

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

PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF A REFERENCE

R/35/2000

BETWEEN

JOSEPH ASHFIELD – APPLICANT

AND

THOMAS LOWE - RESPONDENT

Re: Lands contained in Folio 30507, Co Tyrone

Lands Tribunal – Mr Michael R Curry FRICS IRRV MCI.Arb Hon.FIAMI

Belfast – 4th December 2001

1. The issue for determination was one of costs. Mr Kevin Denver BL instructed by Messrs Doris & MacMahon, solicitors, appeared for the Applicant.
2. In June 2000 the Applicant, Joseph Ashfield made an application under the Property (NI) Order 1978 seeking extinguishment or in the alternative modification for re-alignment of a registered easement for a water pipe. In the Notice of Reference the Respondent, Thomas Lowe was made a party to the proceedings. He was informed of the application in the usual way and in July 2000 formally objected to the application, stating grounds, through his solicitors Francis J Madden & Co (“Maddens”).
3. The matter was fixed for hearing at Omagh Courthouse on 26th October 2000. On 23rd October Maddens sent a fax message to the Tribunal:
“as we have received no further instructions we wish to take our name off record in the application and accordingly we would wish to withdraw our objection. We will therefore not be attending the hearing on the 26th inst.”

4. Neither Mr Lowe nor Maddens attended the hearing. The Tribunal decided not to proceed because:
 - a. The absence of instructions is not the same as instructions to withdraw;
 - b. Withdrawal of an objection is not the same as consent and has not the same effect; and
 - c. The parties should be given an opportunity to make representations in the matter of costs.

5. The Registrar wrote to both parties advising them that at the adjourned hearing on the 14th November the Tribunal would deal with all issues including the proposed withdrawal and costs. By letter of 1st November Maddens wrote:

“ ... confirming that the application has been withdrawn and it would therefore not be necessary for the Respondent to attend”.

Neither Mr Lowe nor Maddens attended that hearing.

6. A party to the proceedings must be given a reasonable opportunity to assess the strength of his hand and the opposing hand. Usually costs will not be awarded against a party who takes initial steps in the proceedings (e.g. lodges an objection) but reasonably promptly either applies to have his name removed from the proceedings or consents to the application (See e.g. McDonald v Geddis & Hobson [2000] R/35/1999). In this case the party took steps in the proceedings but withdrew his objection only at the eleventh hour. Withdrawal is presumed to be an acknowledgement of likely defeat and, as noted above neither Mr Lowe nor Maddens took the opportunity to be present, clarify their position and/or attempt to rebut that presumption. In the absence of consent to the Application, the Tribunal proceeded with the hearing and at the conclusion gave a summary decision ordering that the easement is wholly extinguished.

7. Having heard submissions on behalf of the Applicant in regard to costs, the Tribunal ordered that his costs be paid by the Respondent, such costs in default of agreement to be taxed on the County Court Scale.

8. Correspondence followed.

9. As the parties could not agree the assessment of costs, a further hearing on costs issues was arranged for 4th December 2001.
10. Neither Mr Lowe nor Maddens attended the hearing; Maddens wrote:

“unfortunately because of the expense involved, my clients will not be in a position to attend the hearing and have simply asked me to express their concerns to the Registrar as to why they have to pay expenses in addition to having rights of easement removed from them.”
11. With the consent of Mr Denvir, the Tribunal considered correspondence setting out the reasons on which Maddens based their objection. However in the view of the Tribunal a great deal of confusion, delay and correspondence could have been avoided if the Respondent or his solicitors had taken advantage of any of the many opportunities given to them to attend hearings.
12. For clarification the Tribunal directed that the Applicant provide Maddens with a detailed Bill of costs. Further correspondence followed.
13. Maddens suggested that as the engineer had previously attended at the site many times in connection with an earlier action, a further site visit, photographs and maps were unnecessary. The Tribunal found the detail of the expert’s report helpful and has no basis on which to conclude that its content substantially overlapped with a previous report prepared for a different action on different issues. The Tribunal accepts that the expert’s fee of £593.15 (including VAT) set out is not unreasonable.
14. The Applicants claimed costs on scale 8 of the County Court (Amendment No 3) Rules (NI) 1999 - Part VIII Equity Suits and Proceedings Scale. Maddens suggested scale 2 because it was an undefended application, the issues were not complex and that the lands would have had a low NAV.
15. With some minor adjustments, the Tribunal accepts Scale 8 to be appropriate for the following reasons:
 - There is no relevant figure of Net Annual Value before the Tribunal;

- The entirety of the land had been agreed for sale at £105,000 (although that sale did not proceed). The Respondent objected to the application (this was not simply a claim for compensation) and if there was a compelling case to be put forward on his behalf, ‘friendly negotiations’ might have produced a compromise at a sum wholly consistent with scale 8;
- The issues were relatively complex; and
- The Tribunal accepts that the fact that the Respondent withdrew his objection shortened the Hearing. But he only withdrew his objection at the eleventh hour when the case for the Applicant had already been prepared. He stopped short of consenting and declined to attend or be represented at any Mentions or Hearings that might have assisted to clarify his position.

16. After revision, the Applicant sought costs of £3,820.18 (including VAT where applicable). Having received clarification, and after minor corrections and departures (for occasional costs) from Equity Scale 8 of the County Court, the Tribunal assesses costs as follows:

Solicitor’s Costs (Equity Scale 8, items 1,2 &3)	£955.00	
<i>Plus</i>		
Reviews	£150.00	
		1105.00
VAT		193.38
Counsel’s costs (Equity Scale 8, Advice & Hearing)	£854.00	
<i>Plus</i>		
Travel	36.56	
Reviews & Costs Hearing	£240.00	1130.56
VAT		197.85
Consulting Engineer – D McKeown Fees & Outlay		504.81
VAT		88.34
Miscellaneous Outlays		114.12
Total		£3,334.06

15 The Tribunal awards and directs that the Respondent pays the Applicant’s costs in the total sum of £3,334.06 including VAT.

ORDERS ACCORDINGLY

31st October 2002

**Mr M R Curry FRICS IRRV MCI.Arb Hon.FIAMI
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:-

Applicant – Mr Kevin Denvir BL instructed by Messrs Doris & MacMahon