

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/26/2011
BETWEEN
JOHN RICHARD CUTHBERT – CLAIMANT
AND
NORTHERN IRELAND ELECTRICITY – RESPONDENT

Part 2

Re: Lands at 10 Maydown Road, Londonderry

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

Background

1. The subject property is located off the Maydown Road, some four miles south east of Londonderry city centre. It comprises 37.4 acres of undeveloped land [“the reference land”]. A dwelling house and farm buildings, known as 10 Maydown Road, are also located on the reference land. The land is currently used for agricultural purposes but is zoned for “proposed industry” in the Derry Area Plan 2011.
2. The reference land is traversed by Northern Ireland Electricity lines and pylons (“the equipment”). Northern Ireland Electricity (“the respondent”) had retained its equipment on the claimants’ land by way of a series of voluntary wayleave arrangements but the claimant had terminated these arrangements and requested the respondent to remove its equipment from the reference land. The respondent then made an application to the Department of Enterprise, Trade and Investment (“DETI”) to retain its equipment on the land and subsequently, on the 23rd May 2011, in accordance with paragraphs 10 and 12 of Schedule 4 to the Electricity (Northern Ireland) Order 1992 (“the 1992 order”) the Department granted the respondent permission to retain its equipment on the claimants land by way of a Necessary Wayleave (“NWL”).
3. The claimant subsequently referred to the Tribunal for assessment of a claim for compensation from the respondent for the grant of the NWL in accordance with the provisions of paragraph 11(1) of Schedule 4 to the 1992 Order:

“11(1) – (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”

On that basis the claimants had sought £530,000 compensation in respect of the lands and £15,540 compensation in respect of the dwelling house at 10 Maydown Road. By a decision dated the 9th October 2014 the Tribunal made no award of compensation for the grant of the NWL.

4. Both parties are now seeking their costs in the reference.

Procedural Matters

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

Position of the Parties

6. The claimant’s position was that in all of the circumstances and in light of the established practice in matters concerning compulsory purchase, he was entitled to all of his costs in the reference.

7. The respondent submitted that as nil compensation was awarded it was entitled to recover its costs from the claimant, such costs to be measured by the Tribunal in the absence of agreement on the amount.

Statute

8. 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 subsequent to paragraph (3) the cost 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

9. The Tribunal was referred to the following authorities:

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

This case confirmed that the discretion of the Tribunal must be exercised judicially in “costs” references.

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

Potter L J 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 claimants 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

10. The Tribunal also derived assistance from the following authority:

- Donal and Vivienne O’Neill v Northern Ireland Housing Executive R/49/2009:

“10. Mr Good BL did not oppose Mr Gibson’s BL suggestion that no distinction should be made between a point of legal principle and a valuation issue”

“12. Negative equity is a matter of current widespread concern. No helpful recent authorities on the consequences for compulsory purchase were 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 claimant lost on the issue, there was no special reason to depart from the Purfleet assumption and the claimants should have their reasonable costs”

Discussion

11. In the first of the NWL “costs” references to come before the Tribunal, Brickkiln v Northern Ireland Electricity [2015] R/41/2009, the Tribunal decided that NWL compensation references fell within the ambit of compulsory acquisition. As in Purfleet Farms and O’Neill the starting point for the Tribunal is therefore the assumption that the costs of determining the disputed compensation should fall on the acquiring authority to whose use of

compulsory powers the need to determine the compensation was attributable, unless there were special reasons to depart from that assumption.

- 12.** Mr Shaw QC submitted that the claimant had lost in that no compensation was awarded and on that basis the claimant should be responsible for the respondent's costs in the reference. Mr Orr QC submitted that the claimants had successfully established liability and the correct basis for assessing compensation in NWL cases. He suggested that the respondent had used its statutory powers to acquire rights without consent and as in Purfleet Farms the costs should fall on the acquiring authority. He considered there was no special reason to depart from the Purfleet assumption.
- 13.** The Tribunal agrees with Mr Orr QC, the claimant had established the correct basis for assessing compensation in NWL cases, that is the diminution in market value caused by the grant of the NWL. In the substantive hearing the Tribunal had found the respondents primary approach to be flawed in that it failed to take account of the basic fact that the grant of the NWL had caused the claimant to lose his legal right to have the respondent's equipment removed from the reference property. The claimant had, however, failed to clearly demonstrate how the presence of the respondent's equipment would be a constraint on future development of the reference land which would result in a diminution in market value. With regard to the dwelling house at 10 Maydown Road he had failed to clearly demonstrate, that there was a diminution in market value caused by the grant of the NWL.
- 14.** The Tribunal is content that the claimant's expert had made a genuine attempt to assess the compensation payable and there was never any suggestion of an exaggerated claim. The Tribunal notes that, similar to O'Neill, the issue in this reference, the correct basis of compensation for the grant of a NWL, is of widespread concern and there may be a significant number of similar cases awaiting resolution. The issue had never previously come before this Tribunal and the Tribunal considers that it was reasonable in all the circumstances for the claimants to seek compensation in this case.

Conclusion

- 15.** The Tribunal concludes that, as in O'Neill, even though the claimant had lost on an issue, there was no special reason to depart from the Purfleet assumption and the claimant should have his reasonable costs in the reference.

Orders Accordingly

11th February 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.