LCA/73/2005

LANDS TRIBUNAL ACT 1949

Compensation – Land Compensation Act 1973 Part 1 – Highway not maintainable at public expense within 3 years of opening – Effect of agreement to adopt under s.38(3) of Highways Act 1980 - Interpretation of s. 19(3) of Land Compensation Act under s.3 of Human Rights Act 1998 – Meaning of "0n his behalf" in s36(2)(a) and s.38(3)(b) of Highways Act 1980

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **AMELIA O'CONNOR & PAUL O'CONNOR** **Claimants**

and

WILTSHIRE COUNTY COUNCIL **Respondent**

Re: Dwelling House
53 Braemor road
Calne
Wiltshire

Before: His Honour Michael Rich QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 26, 27 January and 3 February 2006

Robert Weir instructed by Hugh James for the Claimants
Timothy Straker QC and *Paul Stinchcombe*, instructed by the solicitor for the Acquiring Authority

The following cases are referred to in this decision:

Wilson v First County Trust Ltd [2004] 1AC 816
Ghaidan v Godin-Mendoza [2004]2AC 557
Hatton v United Kingdom [2005] 37 EHRR 28
Marcic v Thames Water Utilities Ltd [2004] 2AC 42
Matthews v Ministry of Defence [2003] 1 AC1163

DECISION

1. This was the hearing of a preliminary issue to determine whether the claimants had a valid claim under Part 1 of the Land Compensation Act 1973 having regard to the proper interpretation of s.19(3) of that Act.

2. On 20 January 2000 the Calne Northern Distributor Road ("N.D.R."), a bypass road round Calne in Wiltshire, was opened to traffic. The claimants own and live in a dwelling known as 55 Braemore Road in Calne, and they claim that the value of their interest in that property has been depreciated by noise caused by the use of this highway. On 21 January 2001, they accordingly made a claim against Wiltshire County Council, as highway authority, for compensation under Part 1 of the Land Compensation Act 1973. The Council however claim that the road was not at the date when it was opened a highway maintainable at the public expense as defined in section 329 of the Highways Act 1980, and did not become so within three years of that date. Accordingly the Council relies on the provisions of s.19(3) of the Act of 1973, and denies the claimants' entitlement to any compensation under that Act.

3. By an agreement, made, amongst other powers, under s106 of the Town and Country Planning Act 1990 and dated 26 November 1997, a Consortium of developers (to whom I shall refer as "the Developers") agreed to complete the NDR in step with the residential development of a planned area for the extension of Calne. They were required to complete the highway works, which were the NDR, and to remedy any defects to the satisfaction of the Council within twelve months of the opening of the highway. By paragraph 14 of the 5th Schedule to the s.106 Agreement, the Highway Authority was bound upon being satisfied as to a number of matters there set out to issue the Final Certificate of Completion. By paragraph 15, it was provided that:

> "the County Council shall from the date of the Final Certificate of Completion .. adopt the [NDR] as part of the highway maintainable at the public expense".

4. Section 38(3) of the Highways Act 1980 provides that

> "A local highway authority may agree with any person to undertake the maintenance of a way..
>
> (b) which is to be constructed by that person.. and which he proposes to dedicate as a highway
>
> and where an agreement is made under this subsection the way to which the agreement relates shall <u>on such date as may be specified in the agreement,</u> become .. a highway maintainable at the public expense." (my underlining).

The Developers, however, failed to procure the adoption of the drainage works for the highway by the appropriate authority, in accordance with paragraph 14.7 of the Schedule to the agreement, because, apparently, of some resistance by one of the land-owners. Accordingly the conditions for the issue of the Final Certificate remain unsatisfied and it has not been issued. Accordingly the date specified in the agreement for the adoption of the highway has

not been reached, although it was duly dedicated upon being opened for traffic. The Developers have accordingly remained responsible under the terms of the s106 Agreement to continue to maintain the highway, and s.38(3) of the Highways Act has not operated to make it a highway maintainable at the public expense.

5. The claimants have made this reference to the Lands Tribunal in order to contend that the provisions of s.19(3) of the Act of 1973 should, none the less, be interpreted in accordance with s.3 of the Human Rights Act 1998 so as not to exclude their claim. The relevant words of the sub-section are:

> "no claim shall be made if the relevant date [which means the date on which the highway was first open to the public] falls at a time when the highway was not so maintainable [that is at the public expense] and the highway does not become so maintainable within three years of that date."

The claimants' Statement of Case, dated 4 May 2005, claimed that it should be read as if certain additional words had been added to the sub-section, which not only would have made it irrelevant whether the highway ever became or was even agreed to become maintainable, but none the less would not have entitled the claimants to compensation in their particular circumstances. The Statement of Case was however amended, without objection, on the second day of the hearing to claim that:

> "In order to avoid any incompatibility between the claimants' rights and section 19(3) LCA, this section should be read and given effect so that it reads:
>
> > and no claim shall be made if the relevant date falls at a time when the highway was not maintainable *and when the highway authority had not agreed that the highway would become so maintainable* and the highway does not become so maintainable within three years of that date."

6. The compensating authority does not dispute that a provision in such form would be fairer than one which leaves the entitlement to compensation for depreciation in the value of one's home by noise from a newly opened highway to such chance as has operated in this case. The reading contended for, however depends upon s. 3 of the Act of 1998 being satisfied. This requires:

> "So far as it is possible to do so, [the Act] must be read and given effect in a way which is compatible with the Convention rights."

It will be convenient first to consider the Convention rights with which this unfairness is said to be incompatible and secondly, on the assumption of such incompatibility, whether the reading contended for is "possible" within the meaning of the Section.

7. I do not think that it is material to those questions whether the section read literally could be abused by a highway authority wishing to avoid compensation, by agreeing with a developer a date for adoption under s.38(3) of the Highways Act 1990 more than three years after the opening of the highway. I am inclined to accept Mr Straker's submission on behalf of the compensating authority, that this might well involve conduct undertaken for an improper or ulterior motive, which would be capable of judicial review. It might otherwise be treated as

maladministration if complaint were made to the local government Ombudsman. In the present case, however, no suggestion is made that the Council has acted otherwise than properly and in good faith, and I do not therefore propose to consider such questions.

8. Mr Weir for the claimants relies on three Convention rights. It is convenient to consider those arising under Article 1 of the First Protocol (to which I will refer merely as Article 1) and Article 8 together, and before the rights provided by Article 6. Both these rights are what are called in the jargon "qualified rights". Article 1 provides under the heading

> "*Protection of property*
>
> Every natural .. person is entitled to the peaceful enjoyment of his possessions. No person shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

Article 8 provides

> *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, …"

9. Mr Weir's submissions on these articles can I think be expressed in the following propositions:

(1) The Articles are engaged because

  (i) the value of the claimants' property has been reduced and thus they have been deprived of the peaceful enjoyment of their possessions (Article 1)

  (ii) the claimants' enjoyment of their home has been adversely affected by the noise associated with the NDR (Article 8)

(2) The Highway Authority therefore has the burden of establishing that the statutory provision (presumably which permits these interferences) pursues a legitimate aim and there is a reasonable relationship between the means employed and the aim sought.

(3) The aim of the "three year clause" is to limit compensation to those cases where there is an expectation that the highway authority will subsequently adopt the highway.

(4) The clause is disproportionate because highway authorities who agreed before the opening of the highway to adopt such highway can escape liability to pay compensation under the Land Compensation Act.

10. Although the language of "engagement" is part of the standard jargon of this jurisprudence (see for example per Lord Nicholls of Birkenhead in *Wilson v First County Trust*

Ltd [2004] 1AC 816 at p.836 para 39), I think that its adoption in this case has proved misleading. The issue is whether what Mr Weir calls the "three year clause" is incompatible with the Convention rights relied on, unless read as he proposes. He sets out those rights by reference to the effect of the noise from the highway upon the claimants' property or home. Only if the permitting of the use of the highway without compensation involves a breach of those rights can a statutory provision for compensation which does not benefit the claimants, be incompatible with their enjoyment of these rights. It is accepted that in the absence of statutory compensation, the claimants are left uncompensated, because there can be no effective claim in nuisance against the Developers.

11. Mr Weir's submission, however, in my judgement, misapplies the considerations which led the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2AC 557, to re-interpret paragraph 2(2) of schedule 1 of the Rent Act 1977 so as to grant a right to succeed to the tenancy of their home granted to the claimant's deceased partner, to the survivor of a homosexual couple in the same way as would be enjoyed by the survivor of a heterosexual couple. They accepted that the absence of such right would not, of itself be incompatible with Article 8 which as Lord Nicholls said at paragraph 6 "does not require the state to provide security of tenure for members of a deceased tenant's family". The incompatibility upon which the majority of the House based its decision was with Article 14 which provides for

> "*Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground …"

Accordingly it being agreed, as Lord Nicholls set out in Paragraph 12, that the issue concerned "a provision which falls within the 'ambit' of the right to respect for a person's home guaranteed by article 8" it was also "common ground that article 14 is engaged in the present case." Although the provisions of the "three year clause" may work unfairly, Mr Weir has been unable to rely on any breach of article 14 in such interference with the claimants' rights under articles 1 and 8 as he has identified.

12. I accept, on the authority of the decision of the European Court of Human Rights in *Hatton v United Kingdom* [2005] 37 EHRR 28 at para 96, that

> " There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Art.8."

In that case the claimants failed because the Court was not satisfied that the noise pollution arising from the Scheme to regulate night flying from Heathrow Airport imposed by the Government caused such serious interference with the enjoyment of their homes as to involve a violation of their article 8 rights. If the Council has, by permitting the opening of the NDR, acted in a way which is incompatible with the Convention rights relied on, s. 7 of the Act of 1998 gives to the victims of such unlawful act a right to begin proceedings. The qualified nature of the article 8 rights would, however, as Mr Weir acknowledged, make any such proceedings hopeless, except possibly in the most extreme case. That does not however mean that the limit of provision as to compensation becomes incompatible with the rights which, for these reasons, are not relied upon as having been breached.

13. I accept that noise pollution could so affect a property as also to involve a breach of the owner's rights under article 1. That was accepted in relation to flooding by sewage in *Marcic v Thames Water Utilities Ltd* [2004] 2AC 42 (see at paragraph 37). In so far as this noise pollution arises from the acts of the highway authority, that involves the authority in having the burden of justifying such pollution. If it were such that it could be justified only on the basis that the victim was compensated, then the availability of compensation would determine whether the authority had acted lawfully. But Mr Weir accepted that he could not submit that interference with a person's peaceful enjoyment of his property by highway works involved a breach of his rights under article 1 unless he was compensated. In my judgement therefore any claim under s.7 of the Act of 1998 would again fail as did that of Mr Marcic, but without consideration of the fairness of any compensation scheme.

14. This is made clear, in my judgement, by Mr Weir's acceptance of the limits of the scope of article 1. Article 1 is concerned with the enjoyment of "possessions". Mr. Weir expressly related the right so granted to the claimants' property at 55 Braemore Road rather than to any inchoate right to compensation arising out of the Act of 1973. That is because he accepted the view of the authors of Clayton and Tomlinson on the Law of Human Rights at paragraph 18.63:

> "There is no general rule that interference with the substance of ownership or hindering the enjoyment of property require the payment of compensation."

It seems to me however that once that is conceded, the whole edifice of his submissions falls. The possibility of breach of the Convention rights, which is what Mr Weir means by saying that they are "engaged", does not place any burden on the Highway Authority to establish the reasonableness or justification for the compensation provisions of the Land Compensation Act. Those provisions are not part of the rights required to be safeguarded by these articles of the Convention, and so there can be no question of their being incompatible with the Convention rights secured by Articles 1 and 8. The statutory provisions, to which Mr Weir's second proposition, as set out in paragraph 9 above, refers, do not therefore include s.19(3) of the Act of 1973.

15. Although, at first reading Article 6 is still further removed from incompatibility with s.19(3), Mr Weir has persuaded me that there is, in fact, a more substantial case for its consideration. Article 6 is by its heading concerned with the "Right to a fair trial". Its scope is however wider. The first sentence provides

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Thus if the claimants are entitled to the civil right of compensation for depreciation in the value of their interest in 55 Braemore Road resulting from noise caused by the use of the highway, they are entitled to a hearing of their claim, rather than having it barred by the "three year clause".

16. Mr Weir relied on the speech of Lord Hoffmann in *Matthews v Ministry of Defence* [2003] 1 AC1163 at p1178 where he said that

> "If the purpose of [the challenged legislation] had been to give the [public authority] a discretionary power to swoop down and prevent people with claims .. from bringing them before the courts, I would agree [that this is incompatible with article 6]"

He emphasised that one must look at the substance not the form of the obstacle to access to the courts:

> "What matters is whether the effect is to give the executive a power to make decisions about people's rights which under the rule of law should be made by the judicial branch of government."

17. Mr Weir put the case that this was the effect of s.19(3) succinctly in his skeleton argument as follows:

> "In this case the Land Compensation Act gave the claimants a right to compensation. His right accrued on the first claim day (see s.19(2A)). Any damages [he should have said depreciation] are assessed by reference to the value of their property on that day. The failure of Wiltshire County Council to adopt the highway by 20 January 2003 was to impose a procedural bar on that established right."

If that had accurately set out the right which was in fact granted by s.1 of the Act of 1973, I would agree with him.

18. S.1(1) does indeed say that

> "Where the value of an interest in land is depreciated by physical factors caused by the use of public works .. compensation shall, subject to the provisions of this Part of this Act, be payable to the person making the claim .."

Subsection (3) defines "public works" to include "any highway" and s.3(2) provides that no claim is to be made before the "first claim day" which, in the case of a highway, is a year and a day after the highway opens for traffic (s.1(9) (a)). But it is wrong to say in the case of the NDR that "the right accrued" on that day. "Highway" is defined by s.19(1) to mean ".. a highway maintainable at the public expense as defined in s.329(1) of the Highways Act 1980." Thus the NDR was not, in accordance with the s.106 Agreement, at the date of opening as a highway, a "highway" within the meaning of s.1(3) for the purpose of being "public works" for whose use compensation is payable. Accordingly the "three year clause" is not a bar to a claim which accrued on the first claim day, but, although expressed negatively, in fact an extension of the right to make a claim if the highway becomes maintainable within three years of opening.

19. In my judgement therefore s.19(3) does not create a procedural bar to an established right, but s.19(1) defines and thereby limits the extent of the right created by Parliament in 1973. Accordingly, following the distinction made in the *Matthews Case*, article 6 is not engaged.

20. The hypothetical question as to whether, if I had found s.19(3) non-compliant with Convention rights, s.3 of the 1998 Act requires it to be read as Mr Weir proposes in the amended Statement of Case, is not easily answered, because such conclusion as to non-compliance arises only if the sub-section already means something different from what I hold to be its true meaning. If, however s.19(3) was part of the definition of the right which accrues on the first claim day it would itself be a proviso to the definition of "highway" in s.19(1), which would therefore, in effect, read:

> " 'Highway' means a highway maintainable at the public expense *or, if not so maintainable at the relevant date, becomes so maintainable within three years of that date"*

If that had been the provision, to read "becomes" to include "has been agreed to become" would seem to me to be within the scope of an interpretative provision as explained by the majority of the House of Lords in *Ghaidan's Case.* I add this however, only out of respect to the full and helpful argument which I heard, on both sides as to the meaning and effect of s.3 of the 1998 Act.

21. At the outset of the hearing, I drew it to the attention of the parties that, according to the evidence filed on behalf of the Council, the NDR had not been constructed as originally intended under the s.106 Agreement. After it had been executed on 26 November 1969, the various local authorities concluded that its timing, phased with the residential development of a new area for completion in 2007, would not provide sufficiently early relief to the Calne town centre. Accordingly they entered into an "Acceleration Agreement" dated 20 May 1999. By this, the District and Town Council advanced the funds for early construction of the NDR, subject to repayment by the developers at the date when they would otherwise have had to construct the road. For that purpose it was agreed at Clause 4.1 of the Accelerated Agreement that:

> "The Consortium will construct the NDR in accordance with the Accelerated Programme <u>as agent for the County Council</u> and for that purpose the Consortium will as principal enter into the Road Contract." (My underlining).

It appears from the definition of "Road Contract" at clause 5.1 that the Developers had in fact already "concluded the Road Contract", which, no doubt explains their being "the principal" under it. I suggested that this provision would appear to mean that the NDR was "a highway constructed by a highway authority" within the meaning of s.36(2)(a) of the Highways Act 1980, and accordingly was a highway maintainable at the public expense from the date when it was opened for traffic as a highway.

22. By unopposed amendment of the Statement of Case the claimants adopted this contention. Mr Straker made submissions on behalf of the compensating authority, upon this way of supporting the claim during the hearing as originally fixed, but by agreement he was given leave, if so advised, to add to his submissions at an adjourned hearing. He has done so. He has also produced evidence to explain that the reason why the Council undertook to construct the road was that the District Council wished to finance the acceleration of the programme and were advised that they could make a contribution towards the expenses under s.274 of the Act only if they were expenses "incurred or to be incurred by a highway authority". For this reason the Acceleration Agreement as executed provided for the District

Council to pay to the County Council £3.5m as a contribution to the cost of the Road Works pursuant to s.274 (see clause 5.1). By clause 4.2 the Developers agreed to construct the NDR (by reason of clause 4.1 as agent for the Council) in accordance with the accelerated programme, and the Council would be liable to meet the cost under the Road Contract. By clause 6.1 the Developers were to pay to the Council sums set out in a "Schedule of Repayments" over a period extending to 2008, amounting to nearly £4.5m, which by clause 6.2 the County Council agreed to pay to the District Council, although by what power the Agreement does not make clear.

23. Mr Straker relies on the full definition of highways which are made maintainable at the public expense by s.36(2)(a):

> "a highway constructed by the highway authority otherwise than on behalf of some other person who is not a highway authority." (my underlining).

Clause 4.1 of the Acceleration Agreement has the effect he accepts, that the NDR was a highway constructed by the highway authority, albeit through the agency of the developers. Mr Straker however submits that it was so constructed on the Developers' behalf, and, of course, the Developers are not a highway authority.

24. The Acceleration Agreement recites the s.106 Agreement, but, save that it advances the date by which the NDR is to be constructed, it does not vary its terms. It is by paragraph 18 of the 5th schedule to the s.106 Agreement that the Developer agrees to dedicate the NDR as a highway from the date of its opening for public use. Thus the power which the highway authority exercised under s.38(3) of the Highways Act 1980 to agree with the Developers to maintain the highway from a date specified in the s.106 Agreement remains, for that power is exercisable not only as set out in paragraph 4 above but also in respect of "a way .. (b) which is to be constructed by [the other party to the Agreement], or by a highway authority on his behalf, and which he proposes to dedicate as a highway."

25. Mr Straker accepts that it is a matter of fact whether the Council, on a proper construction of the agreements did indeed construct the NDR on the Developers' behalf. Mr Weir submits that these words mean exclusively for the benefit of the person who is not a highway authority. I reject that submission because the highway authority would have no power to undertake the construction unless they were "satisfied that it will be of benefit to the public" (see s.278 of the Act, which appears to be the only source of power for the highway authority to make agreements as to the execution of highway works). The question therefore appears to me to resolve itself into an inquiry as to whether the Council was exercising its power to construct a highway under s.24(2) of the Act or under s.278.

26. The Council could not have constructed the NDR under s.24 of the Act on land which it neither owned nor acquired except with the agreement of the owners. It did not obtain that agreement because the land-owners, although parties to the s.106 Agreement were not joined in the Acceleration Agreement. The Council relied on the Developers' agreements to construct the road, and to dedicate it. It is, I think for this reason that the Acceleration Agreement was right to rely on s.106 of the Town and Country Planning Act 1990 to bind the Developers to carry out their obligations under the Agreement (see Clause 3.2). The obligation to make the

payment of the sums set out in the Repayment Schedule were included within that Clause, but the Agreement continued

> "3.3 Further and in consideration of the County Council's advancement of the NDR (access from which highway will be to the benefit of the [Developers'] Land) the [Developers] agree to pay the sums set out .. pursuant to sections 38 and 278 of the Highways Act 1980."

Thus, in my judgement the Council's agreement to construct the NDR was an agreement to execute works on terms that the other party to the Agreement (the Developers) pays the costs on the basis that the works are executed for the Developers' benefit. The benefit is not only that which is recited, but also that the construction of the road enables the Developers to fulfil their obligations under the s.106 Agreement to complete and dedicate the NDR.

27. Mr Weir seeks to contradict that conclusion by saying that it is impossible for the principal to an agreement, as the Council is, by virtue of Clause 4.1, also to be the agent of its agent, which the Developers are by virtue of that same Clause. I do not need to consider whether there is indeed necessarily an impossibility either in law or in logic: certainly it is not easy to think of circumstances in which such a circular arrangement of agency would arise. The phrase in s.36(2)(a) and s. 38(3)(b), however, is "on his behalf". I accept that an agent is always acting on behalf of his principal. It does not follow that one cannot act on behalf of another person in the sense of for his benefit, without being his agent. Indeed it seems to me that an agreement under s.278 is the only route, by which a highway authority could construct a way "on behalf of" a person who proposes to dedicate the way on its completion, as provided for by s.38(3)(b), and there is no reason why the agreement which the highway authority makes under s.278 should constitute the authority as agent of the person on whose behalf it carries out the work.

28. Accordingly this alternative basis for the claimants to be eligible to claim compensation under Part 1 of the Land Compensation Act also fails, and the claimants' claim must be dismissed.

29. The parties are now invited to make submissions as to costs, and a letter relating to this accompanies this decision. This decision will take effect when, but not until, the question of costs has been determined.

Dated 6 February 2006

His Honour Michael Rich QC

Addendum as to costs

30. The parties have agreed that the claimant will pay the compensating authority's costs of the preliminary issue to be assessed by the Registrar if not agreed and, by consent, I so order.

Dated 29 March 2006

His Honour Michael Rich QC