

LANDS TRIBUNAL FOR NORTHERN IRELAND
LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982
ROADS (NORTHERN IRELAND) ORDER 1993

R/70/2006
BETWEEN
CHRISTOPHER THRONE - APPLICANT
AND
DEPARTMENT FOR REGIONAL DEVELOPMENT - RESPONDENT

Land at Grangefoyle Road, Bready, Strabane

COSTS

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

Background

1. The A5 is part of the main road between Londonderry and Dublin. In recent years the Department for Regional Development ("the Department") has carried out a number of small improvement schemes along various stretches of the route. In June 2002 representatives of the Department met with Mr Throne ("the Claimant") and his agent (Mr McAllister FRICS) to discuss proposals affecting his land. In November 2002 agreement was reached allowing the Department to enter the land for the purpose of carrying out road works without prejudice to the Claimant's right to compensation.
2. The land included 480 trees that were part of a significant group of various species of mature trees (perhaps 40 years old) that had been planted for shelter and amenity purposes, not for their timber value.
3. An agreement was reached on accommodation works and this included:

"5. Prior to the commencement of the scheme, the Department will identify and confirm with the landowner the number of trees that have to be removed. Following this the landowner will submit a costing for the trees."

["Item 5"]
4. Negotiations on compensation were unsuccessful and a claim was referred to this Tribunal in November 2006.

5. The compensation claimed was based on replacement of the removed trees; 65cm diameter trees would cost several thousand pounds each and 35cm diameter trees more than £500 each. The total claim was in the order of £2,000,000 with an alternative claim in the order of hundreds of thousands of pounds (there were revisions of the amount as the case progressed).
6. For some time the Claimant contended that the Tribunal could entertain a claim that the Department had breached an agreement with the Claimant regarding Item 5. In December 2009 the Claimant conceded the point and, about January 2010, the Claimant accepted an offer of £20,000. The Department agreed to also meet the Claimant's reasonable costs. But those could not be agreed.

Procedure

7. The parties agreed that the Tribunal address the costs dispute by written representations and these were received from:
 - Mr Nathan Hawthorne of A D McClay & Company, solicitors;
 - Dr Philip Blackstock, Arboricultural consultant;
 - Mr Matthew McAllister FRICS;
 - Mr Alistair McNeill of the Departmental Solicitor's Office; and
 - Mr Patrick C G Bradley MRICS of Land and Property Services ('LPS').

Positions of the parties

8. Counsel's fee was agreed. The Claimant sought costs totalling £21,867.83 including VAT. The Department contended that the amount should be less than half that.

Discussion

9. The elements of the costs claimed were:

A D McClay & Company

- consultations/preparation: 28 hours 54 mins @ £133 per hour = £3,843.70 + Vat
- correspondence out: 129 items @ £13.30 each = £1,715.70 + Vat
- telephone calls – 44 @ £13.30 each = £585.20 + Vat
- outlay on OSNI mapping = £ 94.35

Dr Blackstock

- for arboricultural expert advice and attendances = £954.60 + Vat

Mr McAllister

- as agent - for pre-scheme negotiations (3 meetings)
 - 11 hours 45 mins @ £100 per hour = £1,175.00
 - Mileage 327 @ 50p per mile = £163.50
- as agent - for pre-Lands Tribunal referral negotiations

- 25 hours 15 mins @ £100 per hour = £2,525.00
- Mileage 316 @ 50p per mile = £158.00
- outlay
 - Dr Blackstock for preliminary valuation = £283.41
 - Ness Landscapes = £40.00
- for expert advice following the referral (revised)
 - 44 hours @ £125 per hour = £5,500.00
 - Mileage 309 @ 50p per mile = £154.50

A D McClay & Company

10. Mr McNeill suggested that certain work carried out by A D McClay & Company on behalf of the claimant incurred fees that were unreasonable. He suggested that a significant amount of time and effort was wasted pursuing the contention that the Tribunal could entertain a claim that the Department had breached a contractual agreement with the Claimant regarding the performance of allegedly substantial and costly accommodation works (Item 5). He noted a preliminary hearing was listed to consider the point on two separate occasions. Ultimately, in December 2009 at a review hearing, the Claimant conceded the point and accepted that the Tribunal did not have jurisdiction to entertain a breach of contract claim. Mr McNeill also suggested that a further significant amount of time was wasted by the Claimant pursuing inflated and spurious claims for compensation. He contrasted the size of the claim with the settlement. He suggested that the Claim included just about every item that could arise in a vesting type case. He also questioned whether much or any of one particular item (work in connection with the Report on Facts) was ever, in fact, incurred. Mr McNeill suggested that the hourly rate of £133 was excessive but did not go into reasons why. Overall he proposed a reduction of 50% of the solicitor's costs claimed.
11. Mr Hawthorne pointed out that there had been protracted negotiations since 2002 and a final offer of £13,750 was made by the Department in May 2008. He said that the Department instructed an expert in February 2010 and the offer was promptly increased to £20,000 (a figure that closely reflected Dr Blackstock's assessment) and accepted. He suggested that much effort could have been saved if the Department had appointed a tree expert at an earlier stage. He suggested that Mr McNeill's proposals were merely arbitrary and bore no relationship to the amount of work reasonably carried out. Mr Hawthorne strenuously objected to Mr McNeill's suggestion that the claim was inflated to include work not done and he provided further particulars. The Tribunal accepts it was done. Mr Hawthorne pointed out that the hourly was the rate used by his office and it had not been uplifted in any way. The Tribunal accepts the hourly rate.

12. In Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1430, Potter LJ stated the presumption that, under the compulsory purchase code, a claimant should be entitled to its costs in the absence of some special reason to the contrary. A Tribunal not allowing such costs must be able to identify circumstances:

“in which the tribunal considers that an item of costs incurred, or an issue raised, was such that it could not, on any sensible basis, be regarded as part of the reasonable and necessary expenses of determining the amount of the disputed compensation.

... in which the claimant’s conduct of, or in relation to, the proceedings has led to an obvious and substantial escalation in costs over and above those costs which it was reasonable to incur in vindication of his right to compensation.”

13. The Tribunal accepts that the Claimant’s abandonment of the contractual issue implies that the relevant costs should not be regarded as reasonable and necessary. However, to some extent the Department’s inclusion of Item 5 and unfortunate drafting of the agreement on accommodation works appears to have been a root cause of the entire dispute. It was reasonable for the Claimant to consider and be advised on any other implications. Apart from that the Tribunal does not accept that the Claimant actually wasted significant costs in pursuit of an exaggerated claim or spurious items of claim. No attempt was made to single out the relevant costs. The Tribunal concludes that the solicitor’s costs, other than outlay, should be reduced by about 15%.

Dr Blackstock

14. Mr McNeill suggested that the fee for arboricultural expert advice and attendances should be reduced by 50% because the claim on a reinstatement basis was abandoned. Dr Blackstock pointed out that much of his fees resulted from queries and requests for meetings with the Department or their representatives or a need to provide expert advice on negotiating positions adopted by the Department. He contrasted his 15 hours with the 40 hours apparently spent by Estate and Forest Services Ltd on advising the Department. Although the contractual claim for reinstatement of the trees was abandoned, the Tribunal accepts that in all the circumstances of this case, including Item 5, it was not unreasonable or unnecessary for the Claimant to obtain the advice he did from Dr Blackstock. The Tribunal awards Dr Blackstock’s fees.

Mr McAllister

15. For pre-scheme negotiations Mr Bradley suggested that Mr McAllister’s remuneration as agent should be £75.00 per hour. That was based on the same rate paid to a firm of chartered

surveyors acting on various claims for another scheme, the A5 Strabane Bypass in 2002. Mr McAllister stated that he had been paid £100 per hour on the recommendation of LPS in another case that began prior to 2002 and that the charging rate by LPS for a senior valuer was £109.09 per hour at that time. Mr McAllister pointed out that Mr Bradley also accepted a rate of £100 per hour from 2004 and added that he therefore appeared to be suggesting a 25% deduction over a period in which LPS rates changed by about 2.5%. Mr Bradley noted that Mr McAllister worked from home, with lower overheads but suggested no deduction for that. The Tribunal awards Mr McAllister's rate of £100 per hour. The other aspects of the pre-scheme negotiations claim were not disputed.

16. As agent for pre-Lands Tribunal referral negotiations Mr Bradley suggested that Mr McAllister's remuneration should be based on 9 to 12 hours; that being typical for this type of small road scheme. The other aspects were not disputed. Mr McAllister suggested that Mr Bradley had failed to take into account 10 hours spent in negotiations with the Department as a result of difficulties with the conduct of the contractor and the requirement for remedial work prior to Mr Bradley's involvement. After that, Mr Bradley's perhaps otherwise reasonable suggestion of 9 to 12 hours for a typical claim failed to take into account the inferences that might be drawn from the extraordinary Item 5 of the proposed accommodation works and the impact that must have had on dealing with the dispute. In the view of the Tribunal the 15 hours 15 mins claimed by Mr McAllister is not much more than Mr Bradley suggests and not unreasonable. The other aspects of Mr McAllister's assessment, including outlay, were not disputed. The Tribunal awards Mr McAllister's professional fee.
17. For expert advice following the referral Mr Bradley suggested that Mr McAllister's remuneration should be based on 10 hours at a rate of £115 per hour. He suggested that much of Mr McAllister's time was spent simply repeating matters raised in earlier negotiations and the fundamental disagreement as to the correct basis for loss of trees remained. He relied on the submission by Mr McNeill that suggested that a very significant amount of time was wasted by the Claimant pursuing claims which were spurious and suggested that a very significant amount (if not all) of Mr McAllister's time was similarly wasted. Mr Bradley did not point to any of the items set out in Mr McAllister's detailed schedule of time spent and identify them as wasted. Mr McAllister suggested that time was not wasted by him and the difficulties were exacerbated by the failure of the Department to instruct an arboricultural expert to discuss with Dr Blackstock the non-timber value of the trees.
18. For the reasons set out in the discussion relating to the elements of the costs claimed by A D McClay & Company the Tribunal accepts that a part of this item of costs relating to the approach to compensation for the lost trees was such that it exceeded the reasonable and

necessary expenses of determining the amount of the disputed compensation. The Tribunal has concluded that a robust approach is appropriate and assesses the time allowable at 37 hours. Mr Bradley relied on the rates of £115 per hour assessed by the Tribunal in Charles McCann v Department for Social Development [2007] R/67/2004. Mr McAllister referred to the current charging rate by LPS for a senior valuer of £140 per hour. The Tribunal awards Mr McAllister's rate of £125 per hour.

Conclusions

19. The elements of the costs allowed are:

1. A D McClay & Company

- consultations/preparation: 25 hours @ £133 per hour = £3,325.00 + Vat
- correspondence out: 110 items @ £13.30 each = £1,463.00 + Vat
- telephone calls – 38 @ £13.30 each = £505.40 + Vat
- outlay on OSNI mapping = £ 94.35

2. Dr Blackstock

- for arboricultural expert advice and attendances = £954.60 + Vat

3. Mr McAllister

- as agent - for pre-scheme negotiations (3 meetings)
 - 11 hours 45 mins @ £100 per hour = £1,175.00
 - Mileage 327 @ 50p per mile = £163.50
- as agent - for pre-Lands Tribunal referral negotiations
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 - Mileage 316 @ 50p per mile = £158.00
- outlay
 - Dr Blackstock for preliminary valuation = £283.41
 - Ness Landscapes = £40.00
- for expert advice following the referral
 - 37 hours @ £125 per hour = £4,625.00
 - Mileage 309 @ 50p per mile = £154.50

ORDERS ACCORDINGLY

25th January 2011

Mr M R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

LANDS TRIBUNAL FOR NORTHERN IRELAND