

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2020] UKUT 0328 (LC)

UTLC Case Number: LCA/60/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION - COSTS - certificate of appropriate alternative development - whether the Upper Tribunal has power to award costs in an appeal under s.18, Land Compensation Act 1961 - whether proceedings for compensation for compulsory purchase - s.29, Tribunals, Courts and Enforcement Act 2007 - rule 10(6)(a), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

IN THE MATTER OF AN APPEAL UNDER SECTION 18,

LAND COMPENSATION ACT 1961

BETWEEN:

LEECH HOMES LTD

Appellant

and

NORTHUMBERLAND COUNTY

Respondent

COUNCIL

Re: Land at East Lane End Farm,

Morpeth, Northumberland

Determination on written representations

© CROWN COPYRIGHT 2020

The following cases are referred to in this decision:

Boulder Bridge Lane Trust v Barnsley MBC [2017] UKUT 81 (LC)

Bonnell and Morgan v Carmarthenshire County Council [2016] RVR 194

BPP (Farringdon Road) Ltd v Crossrail Ltd [2015] UKUT 356 (LC)

Introduction

1.

In an appeal against a certificate of appropriate alternative development under section 18, Land Compensation Act 1961 does the Tribunal have power to order that one party should pay the costs incurred in the appeal by the other party?

2.

By a decision handed down on 6 May 2020 ([2020] UKUT 150 (LC)), the Tribunal dismissed an appeal under section 18, Land Compensation Act 1961 against the grant by the respondent, Northumberland

County Council, of a “negative” certificate of appropriate alternative development in respect of land at East Lane End Farm, on the outskirts of Morpeth in Northumberland. The applicant for the certificate and the appellant in the appeal is Leech Homes Ltd, which had been the owner of the land before 16 March 2015 when it was compulsorily acquired by the Council for the construction of the Morpeth northern bypass.

3.

The parties have now made submissions on costs. These raise a point of principle of some significance in this type of appeal.

4.

The appellant’s submissions were settled by Mr Paul Cairnes QC. Mr James Pereira QC and Ms Daisy Noble prepared the Council’s submissions. We are grateful to them all for their assistance.

Expenses incurred by the appellant in the appeal

5.

The Tribunal’s decision confirmed the negative certificate granted by the Council under section 17, 1961 Act. Despite the appeal having been wholly unsuccessful the parties agree that the appellant is entitled to the benefit of section 17(10) in respect of its own costs (or “expenses” as they are termed in that provision). Section 17(10) provides that:

“In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person’s favour).”

6.

Having regard to section 17(10), costs incurred in connection with the issue of a certificate by a person who is entitled to compensation are a potential head of compensation and will be recoverable under the 1961 Act to the extent that they were reasonably incurred. Costs incurred in connection with an appeal are expressly included in this head of compensation, subject to the qualification that at least one of the issues in the appeal must have been determined in the appellant’s favour. Where no issue in the appeal was determined in favour of the person entitled to compensation, the inference would appear to be that the costs incurred in the appeal will not be a recoverable head of compensation. That question was not the subject of detailed argument because the Tribunal is not concerned at this stage with the quantification of compensation, so we express no concluded view on it.

7.

There is no need for the Tribunal to make any order in relation to the appellant’s costs, as they are already covered by section 17(10) and can be considered in a future claim for compensation if the parties cannot reach agreement. For the same reasons the Tribunal in *Boulder Bridge Lane Trust v Barnsley MBC* [2017] UKUT 81 (LC) did not have to resolve the issue of jurisdiction when it declined to make an order for costs in favour of a successful appellant in an appeal under section 18.

The Council’s costs of the appeal

8.

Section 17(10) applies only to expenses incurred by a person to whom compensation is payable. No provision is contained in sections 17 or 18, 1961 Act for the payment of expenses incurred by an

acquired authority. In practice the authority is usually the respondent to an appeal under section 18, but it could also be the appellant.

9.

The Tribunal's general power to make orders for costs is contained in section 29, Tribunals Courts and Enforcement Act 2007, which provides (so far as material):

"29. Costs or expenses

(ii)

The costs of and incidental to -

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

10.

The relevant Tribunal Procedure Rules are the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended. Rule 10 is concerned with costs. In its current form, and so far as material, it provides:

"Orders for costs

10. - (1) The Tribunal may make an order for costs on an application or on its own initiative.

(2) Any order under paragraph (1) -

(a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);

(b) must, in a case to which section 4 of the Land Compensation Act 1961 applies, be in accordance with the provisions of that section.

(3)-(5) [...]

(6) The Tribunal may make an order for costs in proceedings -

(a) for compensation for compulsory purchase;

(b) for injurious affection of land;

(c) under section 84 of the Law of Property Act 1925 (discharge or modification of restrictive covenants affecting land);

(d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales;

(e) under Schedule 3A to the Communications Act 2003;

- (f) under the Riot Compensation Act 2016; and,
- (g) on any appeal from the First-tier Tribunal relating to—
- (i) a reference by the Chief Land Registrar, or
- (ii) any other application, matter or appeal under the Land Registration Act 2002.”

11.

The general power conferred by section 29, 2007 Act is limited by the Rules. Rule 10(2) constrains the circumstances in which the Tribunal may make an order for costs to the cases identified in sub-paragraphs (3) – (6). In a case to which section 4 of the 1961 Act applies, the power is further restricted and the Tribunal’s order must be in accordance with the provisions of that section. Sub-paragraphs (3) and (4) contain general powers applicable to all proceedings, such as the power to award wasted costs, or to order reimbursement of fees. Sub-paragraph (5) allows orders for costs to be made in judicial review proceedings. Sub-paragraph (6) then identifies eight categories of proceedings in the Tribunal in which an order for costs may be made.

12.

The parties disagree over the scope of rule 10(6)(a) which allows an order for costs to be made in “proceedings for compensation for compulsory purchase”. It is not suggested that any of the other categories of proceedings identified in Rule 10(6) is applicable to an appeal under section 18, 1961 Act.

13.

For the Council, the submission of Mr Pereira QC and Ms Noble was simply that an appeal against a certificate of appropriate alternative development falls naturally within the description “proceedings for compensation for compulsory purchase”. In substance, they submit, such an appeal is part of the proceedings for the assessment of compensation after land has been compulsorily acquired. The sole purpose of an application for a certificate is to facilitate assessment of the compensation payable. The Tribunal’s jurisdiction to determine such an appeal is part of the legal machinery for the assessment of compensation.

14.

The submissions of Mr Cairnes QC on behalf of the appellant were to the opposite effect. These proceedings are not “for compensation” and rule 10 makes no reference to a section 18 appeal at all. Nor does section 18 refer to compensation and the outcome of an appeal is not an award of compensation. In *Boulder Bridge*, at [54], the Tribunal had commented that rule 10(6) does not, “expressly at least”, include appeals under section 18. Section 17(10) deals specifically with the costs of one party and it ought to be assumed, Mr Cairnes suggested, that the omission of any power to award costs against an unsuccessful appellant was a deliberate policy decision.

15.

At the Tribunal’s invitation the parties also made short submissions on the Tribunal’s decision in *BPP (Farringdon Road) Ltd v Crossrail Ltd* [2015] UKUT 356 (LC), in which it was determined that a claim for compensation for temporary possession of land in connection with the Crossrail project could properly be described as “proceedings for compensation for compulsory purchase” so as to bring it within rule 10(6). Mr Cairnes submitted that BPP provided no guidance on the issue in this appeal, but Mr Pereira drew some support from the Tribunal’s discussion of rule 10(6), at [65]:

“Rule 10(6) is clearly intended as a classification of different types of proceedings in the Tribunal, which has numerous statutory jurisdictions many of which share common features. No attempt has been made comprehensively to list those jurisdictions in the rule, which suggests to us that the classification was intended to be broad rather than narrow. No reason of policy can be detected for distinguishing, for the purpose of the jurisdiction to award costs, between the taking of possession for a temporary period rather than permanently. In the same way no principled justification can be seen for distinguishing between different types of what can broadly be described as injurious affection. [...] We agree with Mr Purchas that an interpretation of rule 10(6) which required a fragmented and arbitrary division between and within proceedings generally concerned with the same subject matter is impossible to justify.”

16.

Mr Pereira emphasised that the classification of subject matter in rule 10(6) was “intended to be broad rather than narrow” and that “fragmented and arbitrary divisions” between and within proceedings generally concerned with the same subject matter could not be justified.

17.

This question has not previously been addressed by the Tribunal. Before 6 April 2012 the right of appeal against the issue of a certificate lay to the Secretary of State and appeals were determined by a planning inspector. Separate provision is made by section 17(10) for the costs of a claimant for compensation who is successful in an appeal and, so far as we are aware, no acquiring authority has previously applied for its costs of a section 18 appeal. In *Bonnell and Morgan v Carmarthenshire County Council* [2016] RVR 194 the Tribunal (Mr Norman Rose FRICS) made an order for costs of a section 18 appeal which had resulted in the issuing of a wider certificate than had originally been granted by the local planning authority. The successful appellants asked for an order for the payment of their costs, rather than waiting for them to be dealt with under section 17(1), but the only issue considered by the Tribunal was the basis of assessment of those costs. The Tribunal noted, at [108], that it was not suggested that it did not have power to award costs on a section 18 appeal or that the successful appellant’s costs must await the determination under section 17(10). The Tribunal proceeded on that agreed basis and did not consider its own jurisdiction.

18.

The place of a certificate in the statutory scheme is clear. Section 14, 1961 Act is about assessing the value of land in accordance with rule (2) of section 5 for the purpose of assessing compensation in respect of a compulsory acquisition. For that purpose section 14(3) provides that it may be assumed that planning permission is in force at the relevant valuation date for any development that is appropriate alternative development.

19.

An application may be made to the local planning authority for a certificate of appropriate alternative development only “where an interest in land is proposed to be acquired by an authority possessing compulsory purchase powers”: section 17(1). The function of a certificate is to identify development (or its absence) which is appropriate alternative development for the purposes of section 14: section 17(6)-(7).

20.

There is therefore an attraction in the simplicity of the argument that the whole purpose of making an application for a certificate of appropriate alternative development and pursuing an appeal if a satisfactory certificate is not obtained is to contribute to the assessment of compensation for

compulsory purchase. These are proceedings “for compensation” not because the proceedings will result in an assessment of compensation, or in an order for the payment of compensation, but because the sole purpose of the proceedings is as a step towards those destinations.

21.

There is some force in Mr Cairnes’ submission that Parliament has dealt expressly with the recovery of expenses incurred in connection with an appeal by the party claiming compensation, but has chosen to make no reference to the costs incurred by the other party to any appeal, the acquiring authority. In contrast, section 4, 1961 Act makes specific provision for circumstances in which an acquiring authority may recover its costs of proceedings in the Tribunal. The opportunity was not taken to amend section 4 or to supplement rule 10(6) in 2012, when jurisdiction to consider appeals against the decisions of local planning authorities on applications for certificates was transferred from the Secretary of State to the Tribunal.

22.

In our judgment the absence from rule 10 of any express reference to costs in appeals under section 18 is neutral. It does not shed any light on the intended scope of the categories in rule 10(6). It is consistent with an assumption that rule 10(6)(a) already includes the costs of a section 18 appeal within the broad scope of “proceedings for compensation for compulsory purchase”.

23.

The absence of any separate treatment of the costs of an acquiring authority in section 17(10) is not a matter to which we give much weight. Section 17(10) is not principally concerned with costs incurred in appeals to the Tribunal, but with expenses of all sorts incurred by a person entitled to compensation in connection with obtaining a certificate. Most applications for certificates do not result in appeals; some appeals are made because the local planning authority has failed to make a decision within the time prescribed by a development order (section 18(3)) and the appeal may be withdrawn if a satisfactory certificate is subsequently issued. The express inclusion of expenses incurred in connection with appeals within the scope of the expenses eligible for compensation cannot therefore be taken as an indication that such costs are not additionally recoverable under the Tribunal’s general power under section 29, 2007 Act (as was assumed in *Bonnell and Morgan v Carmarthenshire County Council*). Nor does the existence of a specific provision under section 4, 1961 Act provide a pointer one way or the other. Section 4 applies expressly in addition to the powers of the Tribunal under section 29, 2007 Act and under Tribunal Procedure Rules relating to costs: section 4(1).

24.

References to the Tribunal for the assessment of compensation under the 1961 Act in respect of land compulsorily acquired routinely raise issues about the planning status of the land taken. An application to a local planning authority for a certificate under section 17 is one procedure for settling any disagreement over the planning assumptions to be made for the purpose of such an assessment, but it is by no means the only way in which the extent of those assumptions can be determined. Claimants can and sometimes do by-pass the section 17 procedure and deal with planning issues only before the Tribunal. In such cases evidence is adduced to demonstrate that, but for the acquiring authority’s scheme, planning permission could reasonably have been expected to be granted for some alternative use. If the Tribunal accepts that evidence it will not issue a certificate of appropriate alternative development, but it will nevertheless be required by section 14(3)(a) to assume that planning permission is, or will be, in force for the development it has found to be appropriate

alternative development. The issues which arise in cases which proceed without any application for a certificate are the same as the issues which arise on an appeal against a certificate under section 17.

25.

It is also not uncommon for proceedings for compensation to combine a claim for compensation under section 1, 1961 Act with an appeal under section 17 against a refusal of a certificate. Procedurally, the Tribunal is likely to determine the appeal as a preliminary issue in the reference but it is not obliged to do so and in a straightforward case it may consider all issues together.

26.

Proceedings in which the assumed planning status of land is determined under section 14, or in which an appeal under section 17 is combined with a reference for compensation are, in our view, clearly proceedings for compensation for compulsory purchase falling within the scope of rule 10(6)(a). In such cases it would be anomalous and illogical to divide costs incurred in dealing with planning issues from costs incurred in other aspects of the assessment of compensation.

27.

We are, therefore, persuaded that a broad interpretation of Rule 10(6)(a) is appropriate (as it was held to be in BPP) and that the Tribunal has jurisdiction to award costs in appeals under section 18.

28.

We are satisfied that this conclusion creates no tension with section 17(10). If costs are awarded in favour of a successful appellant in an appeal under section 18, that appellant will not be able to pursue a claim in respect of the same costs under section 17(10) because they will have suffered no relevant loss which could be eligible for compensation.

29.

Nor do we consider that there is any conflict with section 4, 1961 Act. Section 4 applies in addition to section 29, 2007 Act and the provisions of the Tribunal Procedure Rules relating to costs. To the extent of any conflict, section 4 prevails: section 4(A1)(b). Section 4(3) allows a claimant for compensation to make an unconditional offer to accept a sum and, if the sum eventually awarded is equal to or exceeds that sum, the Tribunal is required to order the acquiring authority to bear its own costs and those of the claimant so far as they were incurred after the offer was made "unless for special reasons it thinks proper not to do so". In the unlikely event that a claimant lost an appeal under section 18, but nevertheless obtained a more favourable award from the Tribunal than it had originally offered to accept, the Tribunal would be able to consider whether the lack of success of the appeal amounted to "special reasons" justifying a departure from the general rule under section 4(3).

30.

It has not been suggested that it is necessary for the Tribunal to wait until the appellant's claim for compensation has been agreed or determined before dealing with the costs of this appeal. We take it, therefore, that there is no relevant offer from the appellant to which section 4(3), 1961 Act might apply.

31.

The orders we make in respect of the costs of the appeal are, first, that the appellant's costs may be taken into account in the determination of compensation in accordance with section 17(10), 1961 Act but that, secondly, the appellant shall pay the respondent's costs of the appeal on the standard basis, such costs to be the subject of detailed assessment if they cannot be agreed. The parties may wish to agree that the time within which a request for detailed assessment must be made should be extended

until after the determination by the Court of Appeal of the pending appeal against the Tribunal's substantive decision.

Martin Rodger QC Mrs Diane Martin MRICS FAAV

Deputy Chamber President

26 November 2020