LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964

LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

ELECTRICITY (NORTHERN IRELAND) ORDER 1992

IN THE MATTER OF A REFERENCE

R/41/2009

BETWEEN

BRICKKILN WASTE LIMITED – CLAIMANT

AND

NORTHERN IRELAND ELECTRICITY – RESPONDENT

Re: Land at Electra Road, Maydown, Londonderry

Lands Tribunal – The Rt Hon Lord Justice Coghlin and
Henry M Spence MRICS Dip.Rating IRRV (Hons)

1. In this case Brickkiln Waste Ltd ("the claimant") has referred to the Tribunal for assessment a claim for compensation from Northern Ireland Electricity Ltd ("the respondent) grounded upon alleged breaches of paragraph 11(1) of Schedule 4 of the Electricity (Northern Ireland) Order 1992 ("the 1992 Order") and the claimant's right to property under Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") in accordance with the provisions of Schedule 6 of the Land Compensation (Northern Ireland) Order 1982 ("the 1982 Order"). The reference was conducted on behalf of the claimant by Mr Mark Orr QC and Mr Barry Denyer-Green BL while Mr Stephen Shaw QC represented the respondent. The Tribunal wishes to acknowledge the considerable assistance that it derived from the care and clarity with which both sets of counsel prepared and delivered their written and oral submissions.

Background

2. The claimant is the freehold owner of land 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 about 12 acres used for agricultural purposes ("the Reference Land north") and the developed part lying to the south of about 20 acres ("the Reference Land south").

3. The Reference Land was originally purchased by the claimant in 2004 for the development of an "environmental waste park" the purpose of which was to substantially reduce waste sent to landfill sites and to convert non-recyclable waste to heat and electricity. The claimant believed that such a development was suitable at this site because the Reference Land;

   i. was zoned for industrial development;
   ii. had good electricity connections;
   iii. had good access to the major road network; and
   iv. was located in close proximity to major waste customers.

4. At the time of original purchase the claimant appreciated that the Reference Land was traversed by electricity power lines carried by pylons and poles which had been installed during ownership by the predecessors in title to the land under several wayleave agreements. The relevant wayleave agreements had been negotiated between Robert J Cuthbert, the claimant's predecessor in title and the then Electricity Board for Northern Ireland ("the Board") on 18th October 1960. Each agreement was to remain in force for a period of 42 years from 7th June 1959 and compensation amounting to £52-10 shillings was paid to Mr Cuthbert in respect of each wayleave Agreement. After expiry of the voluntary agreements the wayleaves were continued in accordance with the provisions of paragraph 12 of Schedule 4 to the 1992 Order applicable to "temporary continuation of wayleaves". The Reference Land was acquired by the claimant in two Folios in April 2005 and mid-2006 in respect of which the claimant paid an aggregate consideration of £850,155. At the time of purchase the northern portion of the Reference Land was subject to a grant of easement in fee simple in favour of BGE (UK) Ltd accommodating a gas pipeline. That easement subjects the claimant, as grantor to a number of conditions including:

   > "3.3 Not, without the prior consent in writing of the Grantee, (such consent not to be unreasonably withheld) to make or cause or permit to be made any alteration to or any deposit of anything upon any part of the Strip, the effect of which would or is likely to interfere with or obstruct access to the Strip and/or the Pipeline by the Grantee or which would otherwise lessen or in any way interfere with the support afforded to the Pipeline by the surrounding soil, for example, by the excavation of soil and/or minerals or do or permit anything else to be done which would materially impact upon the Pipeline or reduce the depth of soil above the Pipeline;
   >
   > 3.4 Not to erect, install or cause or permit to be erected or installed any building, structure, or permanent apparatus or do or permit the carrying out of any works on,

over or beneath the surface of the Strip or the making of any material change in the use of the Strip which would be likely to cause damage or injury to the Pipeline;

3.5 Not to:

i. Plant on the Land any Poplar trees, Willow trees, Ash trees, Beech trees, Conifers, Horse Chestnut trees, Lime trees, Maple trees, Sycamore trees, Apple trees or Pear trees, or any other trees of similar size (whether deciduous or evergreen) within 7 metres of the centre line of the Pipeline.

ii. Allow any shrubs or hedges planted on the Strip to grow to a height exceeding 4 metres and/or which would be likely to develop a route system that could adversely affect the Pipeline;"

5. On 3rd May 2006 the claimant's solicitors wrote to 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 equipment from the Reference Land within 14 days. By letter dated 22nd May 2006 the respondent's solicitors replied confirming that, in the circumstances, the respondent would be obliged to refer the matter to the Department of Enterprise, Trade and Investment ("DETI") seeking the consent of the Department to the retention of the power lines on the land by way of a necessary wayleave ("NWL") in accordance with the provisions of Schedule 4 paragraph 10 of the 1992 Order. In January 2007 the claimant secured planning permission for the development of a waste management facility on the southern portion of the Reference Land and several phases of this facility have been completed with further development planned.

6. On 22nd September 2008 DETI appointed a Wayleave Officer to hear representations from the claimant and the respondent relating to the application by the respondent for a NWL to retain and keep installed the power lines and associated equipment. Subsequent to the hearing the Wayleave Officer recommended to DETI that a NWL should be granted and DETI made the appropriate order on 7th May 2009. Schedule 4 to that order contains a number of terms and conditions including paragraph 5 which provides as follows:

"5 The Department shall have power to review, revoke or vary the terms and conditions of this consent at any time as it may consider proper, but subject thereto, it shall remain in force until so reviewed or revoked."

7. In accordance with paragraph 7 of the same schedule to the order the claimant may notify the Department of its intention to develop any part of the lands across which the electric line is placed in a manner that would interfere with the electric line or necessitate the removal, recycling or alteration of the line it shall notify the Department of such intention and the Department shall review its consent. The Department may see fit to require NIE to remove, re-site or alter the electric line for the purpose of permitting the proposed development subject to the owner paying the costs of or associated therewith or, if the Department sees fit to require the electric line to remain in its position NIE shall pay to the owner "... compensation in such amount as is equal to the diminution in the development value of the lands caused by the existence of the electric line on the lands provided nevertheless that the payment of such compensation by NIE is subject to the Owner executing in favour of NIE an easement in fee simple free from encumbrances for the electric line across his lands."

8. Despite the respondent having arranged to increase the height of the 33kw volt line in order to facilitate the construction of the first phase of the waste management, the claimant maintains that further development of the Reference Land is significantly restricted in terms of the height to which buildings may be constructed and the space available for construction by reason of the presence of the power lines and associated equipment. In its written case the claimant alleges that the presence of the equipment has prevented planned waste related development of some 14 acres of the Reference Land. The claimant further maintains that, as a consequence of such restrictions, the claimant was compelled to accept a surrender of a lease that the claimant had made to Foyle Recyclers who had contracted to develop an End of Life Vehicle ("ELV") recycling facility which had been operational from around January 2009. On 17th December 2009 Foyle Recyclers had written to the claimant's solicitors maintaining that, as a result of the restrictions consequent upon the presence of the power lines and equipment, their yard operations had been reduced by 70% a percentage which they demanded should be reflected in a rent reduction. Subsequently the claimant accepted a surrender of Foyle Recyclers lease but it appears that the claimant is now operating the facility itself under the same restrictions and no specific details of any allegedly resulting loss have been provided. It is also to be noted that the claimant has been able to develop the Reference Land in accordance with all planning applications that it has made and permissions that it has received to date despite the presence of the power lines, pylons and poles and that no relevant further planning applications are currently pending.

The Expert Reports

9. Each party submitted a report from an expert valuer with regard to compensation. Mr Brian Kennedy FRICS FCIR Arb provided the report on behalf of the applicant while the respondent submitted a report from Mr Kenneth Crothers FRICS IRRV (Hons) MCI Arb.

10. In composing his valuations Mr Kennedy considered the open market value of the property upon the assumption that the NWL had not been granted and the electrical apparatus had been removed which he referred to as the "unencumbered value". By way of contrast, he also assessed the open market value of the land subject to the NWL and the existing apparatus which he termed the "encumbered value". At the date of the NWL to which DETI gave its consent, 7th May 2009, Mr Kennedy assessed the unencumbered value to be £3,520,000 and the encumbered value on the same date he calculated to be approximately £2,760,000. In such circumstances, Mr Kennedy concluded that the diminution in value to the property consequent upon the retention of the electrical apparatus was some £760,000. In his view, that figure represented the reduction in the value of the land in the areas directly affected by the electrical apparatus together with injurious affection to the remainder of the site applying the percentage discounts that he considered appropriate. In the course of the exercise that he carried out he also gave consideration to the extent to which the provisions of Clause 7 of the NWL might affect the market value but, having done so, he formed the opinion that the market would not attach any value to the potential for reconfiguration or further development or that the NWL might be determined at some speculative future date.

11. During cross-examination Mr Kennedy conceded that, prior to the date of the NWL, 6th May 2009, the subject lands had been encumbered by the electricity pylons and wires for some four decades and he explained that he had been directed by the applicant's legal advisors to calculate the "encumbered" and "unencumbered" value of the lands. He also agreed that, under the terms of the NWL, the applicant now enjoyed the benefit of paragraph 7 of the Terms and Conditions which permitted it to ask the Department to review the terms of the NWL in the event of the applicant wishing to develop any part of the lands. Such a power had not been available to the applicant under the pre-existing voluntary Wayleaves. However, Mr Kennedy again expressed the opinion that the market would place little value upon the benefit of Clause 7. He also accepted that, quite apart from the pylons and the lines, any potential purchaser would have to take into account the gas pipeline bisecting the land by virtue of an easement in fee simple. Mr Kennedy was specifically referred to paragraphs 12.9 and 12.10 of the report from Mr Crothers which provided as follows:

> "12.9 Accordingly the 'before' valuation is bound to take account of the fact that the apparatus is in place and entitled to remain in place, subject only to the outcome of the DETI Hearing.

> 12.10 I am advised by NIE that, after inquiry, they are unaware of any instance where an application for a Necessary Wayleave, in order to retain existing electric lines, has been refused by DETI."

12. Mr Kennedy said that he agreed with the view expressed paragraph 12.9 and that the advice referred to at paragraph 12.11 was "probably right".

13. Mr Crothers commenced his expert report by recording the history of voluntary wayleave agreements made in 1960, 1962, 1966 and 1978 noting that after the expiry of the last voluntary wayleave had been continued by virtue of the provisions of the 1992 Act until the NWL came into force. He also recorded the history of planning permissions obtained by the applicant in relation to the subject lands noting the developments that had taken place in accordance with the relevant permission and observing that there was no extant application for planning permission. Mr Crothers pointed out that several of the "wayleave comparables" tendered on behalf of the applicant in fact concerned easements and, at paragraph 11.13 of his report he observed that easements differed from the relevant NWL in three material respects:

    > "First, they are permanent and therefore incapable of being brought to an end by the lessee in any circumstances. Secondly, they preclude any building on the affected areas. Thirdly, whatever restrictions may apply now or in the future, the land owner has no route to compensation."

    In such circumstances, he did not consider that easements formed a useful basis of comparison.

14. In cross-examination Mr Crothers accepted that the only impediments to general development of the subject lands were the presence of the gas pipe line and the electricity pylons and lines. He also agreed that the NWL constituted a new form of wayleave with a statutory, as opposed to a contractual, foundation. However, in the context of historical continuity provided by the series of voluntary Wayleaves followed by statutory continuation and, ultimately, the NWL Mr Crothers did not consider that there was any material difference in the value of the subject lands as a consequence of the impediment to development represented by the pylons and lines before as opposed to after the valuation date May 2009. In practical terms the lands were encumbered to the same degree both before and after that date. Mr Crothers also considered it to be significant that the applicant had been able to pursue its chosen form of development for the subject lands in accordance with all of the planning applications that it had made and that no relevant planning application was currently outstanding. Should the presence of the pylons and lines inhibit a realistic prospect of development in the future Mr Crothers pointed out that

the applicant had the benefit of the compensation provisions of paragraph 7 of Schedule 4 to the 1992 Act.

The Legislation

15. The relevant provisions of the 1992 Order are as follows:

i. Schedule 3 Part 1 paragraph 1(1) relates to the compulsory acquisition of land by the licence holder and provides that that where a licence holder proposes to acquire land for any purpose connected with the authorised activities he may apply to the Department for an order vesting that land in him. By virtue subparagraph (2) such power includes the creation of a new right, an easement or other right over land.

ii. Paragraph 6 of the same Schedule applies Schedule 6 of the Local Government Act (NI) 1972 ("the 1972 Act") to the acquisition of land by means of a vesting order made under paragraph 1. As a result any issue of disputed compensation may be referred to this Tribunal to be dealt with in accordance with the general principles applicable to compulsory purchase of land.

iii. Schedule 4 relates to "Other powers, etc of Licence Holders" and paragraph 10 thereof deals with the acquisition of wayleaves.

   Paragraph 11(1) of Schedule 4 provides as follows:

   "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."

iv. Paragraph 12 of Schedule 4 provides for the temporary continuation of wayleaves and enables a licence holder to apply for a NWL in appropriate circumstances.

v. Unlike Schedule 3 Schedule 4 does not include any provision that applies the provisions of Schedule 6 of the 1972 Act to the grant of compensation referred to in paragraph 11.

The Authorities

16. A line of authorities from the jurisdictions in England and Wales and Scotland were cited and debated by both parties as relevant to the approach to compensation that this Tribunal should adopt.

17. Horn v Sunderland Co-Operation [1941] 2 KB 26 was a case concerned with compensation for the compulsory purchase of agricultural land said to be "ripe for building". In that case the

majority confirmed the principle of equivalence and at pages 48/49 Scott LJ made the following observations:

> "(1) Prima facia the purchase price for the land to be taken pursuant to the notice to treat is the market value of the land, and whether to an unwilling or a willing seller, is for this principle, so far as concerns that value, irrelevant.
>
> (2) The estimation of that value must take into account future and potential value, including what is known as 'special adaptability'.
>
> (3) It must be ascertained as at the moment when the notice to treat was given.
>
> (4) The rule of market value necessarily presupposes the presence of the seller in the market, there offering his land for sale in a normal state for that market, that is, in a condition to attract the ruling price. ...
>
> (5) In the case of a sale by private treaty or auction the seller cannot put in his pocket more than the net market value ...
>
> (6) But here we come to the other side of the picture. The statutory compensation cannot, and must not, exceed the owner's total loss, for, if it does, it will put an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the route of statutory compensation, the principle that the owner shall be paid neither less nor more than is lost."

18. In <u>Turris Investments Ltd v Central Electricity Generating Board</u> [1981] 1 EGLR the Lands Tribunal in England and Wales were concerned with the assessment of compensation payable to the claimants in respect of a compulsory purchase order and deed of grant obtained by the Board in respect of lands in relation to which residential planning permission had been granted for 106 dwellings again described by the claimants surveyor as "ripe building land". At the date of valuation the development had been commenced, the estate road had been laid out and sewers and ducting for other public services was in place. The lands had originally been purchased subject to a wayleave agreement in favour of the Board's predecessor which had been in operation since 1957 and the claimants had given 12 months' notice terminating that agreement. Similarly to the present case the Board had then published a draft compulsory purchase order which had been confirmed by the Secretary of State after a hearing. In that

case the right to maintain the electricity equipment and lines on the land constituted a permanent easement. The Tribunal reached the conclusion that the relevant comparison was the proper value of the subject land at the relevant date on the assumption that the pylon and cables then existing were removed in comparison with the value of the land subject to the imposition of the easement after the compulsory purchase order. In addition, the Tribunal considered the question of injurious affection and interference arising from access to the land by Board representatives.

19. The equivalence principle of compensation approved in Horn and the approach adopted in Turris were subsequently followed by the Lands Tribunal in Macleod v National Grid Co plc [1998] 2 EGLR 217. In that case, as in the instant case, the relevant lands had been subject to voluntary wayleaves which had been brought to an end by notice given by the claimants but which, in turn, were made the subject of a NWL by the Department of Trade and Industry. That NWL was to remain in force for 15 years after which it was theoretically determinable by either party giving 6 months' notice. The Tribunal held that while certificates of lawful use related to the *use* of the land they did not permit the carrying out of operations on the land and that, in any event, there was no demand for the reference land for any use permitted in accordance with the certificates. The Tribunal concluded that compensation for the grant of the NWL should be assessed under paragraph 7 of Schedule 4 to the Electricity Act 1989 and not also by specific reference to compulsory purchase legislation. However it also held that the fundamental principle of such compensation was equivalence (Horn) and it therefore followed that the claimant was entitled to compensation for all loss that was not too remote flowing from the grant of the NWL. The Tribunal also expressed the view that compensation for the NWL was to be assessed on the assumption that it would be terminated by notice at the end of the 15th year.

20. In Scotland the decision in Macleod was followed by the Lands Tribunal in Brown Construction Ltd v SP Transmission Ltd (LTS/COMP/2002/2). In that case the reference land had been purchased for housing development and had already been partially developed. Once again the lands were purchased in the knowledge that overhead lines and electricity pylons were located thereon in accordance with voluntary wayleave agreements which were then terminated. After a public local inquiry, the Secretary of State granted a NWL. In the course of reaching a decision the Tribunal expressed the view that:

> "At all events, the claimants, as owners of the land in question, are entitled to compensation in respect of any loss which they can establish they suffered as a result of the grant of the wayleave on 3 September 1998, even although the transmission lines were on the land when they acquired it some 10 years earlier."

21. In Welford & Ors v EDF Energy Networks statutory wayleaves were granted in August 1998 in respect of a number of underground electricity cables which had been laid pursuant to earlier licences but of the existence of which the purchasers of the land had been unaware. In the absence of the cables the claimants would have developed the land in accordance with a 1995 planning permission. The Lands Tribunal noted the distinction between land acquired compulsorily under Schedule 3 and a NWL including the quite different provisions as to compensation but it did not consider that compensation for an NWL should attract a different approach to that which would apply in the case of a permanent easement. The Tribunal found that the loss of profits claim in respect of the prevented development was not too remote and had to be determined by what had happened as the result of the grant of the statutory wayleaves. It did not matter that the claimants might not have bought the land had they known of the existence of the cables. The Tribunal was satisfied that if the cables had not been present on the site, the claimants would have developed the site in accordance with the 1995 planning permission by building a shed and then using the site as a waste-transfer station. Leave to appeal was sought on that point but refused by Jonathon Parker LJ. An appeal was pursued in relation to the issue of remoteness and in giving the judgment of the Court (Welford and others v EDF Energy Networks (LPN) Ltd [2007] EWCA Civ 293) Thomas LJ confirmed that the general approach to the award of compensation under the statutory provisions was that compensation should be assessed on the general principles applicable to the payment of compensation for compulsory acquisition which recognised two separate heads as injurious affection and disturbance. He noted that the general principle was not in dispute and that compensation for the value of land at its market value would reflect a number of factors including the development potential. In the circumstances, having considered all of the factors taken into account by the Tribunal the Court of Appeal affirmed the decision with regard to remoteness.

22. In Arnold White Estates Ltd v National Grid Electricity Transmission plc [2013] UKUT 005 (LC) there was a similar history of a terminable voluntary wayleave followed by the grant of a NWL. Between the date of a contract for purchase of the relevant lands and the date of the grant of the statutory wayleave residential land values had fallen substantially and the value of the reference land had been significantly reduced. The claimant's case was that compensation ought to be awarded on the basis of the original contract price and that, at the date of the grant, the land was worth nothing since no development was possible under the terms of the relevant planning permission. It appears that the claimant began to promote development of the relevant lands at a time when it was hopeful that, following termination of the contractual wayleaves, the respondent would not be granted a statutory wayleave for the retention of the line. The assumption in Bedfordshire Local Plan was that the line would be removed. At paragraph 18 the Upper Tribunal recorded that each of the parties approached the assessment

of compensation on the basis of the difference between the value that the land would have had at the valuation date if the line had been removed and the value that it in fact had at that date given the grant of the 15-year wayleave. The basic issue was whether the without-line value should be the indexed contract price of £5,829,477 or the agreed open market value at the relevant date of £3,195,000.

23. Finally in Stynes and Stynes v Western Power [2013] UKUT (LC) 0214 the Upper Tribunal (Lands Chamber) ("the UT") considered a case in which the claimant sought compensation in respect of injurious affection caused by the presence of a pylon on adjacent land, which he did not own, in addition to that resulting from the passage of electricity power lines across his back garden. In a carefully analysed and reasoned judgment the UT emphasised the difference between the provisions of Schedules 3 and 4 of the Electricity Act 1989 (the equivalent of Schedules 3 and 4 of the 1992 Order in this jurisdiction). At paragraph 44 of the decision the UT said:

> "44 A necessary wayleave acquired under paragraph 6 of sch 4 is not an easement, or any form of interest in or right over land. Schedule 4 puts in place a statutory mechanism for granting a consent that would otherwise have been possible only by way of an agreement, which binds subsequent owners and occupiers but does so without producing any property interest or right."

The UT went on to summarise a NWL as "... nothing more and nothing less than a statutory licence or consent" and to hold that, in accordance with the principle of equivalence, compensation should be confined to loss specifically attributable to the grant and only that.

Discussion

24. i. Schedules 3 and 4 of the 1992 Order clearly distinguish between the compulsory acquisition of land or other interests in land by the licence holder and the acquisition of NWLs. The former are dealt with in a schedule headed 'Compulsory Acquisition of Land' while the latter may be found in the schedule entitled 'Other Powers' of licence holders. Schedule 4 does not include any equivalent application of the compulsory purchase provisions of Schedule 6 to the 1972 Act which are included in Schedule 3. In our view this simply reflects the acceptance by Parliament that a NWL does not involve the acquisition of an interest in land – see Stynes.

    ii. Horn was a standard case of the compulsory acquisition of freehold farming land by a local authority in which the court calculated compensation in accordance with the principle of equivalence. Turris also involved a compulsory purchase order and a Deed of Grant of a

permanent easement. In McLeod the Lands Tribunal rejected the submission that compensation for an NWL should be assessed not only by reference to paragraph 7 of Schedule 4 of the 1989 Act (the equivalent of paragraph 10 of Schedule 4 to the 1992 Order) but also by specific reference to legislation relating to compensation for compulsory purchase. However, despite such rejection in that case the Tribunal went on to have regard to the principle of equivalence in accordance with the approach adopted in Turris. As noted above, in Welford the Court of Appeal confirmed that compensation for wayleaves should be assessed on the general principles applicable to the payment of compensation for compulsory acquisition of land.

iii. In our view, there should be no difficulty in applying the principle of equivalence to compensation in that the claimant should be paid neither less nor more than his loss provided that, in the course of doing so, the relevant statutory framework is applied and the specific facts of the case are properly taken into account.

iv. In this case the claimant's advisers seek compensation based on the open market value of the Reference Land upon the hypothesis that the land was the subject of compulsory purchase and completely unencumbered by the presence of any of the respondent's equipment. When the Tribunal suggested to Mr Denyer-Green BL during the course of his closing submissions that such a hypothesis was somewhat unreal in the total absence of any suggestion that the claimant intended to put the land on the market he responded by observing that compulsory purchase is "frequently unreal". In our view the Tribunal should be assiduous to avoid, if possible, carrying out any exercise that could be properly described as "unreal" and we do not consider that the principle of equivalence, properly understood, requires this Tribunal to do so.

v. By virtue of paragraph 11 of the 4th Schedule to the 1992 Order the claimant, is entitled to compensation in respect of the grant of the NWL to which the Department has now consented in accordance with the provisions of paragraph 10. The claimant has owned the Reference Land for approximately 10 years. During the whole of those 10 years the equipment of the respondent has been present on the Reference Land. Prior to purchase by the claimant, the equipment was present in accordance with voluntary wayleave agreements dating back to 1959. During the period of its ownership of the Reference Land the claimant has not been significantly inhibited from completing any of the development that it has sought to carry out. There are no extant applications for planning permission in respect of development that would be inhibited by the presence of the equipment. The respondent has not obtained nor has the claimant lost any land or interest in land.

vi. The claimant requires to be compensated "in respect of the grant". The respondent has obtained a continuing licence or consent to the equipment remaining upon the Reference Land which is now statutory. As a consequence of the NWL the claimant has lost his legal right to determine the respondent's licence and require the respondent to remove the equipment from its land. It is to the measurement of that loss that the principle of equivalence is to be applied. The loss of that right is of some significance because of the nature and extent of the respondent's equipment on the land. The claimant's own valuer has accepted that there is no evidence of any previous refusal of an application for an NWL by DETI. Unlike the Arnold White case in which the local planned review had made clear the local council's preference that the relevant equipment should be removed, there was no objective evidence in this case to suggest that the claimant's application to have the equipment removed was likely to be successful. However that should not detract from the significance of a right of property ownership being compulsorily terminated by the executive.

vii. It seems to us that the real problem in this case is ascertaining the particular circumstances peculiar to this case upon the basis of which statutory compensation is to be calculated. There is no evidence of any desire or attempt to place the Reference Land on the open market. It has been zoned for industrial use but, apart from a general reference to building height restrictions, there is little specific evidence of the extent to which the claimant has been significantly impeded in carrying out any specific development. It does not appear that Mr Kennedy was given any detailed information which would have enabled him to financially assess the planned development which is said to be inhibited or any of the alleged consequences set out at paragraph 13 of the claimant's case. Mr Kennedy conceded that he had never previously considered a similar case and accepted that the 50% discount to which he referred at paragraph 42 of his report related to grants of easements rather than NWLs. He also agreed that he had made no allowance for the specific easement permitting the presence of the gas pipe. Mr Kennedy has expressed the view that the market would have little regard for the significance of condition 7 of the NWL but, for the claimant, the history of positive liaison between the claimant and the respondent might be a factor to be considered. Any other relevant factor would also have to be taken into account.

25. Accordingly, while we are satisfied that a portion of the lands has been injuriously affected by the NWL, it appears to us that further consideration of the valuation evidence needs to take place with particular to the following:

1) In the absence of any evidence of intention or desire to alienate the lands or any evidence of significant inhibition of development to date, why should compensation include injurious affection of the lands that are not directly affected by the presence of the respondent's equipment?

2) While we are satisfied that a portion of land has been injuriously affected by the NWL, why should compensation include a percentage reduction in its market value in addition to a percentage discount in respect of injurious affection?

3) If compensation for the agreed area of land is not to include a percentage reduction in market value, should the assessment of injurious affection consider the impact of condition 7 upon the claimant rather than on "the market"?

4) Why should the Bord Gais easement, in respect of which compensation has already been paid and received, play any role in assessing compensation to be paid by NIE Ltd?

5) Why, in the absence of any evidence of consequential financial loss and in the context of the facility being successfully operated by the claimant, should the claimant be compensated in respect of the surrendered ELV lease? If the reason relates to the date of the NWL, what investigation has been carried out of the negotiations/contractual documents and correspondence relating to the lease at a time when the claimant was obviously involved in discussions with DETI? For example, on what basis/evidence did the claimant give the lessees the assurance referred to in the letter of 28th October?

ORDERS ACCORDINGLY

6th February 2014

The Rt Hon Lord Justice Coghlin and
Henry M Spence MRICS Dip.Rating IRRV (Hons)
LANDS TRIBUNAL FOR NORTHERN IRELAND