LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

ELECTRICITY (NORTHERN IRELAND) ORDER 1992

IN THE MATTER OF AN APPLICATION FOR COSTS

R/41/2009

BETWEEN

BRICKKILN WASTE LIMITED - CLAIMANT

AND

NORTHERN IRELAND ELECTRICITY – RESPONDENT

PART 3

Re: Lands at Electra Road, Maydown, Londonderry

Lands Tribunal – Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)

Background

1. Brickkiln Waste Limited ("the claimant") is the freehold owner of lands at Electra Road, Maydown, Londonderry ("the reference land") which extends to approximately 32 acres and consists of partly developed and partly undeveloped land. The reference land is bisected by a spine road with the undeveloped part to the north consisting of some 12 acres used for agricultural purposes ("the reference land north") and the developed part to the south of about 20 acres ("the reference land south") which is operated as a waste disposal facility by the claimant.

2. The reference land was originally purchased by the claimant in 2006 and at that time the claimant appreciated that the land was transversed by electricity power lines carried by pylons and poles ("the equipment") which had been installed during the ownership of predecessors in title to the land under voluntary wayleave agreements. These wayleaves were to remain in force for a period of 52 years from the 7th June 1959. After expiry of the voluntary agreements the wayleaves were continued in accordance with the provisions of paragraph 12 of schedule 4 to the Electricity (Northern Ireland) Order 1992 ("the 1992 order") applicable to "temporary continuation of wayleaves."

3. On the 3rd May 2006 the claimants' solicitor wrote to Northern Ireland Electricity ("the respondent") giving notice that the claimant would not be renewing any of the wayleave agreements and that, since the agreements had by that time expired, the solicitors required the respondent to remove all the equipment from the reference land. The respondent subsequently referred the matter to the Department of Enterprise, Trade and Investment

("DETI") seeking the consent of the Department to retain the equipment on the reference land by way of a Necessary Wayleave ("NWL"). On the 7th May 2009, in accordance with paragraphs 10 and 12 of Schedule 4 to the 1992 Order a NWL granted consent to the respondent to retain its equipment on the reference land.

4. The claimant subsequently referred to the Tribunal for assessment of a claim for compensation from the respondent for the grant of the NWL under the provisions of paragraph 11(1) of Schedule 4 to the 1992 Order:

> "11(1) Where a wayleave is granted to a licence holder under paragraph 10 –
>
> a) The occupier of the land; and
>
> b) Where the occupier is not also the owner of the land, the owner may recover from the licence holder compensation in respect of the grant".

5. The claimants had sought compensation of £763,411 which comprised compensation of £581,286 in respect of the reference land south and £181,125 in respect of the reference land north. The respondent considered that no compensation was payable.

6. By a decision dated the 30th September 2014 the Tribunal awarded the claimant total compensation of £30,000 which comprised zero award for the reference land south and £30,000 for the reference land north.

Procedural Matters

7. The Tribunal received written and oral submissions from Mr Mark Orr QC on behalf of the claimant and Mr Stephen Shaw QC on behalf of the respondent.

Position of the Parties

8. The claimant's position was that in all of the circumstances and in light of the established practice in matters concerning compulsory purchase, they were entitled to all costs.

9. The respondent sought costs in respect of the reference land south while accepting a liability to pay costs in respect of the reference land north with both sets of costs being set off against each other.

Statute

10. Rule 33(1) of the Lands Tribunal Rules (Northern Ireland) 1976 provides:-

> "33(1) Except in so far as Article 5 of the Land Compensation (Northern Ireland) Order 1982 applies and subject to paragraph (3) the costs of and incidental to any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President".

Authorities

11. The Tribunal was referred to the following authorities:

- Wooton v Central Land Board [1957] 1 ALL ER 441

Mr Orr QC submitted that this case directed the Tribunal to exercise its discretion judicially

- Purfleet Farms Limited v Secretary of State for Transport, Local Government and the Regions [2002] EWCA CIV 1430

  Potter LJ at page 374 stated the presumption that, under the compulsory purchase code a claimant should be entitled to its costs in the absence of some special reason to the contrary. A Tribunal not allowing such costs must be able to identify circumstances:

  > "In which the Tribunal considers that an item of costs incurred, or an issue raised, was such that it could not, on any sensible basis, be regarded as part of the reasonable and necessary expenses of determining the amount of the disputed compensation ….. in which the claimant's conduct of or in relation to, the proceedings has led to an obvious and substantial escalation in costs over and above those costs which it was reasonable to incur in vindication of his right to compensation"

  And further at paragraph 37

  > "(37) Turning to the question of expert evidence, if the amount of the 'exaggerated' claim is based upon the valuation, opinion and evidence of the claimants expert witness, it will rarely be appropriate in my view, to make an adverse costs order against a successful claimant

- Toby McMurray and Julie McMurray v Northern Ireland Housing Executive R/37/2011

12. The Tribunal also derived assistance from the following authorities:

- Donal and Vivienne O'Neill v Northern Ireland Housing Executive

  R/49/2009:

  "12. Negative equity is a matter of current widespread concern, no helpful recent authority on the consequences for compulsory purchase was found by either party and the Tribunal concludes that it was neither unreasonable nor unnecessary to raise the issue

  13. The Tribunal agrees with Mr Gibson's BL suggestion that in this case, although the claimants lost on the issue, there was no special reason to depart from the Purfleet assumption and the claimants should have their reasonable costs"

- Dawn Bell v South & East Belfast Health & Social Services Trust R/10/2002 Part II

  "3. Mr Good suggested that in the circumstances, this not being a matter involving actual compulsory acquisition, the Tribunal should follow its discretionary guidelines

as set out in Oxfam v Earl and Others BT/3/1995. The general presumption being that unless these are special circumstances costs follow the event.

4. The Tribunal accepts that in the ordinary case costs follow the event …..

5. However the Tribunal is of the view that in compensation references, the starting point is the presumption that the cost of determining disputed compensation should fall on the authority to whose use of compulsory powers the need to determine compensation was attributable. That has been the position since the time of the Land Clauses Consolidation Acts 1845 and probably before that. That view is wholly consistent with the principle of equivalence.

6. The Tribunal accepts that there was no actual compulsory acquisition but compulsory purchase powers cast a long shadow. Had it not been for the possession of compulsory acquisition powers, and the displacement of Mrs Bell as a consequence of the Trusts proposals for redevelopment for it to carry out its function, the issue of a payment under Article 37 would not have arisen. This is a 'compensation reference'."

Discussion

13. Mr Orr QC submitted that in the subject reference a public authority had evoked its statutory powers to limit the right of a private landowner. He considered that the powers exercised fell within the ambit of compulsory purchase, the landowner had no choice and as such the principles applied to other statutes conferring rights of compulsory purchase were equally applicable to the subject reference. He referred the Tribunal to the general rule as outlined in Purfleet Farms, that is the costs of a reference to determine compensation fall on the acquiring authority without whose use of compulsory purchase powers there would have been no need for the landowner to be compensated and in the absence of special reasons to the contrary a claimant is entitled to his or her costs. He submitted that the claimant had been successful in establishing its right to compensation, it had been awarded a lump sum compensation and as such it was entitled to all of its costs.

14. Mr Shaw QC did not consider that the subject reference fell within the ambit of compulsory acquisition as there was a separate schedule relating to NIE acquisition elsewhere in the 1992 Order. He submitted that costs should follow the event and as the decision was split in to two distinct awards, the respondent should be awarded its costs in respect of the reference land south where compensation was assessed at nil. He did, however accept the respondent's liability to pay costs in respect of the reference land north where £30,000 compensation had been awarded, although he considered that the two sets of costs should be set off against each other. In the alternative, if the Tribunal decided that the subject reference fell within the ambit of compulsory acquisition, he submitted that there was a requirement on the Tribunal to look at all of the circumstances and consider if there was any special reason to depart from the normal practice of awarding the claimant its costs. He referred the Tribunal to McMurray v NIHE, a case in which the Tribunal had departed from normal procedure and did not award the claimants their costs. He requested the Tribunal to look at all of the evidence. The claimant had assessed compensation at £763,000 in respect

of two parcels and in one parcel zero compensation was awarded and in the other parcel it was awarded £30,000 compensation. He suggested that this was adequate reason to depart from normal procedure.

Mr Orr QC submitted that there was no precedent for splitting a decision.

15. There were therefore two issues to be decided by the Tribunal:

(i) Did the subject reference fall within the ambit of compulsory acquisition and if so;

(ii) Was there any special reason to depart from the Purfleet assumption that the claimant is entitled to its costs.

Compulsory Acquisition

16. For the following reasons the Tribunal agrees with Mr Orr QC in that the subject reference falls within the ambit of compulsory acquisition :

(i) The provisions of paragraph 11(1) of Schedule 4 to the 1992 Order provide that the landowner is entitled to recover full "compensation" from the licence holder in respect of the grant of the NWL. This is therefore a "compensation" reference occasioned by the exercise of compulsory powers on behalf of the respondent.

(ii) In the Part 1 Brickkiln decision the Tribunal noted that the claimant had lost his legal right to determine the respondents licence and the loss of that right was of some significance. The Tribunal subsequently determined that the principle of equivalence should be applied to that loss. The theory of equivalence as outlined in Director of Buildings and Lands v Shun Fung Ironworks Ltd [19951] EGLR 19, is the "backbone" of compulsory acquisition compensation.

(iii) The Court of Appeal in Welford & Others v EDF Energy Networks (LPN) [2007] EWCH CIV 293 directed that compensation for wayleaves should be assessed on the general principles applicable to the payment of compensation for the compulsory acquisition of land.

(iv) The Tribunal considers the subject reference to be along similar lines to Dawn Bell v NIHE. In that case, which related to a disturbance payment, the Tribunal accepted that even though there was no actual compulsory acquisition, compulsory purchase powers "cast a long shadow" and considered it to be a "compensation reference".

Special Reason to Depart

17. The Tribunal is satisfied that in the subject reference there is no reason to depart from the Purfleet assumption that the claimant is entitled to recover its costs. Even though the claimants' expert, Mr Kennedy had assessed compensation at £763,000 and total compensation awarded was significantly less at £30,000, there was never any suggestion that this was an exaggerated claim. The Tribunal is content that Mr Kennedy had made a genuine attempt to quantify the effect on market value of the NWL, in the context of the 1992 Order, a concept which had never previously come before this Tribunal. Mr Shaw QC

considered that there were two distinct awards, one which was NIL and the other which was £30,000. The Tribunal, however, agrees with Mr Orr QC, there is no precedent for splitting an award. The claimant had made a single claim for compensation of £763,000 and the issue was dealt with as a single reference.

Conclusion

18. The claimant had received an award of compensation which was £30,000 greater than any offer from the respondent and as such the Tribunal considers the claimant is entitled to its costs in the reference. The Tribunal orders the respondent to pay the reasonable costs of the claimant, such costs to be taxed if not agreed.

ORDERS ACCORDINGLY

28th January 2015 **Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)**

LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances

Claimant: **Mr Mark Orr QC instructed by Hampson Harvey, Solicitors**

Respondent: **Mr Stephen Shaw QC instructed by NIE Solicitors**