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THE AGRICULTURAL LAND TRIBUNAL FOR WALES

REFERENCE: ALT 6321

APPLICATION:

An Application by the Applicant to vary the Tribunal's order made on 10 October 2019 so as to make provision for costs.

TRIBUNAL: Dr Christopher McNall (Chairperson)
Eur Ing Dr Phebe Mann CEng MICE FRICS (Drainage Member)
Mr Evan Roberts (Farmer Member)

APPLICANT: Mr John Stephen Wrench

RESPONDENTS: Network Rail Infrastructure Limited

PROPERTY: Beeches Farm, Flint Road, Saltney Ferry, Chester CH4 0BW

HEARING: Decision made on the papers, and without a hearing.

ORDER IN RELATION TO COSTS

1. Pursuant to section 5 of the Agriculture (Miscellaneous Provisions) Act 1954, the Respondents shall pay the Applicant's costs of and incidental to the Application dated 23 May 2014 (including, for the avoidance of doubt, the Applicant's costs of the Application to vary so as to make provision for costs) from (and including) 20 June 2014, all such costs to be assessed if not agreed.

2. By no later than **4pm 20 December 2019** the Respondents shall pay the Applicant an interim payment on account of those costs of £20,000 (twenty thousand pounds).

REASONS FOR THE ORDER

1. These are the reasons for the panel's decision.

2. The procedural history is set out in the Tribunal's earlier order.

3. The parties have each sensibly indicated that they are prepared for us to deal with this application without a hearing. We have considered the representations of both parties.

The principle of costs

4. This is not a jurisdiction in which costs routinely 'follow the event'. The unsuccessful party is not ordinarily ordered to pay the successful party's costs.

5. The Tribunal's jurisdiction to make an costs order between the parties is discretionary, and is limited to the circumstances set out in section 5 of the Agriculture (Miscellaneous Provisions) Act 1954 which provides:

> **"5. Power of Agricultural Land Tribunal to award costs**
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> (1) The Agricultural Land Tribunal, where it appears to them that any person concerned in a reference or application to them ... has acted frivolously, vexatiously, or oppressively in applying for or in connection with the reference or application may order that person to pay to any other person either a specified sum in respect of the costs incurred by him at or with a view to the hearing or the taxed amount of those costs and an order may be made under this subsection, where or not the reference or application proceeds to a hearing.
>
> (2) Any costs required by an order under this section to be taxed may be taxed in the county court according to such of the scales prescribed by rules of court for proceedings in the county court as may be directed by order or, if the order gives no direction, by the county court.

6. The 1954 Act gives no further guidance, beyond identifying three potential 'gateways' to a costs order: frivolity, vexatiousness, or oppression. The 1954 Act does not use the word 'unreasonable'. We remind ourselves that the sanction is a costs sanction, which flows from conduct in relation to the application.

7. Fair warning of the costs jurisdiction was given to the parties. In August 2016, the Tribunal wrote (at Para [15] of its decision):

> "[...] Whilst the Tribunal's Rules, as they presently stand, do not expressly contain an overriding objective, these are nonetheless civil proceedings which the Tribunal is obliged to resolve justly, allocating to them an appropriate share of the Tribunal's resources, taking account of the need to allot resources to other cases. The parties are required to help the Tribunal further that objective. We are warning both parties that we are sufficiently troubled by their conduct of this dispute so far that we may in due course consider engaging our costs powers under section 5 of the Agriculture (Miscellaneous Provisions) Act 1954 if it should subsequently appear to us that any party has acted 'frivolously, vexatiously, or oppressively' in connection with this application, including in relation to any acts or omissions to date."

8. In our view, Network Rail's conduct in relation to the Application does meet the test for the making of a costs order. This is for the following reasons:

   8.1 Network Rail's position, up to and including the hearing in mid 2016, was that the Application should be struck-out. Network Rail sought to take technical (and unmeritorious) objections as to the competence of the Application;

   8.2 Network Rail told the Tribunal and the Applicant on 20 June 2016 that certain works would be done (see Para [25] of the 2016 decision) but those works were not then done, and no good explanation was put forward subsequently as to why they were not done. Even now (see Paragraph 17.2 of Network Rail's submissions in response to the application to vary) there is no explanation as to why the works referred to in June 2016 were not actually done (which must be a matter within Network Rail's knowledge). Rather, there is a vague explanation as to how the situation might have come about. Given that Network Rail does not accept that the Tribunal was misled in June 2016, then it must follow that there was a genuine intention in June 2016 to do the works, but then someone at Network Rail subsequently took a decision not to do those works, despite the observations made by the Tribunal in its 2016 decision;

8.3 Network Rail continued to resist the Application, up to and including the hearing in May 2019, despite knowing what had been said on its behalf in June 2016. (Here, the Tribunal adds that it was conscious that Network Rail is a big organisation, which is why the Tribunal directed that its 2016 decision *"be copied, in full, and as it stands, by Network Rail's legal representatives to their client and that those representatives confirm to the Tribunal Secretary, within 14 days of the date of this decision, in writing that has been done":* see Para [23] of the 2016 decision. That direction does not seem to have been complied with);

8.4 If Network Rail had done what it said it would do, when it said it would do it, then it is likely that at least a significant proportion of the costs of the Application incurred after 20 June 2016 would have been avoided;

8.5 The persons dealing with the litigation at Network Rail obviously did not communicate its June 2016 position as to the works which it said would be done to the persons (advanced as its witnesses in May 2019) who were the persons ostensibly responsible for the maintenance of this section of track. Those witnesses were not familiar with Network Rail's own earlier position. No reason was advanced as to why Network Rail did not produce witnesses with knowledge of its earlier position, and who would have been in a position to give evidence as to why the works had not been done;

8.6 Network Rail failed to comply with the Tribunal's directions, and to co-operate with the Tribunal, in ways which introduced unnecessary delay in dealing with and disposing of the Application, including but not limited to giving listing information (see the Tribunal's direction in June 2019: "*I have directed that this hearing should now be listed, even though Network Rail's representatives have failed - despite at least two requests - to provide dates to avoid to the Tribunal. Their extended time for their compliance expired yesterday. All other participants have complied with the Tribunal's directions, on time, and have provided dates to avoid. I am bound to deal with applications fairly and justly, which includes avoiding unnecessary delay which is prejudicial to parties*");

8.7 The overall impression obtained by the Tribunal in this case is that Network Rail (despite clear warnings in the 2016 decision)

did not regard the Application as an important one meriting genuine engagement on its part.

The amount of costs

9. Given the sum sought, this Tribunal is not in a position to summarily assess the costs. Therefore, the costs will have to go to a detailed assessment. The Tribunal has no power to conduct a detailed assessment, which will have to be in the appropriate form and in an appropiate jurisdiction.

10. The usual position where an order for detailed assessment is made would be that there should be an interim payment on account of costs, and in our view this case is no different. There is no good reason not to make such an order.

11. That interim payment should be the minimum which the Applicant (as receiving party) would expect to receive on a detailed assessment. Doing the best that we can, on the basis of the costs information before us, we consider that sum to be £20,000.

12. In due course (and when we have obtained the Applicant's views) we shall issue a further decision in relation to Network Rail's application to vary the order so as to provide for an extension of time in which to complete certain of the works which were specified in our order.

Dated: 10 December 2019

Signed:

Dr Christopher McNall, Tribunal Chairperson

Certified as a true copy of the Tribunal's decision

Signed:

Mr Adrian Evans, Tribunal Secretary