

**LANDS TRIBUNAL FOR NORTHERN IRELAND**  
**LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964**  
**LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982**

**IN THE MATTER OF A REFERENCE**

**R/38/2011**

**BETWEEN**

**RJJ KILLEN LIMITED – CLAIMANT**

**AND**

**DEPARTMENT FOR REGIONAL DEVELOPMENT – RESPONDENT**

**Re: 41 Cloghole Road, Campsie**

**Lands Tribunal - Henry M Spence MRICS Dip.Rating IRRV (Hons)**

**Background**

1. The A2 Maydown to City of Derry Airport link road now provides a 6 kilometre dual carriageway connection between the existing Maydown roundabout and the City of Derry Airport.
2. An assessment process identifying the preferred route was completed and Orders for the scheme were published in December 2006. A public inquiry was held in 2007 and subsequently, on 18<sup>th</sup> February 2009 the Department for Regional Development (“the Department”) published a Vesting Order with an operative date of 26<sup>th</sup> March 2009.
3. In 2009 RJJ Killen Limited farmed some 160 hectares of land of which they owned approximately 78 hectares with the remaining lands being leased in conacre. The main enterprise on the farm was dairying which was concentrated on the home farm at 41 Cloghole Road, Campsie and comprised some 46 hectares of land (“the Campsie lands”), the farmhouse, milking parlour and other related facilities.
4. Prior to the scheme 10.9 hectares of the Campsie lands were located on the opposite side of the A2 which is the main road between Coleraine and Londonderry. This has now been upgraded to a dual carriageway. Before the scheme access to these lands, known as “fields 9 and 10” was directly from the A2. After the scheme access to fields 9 and 10 from the home farm now involves accessing the dual carriageway, travelling west to the Maydown roundabout before turning and travelling back to the new entrance to the fields. The round trip distance from the farmyard to the entrance to fields 9 and 10 was disputed but would appear to be between 4 and 5 miles.

5. As part of the accommodation works the respondent had considered the provision of a cattle creep/underpass as a means of access to fields 9 and 10 from the home farm but this proposal was rejected on the grounds of excessive cost. The claimant then sought a mandatory injunction compelling the Department to provide the underpass and the matter was referred to the High Court in December 2010. The application for the injunction was, however, struck out by consent.

### Procedural Matters

6. Mr Kevin Downey of Downey Property Solicitors appeared for the claimant. Mr Patrick Good QC instructed by the Departmental Solicitor's Office appeared for the respondent. The Tribunal also received written and oral expert evidence from Mr John Arthur and Mr Robert Martin, both experienced Chartered Surveyors. Additional expert evidence on agricultural matters was received from Dr W A McIlmoyle. Mr McAteer of PCI Consulting and Mr John Killen representing RJJ Killen Limited gave evidence as to farming activities on the land and the profitability of the business.

### Position of the Parties

7. Mr Arthur, on behalf of the claimant, sought a compensation settlement of £645,045 made up of:

Land Take	£91,550
Injurious affection to retained land	£275,000
Loss of 0.2023 ha for turning space	£10,115
Crop Loss	£7,390
New cattle handling facilities	£68,420
Additional costs (excess travelling time)	£80,120
Incremental management time	£15,800
Additional plant and equipment	£93,650
Owners time	£2,000
Temporary disturbance	<u>£10,000</u>
<b>TOTAL</b>	<b>£654,045</b>

8. Mr Martin's opinion was that the compensation payable should be £237,000 summarised:

Land Take	£67,750
Severance of fields 9 and 10	£137,000
Loss of land for turning space	£7,500
Cattle handling facility – payment in lieu	£5,000

Crop loss	£8,390
Claimant's time attending meetings	£2,000
Temporary injurious affection during the works	<u>£9,300</u>
<b>TOTAL</b>	<b>£237,000</b>

9. Prior to hearing the parties had agreed:

• The crop loss	£8,390
• Claimant's time attending meets	£2,000
• Temporary injurious affection during works	£10,000

10. The outstanding issues to be resolved by the Tribunal are:

	<u>Mr Martin</u>	<u>Mr Arthur</u>
Land take	1.831 ha @ £37,000 per ha = £67,750	1.831 ha @ £50,000 per ha = £91,550
Loss of land for turning space	0.2023 ha @ £37,000 per ha = £7,500	0.2023 ha @ £50,000 per ha = £10,115
Construction costs – cattle handling facility	£5,000	£68,240
Severance/injurious affection to retained land	Diminution in MV @ 33.3% = £137,000	Diminution in MV @ 50% = £275,000
Additional costs including incremental management time/ additional plant and equipment	Reflected in severance payment	£189,750

### **Statutory Framework**

11. The rules for assessing compensation are set out in the Land Compensation (Northern Ireland) Order 1982 ("the Order"). The relevant sections for this reference are:

#### Article 6

"Compensation in respect of any compulsory acquisition of land, shall, subject to the provisions of this Order or any other enactment, be assessed in accordance with the following rules:

(1) ...

(2) The value of the land shall, subject to Rules 3 to 6, be taken to be the amount which if sold on the open market by a willing seller might be expected to realise.

- (3) The special suitability or adaptability of the land for any purpose shall not be taken in to account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory acquisition powers.
- (4) ...
- (5) ...
- (6) The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land.”

And

Article 8:

- “(1) In assessing compensation to be paid to any person in respect of the compulsory acquisition of any land, regard shall be had not only to the value of the land acquired but also to the damage, if any, sustained or which may be sustained by that person by reason of the severing of the land from other lands of that person held with that land, or otherwise injuriously affecting such other lands by the exercise of powers conferred on the acquiring authority by any transferred provision.
- (2) Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation payable under paragraph (1) for injurious affecting of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him.”

### **List of Authorities**

12. The Tribunal was referred to the following authorities and references:

- Bwlfa and Merthyr Dare Steam Colliers [1891] Limited v Pontypridd Waterworks Co [1903] AC 426H2
- RIC v Clay [1914] 3 KD 466
- Vyricherla Narayana Gajapathiraju v Revenue Divisional Officer Vizagapatam [1939] AC 302

“The compensation must be determined, therefore, by reference to the price which a willing vendor might be reasonably expected to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must be likely disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be established as its value to the occupier...”

- Horn v Sunderland Corporation [1941] 2 KD 26  
 “The displaced occupier has the right to be put so far as money can do it in the same position as if his land had not been taken from him; in other words he gains the right to receive money payment not less than the loss imposed on him in the public interest, but on the other hand no greater”.
- H C Cooke v Secretary of State for the Environment REF/230/1971  
 “As I have indicated the main items in the Claimant’s claim are the value of the land without buildings, a substantial portion of the cost of new buildings, the whole of the cost of constructing a concrete farmyard and a new farm road and an outfall sewer, the cost of transporting cattle across the road A40 and the capitalised cost of travelling by car from 88 Lavington Drive to the site of the new farm buildings  
 .....  
 In my opinion the arguments advanced on behalf of the Claimant are misconceived. The correct approach to this matter is first of all to assume that the Claimant is a willing seller. That having been done, the next exercise is to ascertain the market price for the land acquired, as was done by the District Valuer. There then has to be added to the market price compensation for severance and injurious affection that is to say, compensation for depreciation in the value of the land not taken. The amount is the difference between the value of the land not taken before the severance or other injurious affection and the value after that date ... Those values are arrived at on the same basis as the value of the land acquired i.e. by reference to market values. As for the claim transporting cattle and travelling by car, these are items of disturbance, that is business disturbance which if valid are appropriate under Rule 6 but only as part of the occupiers claim.”
- Cuthbert v Secretary of State for the Environment REF/185/1977
- Waters and Others v Welsh Development Agency [2004] UK H219
- John Killen, Clarke Killen and RJJ Killen Limited v The Department for Regional Development [2010] NIQB 127
- The Human Rights Act 1998
- Compulsory Purchase and Compensation in Ireland: Law and Practice, McDermott and Wolfe, Irish Property Services
- Butterworths Ireland Limited, 1992 (pages 266, 267)
- Compulsory Purchase and Compensation: Disregarding “the Scheme”, a discussion paper; the Law Commission October 2001
- The Law of Compulsory Purchase, Roots and Others [2<sup>nd</sup> Edition]

13. The Tribunal derived additional assistance from:

- Valuation Office Agency (England & Wales) Land Compensation Manual: Section 3 – Severance and Injurious Affection. Part 1: Entitlement to Compensation.

### “3.13 Increased Working Costs

The effect of the compulsory acquisition may be to substantially increase the costs of working the retained land. The cost of working land will however reflect in its market value. It is therefore not the increased cost of working the land retained that can be claimed, but the depreciation in the market value of that land following the acquisition.

The case of Cuthbert v Secretary of State for the Environment (1979) 252 EG 921 concerned the compensation payable for the severance of an agricultural unit which gave rise to a liability to maintain additional lengths of fencing. The claimants submitted a claim on the basis of capitalised annual maintenance charges plus the discounted cost of future replacement. Considering such a claim under the head of injurious affection the Tribunal allowed £25,000 as opposed to £225,000 claimed and stated:

‘A purchaser ... might well express the value affect of this in terms of £/acre ... but he would ‘if well advised’ have first made as shrewd an estimate as possible of the financial burden he was taking on.’

Further:-

‘The notional purchaser ... might decide to shrug off part of the arithmetical answer in anticipation that other potential purchasers would be adopting a more robust approach to the fencing factor. Alternatively, he might treat the arithmetical answer as insufficiently reflecting the nuisance element of the fencing responsibility’.

VO policy is that such additional liabilities will be reflected in the value of the retained land ‘with the scheme’ and should be considered as an item of injurious affection.”

- Cowper Essex v Acton Local Board [1889] 14AC 153

## **Land Take**

14. Mr Martin assessed the market value of the land taken on the basis of £37,000 per ha. He provided details of sales and other settlements within the scheme to substantiate this figure.

15. Mr Arthur accepted that the market value of the land acquired in normal circumstances would be £37,000 per ha but in his opinion the subject land had a special value to the claimant as it was part of the dairy farm and he assessed the land take on the basis of £50,000 per ha. He did not provide any comparable evidence.
16. Mr Good submitted that the rules in Article 6 of the Order aim to arrive at the value to the owner that is achieved by a culmination of rules (2) and (6), in other words, by the sum of the open market value of the land and any amount due in respect of disturbance. He further submitted that the value of the land is not to be established as its value to the owner [Vyricherla] and the vendor is to be treated as willing to sell at market price. He considered any suggestion that the land had some special value to the claimant ran contrary to rule (2).
17. Mr Downey submitted that the land around the claimant's farm increased in value because of the first class residence and farm buildings that belong to the farm business. He considered the land was an integral part of a going concern farming business and had a higher value to their client than the amount of compensation the respondent was offering.
18. The Tribunal agrees with Mr Good, to assess the market value of the land taken on the basis that it had a special value to the claimant runs contrary to rule (2). The value of the land taken is to be based on open market value, assuming a willing seller and it is highly unlikely that prospective purchasers would pay a premium on the basis that it was part of the claimant's dairy farm. Furthermore the residence and farm buildings cannot be reflected in the market value of the land taken as rule (2) directs that it is only the land taken which is to be "sold on the open market". The Tribunal assesses the market value of the land taken and the land for the turning circle at £37,000 per ha, as per Mr Martin's evidence.

Land Take - 1.831 ha @ £37,000 per ha	<b>£67,750</b>
Loss of land for turning space – 0.2023 ha @ £37,000 per ha	<b>£7,500</b>

### **Cattle Handling Facility**

19. Both parties were agreed that this item should be treated as separate from the other heads of claim. The claimant sought the cost of construction of a new cattle handling facility estimated at £68,420 plus VAT. The respondent put forward an estimate of £5,000 in respect of what it considered to be a true cattle handling facility.
20. Dr McIlmoyle submitted that the purpose of a cattle handling facility was to allow cattle to be handled and treated on site, without the necessity of having to trailer them back to the farmyard. He considered the handling facility could be used during the grazing season and it was only likely to be used for TB/Brucellosis testing, to facilitate loading and unloading and the

occasional treatment of cattle. In his opinion there was no need for such an elaborate and expensive structure as described by the claimants and the £5,000 estimate put forward by the respondent represented fair compensation.

21. Mr Good suggested that it was evident from a reading of the quotation that the claimant was seeking the cost of a stand-alone cattle shed complete with race and cattle crush rather than simply a handling facility.
22. Mr Killen gave evidence that what the claimant was proposing was a cattle handling facility with a race and cattle crush and it was not a stand-alone facility as there was no lying area for the cattle nor was there a feeding area which would allow the animals to be kept there overnight. He considered that the additional costs arise due to the unique proximity of the facility to the nearby river. In Mr Killen's opinion the pen recommended by Dr McIlmoyle would only be suitable for a small number of animals (between 5 and 10). Fifty animals would need to be assembled in a small space and in his view this increased the risk of pollution to the river.
23. Mr Downey submitted that Mr Killen's concerns were not just that there would be additional fines and consequences of pollution, in addition to them, they would lose income from their single farm payment under cross compliance regulations. He confirmed the claimant had never suffered any previous loss of income like this and submitted that the claimant was entitled to a proper facility as described, based on its practical management of the farm. He further submitted that the claimant would be prepared to accept an inferior facility if an indemnity is provided to protect it against any future claims for pollution.
24. Dr McIlmoyle confirmed he had never walked the fields or visited the site of the proposed cattle handling facility. On the other had the claimant had extensive dealings with the agencies involved and had the necessary experience over many years to assess where and how risks might arise. The Tribunal found Mr Killen to be a plausible witness and accepts his contention that the facility, as put forward by the respondent, would increase the risk of pollution. The Tribunal is satisfied that a proper facility, as detailed by the claimant, is required to put them in the position they were in prior to the scheme [Horn] i.e. no environmental and hence financial risk. The Tribunal accepts the claimant's estimate of £68,240 (excluding VAT) as being the appropriate amount of compensation for this head of claim:

Cattle Handling Facility

**£68,240**

### **Severance Injurious Affection**

25. In compensation terms severance refers to the amount of damage that the land remaining in the hands of the claimant, after acquisition, suffers by reason of the acquisition. In other words the reduction in the value of the land retained caused by the physical loss of the land taken.



26. Injurious affection refers to the damage caused to the remaining lands as a result of the physical presence and use of the works i.e. the reduction in the value of the land retained as a result of the construction and subsequent use of the public works. In the subject case it is the effect on the retained lands of the upgrade of the existing road to a dual carriageway.
27. The compensation for severance and injurious affection therefore represents the difference between the value of the land retained with and without the scheme. [Cooke; Cuthbert].
28. Mr Martin restricted the effect of the severance to fields 9 and 10 and assessed as follows:

Before Scheme - 10.98 ha @ £37,000 per ha	£406,000
After Scheme – 10.76 ha @ £25,000 per ha	<u>£269,000</u>
Diminution in market value due to increased working costs	£137,000

He confirmed the reduction in the price per hectare for the severance was in line with other settlements in the scheme. In his evidence Mr Martin did not consider injurious affection.

29. Mr Arthur gave his assessment of this head of claim which he titled “Injurious affection to severance land”:

11 hectares at £25,000 per ha	£275,000
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He took his original pre-scheme value of £50,000 per ha and reduced it by 50%.

30. The Tribunal does not agree with the experts that severance and injurious affection in the subject case should be limited to fields 9 and 10. Mr Killen gave evidence that these lands were an integral part of the dairy farm business. The degree of integration was disputed by the respondent but the Tribunal is satisfied that fields 9 and 10 were an essential part of the dairy farm operations.
31. Article 8(1) of the Order allows for the consideration of the effect of severance and injurious affection on other land “held with” the land being acquired. The Cowper Essex case provided that if separate pieces of land owned by the same person were so near together that the possession and control of each would give an enhanced value to the whole, or would contribute to the advantage or protection of the property as one holding, then they may be considered to be “held with” each other:-

“it is enough if both parcels of land are held by one and the same owner and if the units of ownership conduces to the advantage or protection of the property as one holding”. In accordance with Article 8(1) of the Order the Tribunal is satisfied that fields 9 and 10 are “held with” the 33 ha of land on the other side of the road. It is therefore the effect on all of the retained lands of the upgrade of the existing road to a dual carriageway which needs to be considered. As neither expert had considered this basis of assessment for severance/injurious affection the Tribunal invited further submissions post the hearing.

32. Mr Martin did not alter his position as, in his opinion, the severance did not affect the lands on the opposite side of the road. He did not consider that the upgrade to the dual carriageway had injuriously affected the retained lands.

33. Mr Arthur did avail of the opportunity to provide a further submission. In order to assess the compensation for severance and injurious affection to all of the retained lands he required the following factors to be taken into account:

- injurious affection to the retained land due to the inability to make use of the area of 11 hectares for grazing dairy cows and for access difficulties.
- reduction in value of the overall retained area due to difficulties associated with the moving of stock.
- loss of 0.2023 ha in the land on the north side for turning space in relation to proposed new cattle handling facilities.
- the restriction on the expansion of the dairy herd caused by the scheme, reduces the number of dairy cows which can be accommodated from 300 to 200, with a consequent affect on profits.

In his opinion a reduction of 25% to the “before” value was appropriate for the severance and injurious affection. He took 25% off his “before” value of £2,300,000 (based on a price per hectare of £50,000) to give a figure of £575,000 for severance and injurious affection.

#### **“Before” Value**

34. Both experts were agreed that the retained lands totalled some 44.169 ha and the “bare” land value in the locality prior to the scheme was £37,000 per ha. Mr Arthur, however, considered that as the retained lands were to be valued as “one lot” the price per hectare should be increased to £50,000 per ha to reflect the substantial farmhouse and modern farm buildings located on the land. He did not provide comparable evidence but in his opinion and experience the increase was warranted. He considered it was standard market practice to reflect the value of the buildings in the overall price per hectare. Mr Martin did not provide a “before” scheme value for the retained lands in their entirety. The Tribunal agrees with Mr Arthur, it is standard

market practice to reflect the market value of the buildings in the overall price per hectare and considers a figure of £50,000 per ha for the “before” scheme value of the retained land to be reasonable. An alternative would be to value all of the retained lands at the “bare” land value of £37,000 per ha and add on for the market value of the farmhouse and buildings but the Tribunal agrees with Mr Arthur, this is not market practice.

#### **“After” Value**

35. Mr Killen gave evidence that prior to the scheme it took some 15 minutes to transport cattle across the road, at off peak times but he now faced a round trip of some 4 to 5 miles with difficult access on to a dual carriageway. He further gave evidence that this new journey was an arduous and lengthy process, including the fact that there was now no direct access to fields 9 and 10 and he had to double back over a narrow laneway. He did however consider that the process could be improved by the cattle handling facility as put forward by the claimant which would reduce the need to transport cattle back to the home farm.
36. Dr McIlmoyle disputed that fields 9 and 10 could be used for dairy cattle from Mr Killen’s farm prior to the scheme due to the volume of traffic on the existing “A” road. Mr Killen had, however, been involved in farming the lands full time since 1991 and the Tribunal accepts his evidence that prior to the scheme the process of moving dairy cattle across the road was viable at off peak times in a relatively short space of time.
37. Mr Arthur in his supplementary evidence considered that a reduction of 25% in the market value of the retained lands was warranted to reflect the effects of the scheme. The Tribunal notes Mr Killen considered that the cattle handling facility would improve the process by reducing the need to transport cattle to and from fields 9 and 10. Based on an intuitive approach the Tribunal considers that potential purchasers would reduce their bid by 10% to £45,000 per ha post the scheme to reflect the increased difficulties travelling to and accessing fields 9 and 10.
38. The Tribunal therefore assesses the diminution in market value to the retained lands due to severance and injurious affection.

“Before” scheme value - 44.168 ha @ £50,000 per ha	£2,208,400
“After” scheme value – 44.168 ha @ £45,000 per ha	<u>£1,987,560</u>
Diminution in market value due to severance and injurious affection retained lands	<b>£220,840</b>

#### **Additional Items**

39. “The displaced occupier has the right to be put so far as money can do it, in the same position as if his land had not been taken from him.” [Horn] In other words has Mr McKillen been adequately compensated for his dispossession?

40. The presence of a road bisecting land invariably results in increased costs of working the holding, due to greater travelling time. A severance/injurious affection claim however requires the consideration of the diminution in land values; it is not suffice to capitalise the increased costs of working (Cuthbert). As detailed above what is required is a “before and after” valuation of the retained land although it is recognised that this may well give a lower valuer, and not fully reflect the cost of the severance to the claimant. The shortfall may well substantiate a claim for disturbance (Cooke). In TG O’Fee v Highways Agency [1999] the English Lands Tribunal saw no reason why disturbance compensation for losses should not be claimed in respect of land not taken if not otherwise compensated by the claim for severance and injurious affection. Is there any shortfall in the subject case?

41. In his original assessment of compensation Mr Arthur provided a detailed estimate of Mr Killen’s disturbance costs but he did recognise in his supplementary evidence that most of the items relating to the increased costs of working the farm were reflected in the diminution in market value associated with the severance and injurious affection.

42. The Tribunal, however, considers 3 of Mr Arthur’s disturbance items, relating to additional plant and equipment, to be worthy of further consideration as they may not be accounted for in the diminution in market value due to the increased working costs:

Mr Arthur – “Additional Plant and Equipment”

- Trailer £24,900  
Replaced 3 times over a 20 year period at a cost of £8,300 per trailer
- Quad Trailer £3,750  
Replaced 3 times over a 20 year period at a cost of £1,250 per trailer
- Tractor £65,000  
Replaced 3 times over a 20 year period at a cost of £65,000 allowing for alternative use

43. Mr Killen gave evidence:

- A large cattle trailer is required to transport cattle to and from fields 9 and 10 to reduce the number of journeys. This was not required prior to the scheme.
- The quad trailer is required to tow behind a jeep and to transport the quad to the severed fields. This was not required prior to the scheme.

- The increased travel to fields 9 and 10 will significantly increase the wear and tear on the tractor and it will need to be replaced possibly 3 times over the next 20 years. This is due to the scheme, although the tractor would have other uses not related to the scheme.

44. The Tribunal is satisfied these are valid items of disturbance which are not accounted for in the diminution in value of the retained lands. Taking a robust approach the Tribunal allows £70,000 for these items.

### **Summary**

45. The Tribunal summarises the claimant's entitlement to compensation as:

Land take	£67,750
Severance and injurious affection to retained lands	£220,840
Loss for turning space	£7,500
Cattle handling facility payment in lieu	£68,420
Crop loss	£8,390
Claimant's time attending meetings	£2,000
Temporary injurious affection during works	£10,000
Additional disturbance items	<u>£70,000</u>
	<b>£454,900</b>

46. The Tribunal awards compensation at £454,900.

### **ORDERS ACCORDINGLY**

**9<sup>th</sup> December 2013**

**Henry M Spence MRICS Dip.Rating IRRV (Hons)  
LANDS TRIBUNAL FOR NORTHERN IRELAND**

### **Appearances:**

**Claimant - Mr Kevin Downey of Downey Property Solicitors.**

**Respondent - Mr Patrick Good QC instructed by the Departmental Solicitor's Office.**