

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

**IN THE MATTER OF A REFERENCE**

**R/4/2000**

**BETWEEN**

**BRIAN TERENCE DOLWAY WALKINGTON - APPLICANT**

**AND**

**JAMES ORR & ELLA ORR - RESPONDENTS**

**Lands at Portavogie, Co Down**

**Lands Tribunal - Mr Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI**

**Belfast - 22<sup>nd</sup> November 2000**

In June 1999, the Applicant had entered into a contract for sale to a developer ('Hylands') of development land in Portavogie. The contract contained conditions that any right of way had to be extinguished; there was evidence of what might be either a cow path or a right of way or both, over the land. The Applicant sought modification of its route by a Reference under the Property (Northern Ireland) Order 1978 ('the Order').

The Reference had been made in January 2000 and, by Notice dated 22<sup>nd</sup> March, a hearing had been fixed for May 2000. The case was mentioned before the Tribunal and the parties agreed that their experts would lodge statements of evidence by 18<sup>th</sup> April 2000. But when the statement for the Respondents was lodged, it disclosed and examined a new issue - that the respondent was entitled to use the path not only as an alleged private right of way was also, together with the world at large, as a public right of way. Although the new issue was accepted to relate to matters outside the jurisdiction of the Tribunal, it was a matter which would require consideration in the exercise of the Tribunal's discretion on matters within its jurisdiction. The hearing was put back to allow the implications of the interest of the general public to be considered. Then, in September 2000, the Applicant reached agreement with Hylands that the conditions would be deleted and the sale would proceed to completion without modification or extinguishment.

This was an application under Rule 34(2) of the Lands Tribunal Rules (Northern Ireland) 1976 to withdraw the Reference, without the Respondents' consent. The only issues

between the parties were the allocation and the amount of costs: the Applicants sought no order as to costs, the Respondents applied for their costs.

Keith Robinson BL instructed by Trevor Smyth & Co appeared for the Applicant. Robert Millar BL instructed by S J Diamond & Son appeared for the Respondents.

The Tribunal was referred to previous decisions:

- Napier v Nurse (1996) R/1/1996, and
- McDonald v Geddis & Hobson (2000) R/35/1999.

Both parties accepted that the normal rule is that an application for leave to withdraw is treated as an acknowledgement of defeat or likely defeat but that presumption is rebuttable; for example on grounds that the issue had become academic.

The Tribunal has also considered Roberts (Richard) Holdings Ltd v Douglas Smith Stimson Partnership (1988) 22 ConLR 60 and RTZ Pension Property Trust Ltd v ARC Property Developments Ltd and Anr. [1999] 1 All ER 532 CA. Essentially, in the former case, an unchallengeable defence was introduced at a late stage, in the latter, an alternative solution to the problem giving rise to the litigation was proposed at a late stage, tested between the parties and accepted.

In this case a new challengeable defence was introduced at a late stage, not accepted by the applicants and not tested by the Tribunal.

In RTZ v ARC, Potter LJ considered the review of the position as set out in Roberts Holdings v Douglas Smith Stimson. Judge John Newey had concluded:

“... That there was an exception to the general rule that a successful defendant could not be ordered to pay costs, namely where he had been guilty of “misconduct”, was made plain by Jessel MR in Dicks v Yates (1881) 18 Ch D 76, CA case; in those circumstances the defendant could be ordered to pay some, but not all, of the plaintiff’s costs. This exception is preserved and made explicit by Ord 62, r 10(1); under it anything done or omitted unreasonably or improperly by a party will enable a court to order that his costs be disallowed and that he should pay those of his opponent.”

Dealing with wording slightly different to this Tribunal’s rule 34 (‘on such terms as to costs ... as he may think fit’) Potter LJ continued:

“The wording of Ord 21, r 3(1) (‘on such terms as to costs ... as it thinks just’) appears to me to be designed to give the court the widest possible discretion on costs,

particularly when considered against the contrasting provision in respect of discontinuance before, or immediately following, defence. I accept that it will be rare indeed that an order for payment of a discontinuing plaintiff's costs would be appropriate. None the less, in the prevailing climate, in which the court seeks ways in which to prevent unnecessary costs and delay in the resolution of disputes, it seems to me undesirable that the court should regard itself as shackled from making such an order, for instance in the case of a defendant who perversely encourages a plaintiff into action by concealing the existence of a defence although reasonably invited prior to proceedings to make disclosure. Such circumstances, however, do not require consideration in this case.

I approach this case upon the basis that, where discontinuance occurs in circumstances tantamount to an acknowledgement of defeat, then the normal rule as to costs, namely that the defendant is entitled to an order for his costs of the action, should apply unless good reason can be shown to the contrary. The nature of that good reason will vary according to the form of order which the plaintiff seeks. The alternative forms are of course 'no order as to costs' or, more rarely, an order that the defendant pay the plaintiff's costs in respect of a particular issue or issues, or a particular period of time, in respect of which costs have been wasted or unnecessarily incurred as a result of the defendant's conduct of the proceedings.

For the purpose of justifying an order that the defendant pay the plaintiff's costs, it will be necessary to demonstrate misconduct of the defence in the sense of some act, omission, or course of conduct on the part of the defendant which is unreasonable or improper for the purposes of Ord 62, r 10(1). In order to justify an order that there be 'no order as to costs' in respect of the proceedings or any part of them, the test should be the wider one of what is fair and just in all the circumstances. That will be so whether the application is made in respect of some limited issue or aspect of the defendant's conduct of the proceedings, or whether it is made in respect of the proceedings as a whole on the basis that for some reason they have become of academic interest only in relation to their subject matter and/or their outcome: see *Britannia Life Association of Scotland v Smith* [1995] CA Transcript 353. In this latter type of case, the overall history of the litigation and the circumstances in which discontinuance has taken place will loom particularly large. In the former, while the court must act on the basis of what is fair and just, the starting point, and the principal circumstance to be borne in mind, should be that the plaintiff has abandoned all the pleaded issues without argument or adjudication and must therefore prima facie be regarded as having lost the day on all of them."

Although the wording is slightly different, the Tribunal considers that it must act on the basis of what is fair and just in all the circumstances. But, the starting point, and the principal circumstance to be borne in mind, is that the Applicant has abandoned all the issues without argument or adjudication and must therefore prima facie be regarded as having lost the day on all of them. Bearing that in mind, is there any good reason, based on fairness and justice, why there should be 'no order as to costs' in respect of the entire application or a particular issue or issues, or a particular period of time as a result of the respondent's conduct of the proceedings?

It is often more convenient to work backwards in time. The most significant events were these:

1. **Completion** - in October 2000, Hylands had elected to complete the purchase of the land from the Applicant, without modification or extinguishment, and
2. **Public right of way** - in April 2000, the Respondent had raised, explored and relied upon an issue as to whether the alleged private right of way was also a public right of way.

#### 1. **Completion**

The Applicant has been able to complete his sale, and the Respondents have not made any concession about their rights. The essential test is whether the presumption, of acknowledgement of defeat or likely defeat, is displaced - and that is not always the same as a test of whether the issue has become academic.

The Tribunal is not in a position to reach a conclusion as to the extent, if any, to which Hylands' decision should be taken to be the result of renegotiation with the Applicant of the terms of the contract for sale. However, the nature of the relationship between Hylands and the Applicant is a relevant consideration.

Issues may be rendered academic by the actions of an independent other party, or another party to the action. In the former case, it may be that fairness and justice demands that each party bears their own costs. Where it is another party to the action, the respondent may usually expect to get his costs from them.

For the following reasons, the Tribunal is not persuaded that the completion of the sale to Hylands amounted to circumstances that were sufficiently exceptional to displace the presumption of likely defeat:

- the presumption of likely defeat is a strong one and 'the principal circumstance to be borne in mind, should be that the Applicant has abandoned the issues without

- the Tribunal, not being privy to discussions between the parties, has no basis on which to conclude that the application to withdraw was not tantamount to an acknowledgement of defeat;
- although the application may have been brought about by the completion of the sale and Hylands were not a party to the proceedings, they were an 'interested party' by contract and even if their role in the event made the issues evaporate or become academic, that is not something in the same category as an independent action by an unconnected other party;
- the Respondents may face one or both the same issues in future proceedings; and
- if Hylands had been a party (and Art 3(4) of the Order would have permitted that) and they had applied to withdraw in these circumstances, it is difficult to see why the Respondents would not have recovered their costs from them. It would not be fair or just to deprive the Respondents of their costs as a consequence of the application having been brought only by the present applicants and, in effect, to allow the latter to shelter behind the actions of Hylands.

## 2. *Public rights*

It was not until the 18<sup>th</sup> April 2000 that the Respondents raised the issue of whether there was a public right of way and that substantially changed the character of the case the Applicant had to meet. In the view of the Tribunal that raises a question about the conduct of the Respondents.

The application was for 'no order as to costs' and in order to justify such an order in respect of the proceedings or any part of them, the test should be what is fair and just in all the circumstances and that should be applied in a robust rather than a strict manner. That will be so whether the application is made in respect of some limited issue or aspect of the defendant's conduct of the proceedings. See RTZ v ARC. Does the conduct of the Respondents in this case provide a reason for such an award?

The Tribunal is not persuaded to depart generally from the presumption that the application to withdraw should lead to an award of costs against the Applicant. But, the Tribunal concludes that it is fair and just that there be no order as to costs in respect of one particular item, that is the costs of the experts in preparing their statements:

- There was neither breach of rules nor misconduct of the defence in the sense of some act, omission, or course of conduct on the part of the Respondents which was so unreasonable or improper that it would be fair or just to award costs against them - that would go too far;

- It is undesirable that a party should not disclose the existence of a defence when the tribunal requires, and is well known to require, 'cards face up on the table' to prevent unnecessary costs and delay - especially in connection with topics for expert reports. The Applicant could and should have been informed of the public right of way issue earlier, before the experts completed their statements;
- On a robust view, and that is the proper view, over the particular period of time, between the previous mention and the new issue being disclosed to the Applicants, it is a reasonable assumption that the main activity and expense was the preparation of the experts' statements; and
- Again it is a robust solution but the Tribunal finds in all the circumstances that it is fair and just to make no order as to this particular item only.

The Tribunal orders that, apart from the item below, the Applicant pay the costs of the Respondents, such costs to be taxed if not agreed. The Tribunal makes no order as to costs in respect of one particular item, that is the costs of the experts in preparing their statements.

#### **ORDERS ACCORDINGLY**

**12<sup>th</sup> June 2001**

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

#### **Appearances:-**

**Keith Robinson BL instructed by Trevor Smyth & Co appeared for the Applicant.**

**Robert Millar BL instructed by S J Diamond & Son appeared for the Respondents.**