

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2022] UKUT 54 (LC)

UTLC Case Number: LC-2018-19

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – COMPULSORY PURCHASE – costs – offer to settle part of claim – offer withdrawn on first day of hearing – claimant recovering less than sum offered – s.4, Land Compensation Act 1961 – s.29, Tribunals, Courts and Enforcement Act 2007

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN

PRO INVESTMENTS LIMITED

Claimant

-and-

LONDON BOROUGH OF HOUNSLOW

Acquiring
Authority

Re: Capital Court,
Interchange Way,
Kew Bridge,
Brentford,
TW8 0EX

Martin Rodger QC, Deputy Chamber President and P D McCrea FRICS FCI Arb

The following cases are referred to in this decision:

Bonnell v Carmarthenshire County Council [2014] UKUT 413 (LC)

Halpern v Greater London Authority [2014] UKUT 116 (LC)

Hughes v Doncaster Council [1991] 1 AC 382

National Roads Authority v Bodden [2016] RVR 176

Purfleet Farms Ltd v Secretary of State for the Environment, Transport and the Regions [2002] 1 P&CR 20

1. The parties have now exchanged submissions on costs in which each claims an order in its favour for the payment of at least some its costs.
2. The parties agree that the claimant is entitled to its costs of the reference up to and including 10 March 2021, that being the date on which the Acquiring Authority first made an offer capable of influencing the exercise of the Tribunal's discretion to award costs under section 29 of the Tribunals, Courts and Enforcement Act 2007. The claimant is entitled to its costs up to that date on the well-established principle that the expenditure which it incurred in pursuing its claim for compensation was part of the expense that has been imposed on it by the compulsory acquisition of its land for which it is entitled to be fully and fairly compensated (*Purfleet Farms Ltd v Secretary of State for the Environment, Transport and the Regions* 1 P&CR 20; para 24.13, Practice Directions, Upper Tribunal (Lands Chamber)).
3. On behalf of the claimant Mr Glover QC and Ms Golden invite the Tribunal to direct payment of the claimant's costs on the indemnity basis (i.e. on the basis that the claimant should have its costs except to the extent that they are shown by the Acquiring Authority to have been incurred unreasonably or to have been unreasonable in amount). That is because an indemnity against the reasonable costs of pursuing a claim for compensation is consistent with the principle of equivalence, as the Tribunal (Mr N J Rose FRICS) held in *Bonnell v Carmarthenshire County Council* [2014] UKUT 413 (LC), applying the reasoning of the Court of Appeal of the Cayman Islands in *National Roads Authority v Bodden* [2016] RVR 176. Mr Mould QC and Mr Byass did not seek to dispute that the indemnity basis was the appropriate basis of assessment and we will direct it in this case.
4. The final hearing of the reference commenced on 12 April 2021 and ran for 5 days. The appropriate order in relation to the costs of the reference incurred from 10 March 2021 until at least the commencement of the hearing is affected by an offer made by the acquiring authority on that date.
5. On 10 March 2021, the acquiring authority made an offer to pay the claimant £11,575,000 which was stated to be based on a rule 2 land value of £11.5m plus a basic loss payment of £75,000. The offer was headed "without prejudice save as to costs" and the Tribunal was not aware of its existence until it saw the parties' submissions on costs. Now that it has been shown to us, we do not find it an entirely straightforward document to understand.
6. Despite being described in paragraph 1 as an offer "in settlement of [the claimant's] claim" paragraphs 3 and 4 of the offer were in these terms:

"3. This offer does not include the below items which will be paid by the Acquiring Authority to Pro Investments Limited to the extent that they are found to be payable (as applicable) and in the sums agreed or, in the absence of agreement, assessed:

- (a) Reasonable pre and post reference costs incurred by Pro Investments Limited which remain outstanding at the date of this letter.
- (b) Reinvestment costs.
- (c) Disturbance costs.
- (d) VAT payable on any part of the compensation.
- (e) Statutory interest payable on any part of the compensation.

4. For the avoidance of doubt, this offer includes all other elements of the claim"

The list of exclusions in paragraph 3 is understood by us to mean that the offer was not intended to compromise all of the claimant's claims, but only the rule 2 land value and basic loss claims. That impression is confirmed by the statement in paragraph 4 that the offer includes "all other elements of the claim" i.e. all elements other than those mentioned in paragraph 3. From submissions made on behalf of the acquiring authority we understand that that is how the authority intended the letter to be read.

7. It is apparent therefore that, unless and until a separate agreement was reached, the effect of the claimant's acceptance of the offer would have been that the reference would have continued to determine whether compensation was payable at all under the five outstanding headings. The claimant was not being required to abandon the additional claims as a condition of acceptance of the sum offered. Nor was the acquiring authority accepting a liability in principle to make a payment in respect of the five additional claims because the statement that "the below items ... will be paid" was immediately qualified by the words "to the extent that they are found to be payable (as applicable)". No offer was made to pay the claimant's costs.
8. The offer was stated to be made pursuant to section 4(1)(a) of the Land Compensation Act 1961 (the 1961 Act), and paragraphs 24.15 to 24.19 of the Tribunal's Practice Directions. It was expressly stated that it would remain open for acceptance "until we notify you otherwise". The offer was withdrawn by an email sent by the acquiring authority's solicitors immediately after the final hearing commenced on 12 April.
9. In a claim for compensation for compulsory acquisition section 4 of the 1961 Act is superimposed on, and prevails over, the Tribunal's general statutory discretion to award costs. So far as relevant, it is in these terms:

4.— **Costs**

(A1) In any proceedings on a question referred to the Upper Tribunal under section 1 of this Act—

(a) the following subsections apply in addition to section 29 of the Tribunals, Courts and Enforcement Act 2007 (costs or expenses) and provisions in Tribunal Procedure Rules relating to costs; and

(b) to the extent that the following subsections conflict with that section or those provisions, that section or those provisions do not apply.

(1) Where either—

(a) the acquiring authority have made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Upper Tribunal to that claimant does not exceed the sum offered; or

(b) the Upper Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by him, containing the particulars mentioned in subsection (2) of this section;

the Upper Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the offer was made or, as the case may

be, after the time when in the opinion of the Upper Tribunal the notice should have been delivered.

(2) The notice mentioned in subsection (1) of this section must state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated.”

10. There is a dispute between the parties as to whether the acquiring authority’s offer of 10 March 2021 engaged section 4.
11. The claimant’s case is that each of the five additional claims was “an element in assessing the value of the land to him, not a distinct and independent head of compensation” (quoting the words of Lord Bridge in *Hughes v Doncaster Council* [1991] 1 AC 382, 390E). Because the offer was not an offer to settle the whole of the claim it was not “an unconditional offer in writing of any sum as compensation” such as was intended to be referred to by section 4. The Tribunal is therefore free to exercise its jurisdiction under section 29 of the 2007 Act free of the restrictions which would be imposed on it if section 4 applied.
12. The acquiring authority submits that the letter of 10 March was a perfectly good offer for the purpose of section 4, and that there was no need for it to extend to all of the issues in dispute.
13. Interesting though the claimant’s argument is, for reasons we will explain, we do not think it makes a significant difference to the outcome of the application for costs in this case.
14. The claimant accepts that, on the normal principles which apply in any case where a claimant has failed to do better than a respondent’s sealed or *Calderbank* offer, the acquiring authority should have its costs of the reference for the period when the authority’s offer was effective. Mr Glover suggests that that period should begin on 26 March 2021, to allow a reasonable time for the claimant to consider the offer, and should end on 11 April 2021, when the offer was withdrawn. That outcome does not depend on section 4 at all.
15. The claimant highlights the Tribunal’s recognition, at [27], that the reference presented a particularly difficult valuation exercise, which was complex and required a number of valuation judgments to be made. By the time the offer was made, the experts had each produced two reports and had agreed a joint statement. On 12 March, Mr Cottage submitted a further supplementary report which required careful analysis.
16. If section 4 does not apply to the offer the Tribunal’s usual practice would be that the liability for costs incurred by a claimant which failed to beat a *Calderbank* offer would bite only after a reasonable time for acceptance of the offer had passed. But in the case of an offer made close to the date of a final hearing, as in this case, a party ought to know the strengths and weaknesses of its own case and ought to be in a position to make a prompt decision whether to accept an offer made to it. We do not regard the eleventh hour exchanges of further evidence which occurred in this case as material to the assessment of a reasonable period for consideration of the offer. They are part of the risks of litigation which fall on both sides, and which the acceptance of a compromise is intended to mitigate. The acquiring authority suggested that the reasonable period for consideration ought to have been no more than seven days, and we agree.
17. Paragraph 24.14 of the Tribunal’s Practice Directions states that a claimant who is awarded compensation but who fails to beat an offer to which section 4 applies will not normally receive their own costs, and will pay those of the acquiring authority, after the reasonable time for

acceptance of the offer. On consideration we do not think that is a correct statement of the consequences of section 4. If section 4 applies, the Tribunal is required to make an order that the claimant pay the acquiring authority's costs "so far as they were incurred after the offer was made" (unless for special reasons it thinks proper not to do so). The statute does not allow a period of grace while the offer is considered, and the Tribunal's Practice Directions cannot alter the effect of the statute. Nor can the need for time to consider an offer be described as a "special reason" for disapplying the statutory direction, since some time for consideration is likely to be required in almost every case.

18. The question whether the offer of 10 March was one to which section 4 applies or not may well be of some financial significance, despite affecting the costs incurred during a period of only seven days. Those seven days were sufficiently close to the commencement of the hearing that they are likely to have been a period of quite intense preparation.
19. We are satisfied that section 4 does apply to this reference. First, we see no reason why an acquiring authority ought not to be able to make an offer to settle part only of a claim and to rely on section 4 in relation to the costs of that part. Secondly, the main reason the acquiring authority could make no offer to pay compensation in respect of the five excluded categories identified in its letter of 10 March was that it had insufficient information to know what was being claimed. As we explained in our decision, at [93], by the start of the hearing the claimant had not provided the information necessary to quantify its claim for pre-reference costs and CAAD costs (eventually determined at £697,000). The evidence to explain the early redemption charges was handed up in the course of the hearing. It is true that the acquiring authority had been aware of the reinvestment costs claimed and had admitted liability to pay them in its statement of case, so an offer ought to have been capable of being made for that item (worth £168,000) but the details of the remaining claims fell far short of the standard identified in section 4(2), 1961 Act. Contrary to Mr Glover's submission, therefore, we are satisfied that it is appropriate in this case to treat the offer as being in respect of substantially the whole of the claim of which sufficient particulars had been provided.
20. Our starting point in considering the appropriate order in respect of the disputed costs is therefore that section 4 of the 1961 Act applies. The order we are required to make is that the claimant shall pay the acquiring authority's costs in relation to the heads of claim covered by the offer so far as they were incurred after the making of the offer, unless for some special reason we decide that it would be proper to make a different order. We interpret the reference to costs incurred "after the offer was made" as meaning those costs incurred on or after 11 March 2021, the day after the offer was received. We do not think it appropriate to award only a proportion of those costs because the additional claims excluded from the offer were not properly particularised until very late in the day.
21. The acquiring authority withdrew its offer on 12 April 2021, the opening day of the final hearing, after the hearing had commenced. The claimant submits that any liability for costs should terminate on that date and relies on the decision of the Tribunal (HH David Mole QC and Paul Francis FRICS) in *Halpern v Greater London Authority* [2014] UKUT 116 (LC) where an acquiring authority had withdrawn an offer after the conclusion of the hearing of a compensation reference but before an exchange of written closing submissions had been completed. The Tribunal awarded the claimant less in compensation than had been offered by the acquiring authority and the claimant was ordered to pay the authority's costs from the date of the offer until it was withdrawn; as to the costs incurred after the withdrawal of the offer the Tribunal's view, at [221], was that:

"Whilst the acquiring authority's reasons for withdrawing the offer seem to us to be sound, we do not however think it would be right for the claimants to have to pay

their costs after that date. In our view the authority's protection on costs exists up until the offer was withdrawn, but thereafter the fact that it was is considered to be a "special reason" to deprive them of their costs from that date."

22. The acquiring authority suggests that the effect of paragraph 24.16 of the Tribunal's Practice Directions is that all offers lapse at the commencement of a hearing, and that the withdrawal of its offer simply reflected that principle. So far as is relevant, paragraph 24.16 of the Tribunal's Practice Directions provides that:

"Every offer should state for how long it will remain open for acceptance. An offer which does not state how long it is open for will be assumed to be open for acceptance until the commencement of the hearing to which the offer relates."

It can be seen that this direction does not have the effect suggested by the acquiring authority. It is for a party to decide for how long its own offer is to remain open for acceptance. Paragraph 24.16 does not take away that freedom, but instead states that if a party does not say how long its offer will remain open, the Tribunal will assume that it was intended to be available for acceptance only until the commencement of the hearing. As the acquiring authority points out, a significant purpose of making any offer is to dispose of the litigation and thus avoid incurring further costs, and it is for that reason that it will be assumed that an offer is intended to lapse once the hearing begins, unless the party making the offer makes clear that it intends the offer to remain open.

23. It was also pointed out on behalf of the acquiring authority that in *Halpern* the GLC appears not to have asked for its costs after the withdrawal of the offer (see [196]), except in relation to the costs of specific issues. We nevertheless consider that the approach taken by the Tribunal in *Halpern* is sound, and we agree that the withdrawal of the offer on 12 April 2021 is a special reason for not making the order which section 4 would otherwise require in respect of the costs incurred after that date. Section 4 is a blunt instrument, lacking the subtleties of CPR Part 36, and the Tribunal should be cautious when applying it. The only way in which the claimant could obtain compensation after the withdrawal of the offer was by continuing with the reference or by negotiating with the acquiring authority. We have not been informed of any negotiations and we must assume that any which did take place remain privileged and therefore irrelevant to the issue of costs. We therefore agree with the Tribunal in *Halpern* that the withdrawal of the offer is a special reason why the claimant should not be required to pay the authority's costs after 12 April. We make no distinction between costs incurred on that day before or after the precise moment of withdrawal.
24. Nevertheless, we do not accept the claimant's submission that it should have its costs after the withdrawal of the offer. It could have avoided those costs and secured significantly more in compensation by accepting the original offer and by providing the information necessary for the acquiring authority to make an offer in respect of the costs of the CAAD proceedings. The parties were exchanging information before, during and after the hearing and we cannot determine when sufficient information was supplied by the claimant to enable the authority to evaluate the elements of the claim excluded from the offer. The acquiring authority does not rely on section 4(1)(b) of the 1961 Act as an independent ground for recovery of its costs after the withdrawal of the offer. The appropriate order in the circumstances is that each party should pay its own costs incurred after 12 April. Making this order is another reason why it is unnecessary for us to consider whether the costs payable by the claimant in the period before the withdrawal of the acquiring authority's offer should be reduced to reflect the fact that the offer itself did not relate to the whole of the claim and excluded heads of compensation on which the claimant was eventually successful. The additional claims seem to have been overlooked and the costs referable to them were largely incurred after the commencement of the hearing.

25. We will therefore make an order providing as follows:

- (1) the acquiring authority shall pay the claimant's costs of the reference incurred up to and including 10 March 2021 on the indemnity basis;
- (2) the claimant shall pay the acquiring authority's costs of the reference incurred from and including 11 March 2021 up to and including 12 April 2021 on the standard basis;
- (3) there shall be no order in respect of costs incurred on or after 13 April 2021 (including in making submissions on costs).

Martin Rodger QC,
Deputy Chamber President

P D McCrea FRICS FCI Arb

1 March 2022