IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 345 (LC)
Case No: ACQ/46/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – reference to the Upper Tribunal shortly before expiry of limitation period – case ultimately settling (upon a basis involving the grant back of rights to the claimants rather than the payment of compensation) – costs applications made by both sides – whether the provisions of Land Compensation Act 1961 section 4 (1)(b) engaged – if so whether special reasons exist such that it is proper not to make an order for costs as envisaged by that section

IN THE MATTER OF A NOTICE OF REFERNCE

BETWEEN:

THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON

Claimants

- and -

TRANSPORT FOR LONDON **Acquiring Authority**

Re: Land at Billingsgate Market, Trafalgar Way, London

- -

Determination under written representations

His Honour Judge Huskinson

The following cases are referred to in this Decision:

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 WLR 404

LCC v Tobin [1959] 1 WLR 352 (CA)

Colneway Ltd v Environment Agency [2004] 44 RVR 37

Spirerose Ltd v Transport for London [2008] 48 RVR 12

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DECISION

Introduction

1. There are before the Tribunal applications by the parties regarding costs. The claimants seek costs against the acquiring authority. The acquiring authority seek costs against the claimants. Each party resists the claim for costs made by the other.

2. The present proceedings were commenced by a notice of reference made by the claimants dated 14 June 2017. By a letter dated 13 June 2018 the claimants' solicitors notified the tribunal that on 12 June 2018 the claimants reached a settlement with the acquiring authority and that therefore the claimants' reference was withdrawn. The views of the acquiring authority were sought regarding the proposed withdrawal. The acquiring authority raised the question of a costs claim which in turn resulted in a costs claim being made by the claimants.

3. The claimants do not have a unilateral right to withdraw the reference. The notice of withdrawal dated 13 June 2018 stated that it was given in accordance with "the 2009 Procedural Rule 17 (1)(a)". I interpret the intention of this document as being a notice of withdrawal in accordance with Rule 20 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 as amended which provides:

> **20.**—(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—
>
> (a) by sending or delivering to the Tribunal and all other parties a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.

4. Accordingly the reference is not yet withdrawn and remains in place for the purpose of the present costs determination.

5. In summary the facts leading to the making of the reference to the Upper Tribunal are as follows.

6. (1) Pursuant to section 6 of the Crossrail Act 2008 the Secretary of State was empowered to acquire, inter-alia, a stratum of sub-soil beneath Billingsgate Market (the reference land) in order to construct the Crossrail railway. The relevant powers of compulsory purchase were subsequently devolved to the acquiring authority.

(2) The claimants held two interests in the reference land namely the freehold (being the freehold reversion upon a lease for a term of 999 years held by the London Borough of Tower Hamlets) and also a lease for a term of 99 years held by the claimants from that London Borough.

(3) The reference land was acquired by the acquiring authority under a general vesting declaration made on 6 April 2011. The vesting date was 16 June 2011.

(4) There was some correspondence between the representatives of the acquiring authority and the representatives of the claimants in 2012 and 2013 regarding the acquisition of the subsoil. It seems that no significant efforts were made by the parties to settle the matter prior to the summer of 2017. No document purportedly representing a particularised claim was submitted by the claimants until the claim next mentioned.

(5) On 9 June 2017 the claimants' solicitors wrote to the acquiring authority indicating that (as was the case) the six year limitation period for a reference to be lodged with the Upper Tribunal was to expire very soon. The claimants therefore said that they would, by way of what they described as "a protective measure", make a reference to the Upper Tribunal. This letter contained a paragraph indicating that the writer was instructed formally to make a claim for compensation in accordance with section 1 of the Land Compensation Act 1961 including claims for injurious affection, subsoil acquisition, settlement and disturbance. The injurious affection claim was stated to be for £18.75 million. This was said to reflect the fact that the acquisition of part of the subsoil would result in a diminution in the value of the claimants' land interest. It was suggested that, using a residual valuation method, it could be seen that the value of the claimants' land interest with the Crossrail tunnel not in situ was £78.75 million whereas the value with the Crossrail tunnel in situ was £60 million. Some limited documentation including two annexes, each of just over one page, were enclosed to support this claim.

(6) On 14 June 2017 the claimants made the present reference.

(7) The parties requested the Upper Tribunal to grant a stay in the proceedings in order to allow time to negotiate settlement of the claim. A draft consent order was proffered. However the Upper Tribunal refused the application and required the acquiring authority to serve its statement of case within one month and made orders for the exchange of witness statements. Further representations were made to the Upper Tribunal to the effect that a different course should be pursued. As a result a case management hearing was set for 15 November 2017 when further directions were given. These directions included a direction that the claimants were to serve an updated statement of case and a response to a previously made request for further and better particulars.

(8) On 1 February 2018 the claimants served an amended statement of case and served further particulars including particulars regarding how the claim for injurious affection was said to be justified. This included a development master plan showing a potential redevelopment of the reference land on the basis that the tunnels were not present.

(9) The acquiring authority was dissatisfied with the extent of the information provided and indicated as much by their solicitors' letter of 19 February 2018. Further information was provided on behalf of the claimants by letter dated 20 February 2018, but the acquiring

authority remained dissatisfied as is shown by their solicitors' letter of 28 February 2018 to the Upper Tribunal applying for disclosure and further and better particulars. The claimants expanded further upon this dissatisfaction in their solicitors' letter of 20 April 2018.

(10) As a result there was a further case management hearing on 27 April 2018. The orders then made included an order that the reference was to be stayed until 25 May 2018 to enable the parties to negotiate a final settlement, failing which subsequent directions were to take effect. It may be noted that the directions included provision for each party to be entitled to call an expert witness in four separate disciplines, meaning that the potential hearing could have had evidence from eight separate experts.

(11) In fact no settlement was reached by 25 May 2018. However by 12 June 2018 a settlement was reached. This led to the notice of withdrawal of the proceedings and to the present argument about costs.

7. The details of the settlement are not before the Upper Tribunal however from the material before me, including paragraph 2.7 of the letter from TLT on behalf of the claimants dated 11 July 2018, it appears that the claimants settled the claim and agreed to withdraw the reference

> "… because it has been offered an interest in the land that has vested in the Acquiring Authority that is of equivalent value to its compensation claim negating the need for a monetary settlement"

Also from the letter from Ashurst LLP, solicitors on behalf the claimants, dated 24 July 2018 the following appears in paragraph 1.28:

> "The settlement involved the parties entering into a 25 year option agreement which provides that the Acquiring Authority will, if required as a result of the scheme design, and provided that there is no adverse impact on the tunnels, grant rights for the Claimant to insert piles into the acquired sub- soil."

This letter also states in paragraph 2.8 that the terms of the settlement did not deal with costs.

Acquiring authority's submissions regarding costs

8. I deal first with the acquiring authority's submissions because these are the first in time. In response to the acquiring authority's application the claimants also made their own application for costs.

9. In summary the acquiring authority advance the following submissions.

10. The acquiring authority draw attention to the Land Compensation Act 1961 section 4 which provides so far as presently relevant as follows:

> "4. Costs
>
> (A1) In any proceedings on a question referred to the Upper Tribunal under section 1 of this Act –
>
> (a) the following subsections apply in addition to section 29 of the Tribunals, Courts and Enforcement Act 2007 (costs or expenses) and provisions in Tribunal Procedure Rules relating to costs; and
>
> (b) to the extent that the following subsections conflict with that section or those provisions, that section or those provisions do not apply
>
> (1) Where either –
>
> (a) the acquiring authority have made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Upper Tribunal to that claimant does not exceed the sum offered; or
>
> (b) the Upper Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by him, containing the particulars mentioned in subsection (2) of this section;
>
> the Upper Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Upper Tribunal the notice should have been delivered.
>
> (2) The notice mentioned in subsection (1) of this section must state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated."

11. The acquiring authority submits that no claim at all was made by the claimants until their letter of 9 June 2017; that this letter was not a proper claim, such as to satisfy section 4(1)(b) and (2); that the claim put forward in the reference dated 14 June 2017 was not a proper claim; and that in effect no proper claim (i.e. a claim so as to satisfy section 4) has at any stage been made by the claimants prior to the ultimate settlement of the claimants' claim as referred to above. The acquiring authority therefore rely upon section 4 and argue that they are entitled to their costs.

12. The acquiring authority point out that on 20 April 2018 their solicitors set out how the information provided by the claimants on 1 February 2018 was insufficient to enable the acquiring authority properly to assess and make an offer in respect of the claim. They observed that unless the claimants' statement of case contained more particularity and clarity

the exchange of pleadings would not expose the issues that would be critical to the claim. They further complained that the claimants had not properly met the requirements of the previous order made by the Upper Tribunal.

13. In summary the acquiring authority complain that they first received details of the claim only days before receipt of the notice of reference; that no evidence has ever been provided to support the amounts claimed in respect of injurious affection and settlement; and there has been little to demonstrate how the claim figures were ever calculated. They say that had the claimants submitted their claim promptly and with sufficient detail to enable the acquiring authority to make an offer, then the parties would have been in a position to liaise as to the likely impact of the effect of the acquisition and construction of the tunnels on the redevelopment of the reference land. If that had occurred it would have been unlikely there would have ever been a need to refer the matter to the Upper Tribunal. In their solicitors' letter dated 24 July 2018 at paragraph 1.28 they referred to the terms of the settlement, they observe that the claimants have not provided a scheme design showing the need for such rights as are conferred by the settlement, and they observe further as follows:

> "This, together with the length of option period requested by the Claimant, goes to demonstrate that submitting a claim for circa £18m and referring it to the Tribunal when it did was premature and ill-conceived and therefore a total waste of time and money. All that was needed was a discussion between engineers. Crossrail has always been open to such discussions. Similar negotiations have been successfully concluded with other landowners across London without any need for a reference to the Tribunal."

14. The acquiring authority therefore ask for an order that the claimants bear their own costs and pay the costs of the acquiring authority so far as those costs were incurred after the time when, in the opinion of the Upper Tribunal, the notice of the claim should have been delivered to the acquiring authority including particulars of the claimants' claim sufficient to allow the acquiring authority to make a proper offer. A summary of costs in the sum of £59,571.60 was enclosed.

The claimants' submissions regarding costs

15. In response to the acquiring authority's application for costs and in support of their own application for costs (in the sum of £91,656.06) the claimants advance the following submissions.

16. They draw attention to certain correspondence in 2012 and 2013 and suggest that the acquiring authority could and should have been more forthcoming with information.

17. They point out that the settlement agreed between the parties has value to the claimants. This is not a situation where a reference is being withdrawn because a claimant has accepted that no valid claim exists. The claim has been withdrawn because the claimants have been offered an interest in the reference land (i.e. that parts of it which have vested in the acquiring authority) that is of equivalent value to the compensation claim – thereby negating the need for a monetary settlement.

18. The claimants observe that, if the acquiring authority had provided the information which the claimants requested back in 2012, the present claim could have been settled without any reference to the Upper Tribunal being made at all.

19. The claimants resist any criticism of their conduct while the matter was still a live reference before the Upper Tribunal, pointing out that each party was initially minded to seek an adjournment to allow negotiations, but that it was the Upper Tribunal itself which declined to make such an order. The claimants seek to justify each procedural step that was taken and to resist any criticism made by the acquiring authority.

20. The claimants point out that the summary of costs submitted by the acquiring authority does not include any costs for any type of technical appraisal relating to the formulation of the injurious affection claim. They submit in consequence that the acquiring authority had no intention of making any technical assessment of the claimants' claim irrespective of how much detail the claimants produced.

21. The claimants refer to the underlying principles regarding costs when compensation is claimed regarding the compulsory acquisition of land, namely the equivalence principle. They refer to *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 WLR 404. A claimant is entitled to be compensated fairly and fully for its loss and is entitled to compensation for losses fairly attributable to the taking of the land, but not to any greater amount. The basic premise is that the claimants are entitled to be reimbursed their reasonable costs in making the claim. Also all claimants are entitled to reasonable surveyors', legal and other professional fees incurred as a direct consequence of the compulsory purchase, see *LCC v Tobin* [1959] 1 WLR 352 (CA).

22. The claimants contend that in dealing with the reference the claimants have endeavoured to meet the demands of the acquiring authority to evidence their claim without incurring unnecessary additional costs. They suggest that the acquiring authority have made repeated requests for more and more information without any regard to the potential costs to the claimants (a public authority) and have failed even to consider that which was provided in any way other than a cursory fashion (because no technical appraisal appears ever to have been made).

Discussion

23. The claimants ought to receive, as part of their compensation, any costs that they reasonably incurred before the date of the reference in preparing their claim for compensation, since those costs represent part of what the claimants have lost through compulsory acquisition of their land. In the decision upon costs in the Lands Tribunal (George Bartlett QC President and PR Francis FRICS) in *Spirerose Ltd v Transport for London* [2008] 48 RVR 12 at paragraph 147 the following appears:

> "On the basis of *LCC v Tobin* the claimant ought to receive, as part of its compensation, any costs that it reasonably incurred before the date of the reference in preparing its claim for compensation, since those costs represent part of what it has lost through compulsory acquisition of its land. Costs incurred after the date of reference are governed by s 4 of the 1961 Act; and, under subs (1), where a claimant has failed to deliver a claim in time to enable the acquiring authority to make a proper offer, the claimant must, in the absence of special reasons, bear its own costs and pay those of the acquiring authority. This provision relates specifically to the costs of proceedings before the Lands Tribunal. The purpose is to ensure that the acquiring authority is not liable for the claimant's costs, and gets its own costs, up to the time when it could have made a proper offer. There is clearly an underlying policy purpose in ensuring that the acquiring authority is in a position to make an offer before it incurs, or becomes liable for, any costs in the proceedings. As far as pre-reference costs are concerned, however, provided that they were reasonably incurred in preparing the claim, it does not seem to us that there is any reason for disallowing them, simply because no claim or no suitably quantified claim was submitted to the authority before the reference was made to the Lands Tribunal. The reasonableness of such costs is to be judged in relation to the need for them to have been incurred for the purpose of determining the compensation to which the claimant is entitled, and the policy purpose underlying s 4(1) has no application."

The *Spirerose* case went on appeal to the Court of Appeal and to the House of Lords, but those decisions are not relevant to the approach upon the question of costs.

24. Accordingly I am not concerned, when deciding these applications for costs of and incidental to the proceedings before the Upper Tribunal, to deal with any pre-reference costs incurred by the claimants. These are part of the compensation to which the claimants are entitled. (I note from paragraph 2.8 Ashurst's letter dated 24 July 2018 that the terms of the settlement did not deal with costs – however whether pre-reference costs were or were not dealt with as part of the compensation claim these costs are not a matter before me.)

25. As regards the costs of and incidental to the reference I reach the following conclusions.

26. I do not find any relevant failure by the acquiring authority to answer correspondence in 2012 or 2013 or thereafter from the claimants or their advisers such as to justify the delay in the claimants making any claim in respect of the reference land.

27. The limitation period for making a claim in respect of the acquisition of the interests in the reference land was to expire on 14 June 2017. The claimants made no claim in relation to the reference land until the letter of 9 June 2017.

28. This letter of 9 June 2017 was accompanied by documentation which in my view was inadequate to constitute "a notice in writing of the amount claimed by him, containing the particulars mentioned in subsection (2) of this section" within section 4 (1)(b) of the Land Compensation Act 1961 as amended. The claim was for a large sum namely £18.75 million for injurious affection plus an unspecified amount for settlement. Looking merely at the claim for injurious affection, the limited information provided in the short annexes was insufficient to satisfy the requirements of section 4(2).

29. The reference dated 14 June 2017 did not remedy the shortcomings in the letter of 9 June 2017.

30. Turning to section 4, I consider that in order to satisfy the requirements of section 4(1)(b) the claimants should have delivered to the acquiring authority a properly particularised notice in writing of the amount claimed by a date comfortably prior to the expiry of the limitation period (14 June 2017) to enable the acquiring authority to make a proper offer comfortably before that date. I am therefore satisfied that the claimants in this case have failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by them containing the required particulars. The time when in my opinion such notice should have been delivered was no later than 14 December 2016 (being six months before the expiry of the limitation period).

31. The provisions of section 4(1)(b) are therefore engaged.

32. However this does not mean that the Upper Tribunal must order all of the costs incurred after 14 December 2016 to be paid by the claimants irrespective of what thereafter happens. If in due course a claimant, having failed in proper time serve a proper notice of claim, then does serve a proper notice of claim, the acquiring authority will be entitled to a reasonable time to consider this claim. However if thereafter the acquiring authority makes no adequate offer and is ultimately ordered to pay compensation the acquiring authority can be required to pay costs after the expiry of this reasonable time (i.e. a reasonable time after the belated submission of the proper claim) see the analysis in the decision of the Lands Tribunal (George Bartlett QC, President and NJ Rose FRICS) in *Colneway Ltd v Environment Agency*

[2004] 44 RVR 37 at page 45 and following. See also the passage cited above from *Spirerose*:

> "This provision relates specifically to the costs of proceedings before the Lands Tribunal. The purpose is to ensure that the acquiring authority is not liable for the claimant's costs, and gets its own costs, up to the time when it could have made a proper offer."

33. Further particulars of the claimants' claim were served on 1 February 2018. These were criticised by the acquiring authority as being inadequate. However these particulars did show how the claimants potentially had a genuine and substantial claim for injurious affection by reason of the interference (through the presence of the tunnels) with potential future development of the reference land.

34. Had the matter proceeded to a hearing pursuant to which a specific amount of money was ultimately ordered by way of compensation for injurious affection then it is possible there would be some merit in the claim of the acquiring authority that the further documentation provided on 1 February 2018 still did not amount to a properly particularised claim so as "to enable them to make a proper offer" within section 4.

35. However as matters have in fact transpired, the case was always capable of settlement (and has now been settled) not by the payment of a sum of money but instead by the entry into a settlement between the parties pursuant to which an interest in the reference land is to be given back to the claimants, being an interest that is said to be equivalent in value to the compensation claim – thereby negating the need for a monetary settlement.

36. This apparently sensible settlement has been open to the parties at all times (including during the almost 6 years between the vesting of the land and 14 June 2017. Neither party pursued it.

37. In these circumstances I consider that:

(1) the claimants should have given a properly particularised notice of the amount claimed (so as to satisfy section 4(1)(b) and (2)) no later than 14 December 2016;

(2) the claimants failed to give any such properly particularised notice of the amount claimed prior to the making of the reference or in the reference document itself;

(3) the claimants did give a properly particularised notice of the amount claimed by their documentation of 1 February 2018 - this was sufficiently particularised because it

showed there was genuinely a potential claim for a large sum for injurious affection and this was sufficient to enable the acquiring authority to make a proper offer, namely an offer such as was ultimately accepted (the grant of rights over the reference land);

(4) the acquiring authority was entitled to a reasonable time to consider this further documentation – but as this was by way of further particulars of a previously made (but inadequately particularised) claim there was the necessity for only a moderate amount of further time for the acquiring authority to consider this material and to make a proper offer (namely the offer of the grant of rights over the reference land); and

(5) this reasonable time to consider the further documentation was in my view one month.

38. It follows prima facie from the foregoing under section 4(1)(b) (and leaving aside for the moment the words "unless for special reasons it thinks proper not to do so") that so far as concerns the costs of the present reference the claimants should bear their own costs and pay the costs of the acquiring authority after 14 December 2016 (i.e. the time when in the opinion of the Upper Tribunal a proper notice of claim should have been delivered).

39. It is then necessary to consider the words "unless the special reasons it thinks proper not to do so". The first point to notice regarding these words is the following. For the reasons mentioned above I conclude that a proper notice of claim had been delivered by 1 February 2018 and that by 1 March 2018 the acquiring authority could have made a proper offer. In those circumstances the order for costs which provisionally (and subject to the next mentioned points) appears to be appropriate is an order that the claimants should bear their own costs and pay the costs of the acquiring authority until 1 March 2018 and that thereafter the acquiring authority should bear their own costs and should pay the costs of the claimants.

40. However I conclude that this case could always have been settled, without substantial difficulty or expense, if the parties had turned their minds to the case much earlier than they did. I note the comment made on behalf of the acquiring authority which I have set out in paragraph 13 above and which, after complaining that the reference to the tribunal was premature and ill-conceived and a total waste of money, states:

> "All that was needed was a discussion between engineers. Crossrail has always been open to such discussions. Similar negotiations have been successfully concluded with other landowners across London without any need for a reference to the Tribunal."

Assuming this to be the case, the acquiring authority could have been proactive rather than waiting themselves until the end of the limitation period and the inevitable receipt of a protective claim and reference to the Upper Tribunal. The acquiring authority must have known that they had taken the reference land from the claimants and that there was a potential

compensation claim to be settled, which would not simply disappear. If the claimants were aware (as this letter suggests they were) of problems such as posed in the present case being successfully concluded with other landowners across London without any need for a reference to the Upper Tribunal, then the acquiring authority could themselves have avoided the reference by contacting the claimants and suggesting such negotiations in the present case.

41. Also there is no (or no satisfactory) explanation before me as to why it took so long as from June 2017 to June 2018 for the apparently simple settlement to be reached.

42. Further, as regards the procedural steps taken during the one year of the proceedings being extant before the Upper Tribunal there appears from the correspondence before me to be substantial scope for each party to criticise the other regarding each step that was or was not taken (and thereby potentially give rise to further litigation and argument upon any assessment of costs).

43. In these circumstances I consider that special reasons do exist why it is proper **not** to order that the claimants bear their own costs and pay the costs of the acquiring authority after 14 December 2016.

44. A proper and just result regarding costs can be obtained if each party is ordered to bear their own costs.

Conclusion

45. I dismiss the acquiring authority's application for costs. I dismiss the claimants' application for costs. Each party is to bear their own costs of and incidental to the reference.

His Honour Judge Huskinson

26 October 2018