

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL COMPENSATION ACT (NORTHERN IRELAND) 1964
PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF A REFERENCE

R/22/2010

BETWEEN

LIAM & KATE CUNNINGHAM – APPLICANTS

AND

SHEILA FEGAN – RESPONDENT (1)

ALAN McARDLE – RESPONDENT (2)

COSTS – PART 1

Re: Right of Way at Helen's Terrace, Newry

Lands Tribunal - Mr M R Curry FRICS MCI.Arb Hon.Dip.Rating

Background

1. A head lease dated 9th April 1937 created a right of way along the rear of a row of 7 houses now known as 1 to 7 Helen's Terrace. Originally this ran immediately across the rear of the buildings, between them and their rear gardens. Over time parts of the route had been varied in practice as residents modified the rear of their houses, e.g. adding steps and central heating oil tanks. No. 7 is closest to the public road and the right of way ran from there and terminated at No. 1. But later an extension to the rear of No. 1 and the construction of a new boundary wall severed its access, indicating that effective use of the right of way then terminated at the other boundary between No. 2 and No. 3. Over time ownership of a number of the rear gardens of the remaining properties has been severed from ownership of the corresponding houses.
2. Liam and Kate Cunningham were the owners of the house and rear garden of No. 3. They had planning permission for an extension to their house which, to be implemented, would require the right of way to be relocated. The Cunninghams applied, under the Property (NI) Order 1978 to the Tribunal for modification of the route.
3. The application was advertised and only two objectors came forward. One was Sheila Fegan, the owner of the house and rear garden at No. 2; the other was Alan McArdle, the owner of the

garden to the rear of No. 4. Ms Fegan had stabling in the rear garden, and used the right of way to drive along and reverse a vehicle towing a horse box.

4. Although there were discussions between the parties, agreement was not reached and the matter was listed for hearing at Armagh Courthouse on 17th February 2011. On the day there were further discussions between the parties. Mr McArdle's position was that the existing route did not cross his land and so the Tribunal had no jurisdiction to create a new right of way across his premises. If that were so, Ms Fegan's position was that it would not be possible to provide a modified right of way with adequate radii for reversing a towed horse box. The hearing was adjourned.
5. The adjourned Hearing was relisted for 20th June 2011. On 17th June 2011, Mr McArdle withdrew his objection.
6. On the day of Hearing, the other parties reached agreement on the substantive issue.

Procedure

7. Oral submissions were received from Peter Girvan BL, Aidan Sands BL and Patrick Savage BL.

Positions

8. In regard to the adjourned hearing at Armagh, Mr Girvan BL on behalf of the Cunninghams and Mr Sands BL on behalf of Ms Fegan both suggested they should have their costs for the day. Mr Savage BL on behalf of Mr McArdle, but who did not appear for him at the earlier stages, suggested all parties should bear their own costs.
9. In regard to all other costs, Mr Girvan BL suggested that each should bear their own, but in the alternative the Cunninghams should be awarded their costs; Mr Sands BL suggested Ms Fegan should be awarded her costs; and Mr Savage BL suggested all should bear their own costs.

Discussion

10. At the hearing at Armagh, a jurisdictional issue was raised on behalf of Mr McArdle, without any prior notice. That required an adjournment to allow further factual observations to be made and reported. That could and should have been avoided if the issue had been raised earlier. The Tribunal agrees with Mr Girvan BL and Mr Sands BL that their clients should have their costs for the wasted day.

11. Otherwise, the starting point in regard to Mr McArdle is that he withdrew his objection and the presumption is that he did so because he would lose. The Tribunal agrees with Mr Savage BL that substantial differences may have remained between the other parties but is not persuaded that is a reason to depart from the presumption. The Tribunal concludes that Mr McArdle should also bear any other reasonable costs of the other parties in dealing with his objection.

12. It seems to the Tribunal that as between the Cunninghams and Ms Fegan the dispute took on the character of contentious litigation only in regard to the proposed route. Ms Fegan did not oppose some modification. The issue of costs is complicated by the conduct of Mr McArdle. While his objection remained, Ms Fegan's solicitors declined to give the matter any further consideration and, as the solution was not available until Mr McArdle withdrew, that seems to be a wholly reasonable position for Ms Fegan to have taken. That avoided adding to her costs. As the non-contentious aspects of the application for modification by the Cunninghams were imposed on Ms Fegan through no fault of her own she should have her costs in dealing with them. In regard to the contentious aspects, Ms Fegan was successful in achieving the route designed by her expert witness. The Tribunal therefore concludes that the Cunninghams should bear Ms Fegan's reasonable costs other than those to be met by Mr McArdle as determined above.

ORDERS ACCORDINGLY

7th September 2011

**Michael R Curry FRICS MCI.Arb Hon.Dip.Rating
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances

Applicants (1): Peter Girvan BL instructed by The Elliot-Trainor Partnership, Solicitors.

Respondent (1): Aidan Sands BL instructed by Campbell and Grant, Solicitors.

Respondent (2): Patrick Savage BL instructed by Tiernans, Solicitors.