The Lands Tribunal

Decisions

LANDS TRIBUNAL ACT 1949
LCA/98/1999

COMPENSATION - Tree Preservation Order - refusal of consent to fell two trees - consent subsequently granted after Public Inquiry - claim for loss of earnings and other costs incurred in pursuing matter and damages for stress, inconvenience and anxiety – Town and Country Planning Act 1990 Section 203. Compensation awarded £5,739 and interest from 11 August 1994.

IN THE MATTER of a NOTICE OF REFERENCE

BETWEEN

JAMES MOONEY

Claimant

and

WEST LINDSEY DISTRICT COUNCIL

Respondent

Re: 17 Southlands Gardens, Morton, Gainsborough, Lincs

Tribunal Member: P.R.Francis FRICS

Sitting at: Newark County Court, Crown Building, 41 Lombard Street, Newark.

On 14 January 2000

The Claimant in person.
Robert Ashworth, solicitor to West Lindsey District Council, for the respondent.

The following cases are referred to in this decision:

Factorset Limited v Selby District Council [1995] 2 EGLR 190.
Buckle v Holderness District Council [1996] 2 EGLR 133.
Bollans v Surrey County Council (1968) 20 P&CR 745.
Fletcher v Chelmsford Borough Council [1991] 2 EGLR 133.

DECISION

1. This is a reference to determine the compensation, if any, payable to Mr. James Mooney ("the claimant") by West Lindsey District Council ("the Council") under section 203 of the Town and Country Planning Act 1990 ("the 1990 Act") consequent upon the refusal of consent to fell two trees at 17 Southlands Gardens, Morton, Gainsborough, Lincs ("the subject property"), under the terms of a Tree Preservation Order.

2. The hearing was conducted under the Simplified Procedure (Rule 28, Lands Tribunal Rules 1996), and the claimant appeared in person. Mr. Robert Ashworth, Solicitor to West Lindsey District Council appeared for the respondent.

3. The claimant had produced, prior to the hearing, substantial and voluminous documentation relating to his ongoing dispute with the Council and its officers, much of it having little or any relevance to the issues which I am to consider. I therefore make only passing reference to it where appropriate. Due to the strained relationship between the parties, a statement of agreed facts had not been prepared, but from the documentation produced and the oral evidence given at the hearing, I find the following facts:

3.1 The County of Lincoln, Parts of Lindsey, Tree Preservation (Morton) Order 1969 ("the TPO") was made on 30 October 1969. It related to a large number of trees in the general area.

3.2 The claimant purchased the subject property, a detached house on a new estate, in 1979, and added a garage extension in 1983. The trees within the boundaries of the property covered by the TPO were specified as within groups G.1 and G.9 in the schedule to the Order.

3.3 In April 1987, whilst re-planning his garden, the claimant applied for consent to fell five trees, and carry out surgery on others. This followed a

report from an arboricultural expert who had advised that two of the trees in particular – a sycamore (T4) and a lime (T5) were too close to the house. Consent to fell three trees was granted, together with some surgery works, but in respect of trees T4 and T5 it was refused. The claimant appealed against the refusal to fell the two remaining trees, the subject of his application. The appeal was dismissed in January 1988.

3.4 In June 1994 the claimant made a further application to the Council for consent to fell ten trees that were covered by the TPO, these forming a line along the rear, north-east boundary which separates the house from the adjacent Walkerith Road. Following a report by Arthur Arbon, of Tree Advisory Services, North Hykeham, Lincoln, commissioned by the Council, (which had recommended that trees T4 and T5 were reduced by 50 per cent) and advice from the District Planner, consent to fell was refused on 11 August 1994, but permission was granted to install a cable brace in one of the trees, (T9). It is this refusal that forms the basis of Mr. Mooney's claim.

3.5 In October 1994 the claimant submitted an appeal to the Secretary of State for the Environment, with a further amended appeal in December 1994 to cover the application for the Article 5 Certificate to be lifted, thus allowing him to claim compensation. Following correspondence with the Government Office for the East Midlands, the claimant applied for the appeal (which was in respect of trees T4 and T5 only) to be heard by means of a Public Inquiry. A Public Local Inquiry was held in June 1996 and the decision of the Secretary of State was issued on 31 July 1996. This allowed the appeal and granted permission to fell the two trees, subject to a replanting scheme, and also cancelled the article 5 certificate insofar as it related to the appeal trees.

3.6 In September 1996 Mr. Mooney submitted a claim for compensation in the sum of £2,105,368. Subsequently, due to illness, and his understanding that an agreement had been reached with the Chief Executive of the Council to the effect that the matter would be dropped if no further correspondence was entered into, the claimant did not pursue the claim.

3.7 On 20 May 1999 the Council wrote to the claimant to make arrangements for the inspection of the replanting scheme. Following this, the claimant reactivated the claim at a revised figure of £700,000.

3.8 The Notice of Reference was dated 16 July 1999.

Issues.

4. The claimant had submitted his claim in two parts. Firstly, direct loss of earnings and free time in preparing the case for the felling of the two trees, preparing the appeal, and subsequent correspondence with the respondent following the Secretary of State's decision, together with costs of consultants and advisers and incidental expenses. This amounted to £200,000. The second part of the claim was stated to be for the loss and damage to the physical and mental wellbeing of the claimant and his family, caused by the Council's actions, and amounted to £500,000.

5. It was for me to consider the validity of the constituent parts to these heads of claim, and determine accordingly. At the end of the hearing, I determined which of the heads of claim were, in my judgment, valid and acceptable, the parties then agreed quantum in those respects, and I summarise those below. The only matter reserved for subsequent decision related to interest on allowable costs.
Claimant's case.

6. Mr. Mooney said that the whole matter, and dispute with the Council, had arisen as a result of its failure to act to ensure the safety of him and his family and its unreasonable attitude to his concerns. In his view, the trees for which permission to fell had been refused had constituted a clear and present danger due mainly to their size and close proximity to the house. Tree T4, a sycamore, was 16.4m. in height, and 6.5m from the house, and tree T5, a lime, was 15.9m. high and only 2.3m. from the rear wall. He referred to the report prepared upon his instructions in respect of the 1987 application, and to Mr. Arbon's report to the Council, which had recommended the trees be reduced in size by 50 per cent. This view had been supported by Mr. Northcote for the District Planner, but despite those recommendations the planning committee had refused permission to do anything to the those trees and had only allowed him to do some work on tree T9, which was not as near to the property.

7. Mr. Mooney said he made an application for a Public Inquiry, but following discussions with the Council regarding his, and other residents, requirements for a risk assessment on the TPO trees (which the Council had initially refused to do), withdrew that application when it eventually agreed. That assessment, he said, also concluded that the trees should be felled, but when the Council again refused to allow felling, despite its officer's recommendation, he applied for the inquiry to be re-instated. Prior to the Inquiry taking place, Mr. Mooney said that in January 1996, branches from one of the trees fell onto a patio in

the garden where only minutes earlier his daughter had been playing, and caused damage to a pergola and ornamental wall. Again, despite his resulting approaches to the Council over his renewed concerns over safety, he said it was still not prepared to relent.

8. The claimant said that due to the stress caused by the Council's attitude, and its constant refusal to heed specialist's recommendations over the trees, he had had to take many months off work to concentrate solely, and full time, on fighting what he described as a blatant abuse of power. He asserted that the Council had a duty under Health and Safety legislation to ensure its constituents were not put at risk, and had any damage or injury occurred as a result of his not being allowed to fell the trees, then he would have held it responsible. Mr. Mooney said that the Council was putting its concerns over the potential loss of amenity which removal of the trees might create, over and above the value of human life.

9. In cross-examination, Mr. Mooney admitted that he had not removed the dead branch on tree T5, highlighted in Mr. Arbon's report, although he said he had not seen it. He also accepted that despite the close proximity of the two trees to the house, he had proceeded to build a substantial extension, in 1983, which resulted in tree T5 being only just over two metres from the rear wall, and the roof being overhung by branches. He said that no special foundations, to allow for possible tree root damage, had been incorporated. In response to a question from me, Mr. Mooney said that he had not made any claim on his household insurance policy regarding the damage caused by falling branches.
Respondent's case.

10. Mr. Ashworth said that the Council had not been unreasonable, but that there had been a fundamental disagreement with the claimant over the trees concerned, and that Mr. Mooney's attitude throughout, evidenced by the protracted and at times bitter correspondence, had militated against any opportunity for the matter to be resolved by a common sense approach.

11. He said there was no suggestion that the Council regarded retention of the trees as more important than life and limb, and had Mr. Arbon's report recommended felling, or intimated there was any immediate danger, then no doubt the Council's decision would have been different. As to the Health and Safety and duty of care aspects to which the claimant had referred, Mr. Ashworth said there was no case law, of which he was aware, to support the contention that the Council's duties in that regard extended to TPO's, and said that Mr. Mooney had

failed to point to any authorities to support his claims.

12. In respect of the risk assessment carried out on trees T4 and T5 by Mr. Elliott of the Council, Mr. Ashworth said the report had concluded that T4 had a low to medium risk assessment of failure under normal conditions, felling had not been recommended, and only normal maintenance and removal of deadwood was required. T5 had a medium risk assessment of failure under normal conditions, and due to the tree having been extensively worked upon, and some damage to its root structure having been caused by the building of the extension, consideration should be given to its removal in the long term. It was also stated in Mr. Elliott's report that some trauma could have been caused to both trees due to the construction by the claimant of the patio and timber and brick structures between them, and Mr. Ashworth therefore concluded that the claimant had materially contributed to any problems with the trees by his own actions. He said that none of the experts who had inspected the trees had concluded that there was any imminent danger therefrom, and refuted the claimant's suggestion that the reports had condemned the trees, saying that his comments had been selective, and taken out of context. What is more, he said, the inspector's decision at the enquiry, to allow the trees to be felled was finely balanced.

13. Mr. Ashworth said that the Council contends that the claimant is not entitled to compensation as claimed, and said it was for this Tribunal to establish whether any loss suffered was such as might "fairly and reasonably be considered as arising naturally from the refusal of consent under the Order" and that the case should be determined on "its facts and merits". These principles were, he said, established in Factorset Limited v Selby District Council [1995] 2 EGLR 190. He said that the decision in Buckle v Holderness District Council [1996] 2 EGLR 133, which related to compensation being awarded to a claimant for the cost of underpinning foundations damaged by roots of a tree the subject of a TPO, should not apply in this instance. In that case an application for consent to remove the tree had been refused both by the local authority, and by the Secretary of State on appeal. Compensation for the appeal costs was awarded as a consequence of a loss that flowed from the Council's refusal of consent, because, it was held, it was reasonable for the claimant to have pursued the appeal to mitigate his loss.

14. The majority of the items claimed, particularly in relation to the costs of Mr. Mooney's own time were, Mr. Ashworth said, artificial and inflated, and apart from some of the experts costs, were not substantiated by receipts or any other form of proof. The claim for the cost of repairs by Stevenson Building

Services in the sum of £2,200 for works to the structures damaged by a falling branch were not a valid head of claim, in that not only had it not been included within the original claim, but also the structures had been built by the claimant in 1988 when he was already concerned about the trees, and had admitted he was aware of the dangers. Also, no insurance claim had been made. All heads of claim in the second part of Mr. Mooney's claim were entirely refuted, and Mr. Ashworth submitted that the claim in its entirety was ill-founded, excessive and an abuse of the Tribunal's process.

Decision.

15. Firstly, there is no doubt in my mind that the claimant has become obsessed, over a period of many years, with the need to remove as many trees as possible from the rear garden of his property. Although this reference relates purely to the amount of compensation (if any) to be awarded in respect of the Council's refusal of consent in 1994 and the appeal to a Public Local Inquiry in 1996, there is much more to the matter. Not only was there the earlier application for consent to fell trees in 1987, and the appeal therefrom, but, as extensively documented within the claimants trial bundles, there were further applications in 1995 by the claimant's wife and daughter, and another appeal to the Secretary of State.

16. In addition to the evidence that relates directly to the issues upon which I am to decide, the claimant submitted documentation running to three ring binders containing over sixty appendices. Most of this related to his ongoing dispute with the Council, and much has had to be disregarded as irrelevant.

17. The first part of Mr. Mooney's claim can be summarised as:

1. Loss of Earnings (May 1994 to September 1995).£143,000
   Mr. Mooney said that he had re-commenced employment on a part time basis in February 1995, and full time in September 1995, and thereforewas not claiming loss of wages after this time.
2. Loss of Free Time (Jun 1994 to June 1996)£ 42,000
   This claim relates to additional time beyond normal working hours as claimed in (1) above, dealing with correspondence with the Council prior to the appeal.
3. Loss of Free Time for Claimant's Wife (June 1994 to June 1995)£ 10,000
4. Loss of Free Time corresponding with third parties (June 1994 to June 1996)£ 36,000
5. Loss of Free Time in preparing appeal (March to June 1996)£ 14,700

6. Loss of Free Time corresponding with the Council following the appeal. (June 1996 to March 1997)£ 18,000
7. Cost of Consultants£ 5,000
8. Incidental expenses£ 1,000
9. Cost of Repairs to Garden Structures£ 2,200

Items 1 to 9 amount to £271,900, against which the claimant had made a reduction of £71,900 to allow for potential duplication and tax, resulting in a net claim rounded to £200,000.

18. No documentary evidence, receipts, dockets or other substantiation was produced in respect of claim items 1 to 6. I am assisted here by the case of Bollans v Surrey County Council (1968) 20 P&CR 745., a Lands Tribunal decision in which R.C.Walmsley FRICS in dealing with an unquantified claim for loss of profits, said at p756:
" Whilst, therefore, I am in no doubt that Mr. Bollans has been deprived of much anticipated pleasure as a result of finding his woodland operations confined within the cleared one-third acre, and I can sympathise with his feelings of frustration, I am not satisfied that he has also been put to a financial loss. This is not a finding that that he has in fact suffered no damage under this head; it is a finding that I am unable to award any compensation for loss of profit, because the claimant has failed to establish the extent of his loss, if any".
In disallowing the costs claimed, he went on to say:
" ....but I should add that the claimant failed to produce any details, or supporting evidence such as receipted accounts, to substantiate that the stated expenditure had in fact been incurred".

19. In Mr. Mooney's case, the amounts claimed are, in my judgment, wholly speculative and without foundation. He has claimed sums based upon what he says he would have earned had he been working full time. In other words, for the periods he was not gainfully employed, and for the periods he was working part time, he has sought to replace, in full, the income that he had previously enjoyed. In addition, he has claimed substantial sums for loss of free time, thus contending that the time needed to prepare for the appeal not only accounted for the whole of his normal working week, but also ate into his, and his wife's free time.

20. As I indicated at the conclusion of the hearing, I find there are no sustainable grounds for allowing any of the amounts claimed under these heads.

Applying the principle in Factorset, I do not consider that any of the "losses" referred to could fairly and reasonably be considered as arising naturally from the refusal of consent under the TPO, and thus award nil in relation thereto.

21. As to the cost of consultants, the Council accepted that the principle that this was a valid head of claim was established in Fletcher v Chelmsford Borough Council [1991] 2 EGLR 133., and Mr. Mooney confirmed that all the costs were incurred post the date of refusal - 11 August 1994. The parties agreed that the report of Mr. Jorgensen at a cost of £1,350 was in respect of the appeal, and the Council accepted it subject to a receipted invoice being produced by the claimant. The arboricultural report of Mr. Wynn at £1,250 and Mr. Mooney's solicitors costs at £2,139 were accepted and receipted invoices for those were produced. I confirm, therefore, that the compensation awarded under claim item 7 amounts to £4,739.

22. Mr. Mooney had claimed £1,000 for incidental expenses, including mileage, stationery, photocopying etc. Although again not fully substantiated by receipts, the Council accepted this head of claim as reasonable and I therefore award that amount.

23. Claim item 9 related to the invoice from Stevenson Builders for repairs to the claimant's garden structures. I accept the Council's submission that, by not making a claim under his insurance, the claimant had failed to take action to mitigate his loss. I award nil under this head.

24. The second part of the claim, amounting to £500,000, was for loss and damage of indirect costs resulting from the Council's actions, including loss of faith in the democratic system, and damage to the emotional state of the claimant and his family. Mr. Mooney accepted at the hearing that this element of the claim was "totally subjective", and could not be substantiated by evidence or in monetary terms. In my judgment, the Factorset principles apply equally to this part of the claim. As indicated orally, I determine compensation under this part of the claim at nil. In doing so, I fully accept and concur with the Council's conclusions that this element of the claim in particular was ill-founded, excessive and an abuse of the Tribunal's process.

25. The final issue for my determination relates to interest on the compensation that has been awarded. Mr. Ashworth submitted that the claimant had taken an excessive amount of time to bring the claim – some three years since the Inspector's decision, and thus the Council's liability should be limited. There

was also a question as to the point from which interest should run, if indeed I should determine that it is payable. In that regard he referred to Buckle in which the Tribunal member had concluded the claimant was not entitled to interest under the relevant statutory provisions, and in any event it is the duty of the Tribunal to award compensation. Whether or not interest is payable on that compensation is clearly the subject of separate statutory provisions the interpretation of which, the member said, strictly lies elsewhere.

26. However, in that case, the operative date (upon which consent was refused) was in October 1990. That date is relevant here because interest runs on compensation from the date the consent required by the tree preservation order is refused or granted subject to conditions (Planning and Compensation Act 1991, s.80 (1) and Sched. 18, Pt1), provided that it is after 25 September 1991 (S.I.1991 No 2067 art.4 and Sched. 2, para 6(29). (My emphasis).

27. It is clear therefore that the Act makes provision for the payment of interest from the date of refusal in cases where the operative date is after 25 September 1991 (as in the instant case), and there is no provision for the application of an arbitrary cut off point.

28. In summary, I determine that the Council shall pay to the claimant compensation of £5,739 to which interest shall be added at the statutory rate from 11 August 1994.

29. This decision determines the substantive issues in this reference, and the Tribunal's award is final. In view of the provisions of Rule 28(11) of the Lands Tribunal Rules 1996, I make no award as to costs. Rights of appeal under section 3(4) of the Lands Tribunal Act 1949 and order 61 rule 1(1) of the Civil Procedure Rules will come into operation from the date of this decision.

DATED

(Signed) P.R.Francis FRICS.