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UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0214 (LC)
UTLC Case Number: ACQ/130/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – electricity – grant of necessary wayleave under Schedule 4 of Electricity Act 1989 – overhead line – injurious affection – whether section 44 of the Land Compensation Act 1973 applies – application of the principle of equivalence

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**NEVILLE JAMES STYNES AND BARBARA STYNES**	**Claimants**
	and	
	WESTERN POWER (EAST MIDLANDS) PLC	**Compensating Authority**

Re: 8 Turlands Close,
Walsgrave,
Coventry
CV2 2PT

Before: Sir Keith Lindblom, President and Mr A.J. Trott F.R.I.C.S.

Sitting at: 43-45 Bedford Square, London WC1B 3DN
on 18 and 19 April 2013

Mr Stephen Tromans Q.C. and *Mr Richard Wald*, instructed by Hugh James Solicitors, appeared for the claimants
Mr David Elvin Q.C., instructed by Squire Sanders (UK) LLP, appeared for the compensating authority

section 44, a relevant taking or acquisition of land for the purpose of the works giving rise to the claim for compensation, that acquisition or taking took place, and the works themselves were carried out and completed, before the 1973 Act came into force. In our view Mr Elvin was right to submit that the provisions of section 44 do not bite in a situation such as this. It seems to us impossible to construe the statutory language as having that retrospective effect.

79. Thirdly, section 44 does not extend the scope of claims for compensation for injurious affection beyond cases in which the injurious affection is of land retained by a person from whom other land is acquired or taken for the purpose of the works, and this is not such a case. The works in question must be works that are to be situated at least "partly" on land owned by the claimant and subject to the acquisition or taking. If the works are to be situated only on land in which the claimant has no interest the provisions of section 44(1) do not apply. In this case, as Mr Elvin submitted, for the extended definition of injurious affection of section 44 to be engaged, there would have to have been works of the licence holder at least partly situated on the reference property. Since there are no relevant works situated, even in part, on the reference property, section 44 could not operate to bring the effect of the whole of the works into the scope of compensation for injurious affection to the value of the reference property.

The principle of equivalence

80. We come finally to the principle of equivalence.

81. The principle itself is not controversial. It is long established and well understood, and indeed is a fundamental part of the law of compensation for compulsory purchase. In *Horn v Sunderland* Scott L.J. referred (at p.49) to "the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss". He had observed (at p.40) that the "main object" of the Acquisition of Land (Assessment of Compensation) Act 1919 was "undoubtedly to mitigate the evil of excessive compensation which had grown up out of the theory, evolved by the Courts, that because the sale was compulsory the seller must be treated by the assessing tribunal sympathetically as an unwilling seller selling to a willing buyer". He went on to say this (ibid.):

> "The word "compensation" almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that, unless he received a price that fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice. The 1919 Act, by its abolition of the ten per cent. addition for compulsory purchase (s.2 r.1), and by its special rules in rr.3, 4 and 5, undoubtedly contributed to the intended reform, but perhaps the provision that was most likely to check exaggerated prices for the land was the reversal by r.2 of the old sympathetic hypothesis of the unwilling seller and the willing buyer which underlay judicial interpretation of the Act of 1845."

82. More recently, Lord Nicholls, in the Privy Council in *Shun Fung*, said this (at p.125):

> "The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it

might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail."

83. In *Waters v Welsh Development Agency* [2004] 1 W.L.R. 1304 Lord Nicholls (in paragraph 4 of his speech, at p.1307B) described the aim of compulsory purchase compensation as being "to provide a fair financial equivalent for the land taken". In the context of the *Pointe Gourde* principle and the separation between the concepts of "value to the owner" and "value to the purchaser", he said (in paragraph 61, at p.1319C-E) that Parliament's objective had been to provide "dispossessed owners with a fair financial equivalent for their land". They were to receive "fair compensation but not more than fair compensation". This was the "overriding guiding principle when deciding the extent of a scheme."

84. We cannot accept Mr Tromans' submissions on the application of the principle of equivalence in the circumstances of this case.

85. As Mr Elvin submitted, the principle that a claimant is entitled to receive, as Lord Nicholls put it in *Shun Fung*, compensation for "losses fairly attributable to the taking of his land, but not to any greater amount", applies to the determination of compensation under the relevant statutory scheme. It does not extend the scope of compensation available under paragraph 7(1) of Schedule 4 to the 1989 Act beyond the parameters set by that provision. The compensation properly recoverable under paragraph 7(1) remains "compensation in respect of the grant". The principle of equivalence does not generate a right to be compensated for losses that do not flow from the grant of the necessary wayleave itself. It does not increase the compensation available under paragraph 7(1) to a level that could only be attained if section 44 of the 1973 Act were engaged. It does not entitle the claimants to receive compensation for injurious affection attributable to the presence and use of the compensating authority's apparatus on the land adjacent to the reference property. Such compensation, as we have said, cannot be paid in a case such as this, where no land has been taken from the claimants, no interest in land created, and no property rights acquired.

86. Mr Tromans complained that this conclusion is both unfair and unjust. We disagree. In this statutory context the principle of equivalence rests in the concept of "compensation in respect of the grant". Parliament has embodied the principle of fair compensation in those statutory words. If the compensation due to a claimant is less when a necessary wayleave for a period of 15 years has been granted under Schedule 4 than when land or rights are compulsorily acquired under Schedule 3, the principle of equivalence is not offended. Sometimes, no doubt, a smaller amount of compensation will be payable because the licence holder has sought and acquired a 15-year wayleave for a particular section of line rather than a permanent easement. But the principle of equivalence does not mean that a claimant is entitled to an equal amount of compensation in either case. What it requires is a fair and complete assessment of compensation under the relevant statutory scheme.

87. Neither in combination with section 44 of the 1973 Act nor independently of it does the principle of equivalence justify the approach Mr Tromans urged upon us. If, as we have held,

section 44 of the 1973 Act does not apply to the assessment of compensation for injurious affection when a necessary wayleave is granted under Schedule 4, we do not think the principle of equivalence is a means of achieving the same result. To expand the concept of "compensation in respect of the grant" so as to mean compensation both in respect of the grant and in respect of matters not in the grant would distort it more than it could bear. Construing the statutory words in that way would not, in our view, be consistent with the principle of equivalence. It would negate that principle. It would warrant an award in excess of fair and full compensation for any loss one could attribute to the consent given under paragraph 6. Thus it would offend the jurisprudence in the passage of Lord Nicholls' speech in *Shun Fung* to which we have referred and on which Mr Tromans sought to rely. Fairness does not require compensation in this case to be assessed as if the grant of the necessary wayleave under Schedule 4 could be equated with a compulsory acquisition of land or rights over land under Schedule 3. Fairness surely requires the statutory provisions to be read and applied as they are framed. The Court of Appeal did not suggest otherwise in *Welford*.

88. Finally, we come to the argument Mr Tromans reserved: that the Court of Appeal's decision in *Edwards* was wrong. In that case the court held that, under section 63 of the 1845 Act, compensation for injurious affection should be awarded only for such injury as had resulted from the use of the land acquired from the landowner being compensated, and not for any injury attributable to the use of land acquired from others. Mr Tromans suggested that that conclusion would be untenable in the modern culture of "full and fair compensation". As he pointed out, its correctness was questioned by Carnwath L.J. (as he then was), giving the judgment of the Court of Appeal in *Moto Hospitality Ltd.* (at paragraph 54), where he said that the court had "some doubt" whether *Edwards* would have been decided the same way today, having regard, for example, to the Privy Council's decision in *Shun Fung*. But Carnwath L.J. expressed no concluded view on that question. He acknowledged that the effect of the decision in *Edwards*, as it bore on section 63 of the 1845 Act (now section 7 of the 1965 Act), had been reversed by section 44 of the 1973 Act.

89. As we think Mr Tromans acknowledged, it is not for us to decide whether or not the Court of Appeal was wrong in *Edwards*. In determining this reference we must take the statutory provisions as we find them, and apply them in the light of the relevant case law. In our view Mr Tromans' submissions on *Edwards* do not enhance his argument on the issues we have to decide, either on section 44 of the 1973 Act or on the principle of equivalence.

Conclusion

90. For the reasons we have set out we cannot accept Mr Tromans' argument. In our view Mr Elvin's submissions are well founded and we accept them. Compensation for injurious affection in this case will therefore be assessed on the basis contended for by the compensating authority. As we have said, the parties have agreed that the amount of compensation payable to the claimants in the event that section 44 of the 1973 Act does not apply in this case is £4,000, and we so determine.

91. A letter on costs accompanies this decision, which will take effect when, but not until, the question of costs is determined.

Dated 19 July 2013

Sir Keith Lindblom, President

Mr A.J. Trott F.R.I.C.S.

Addendum on costs

92. The compensating authority has applied for its costs.

93. We shall deal with this application under rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (see rule 10 of the Tribunal Procedure (Amendment No.3) Rules 2013).

94. The compensating authority made sealed offers to settle the claimants' claim for compensation on 25 November 2011, on 9 February 2012, and on 17 February 2012. The Tribunal's award exceeds each of those three sealed offers.

95. A further sealed offer, in a letter dated 19 July 2012, was for £4,500, plus reasonable pre-reference costs and reasonable legal and professional fees up to the date of the offer, in "full and final settlement" of the claim. The compensating authority says this offer "was served in accordance with Rule 13 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 by sending it by pre-paid post or Document Exchange to the Claimants' Solicitors at their address for service on 19 July 2012". A copy of that sealed offer was lodged with the Tribunal on 23 October 2012. The Tribunal's award of £4,000 does not exceed the sealed offer of 19 July 2012. The compensating authority therefore submits that the principle in section 4(1) of the Land Compensation Act 1961 ("the 1961 Act") should be applied, with the consequence that the claimants should bear their own costs and be liable for the compensating authority's costs from 19 July 2012. There are no special reasons to make any other award. As the pre-reference costs are part of an award of compensation payable under rule 6 in section 5 of the 1961 Act, and as no details of these costs were submitted to the Tribunal by the claimants during the proceedings, no additional award should be made for these costs. But in any event the sealed offer of 19 July 2012 treated pre-reference costs as a separate payment. It follows that any award of pre-reference costs would make no difference to the application of the principle in section 4 of the 1961 Act in this case.

96. The claimants resist any order for costs being made against them. They say that at the time when the wayleave was granted, in September 2010, the compensating authority was "only prepared to pay £1,000 for an easement to keep the line in situ". After the claim was referred to

the Tribunal, on 31 October 2010, the compensating authority made its four sealed offers. The last of these offers was "not actually received by the claimants until 10 January 2013". The claimants accept that the Tribunal's award of £4,000 is a less favourable outcome than the compensating authority's final offer. They accept too that the general rule is that the successful party ought to receive its costs. And they accept that the legal argument they put forward has failed. However, they say, they acted reasonably in putting this argument before the Tribunal. The legal issues were important for the power generating industry, and the outcome has implications for many other cases. To make an award of costs against them in these circumstances would be unjust.

97. In its reply to those submissions the compensating authority maintains that its final sealed offer was sent to the claimants' solicitors "at their address for service on 19 July 2012". There was no response. On being asked, in January 2013, whether they had received the sealed offer, they said they had not. A further copy of it was therefore sent to them on 10 January 2013.

98. In their letter to the Tribunal dated 25 October 2013 the claimants' solicitors say:

> "... We have no record of having received the offer letter dated 19 July 2012 and the [compensating] authority's solicitors have not provided any fax confirmation or proof of posting. It was only when we received an e-mail from the [compensating] authority's solicitors dated 8 January 2013 referring to the sealed offer that we were aware of it. We note that the letter is marked "by fax and post" but also bears our DX number in the address section. We maintain that we have no record of having received the offer when it was originally sent."

99. With their letter of 25 October 2013 the claimants' solicitors have provided the relevant correspondence between themselves and the compensating authority's solicitors.

100. In our view the compensating authority's submissions are clearly correct in principle, and we accept them. The general principle in section 4 of the 1961 Act clearly applies in this case. The Tribunal's award exceeds the sealed offers made by the compensating authority in November 2011 and February 2012, but not the final one. The fact that the contentious issues in this claim were matters of law and the possibility that our decision will have implications for other cases are not, in our view, reasons for departing from the basic principle that in these circumstances an award of costs will be made against a claimant.

101. This leaves the question of the date from which costs should be awarded. The claimants say that they did not receive the compensating authority's final sealed offer until 10 January 2013. The compensating authority, as we understand it, does not dispute this as a matter of fact. But it insists that the offer was sent to the claimants' solicitors on 19 July 2012.

102. We note that the compensating authority's solicitors' letter dated 19 July 2012 concludes:

> "We look forward to hearing from you."

It seems to have been only on 8 January 2013, in an e-mail to the claimants' solicitors, that the compensating authority's solicitors sought the claimants' response to that offer. The claimants' solicitors responded in an e-mail on the same day. They said that they had not received a sealed offer dated 19 July 2012, and that the most recent offer they had had was the one made in the compensating authority's solicitors' letter dated 17 February 2012. They asked for a copy of the sealed offer letter to which the compensating authority's solicitors had referred "by return". Two days later, on 10 January 2013, the compensating authority's solicitors enclosed a copy of their letter dated 19 July 2012 with a letter to the claimants' solicitors, in which they said:

> "We enclose for your attention a copy of our client's sealed offer letter dated 19 July 2012, previously sent to you by fax and by DX on 19 July 2012, which remains open for acceptance by your client.
> ...".

The Tribunal had received a copy of the compensating authority's sealed offer dated 19 July 2012 with a letter from the compensating authority's solicitors dated 23 October 2012. A second copy was sent to the Tribunal on 10 January 2013.

103. We cannot find, in the light of the material before us, that the compensating authority's solicitors failed to send the final sealed offer to the claimants' solicitors on 19 July 2012. Nor, however, can we find that the claimants received that offer before 10 January 2013. In the five and a half months between 19 July 2012 and 8 January 2013 there appears to have been no correspondence about it. In the circumstances we think the right thing to do is to award the compensating authority its costs from 31 January 2013, which allows 21 days as a reasonable time for the claimants to consider and respond to the offer once they had received it.

104. The claimants must therefore pay the compensating authority's costs from 31 January 2013, such costs, if not agreed, to be the subject of detailed assessment by the Registrar on the standard basis.

105. The parties have agreed the pre-reference costs in the sum of £2,600 plus VAT, and this will be reflected in any order the Registrar is required to make.

106. Finally, we note the submissions made on either side on interest. The claimants submit that they are entitled to interest. The compensating authority accepts this. However, as it points out, the applicable rate of interest is currently nil, and it follows that no interest is payable on our award.

Dated: 8 November 2013

Sir Keith Lindblom, President

A.J. Trott F.R.I.C.S.