the Tribunal rule on this clause and it was not the fault of the applicant that the clause had been drawn up in a way that led him to require a Lands Tribunal application. This was not a question of success or failure. It was necessary for the Tribunal to interpret the 1st respondent's clause in its standard wayleave agreement.

Discussion

16. It was not disputed that the Tribunal had adjudicated in favour of the 1st respondent in the Part 1 reference and in the normal way it should have its costs, as outlined in Oxfam v Earl. Were there, however, “exceptional circumstances” in the subject reference which would warrant a departure from that rule? The Tribunal does not accept the applicant’s submission that there were “exceptional circumstances” in the subject reference which would warrant a departure from the general rule. The Tribunal does accept that the applicant had been misled by clause 15 of the 1st respondent’s wayleave agreement. It had been indicated by the 1st respondent, however, at a mention of the reference on 14th January 2019 that it considered the reference to be “a simple negligence claim not for the Lands Tribunal”.
17. The 1st respondent’s position re the jurisdiction of the Lands Tribunal in the subject reference was then clearly set out in Mr Stevenson BL’s “Submission on Jurisdiction” to the Tribunal dated 11th February 2019. At that point it should have been clear to the applicant that the reference did not fall under the jurisdiction of the Lands Tribunal.

Conclusion

18. Allowing time for the applicant to have considered Mr Stevenson BL’s submission of 11th February 2019, the Tribunal awards the 1st respondent its costs in the reference as from 1st March 2019.

5th November 2019

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

Appearances:

Applicant: Mr Martin McDonnell BL instructed by McGale Kelly & Co, solicitors.

1st Respondent: Mr Douglas Stevenson BL instructed by Carson McDowell LLP, solicitors.