

**LANDS TRIBUNAL FOR NORTHERN IRELAND**

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

**IN THE MATTER OF A REFERENCE**

**R/5/1992**

**BETWEEN**

**NORMAN CROSSAN - CLAIMANT**

**AND**

**THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND - RESPONDENT**

**Lands Tribunal for Northern Ireland - The President,**

**His Honour Judge Peter Gibson QC and Mr A L Jacobson FRICS**

**Belfast - 5<sup>th</sup> March 1993**

This reference was a claim for consequential loss of £1,320 said to be sustained as a result of a sewerage scheme consisting of the laying of pipe lines in a public highway known as Mill Street, Comber, Co Down. The Claimant's shop, a newsagents and tobacconists, is situated at No 81 Mill Street. No physical damage was caused to that shop nor was any land acquired. As a result of a Temporary Closing of Roads Order made under Article 24 of the Road Traffic (Northern Ireland) Order 1981 the short link road between Railway Street and Belfast Road (at its junction with Mill Street) was temporarily closed to traffic from 8 am on 27<sup>th</sup> May 1981 for a period of 5 weeks. As a result the volume of traffic using Mill Street was diminished, but at no time was any portion of the Claimant's premises adjoining the highway subject to that Temporary Closing of Roads Order. Because of the altered road arrangements, traffic lights were placed outside the Claimant's shop and no waiting cones were placed by the Royal Ulster Constabulary along the odd-numbered side of Mill Street. There was no interference with any private right of the property of the Claimant.

The claim for compensation was made under Article 55 of the Water and Sewerage Services (Northern Ireland) Order 1973 ("the 1973 Order") which reads as follows:-

- "55 - (1) In executing any works under this Order, the Department shall -**
- (a) cause as little detriment and inconvenience and do as little damage as possible;**
  - (b) make good, or pay compensation for, any damage caused by, or in consequence of, the execution of the works.**
- (2) Subsection (2) to (6) of section 38 of the Mineral Development Act (Northern Ireland) 1969 shall have effect for the purposes of any claim for compensation under this Article as if, in those subsections, any reference to that section, that Act or the Ministry of Commerce were a reference to, respectively, this Article, this Order or the Department."**

Section 38 of the Mineral Development Act (Northern Ireland) 1969 ("the 1969 Act) reads as follows:-

- "(2) Any question arising as to -**
- (a) the entitlement of any person to compensation under this section, or**
  - (b) the amount payable by way of that compensation, shall, in default of agreement, be referred to and determined by the Lands Tribunal.**
- (3) Compensation under this section in respect of damage to land shall not be payable to any person from whom any land has, or ancillary rights over land have, been acquired by the Department under this Act and to whom any compensation is payable under section 14 of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 by the Department in respect of injurious affection of the first-mentioned land.**
- (4) In assessing compensation under this section in respect of damage to land regard shall be had to any benefit which the person entitled to the compensation may derive from any works which have been or are to be carried out, or any use of land, by the person causing the damage.**

- (5) In assessing compensation under this section in respect of damage to land regard shall also be had to any undertaking given by the person causing the damage to make alterations or additions to any works, or to construct additional works, or to vary or abandon any use of land, or to abandon any part of any land acquired or ancillary rights, or to grant other lands or easements.
- (6) Where for the purpose of assessing the amount of any compensation payable under this section the value of any land is required to be determined, that value shall be determined in accordance with rules (2) to (4) of Article 6(1) of the Land Compensation (Northern Ireland) Order 1982."

Certain legal matters arose between the parties but no preliminary point of law was agreed. Consequently three preliminary points of law were submitted by the parties - two by the Department and one by the Claimant. They were couched as follows:-

#### **The Department**

- "i. Is the Applicant entitled to maintain an application pursuant to Article 55 of the Water and Sewerage Services (Northern Ireland) Order 1973 in respect of losses sustained by him which are attributable to the temporary closing of the road, pursuant to Article 24 of the Road Traffic (Northern Ireland) Order 1981?
- ii. Where there has been no interference with a private right of property of the Applicant in connection with the execution of works under the 1973 Order, is the Applicant entitled to maintain a claim for compensation under Article 55 of the said Order for consequential loss?"

#### **The Claimant**

"Is the Applicant entitled to maintain an application for compensation pursuant to Article 55 of the Water and Sewerage Services (Northern Ireland) Order 1973 in respect of damage in the form of pure consequential loss sustained by him?"

Mr Declan Morgan of Counsel (for the Respondent Department) submitted:-

1. The Temporary Closing Order prevented traffic from proceeding from Mill Street to Railway Street thus causing a diminution in road traffic passing No 81 Mill Street. The Applicant claims for loss of profits resulting from such diminution.
2. There was no physical damage to Claimant's property.
3. There was no interference with any private rights of property belonging to the Claimant.
4. In order to be entitled to compensation the Claimant must show 'damage' under Article 55 of the 1973 Order. The meaning of the word 'damage' may be gleaned from Stroud's Legal Dictionary but the Department relies on the test that the meaning of a phrase or word must be judged by the construction of the statute.

Refers to Tor Line A B v Alltrans Group of Canada Ltd; The TFL Prosperity [1984] 1 All ER 103

Submits that in Article 55(1)(a) of the 1973 Order the word 'inconvenience' must be construed as personal and the word 'detriment' must be construed as to a person's loss of profits or monetary loss.

Whereas in Article 55(1)(b) the reference to 'damage' must be construed as physical damage.

The distinction is drawn between damage which is compensatable and detriment or inconvenience either of which is not compensatable.

5. Article 55(2) of the 1973 Order incorporates Section 38 of the 1969 Act which sets out the rules for compensation. Those rules refer to damage to land.
6. The temporary closing of the part of the road connecting Mill Street to Railway Street was made under Article 24 of the Road Traffic (Northern Ireland) Order 1981. The Claimant's claim that losses arose because there was a reduction in trade due to that Temporary Closing Order does not sustain a claim for compensation.

Mr David McBrien of Counsel (for the Claimant) submitted:-

1. This is not a private right of property case but a public right of way interfered with and the Claimant has suffered damage which apart from the statutory authority he would have a good cause of action.

Refers to Lingke v Mayor, etc of Christchurch [1912] 3 KB 595 and Andreas Leonidis v Thames Water Authority 11 BLR 16

In the Leonidis Case Parker J @ p27 says:- "It would enable a Water Authority to close completely a street of shops for a year or more if it was reasonably necessary thus depriving the shopkeepers of their livelihood for a year, and yet say there was no right to compensation. A construction on the section leading to such a result would be to attribute to Parliament an intention which amounts almost to confiscation without compensation."

2. The Applicant accepts that the word 'damage' must be defined in the context of the statutes in this case. It is also appreciated that a distinction must be drawn between the situation where the highway is completely blocked off and where there is a temporary obstruction of part of an access between two roads causing a diminution in the volume of traffic.
3. In answer to a question by the President regarding the ratio in R (McCreesh) v County Court Judge for Armagh [1978] NIR 164 Mr McBrien submitted that in this Case the acts done by the Department would be actionable at common law and it followed that statutory compensation should be paid.  
The McCreesh Case is much more restrictive and is concerned with the Northern Ireland (Emergency Provisions) Act 1973 rather than a common law question of damages.
4. The Claimant relies on the Leonidis Case and the Lingke Case as well as the proper interpretation of the statutes as indicated by the interpretation of other statutes in Case Law. The trend of those interpretations are relied on to show that compensation is payable.

Mr Morgan in reply:-

1. The right to a common law remedy might arise if the Claimant's access to his own property had been interfered with and as a result he could show that had caused a loss of profits. But Article 55(1)(b) of the 1973 Order merely gives the right to compensation for damage - not for inconvenience nor detriment. The Department must cause as little inconvenience or detriment as possible (Article 55(1)(a)). If the Department does cause more inconvenience or detriment the Claimant could sue at common law for a public nuisance. If the Department acted negligently the dispute would be decided by the Courts in common law.

## **DECISION OF THE LANDS TRIBUNAL**

This reference concerned a claim for compensation for loss of profits caused by a Temporary Closing Order for a short piece of road (under a flyover) which connected Railway Street and Mill Street (No 81 Mill Street fronted that street and was a short distance away from the closed road). However Mill Street itself continued into the Belfast Road without hindrance apart from temporary traffic lights which regulated traffic flow during the period during which sewer pipes were being laid in Mill Street. At no time was No 81 Mill Street subject to the Temporary Closing of Roads Order nor was there any interference with any private right of the Claimant's property. No physical damage of any kind was caused to the Claimant's property, but the Royal Ulster Constabulary placed no waiting cones on the edge of the pavements on the odd-numbered side of Mill Street.

The leading Case in Northern Ireland Law is R (McCreesh) v County Court Judge for Armagh [1978] NIR 194. That case concerned a garage and service station in Newtownhamilton which catered, inter alia, for heavy goods vehicles travelling on the main route between the Republic of Ireland and Great Britain, by way of the port of Larne. The security forces blocked three out of the only four public roads leading into or out of Newtownhamilton including Dundalk Street blocked at a point a short distance away on the Dundalk side of the Claimant's premises. The fourth of the four public roads was totally closed between 9 pm and 8 am each day and was controlled by a manned barrier during the remainder of each day. The claim for compensation was founded under the provisions of the Northern Ireland (Emergency Provisions) Act 1973.

The Northern Ireland Appeal Court allowed the appeal and held "that, although the Applicant had a special and individual interest in the public right to this portion of the highway and would, apart from statute, be entitled to sue for damages, yet there was no interference with his private right of direct access to the highway and therefore there was no right to compensation under Section 25(1) of the Northern Ireland (Emergency Provisions) Act 1973."

As Jones L J put it @ p169:- "Accordingly for those reasons it follows that an obstruction to passage and re-passage on the highway interferes with a public right and that if someone who owns premises on the obstructed highway can show particular damage that fact does not convert the public right into a private right and so cannot be said to interfere with private rights in property."

Also as Lowry L C J (as he then was) said @ p170:- "As to the statutory position, I would recall that the power to block the roads was exercised under regulation 9 and that the relevant compensation provisions at the time this was done was Section 11(1) of the [Civil Authorities (Special Powers) (Northern Ireland)] 1922 Act. It is agreed that, by virtue of Section 31(5) of the [Northern Ireland (Emergency Provisions)] 1973 Act, the appropriate compensation provision is Section 25(1) of that Act:

'Where under this Act any real or personal property is taken, occupied, destroyed or damaged, or any other act is done interfering with private rights of property, compensation shall, subject to the provisions of this section, be payable by the Ministry.'

Section 11(1) referred to an act 'involving interference with private rights of property'. Whether this phrase might extend to a type of interference not covered by Section 25(1) does not matter, because the crucial words are 'private rights of property'.

When a statutory power is exercised regularly and without negligence, a person who is damnified can claim only the compensation which is provided by statute. In order to be eligible to claim, the person must show that, but for the statute, he would have had a valid claim for damages under the ordinary law. This presents no legal problem to the present Applicant because, if he had sustained loss from the unauthorised obstruction of the highway he could have sued as a person suffering particular damage from a public nuisance. One could of

course have a tort which constitutes a public and a private nuisance at the same time, but that is not the position here.

But this is not enough: Jolliffe v Exeter Corporation [1967] 1 WLR 993. What the Applicant must prove in general is that compensation is available as a substituted remedy and in particular that the act here complained of was one interfering with his private rights of property."

The Temporary Closing Order in the instant Case was made pursuant to Part III of the Road Traffic (Northern Ireland) Order 1981 and in particular to Article 24 thereof viz:-

- "(1) Subject to paragraph (2) and Article 26, the Department may temporarily restrict or prohibit the use of any public road by vehicles generally or by vehicles of any particular class or description.
- (2) The Department shall not, in relation to any road, exercise the powers conferred by paragraph (1) unless the Department is satisfied that -
- (a) the condition of the road or the nature or volume of traffic on the road would be likely to cause danger to persons using the road, whether by means of vehicles or otherwise; or
  - (b) the use of the road by vehicles or by vehicles of any class or description would be likely to cause substantial damage to the road,

and that it is necessary in the interests of safety that restrictions or prohibitions on the use of that road should come into force without delay."

Article 24(3) is not relevant.

It is common case that the Temporary Closing Order properly was made in the interests of safety. Also that the loss of profits sustained was directly caused by that Closing Order. In Jolliffe v Exeter Corporation [1967] 2 All ER 1099 Lord Denning M R said @ p1101

"The judge decided in favour of the plaintiff on the ground that '... the stopping-up of the highway was nothing more than a step in the execution of the authorised works - a step which the defendants counselled and procured the Minister to take'.

I am afraid I take a different view. The stopping-up of the highway was a separate step altogether. It was not done in the execution of the authorised works, ie the works on the pink land. It was done by the Minister under a separate statute. The injury to the plaintiff would have been just as great if the highway had been stopped up by a barrier without any road works at all.

In my opinion the injury to the plaintiff was done by the stopping-up of the highway, for which the statute has not provided compensation."

There is no provision for compensation for a Temporary Closing Order in the Road Traffic (Northern Ireland) Order 1981. Yet it is common case that any injury the Claimant sustained arose from that Closing Order. The Appeal Court's decision is persuasive authority that on the facts in this Case that no compensation is payable.

The Tribunal's jurisdiction does not arise from that Road Traffic (Northern Ireland) Order 1981 but from Article 55(2) of the 1973 Order which incorporates Section 38 of the 1969 Act. Thus the Claimant only can claim compensation for "any damage caused by, or in consequence of, the execution of the works" (the Tribunal's underlining).

The works carried out was the laying of new sewer pipes in Mill Street. There was no claim that the losses arose from the execution of those works. In paragraph 3 of the Claimant's written submissions it is stated:-

"At no time was any portion of the Applicant's premises adjoining the highway subject to the Temporary Closing of Roads Order."

Paragraph 4 states:- "As a result of the above, the volume of traffic using Mill Street and passing the Applicant's property was consequently reduced. No-waiting cones were placed along the edge of the North footpath by the RUC."

And Paragraph 5:- "No physical damage of any kind was caused to the Applicant's property. The Applicant's claim rests solely on the basis of the reduction in the volume of passing trade caused by the acts of the Respondent."

The question posed by the first preliminary point of law submitted by the Department must in the circumstances of this case be answered in the negative.

The Claimant in his claim for compensation under Article 55 of the 1973 Order relied on the Lingke Case.

The headnote in that case reads:- "The mere temporary obstruction of access to premises, causing considerable inconvenience and loss of business to the occupier, may constitute 'damage' in respect of which he is entitled to claim compensation under s 308 of the Public Health Act 1875".

The facts in that case were that the plaintiff occupied a house and shop, fronting a very narrow street and it was situated between two bridges and therefore lay very low. The works consisted of the laying of an air main under the pavement; the laying of a main drain within a foot of the kerbstone with a manhole to it and the making of a kind of pumping station or ejection chamber on the other side of the road. Because the road was the only outlet from Christchurch on that side of town all the excavated spill was thrown up against the plaintiff's house and shop thus stopping access to them. By the process of climbing and indulging in certain gymnastic feats access could be obtained, but furniture could not be delivered to the plaintiff for sale in the shop, nor, if she sold furniture, could it be delivered to customers. The defendants took three months to complete the works during which time the plaintiff was deprived of ordinary access.

Fletcher Moulton L J @ p608 says:- "Suppose a private person puts heaps of rubbish in the street, breaks its surface, and digs trenches therein for any purpose whatever - and in my opinion it makes no difference what the purpose is - he is liable to indictment. He has broken up the surface of the highway. That is a nuisance, and he is therefore liable to an indictment at the hands of the public, and in the name of the public. But that is immaterial for the purpose of today. For the purpose of today the question is, has he committed an actionable wrong on the plaintiff? The law with regard to that is not in doubt. If there is a public right such as the user of

a street and it is interfered with by an individual, that interference does constitute an actionable wrong and give a right to damages to those members of the public who can prove special damage there from ie some damage flowing to them which does not flow to ordinary members of the public." And later on p609:- "I consider that this interference with her premises by this obstruction was so direct and so individual and special that if it had been unauthorised she could have proved special damage because the exit to the street from her house and the access to her house from the street were so interfered with that the house was not capable of being occupied as conveniently as before, and the difference between the two was substantial and not slight".

The agreed facts of the instant case show that "no physical damage of any kind was caused to the Applicant's property nor was there any interference with any private right of the property of the Applicant". The Lingke Case is of no help to the Claimant for access to and from the Claimant's property was not interfered with.

As Lord Lowry put it in the McCreesh Case at p171A:- "In order to be eligible to claim, the person must show that, but for the statute he would have had a valid claim for damages under the ordinary law. This presents no legal problem to the present Applicant, because, if he had sustained loss from an unauthorised obstruction of the highway, he could have sued as a person suffering particular damage from a public nuisance".

The Claimant's submission was that he had sustained losses from an interference with a private interest in land for which, if unauthorised, he could have sued for damages at common law.

But in order to succeed, the Claimant must then prove that compensation is available as a substituted remedy in the statute.

The Road Traffic (Northern Ireland) Order 1981 is silent as to compensation and thus the Claimant falls back onto Article 55(1)(b) of the 1973 Order ie "make good, or pay compensation for, any damage caused by, or in consequence of, the execution of the work". The meaning of the words "any damage" are fundamental to this issue - the Claimant arguing that any loss, whether purely financial or not, is covered by those words.

Firstly, Article 55(1)(a) requires the Department to "cause as little detriment and inconvenience and do as little damage as possible".

"detriment" and "inconvenience" refer to personal matters; whereas on the other hand 'damage' in Article 55(1)(b) caused by, or in consequence of, the execution of the works, is compensatable.

The works consisted of the installation of new sewer pipes in the road as authorised by the 1973 Order and the word 'damage' has been defined in a number of authorities under various statutes:-

(a) Herring v Metropolitan Board of Works [1865] 19 CBNS 510

Concerning Section 135 and Section 225 of the Metropolis Local Management Act 1855 which enabled the reconstruction of a sewer running under a street making compensation for any 'damage' done.

Per Montague Smith J @ pp 525,526:-

"Although the words of Section 135 are large I do not think they extend to a case of consequential damage like this. This damage is said to have arisen by reason of the erection of hoarding necessary for repairing the sewer in a public street rendering the access to the Appellant's premises inconvenient, whereby, it is said, he has sustained a loss not common to the rest of the public or the rest of the inhabitants of the particular street.... The word 'damage' must necessarily receive a more limited construction. It must be confined to something like actual damage to property".

(b) Smith and Others v Brown and Others [1871] LR 6 QB 729

Cockburn CJ @ p733:-

"in those Acts [The Merchant Shipping Act 1854 and The Merchant Shipping Amendment Act 1862] the term 'damage' is nowhere used as applicable to injuries done to the person; it is applied only to property and inanimate things".

(c) Swansea Corporation v Harpur [1912] 3 KB 493

At p505 Fletcher Moulton L J said:-

"The word 'damages' and 'damage' in law have more than one meaning and great care has to be exercised in examining the context in which they severally appear ..."

- (d) Crofter Hand Woven Harris Tweed v Veitch [1942] AC 435

At p442 Viscount Simon L C said:-

"... I shall try to distinguish between 'damage' and 'injury', following the stricter diction, derived from the civil law, which more especially prevails in Scottish jurisprudence. So used, 'injury' is limited to actionable wrong, while 'damage', in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not.

- (e) Smiley v Townshend [1949] 2 All ER 817, [1950] KB 311 CA

This concerned the meaning of the word 'damage' in Section 1(1) of the Landlord and Tenant (Requisitioned Land) Act 1944. It was held that it should be interpreted in the strict sense of "... damage of a physical nature ...".

- (f) The Stonedale No 1, Abel (Richard) and Sons Ltd v Manchester Ship Canal Co [1955] 2 All ER 585, [1956] AC 1

Concerning Section 9 of the Manchester Ship Canal Act 1897 limiting the liability of shipowners for 'damage' to a certain portion of the Canal, Viscount Simonds at p694 says:-

"The whole context points to physical damage to physical things".

- (g) Superior Lands Ltd v Wellington City Corporation [1974] 1 NZLR 240

Section 166 of the Municipal Corporations Act 1954 reads:-

"Every person having any estate or interest in any lands taken under the authority of this list for any public work, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers hereby given, shall be entitled to full compensation for the same from the Corporation".

At p249 Beattie J said:-

"I am firmly of the view that compensation is confined to public works and that the words 'any damage' in s 166 apply to compensation for loss caused by an interference with an interest in land but not for damage to trade or business or for damage resulting in personal loss or inconvenience".

The wording of Article 55 of the 1973 Order is not wide enough to cover the situation in this Case where financial loss appears to be sustained by reason of a restriction of a public right of way in which the Claimant has a special and individual interest. As Jones L J put it in the McCreesh Case at p167c:-

"Now if a barrier is placed in the entrance to a person's premises so as to prevent passage between those premises and the public highway there is an infringement of the right of the owner, or occupier, of those premises. But if the barrier is in the street at such a distance from the premises as not to prevent passage from the premises to the street and vice versa there is no infringement of any private right".

The compensation rules delineated in Section 38 of the 1969 Act concern generally compensation for damage to land, such compensation (in default of agreement) being determined by the Lands Tribunal. The whole context of the 1969 Act with regard to compensation is concerned with damage to land. The incorporation of Section 38(2) to (6) in Article 55 of the 1973 Order further underlines that the word 'damage' refers to damage to land.

So that where there has been no interference with a private right of property in consequence of the execution of the works under the 1973 Order no damage has been caused and no compensation is payable. Even where there has been an interference with a private right of property the claimant must have been entitled at common law to sue for damages, apart from the statute and in addition the statute must provide the substituted remedy of compensation (see Jolliffe v Exeter Corporation and R (McCreesh) v County Court Judge for Armagh).

The Respondents Department's second preliminary point of law must in the circumstances of this case be answered in the negative.

Similarly the Claimant's preliminary point of law must also (in the circumstances of this case) be answered in the negative.

The Tribunal makes no order as to costs.

### **ORDERS ACCORDINGLY**

**2<sup>nd</sup> April 1993**

**The President, Judge Peter Gibson QC  
and Mr A L Jacobson FRICS**

#### **Appearances:-**

**Mr David McBrien of Counsel (instructed by Messrs Campbell, Bates & Co, Solicitors) for the Claimant.**

**Mr Declan Morgan of Counsel (instructed by R F Cole Esq, Solicitor of Department of Finance & Personnel Solicitor's Branch (Environmental Division)) for the Respondent.**