CA on appeal from Order of Lands Tribunal before Peter Gibson LJ, Judge LJ, Waller LJ. 2nd July 1999.

JUDGMENT : LORD JUSTICE JUDGE:

1. This is a Case Stated under section 3(4) of the Lands Tribunal Act 1949 and Ord. 61 of the Rules of the Supreme Court by the Lands Tribunal (Mr Michael St John Hopper FRICS) for the decision of the Court of Appeal arising from his order for costs, following an award of £38,000 in compensation under the Coal Industry Act 1975.

2. The appellants owned a freehold interest in a property in Ashby Road, Moira in Leicestershire which sustained damage as a result of mining subsidence. They claimed compensation under the 1975 Act for which the National Coal Board, then British Coal Corporation, now the Coal Authority, (the respondents) would be responsible. This claim was first made in November 1979. By letter dated 13th July 1982 the respondents made an open offer to settle for £35,000 and to carry out works valued at an additional £2610. The precise details require no analysis. The offer was rejected, and subsequently withdrawn. On 2nd April 1985 the respondents indicated that *"in the absence of any agreement in your clients' claim for compensation, the Board have opted to carry out repairs. I shall now arrange for a schedule of repairs to be prepared"*. This offer was rejected on behalf of the appellants on the basis that once the respondents had elected to discharge their liability by paying compensation, it was not open to them to discharge their liability in this way.

3. The first reference to the Lands Tribunal was dated 29th January 1986. The claim was valued at £466,000 or, on an alternative calculation, £355,000. Shortly before the hearing, on 13th April 1989, a sealed offer for the purposes of r. 50 of the Lands Tribunal Rules 1975 was delivered. Marked "without prejudice" the relevant passages read: *"The British Coal Corporation offers the claimants the sum of £100,000 .... in full and final satisfaction of all claims which are the subject of the above reference .... and in satisfaction of all liability for coal mining subsidence damage at the subject property.....*
This letter is to be treated as the Corporation's sealed offer for the purposes of r.50 of the Lands Tribunal Rules 1975."

   The letter made no reference to the costs already incurred, and no doubt because it was a *"sealed offer"*, the time available for acceptance was not limited or defined.

4. This offer elicited no response from the appellants.

5. On 15th November 1989 a further reference was made, and it was agreed that the two references should be heard together. By letter dated 22nd November, which was fundamental to the decision now under consideration, the sealed offer contained in the letter dated 13th April was withdrawn.

6. Again marked "*without prejudice*", the relevant parts of the letter read: *"The sealed offer contained in my letter dated 13th April 1989 is withdrawn.*
The Corporation offers your clients the sum of £100,000 ..... in full and final settlement of their claims before the Lands Tribunal.
This offer is available on the following terms as to costs:
(a) The Corporation agree to pay your clients' costs on the standard High Court scale up to and including 13th May 1989.
(b) Your clients will pay the Corporation's costs on the standard High Court scale after 13th May 1989.
This offer remains open until 5 pm on Tuesday next, 28th November 1989, thereafter it will be withdrawn."

7. The relevance of the dates specified in the letter is clear. 13th May 1989 was precisely one month after the sealed offer, so the respondents were suggesting that 28 days would have been a sufficient period to consider and accept the offer of £100,000, and that the costs thereafter should be borne by the appellants. 28th November 1989 was the date fixed for the hearing of the references, and 5 pm would have come at the end of the first day's hearing.

8. On 28th November, what can conveniently be called the first hearing began. It eventually occupied 25 days, spread over some six months. By its express terms the offer of 22nd November lapsed at the end of the first day.

9. By its interim decision dated 30th September 1991 the Lands Tribunal concluded that the appellants were entitled to compensation. All questions of costs were reserved.

10. At the request of the respondents, a case was stated for the decision of the Court of Appeal, which, on 11th March 1994, ordered that the references should be remitted to the Lands Tribunal. Appropriate orders for costs of the appeal were made and do not arise for present consideration. The effect of the decision was that the respondents were liable to compensate the claimants, but that the compensation should be assessed on a different, and reduced basis, to that adopted by the Tribunal at the first hearing. Directions were given about the future conduct of the references. The parties were required to prepare and serve fresh points of claim and defence. When this was done the claim was valued at £26,900. The respondents denied any loss. The earlier offer was not revived or amended. Indeed no further offer was made. The points of claim were subsequently amended on the first day of the second hearing on 22nd April 1996, first, in the morning, to £28,500, and subsequently, on the same day at lunchtime, to £45,436. These increases continued to be based on the reformulated claim contained in the fresh points of claim prepared in compliance with the decision of the Court of Appeal. The respondents reserved their position about costs.

11. This second hearing lasted three days. It was no longer concerned with liability, but with the valuation of the reformulated claim.

12. On 23rd July 1996 the Lands Tribunal ordered that the appellants should be awarded £38,000 in respect of the diminution in value of the property following mining subsidence. Submissions about costs were invited. This hearing took place on 17th February 1997.

13. In a reasoned decision dated 1st August 1997, Mr Hopper in the exercise of his discretion under r.50 of the Lands Tribunal Rules 1996 concluded: *"The claimants should be entitled to 90% of their costs, except those relating to the appeal and applications, incurred up to 24th May 1989 and that the claimants should pay the respondent's costs, again excluding the costs of the appeal and the applications, incurred after 24th May 1989, subject to the claimants being liable for one third of the respondent's counsel's brief fee, and the respondent being liable for 90% of two thirds of the claimants' counsel's brief fee, in relation to the first hearing in both cases. The claimants are to pay the respondent's costs of the second hearing."*

14. In his judgment Mr Hopper held that he should not consider the offer dated 22nd November 1989 in isolation from the earlier sealed offer, and concluded that the respondents intended that the later offer should be regarded as a revision of the earlier offer, available to be referred to in relation to costs. It should therefore *"not be disregarded in deciding how costs should be borne"*. He noted that the offer substantially exceeded the amount of the final award. In effect he took it into account in relation to both hearings and treated it as decisive.

15. He gave leave to appeal on the following questions:

"A. Whether a sealed offer purporting to be made under .... the Lands Tribunal Rules 1975 but which is expressed to be open to acceptance only up to a certain date (being the date of the first day of trial) should, in the event of the claimants being eventually awarded a sum less than the sum offered, to be taken into account in determining the incidence of the costs:

(a) of the trial after the first day?

(b) of a rehearing directed by the Court of Appeal which is heard six years after the first trial?

B. Whether the Lands Tribunal erred in law in ordering the claimants:

(a) to pay the costs of the first hearing between 29th November 1989 and 17th May 1990?

(b) to pay the costs of the rehearing (being the costs incurred after the references were reremitted by the Court of Appeal)?"

16. The essential issue on the hearing of the appeal was the extent, if any, to which Mr Hopper was entitled to take account of the offers contained in the letters of 13th April and 22nd November 1989. He accepted that the eventual award could be regarded as less favourable in real terms than the original offer made in July 1982, but decided that this offer, which had in any event been effectively withdrawn in April 1985, was irrelevant to the issue of costs. There was no cross appeal against this conclusion, but Mr Harrison-Hall for the respondents underlined that Mr Hopper's judgment on the issue of costs had been reached after a meticulous analysis of all the relevant factors in this very protracted litigation.

17. In Mr Andrew Clutterbuck's helpful argument for the appellants the contention advanced to Mr Hopper that the letter dated 22nd November 1989 was inadmissible on the question of costs was not pursued. Instead he accepted, rightly in my judgment, that once the issues to be decided in the second hearing had been resolved, it was reasonable for the letter to be treated as relevant, but not decisive, on the question of costs as if it were what is currently characterised as a Calderbank letter (**Calderbank v Calderbank** [1976] Fam 93). He submitted however that the offer contained in the letter, whether taken on its own, or together with the earlier sealed offer, was in any event withdrawn with effect from the end of the first day's hearing on 28th November. By analogy with the decision in **Garner v Cleggs** [1983] 1 WLR 862, he suggested that any possible impact which the letter might have had did not extend beyond the date when the offer was withdrawn. He sought to derive further support from the Civil Procedure Rules, and in particular Part 36.5.(8) which deprives an offer which has been withdrawn of any effect.

18. Mr Clutterbuck contended that Mr Hopper simply overlooked that the offer was withdrawn. I am unable to accept that in the context of this part of his closely reasoned decision Mr Hopper did not fully appreciate the precise terms of the letter dated 22nd November 1989, but inevitably he focused on the contentions then being advanced that the letter was inadmissible, which it is now conceded he was right to reject.

19. Mr Clutterbuck developed an additional strand to the argument in relation to the costs of the second hearing. Stripped to essentials, he suggested that this hearing was for all practical purposes a new piece of litigation consequent on the decision of the Court of Appeal, and that the offers made in 1989, and withdrawn as long ago as 28th November 1989, were wholly irrelevant. Rather than protect their position, as they could, by making a further sealed offer or writing a Calderbank letter, the respondents had simply denied that the appellants' claim had any value, notwithstanding the decision of the Court of Appeal that some liability would be established, and the value of the claim required re-assessment.

20. Mr Harrison-Hall underlined the principle that this Court should not interfere with the discretion exercised in relation to costs, particularly given the meticulous nature of Mr Hopper's judgment. He suggested that from April 1989 onwards and until after the first hearing had begun, the appellants could have accepted a settlement substantially in excess of the ultimate valuation of the claims. The result carefully achieved by the orders made in relation to counsel's fees reflected a balanced conclusion which could not be described as unreasonable: that these orders illustrated the care taken by Mr Hopper and the fair and balanced conclusion which he reached.

21. In my judgment Mr Hopper was right to approach the question of the costs of the first hearing separately from those of the second hearing. In his judgment each item of costs is given a separate heading. The problem however is that he appears to have treated his decision about the costs of the second hearing as if it depended on the decision he had reached about the costs of the first hearing. Although no basis for interfering with the exercise of his discretion in relation to the lengthy first hearing has been shown, there is nothing in his judgment to explain why the offers made and withdrawn before the end of 1989 were relevant to the conduct of proceedings over six years later when the hearing to which the offer related, and the issues ventilated at such length, had vanished into history, and when, in reality, the second hearing represented a new start to the proceedings. This amounted to a significant misdirection or non-direction. In my judgment the offer withdrawn so many years earlier had on proper analysis no relevance to the costs of the second hearing based on newly prepared points of claim in accordance with the directions of the Court of Appeal. Accordingly, the conclusion in relation to the second hearing was wrong in principle, and unsustainable. The appropriate order was that these costs should be borne, not by the appellants but by the respondents. To that extent this appeal should be allowed.

LORD JUSTICE WALLER: I agree.

LORD JUSTICE PETER GIBSON: I also agree.

MR A CLUTTERBUCK (Instructed by Flint Bishop Barnett of Derby) appeared on behalf of the Appellant
MR G HARRISON-HALL (Instructed by Nabarro Nathanson of Sheffield) appeared on behalf of the Respondent

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