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 A REFERENCE

R/41/2009

BETWEEN

BRICKKILN WASTE LIMITED - CLAIMANT

AND

NORTHERN IRELAND ELECTRICITY – RESPONDENT

PART II

Re: Lands at Electra Road, Maydown, Londonderry

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

Background

1. This is the second part of a reference whereby Brickkiln Waste Limited ("the claimant") has referred to the Tribunal for assessment of a claim for compensation from Northern Ireland Electricity ("the respondent") for the grant of a necessary wayleave ("the NWL"). On the 7th May 2009 ("the valuation date"), in accordance with paragraphs 10 and 12 of Schedule 4 to the Electricity (Northern Ireland) Order 1992 ("the 1992 Order"), the NWL granted consent to the respondent to retain its lines and pylons ("the equipment") on the claimant's lands.

2. Following a review of the facts and the law in the Part 1 hearing, the Tribunal decided that further consideration of the valuation evidence needed to take place and five questions were put to the valuation experts.

Procedural Matters

3. 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. Each party provided evidence from an expert valuer with regard to the compensation to be paid. Mr Brian Kennedy provided expert valuation evidence on behalf of the

claimant while Mr Kenneth Crothers provided expert valuation evidence on behalf of the respondent. Mr Kennedy and Mr Crothers are experienced Chartered Surveyors.

4. Expert planning evidence was also submitted to the Tribunal. Ms Gemma Jobling presented this evidence on behalf of the claimant and Mr Terence McCaw on behalf of the respondent. Ms Jobling is an experienced planner and Mr McCaw is an experienced planner and architect.

5. Mr John Doran of Brickkiln Waste Limited provided factual evidence. Mr Doran also facilitated an inspection of the Brickkiln site.

6. The Tribunal is grateful to the legal representatives and experts for their detailed submissions and evidence. It is also worth noting that, at the request of the respondent and agreed to by the claimant, a procedure known as "hot tubbing" was introduced for the first time in the Tribunal, to allow the experts to give concurrent evidence. It was generally agreed that the "hot tubbing" experiment was a success in that it provided a quicker and more efficient means of giving expert evidence to the Tribunal. The Tribunal is grateful to the parties for their participation.

The Interim Decision

7. The findings of the Part I hearing are summarised in paragraph 24 of the Interim decision:

> "(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 a 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 properly be 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 clamant 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 a 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, this 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 to 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."

8. Both the claimant and the respondent reserved their positions on the Interim Decision pending the final determination by the Tribunal.

The Part II hearing – position of the parties

9. Mr Orr QC considered that the issues between the parties were the proper meaning and effect of paragraph 11 of Schedule 4 to the 1992 Order, "compensation in respect of the grant", in relation to the grant of the NWL on the 7th May 2009 and the measurement of compensation giving effect to that provision, in light of the Interim Decision of the Lands Tribunal on the 6th February 2014.

10. He understood from the Interim Decision that:
    (i) the principle of equivalence applied;
    (ii) to the loss of the legal right to end the licence and have the equipment removed;
    (iii) the loss of that legal right was of some significance;
    (iv) a right of property ownership, to have the land free of the equipment, had been compulsorily terminated.

11. He submitted that the application of the principle of equivalence therefore required a comparison between two states:

    (i) the state where the legal right to end the licence and have the equipment removed had not been compulsorily terminated or taken, and the equipment would have had to be removed in accordance with paragraph 12(4) of Schedule 4 to the 1992 Order (the "un-encumbered" state); and

    (ii) the state with the NWL in place and the legal right taken away, and where the respondent had been granted an additional and indeterminate term, beyond

the terms under the terminated voluntary wayleaves (the "encumbered" state).

12. He further submitted that the principle of equivalence in relation to the grant of a NWL was that which measured the loss suffered by the claimant in comparing the "un-encumbered" with the "encumbered" state and the fairest and most objective assessment of that loss was to identify the consequential diminuition in open market value, for the following reasons:

    (i) that was the basis of the assessment of injurious affection, and the Tribunal accepted that there was such injurious affection (paragraph 25 of the Interim Decision);

    (ii) that was the basis of compensation for NWLs throughout the rest of the UK, as confirmed by the quoted authorities;

    (iii) that was in accordance with the common law of damages relating to trespass, which does have application in Northern Ireland. (See Swordheath Properties v Tabet [1979] 1 WLR 285, per Megaw LJ at p228A-F, approved by Privy Council in Inverugie Investments v Hackett [1995] 1 WLR 713, per Lord Lloyd at p717F-718C.) These cases showed that the claimant did not have to prove that it was impeded or prevented from using the land, or would have used or let its land for the values being claimed.

13. Following consideration of the law and the decided authorities Mr Orr QC concluded:

    (i) the principle of equivalence underlied the claim for compensation, and underlied any claim for injurious affection.

    (ii) the Tribunal's Interim Decision, to the effect that the principle of equivalence applied, was consistent with the law in the rest of the UK;

    (iii) the effect of the grant of the NWL was that there had been a compulsory termination of the right of the claimant to have the wayleave terminated and the equipment removed;

(iv) the principle of equivalence recognised that, in consequence of the grant of a NWL, the claimant had lost the ability to develop or sell in the open market as he chose;

(v) it was not necessary to show that he would have developed or would have sold because the effect of the grant of the NWL was that the claimant had land that was burdened for an additional, indeterminate term by the compulsory taking of a significant legal right and the claimant had land worth less than it would have been had the NWL been refused;

(vi) the diminution in value approach, being the difference between the "un-encumbered" and the "encumbered" values, satisfied the principle of equivalence and underlied any injurious affection claims, a concept very familiar to valuers; and

(vii) there was no support in the law, or indeed in the Interim Decision, for the approach of the respondent that the claimant must show an actual loss, in the sense of an inability to achieve its or any particular development proposals, whether in terms of the unimplemented planning provisions, or otherwise, or any inability to sell or to lease.

14. Mr Shaw QC drew the following propositions from the Interim Decision's treatment of the law:

(i) A necessary wayleave is not the acquisition of an interest in land: see paragraph 24(i) of the Interim Decision citing the decision in Stynes.

(ii) Compensation for a NWL should be assessed in accordance with the "principle of equivalence" as explained in the case of Horn but not by reference to compensation for compulsory purchase: see paragraph 24(ii) of the Interim Decision.

(iii) In accordance with the principle of equivalence, the claimant should be paid for his loss provided that it aligns with the appropriate statutory framework (here the 1992 Order) and not otherwise and is appropriate in light of the specific facts of the case to the taken into account: see paragraph 24(iii) of the Interim Decision.

(iv) The principle of equivalence does not require the Tribunal to perform an "unreal" exercise: see paragraph 24(iv) of the Interim Decision.

(v) Here the claimant has "lost" the "legal right to determine" the respondent's licence to place and keep equipment on the Reference Land and to require the respondent to remove that equipment: see paragraph 24(vi) of the Interim Decision.

(vi) The key issue for the tribunal was to ascertain the particular circumstances of the case on the evidence produced bearing in mind that the claimant has the burden of proof: see paragraph 24(vii) of the Interim Decision.

15. He concluded that, as noted in paragraph 24(iii) of the Interim Decision, the exercise was to look at all the material specific circumstances of the case in order to measure what was the correct "loss" to be compensated under the legislation in this jurisdiction (as opposed to other statutory schemes).

The Authorities

16. During the Part I hearing the Tribunal referred to the following authorities:

- Horn v Sunderland Co-operation [1941] 2KB26
- Turris Investments Ltd v Central Electricity Generating Board [1981] 1 EGLR
- Mcleod v National Grid Co plc [1998] 2 EGLR217
- Brown Construction Ltd v SP Transmission Ltd (LTS/Comp/2002/2)
- Welford and others v EDF Energy Networks (LPN) Ltd [2007] EWCA Civ 293
- Arnold White Estates Limited v National Grid Electricity Transmission plc [2013] UKUT 005 (LC)
- Stynes and Stynes v Western Power [2013] UKUT (LC) 0214

17. Post the Part 1 hearing the Court of Appeal decision in Anthony White was published (National Grid Electricity Transmission PLC v Anthony White Estates Limited [2014] EWCA Civ 216). The Court of Appeal upheld the decision of the Upper Tribunal and the Tribunal considers the following extracts from that decision to be of particular relevance to this reference:

> "13. Secondly it is common ground that the valuation date for the purpose of the quantification of compensation under paragraph 7(i) is the date of the grant of the wayleave …"

and

> "22. … In relation to wayleaves, the two types are (1) compensation in respect of the grant and (2) compensation for damage or disturbance by the exercise of the rights granted. There is in reality no land taken or other land retained in a wayleave case because, in sharp contrast to compulsory purchase, no interest in land previously vested in the owner is compulsory acquired at all. A wayleave may itself be an interest in land, but it comes in to existence for the first time by virtue of the grant."

and

> "25. I have been similarly unable to find support, in the language of paragraph 7 or in any authorities, for Mr Purchas' alternative main submission, namely that compensation under paragraph 7(1) depends upon showing some effect upon the land itself of the grant of the wayleave, as a necessary link in the chain of causation between the grant and the suffering of financial loss…"

> "26. … The reported cases repeatedly emphasised that it is by reference to the value to the owner of the land being acquired that compensation is quantified, rather than (if different) its objective market value …"

Measurement of compensation

18. Both parties were agreed that the principle of equivalence, as outlined in Horn should apply, that is the claimant should be paid neither more or less than his loss, caused by the grant of the NWL. In assessing that loss, however, the relevant statutory framework as outlined in the 1992 Order must be applied and the specific facts of the subject case should be taken into account.

19. As a consequence of the grant of the NWL the claimant had lost his legal right to determine the respondent's licence and have its equipment removed and it is the measurement of that loss to which the principle of equivalence is to be applied. The Tribunal agrees with Mr Orr QC, the correct measurement of that loss is the diminution

in market value of the claimant's lands, that is the difference in market value with the equipment removed ("un-encumbered") and the equipment in place ("encumbered"). That is the measurement of compensation agreed and confirmed in all of the UK decided authorities.

20. The assessment of compensation must, however, reflect the terms of the relevant statutory framework in this jurisdiction. Although the language of the English statute is similar to the 1992 Order the terms of the NWL in each jurisdiction differ and in particular condition 7 of the subject NWL which allows for either the removal of the equipment or the payment of compensation when a "bona fide" intention to develop the lands have been hindered by the presence of the equipment.

The Five Questions

21. Following consideration of the valuation evidence presented by Mr Kennedy at the Part 1 hearing, the Tribunal sought clarification regarding several items in his claim for compensation and the following questions were put to the valuation experts:

Question 1

In the absence of any evidence of intention or desire to alienate the lands or any evidence of any 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.

It was Mr Kennedy's view that the diminution in market value of the claimant's lands were not confined to the wayleave areas. He considered the value of the lands outside the wayleaves to be affected as the equipment restricted development on these areas also.

Mr Crothers could see no reason why a compensation claim should not include injurious affection of lands not directly impacted by the presence of electric lines. He considered, however, in the subject case that no such injurious affection existed as the claimant had been able to develop what it sought to develop and was capable of implementing two extant planning permissions if it so intended.

Both valuation experts were therefore agreed that compensation could include a claim for injurious affection on lands not directly affected by the equipment. The onus, however, is on the claimant to clearly demonstrate the valuation impact, if any,

of such injurious affection and Mr Crothers considered that in the subject reference the claimant had failed to do so.

Question 2

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

Mr Kennedy responded that none of the land had been valued with two separate allowances and discounts for injurious affection had only been applied to the lands outside the wayleave corridors.

Mr Crothers did not understand Mr Kennedy's assertion that discounts for injurious affection had only been applied to the lands outside the wayleave corridors as Mr Kennedy had already applied injurious affection discounts to the lands within the wayleave corridors. In Mr Crothers' opinion a central consideration with regard to injurious affection was whether the electric lines presented any impediment of valuation significance. In his view that could only be measured by reference to the effect, if any, upon the development capacity of the lands. He referred to the evidence of Mr McCaw which was founded in his expertise in both planning and architectural matters and in which he concluded that the land to the south of the spine road was capable of housing further development to its full capacity, without interference from the equipment. So far as the northern portion of the site was concerned Mr Crothers considered these lands were already significantly blighted by the BGE easement and whatever, if any, impediment to develop came from the presence of the equipment, it was immaterial and of no consequence in valuation terms.

The Tribunal agrees with Mr Crothers, a central consideration was whether the equipment presented an impediment of valuation significance and that could only be measured by the effect, if any, on the development capacity of the lands.

Question 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'?

In response Mr Kennedy informed the Tribunal that he was instructed that the appropriate basis of compensation was the diminution in market value of the property.

Mr Crothers noted that the original rights under the old wayleave agreements had been replaced by a new bundle of rights by the NWL. He produced a table comparing the rights under the old agreements and those granted by the NWL. In his opinion the NWL effectively replicated many of the provisions in the pre-existing wayleaves and therefore had similar practical effect. In drawing comparison between the lands subject to the pre-existing wayleaves and the new circumstances prevailing upon the grant of the NWL, Mr Crothers formed the view that there was no difference in value.

As an alternative approach Mr Crothers considered the scenario whereby comparison was to be drawn between the "un-encumbered" and "encumbered" values of the Reference Land and concluded that there was no material difference between the two valuations. His conclusion was based on the following:

- development of those areas of the site that were not traversed by the equipment was in no way impeded.

- so far as the southern portion of the site was concerned, the equipment traversed an area of "open space" forming access roads, marshalling areas etc which were not only normal but necessary concomitants of industrial development and use. The equipment posed no restriction upon the use of these areas in any practical sense.

- if the equipment was to be removed, there would be no change in the use of these areas and they would remain in such use for the foreseeable future.

- as demonstrated by Mr McCaw some development of this area was possible, with or without the equipment. So far as the northern portion of the site was concerned, removal of the equipment would not materially enhance the

development potential or the capacity of the lands, given the severe blight already created by the BGE easement.

For these reasons Mr Crothers concluded that there was no material detriment arising from the grant of the NWL. In any event he considered that if the claimant, or indeed a successor in title, were to advance a bona fide development proposal that was prevented by the presence of the equipment, condition 7 of the NWL would be engaged and the Department would review its consent. In his opinion such a review would either result in the removal of the equipment or retention of the equipment subject to the provisions of condition 7(c) which provided for payment of compensation based on the diminution in development value. It was his assessment that the proper time for compensation to become payable to the landowner was when there was demonstrable interference with use and development of its land and a consequential loss of value.

Mr Crothers concluded that condition 7 clearly legislated for such circumstances and in his opinion its provisions and impact were material considerations in the assessment of the claimant's compensation. He considered that if the impact of condition 7 was to be ignored, double compensation would arise if a claimant was granted compensation for injurious affectation at two junctures, first upon the grant of the NWL and again upon the application of condition 7 thus offending the very principle of equivalence that was central to the assessment of compensation.

The Tribunal agrees with Mr Crothers, the provisions and impact of condition 7 of the NWL were material considerations in carrying out an assessment of the claimant's compensation.

Question 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?

Mr Kennedy noted that the land to the north of the Spine Road was encumbered by a pre-existing easement in favour of Bord Gais which restricted the development potential of that area and he reflected this by applying a reduced valuation rate to the easement land. He also considered that the respondent's equipment further restricted the development potential of this area and compounded the impediment of

the Bord Gais easement by producing an unusually fragmented development site. He did not consider there was any element of "double-counting" in his assessment of the diminution in market value.

Mr Crothers considered the terms of the Board Gais easement to be very onerous as they precluded any form of construction on the 14 metre width of the easement thus dissecting the site into two separate parcels of land, neither of which was conducive to industrial development. In his opinion the lands to the north hand been irreparably damaged by the Bord Gais easement.

Mr Crothers then considered the effect of the NWL on the lands to the south and in his opinion it was clear from the drawing produced by Mr McCaw that, apart from two corridors, the vast majority of the land was capable of accommodating development that was unimpeded by the equipment.

So far as the two affected corridors were concerned Mr Crothers considered they were well capable of being "worked with" by utilising these areas for essentials such as access, circulation, marshalling and they were also capable of accommodating buildings or other structures which did not breach the safety height limits.

Mr Crothers concluded that it was therefore appropriate to consider the issues having regard to the existence and express terms of the Bord Gais easement and, in that sense; it played a role in the assessment of compensation.

Both experts were therefore agreed that the Bord Gais easement should play a role in the assessment of the claimant's compensation.

Question 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 the 28th October?

Mr Kennedy responded that his valuations did not assume a surrender of the ELV lease and it was his understanding that the ELV lease was still subsisting at the valuation date.

Mr Crothers considered the factual position to be clear in that at the relevant date there was in place a lease to Foyle Recyclers Limited for a term of 15 years at a rent of £110,000 per annum, subject to "upwards only" rent review. That was a subsisting investment with a lengthy unexpired term and he could see no good reason why the tenant could and should not have been required to comply with its covenants under the lease for its full term. In his opinion no proper claim arose in respect of the surrender of the ELV lease.

Mr Kennedy confirmed that his valuations did not assume a surrender of the ELV lease and as such it did not play a part in his claim for compensation.

Assessment of Compensation – Claimant's Approach

22. It is the Tribunals view that Mr Kennedy adopted the correct approach to the assessment of compensation by considering the "un-encumbered" and "encumbered" values of the Reference property:-

"Un-encumbered" Value

23. Mr Kennedy assessed the "un-encumbered" value by using pricings of £15 per ft^2 rental on the buildings, capitalised at 15% and a price of £60,000 per acre on the undeveloped lands. He reduced the price per acre to £50,000 on the lands to the north to reflect the presence of the Bord Gais easement. Using these pricings he arrived at a total "un-encumbered" value of £3,521,000.

24. To substantiate his pricings of £15 per ft^2 and £60,000 per acre Mr Kennedy provided details of what he considered to comparable sales of various "industrial" properties throughout Northern Ireland. There were 14 items of industrial sales information in total. Regrettably, however, Mr Kennedy did not explain, for the benefit of the Tribunal, how detailed consideration of these comparables in comparison to the Reference Property led him to select pricings of £15 per ft^2 for the subject buildings or £60,000 per acre for the undeveloped lands. Nor did he explain his selection of 15% for the capitalisation rate.

25. In Janet Greer v Northern Ireland Housing Executive R/19/1996 the Tribunal made the following observations:

> "The Tribunal cannot carry out its own research, it must rely primarily on the evidence before it.
>
> In analysing other transactions, it is for the experts to decide what factors they think are appropriate and communicate their criteria and reasons for that to the Tribunal. It is not sufficient simply to dump a bundle of comparisons and other observations on the table: the expert witness must disclose their analysis to demonstrate the inferences they say can be drawn."

Mr Kennedy failed to communicate the inferences he had drawn from the comparative evidence he provided. He did concede, however, that he did not have any direct evidence of industrial lands being sold at a reduced price due to the presence of NIE equipment.

26. Mr Crothers was unable to verify the accuracy of the comparative evidence provided by Mr Kennedy but taken at face value he considered that it appeared to indicate that industrial type buildings attracted rental pricings ranging between £5.58 per ft^2 and £52.50 per ft^2, while industrial land attracted prices ranging between £20,300 per acre and £195,000 per acre. The Tribunal agrees with Mr Crothers, Mr Kennedy had not provided a "link" between the comparable evidence he submitted and his assessment of the "un-encumbered" value of the reference property.

"Encumbered" Value

27. In order to assess the "encumbered" value of the reference property Mr Kennedy reduced the value of 9 acres of the Reference Land South by 15% to reflect injurious affection due to the impact of the equipment and 7.25 acres of the Reference Land north by 25%. He also reduced the price per acre for the land under the 3 line wayleave to £30,000 and the land under the single line wayleave to £45,000. Using these figures he assessed the total "encumbered" value of £2,758,672 with a resulting diminution in value of £762,675 and this was his claim for compensation.

28. In order to justify his assessment of the valuation impact of the NWL Mr Kennedy provided a schedule of 4 transactions which he entitled "Wayleave Transactions". In the course of the Part 1 hearing, however, Mr Kennedy had already conceded that

these transactions were in fact permanent easements, although he considered the effect to be the same.

29. Mr Crothers considered that the terms of these easements contrasted with the terms of the NWL in three respects:

    (i) they were permanent and were incapable of being brought to an end by the lessee in any circumstances.

    (ii) they precluded any building on the affected acres.

    (iii) whatever reduction may apply, now or in the future, the landowner had no route to compensation.

30. The Tribunal agrees with Mr Crothers and considers that the restrictions imposed by these permanent easements were significantly more onerous than those imposed by the NWL where the only restriction was the height of buildings which could be constructed under the overhead lines. Mr Kennedy had failed to compare and contrast the valuation impact of the easements with the valuation impact of the NWL. He merely stated that he considered the valuation impact to be the same but he did not provide any detailed analysis or evidence to support this assertion. He also has failed to demonstrate how his "wayleave" comparative evidence lead him to select 15% and 25% injurious affection on parts of the Reference Land. The Tribunal therefore derives little assistance from Mr Kennedy's assessment of the diminution in market value of the Reference Land.

Discussion

31. Mr Kennedy had assessed the "encumbered" and "un-encumbered" values of the Reference Land which led him to the conclusion that the diminution in market value caused by the presence of equipment was £762,611. This was based on his assertion that the equipment restricted further development of the Reference Land, as confirmed by Ms Jobling's planning evidence. She considered that the overhead power lines traversed substantial portions of the subject lands and in doing so constrained the development potential of the land, particularly because waste management facilities had a bespoke requirement for tall buildings to accommodate plant and machinery. His percentage reductions for the injurious affection caused by the equipment was

based, however, on his comparative evidence relating to permanent easements, although he considered the effect of the NWL to be the same.

32. The Tribunal does not agree that the effect of the permanent easements cited by Mr Kennedy were the same as that of the subject NWL. These easements were permanent and prohibited any building on the affected areas. The only restriction with regard to the equipment was the height of the buildings that could be constructed within the air corridors under the overhead lines, which was generally agreed to be a minimum of 6 metres. Indeed, by raising the height of a section of the overhead lines the respondent had facilitated the construction of a 10 metre high building by the claimant, referred to as "building B".

33. When asked about the effect of condition 7 of the NWL which provided for future development of the Reference Land, Mr Kennedy considered that it would have no material effect on the market value of the "encumbered" lands.

34. Mr Crothers' approach was to consider the "bundle of rights" enjoyed by the claimant before and after the grant of the NWL. He analysed the terms of the NWL, compared it to the voluntary wayleave which preceded it and found that there was such a degree of overlap and replication between the two arrangements that there was no practical difference in terms of value.

35. The Tribunal agrees that there was little difference between the "old" and the "new" wayleave arrangements but this approach of Mr Crothers failed to take account of the basic fact that the claimant had lost its legal right to have the respondent remove its equipment from the Reference Land.

36. Mr Crothers went on to consider the alternative approach, as adopted by Mr Kennedy, namely the lands subject to the NWL compared to the assumed scenario that the equipment had been removed and came to the conclusion that there was no material difference between the two valuations given:

    (i) development of those areas of the Reference Lands not traversed by the equipment was in no way impeded.

    (ii) as regards the southern portion of the site, the equipment traversed existing areas of open space which formed access roads, marshalling areas etc which

were normal and necessary elements of industrial development and use. The equipment posed no restriction on the use of these areas in any practical sense and this was the clear evidence of Mr McCaw.

(iii) if the lines were to be removed there would be no change in the use of these areas and they would remain in that use for the foreseeable future.

(iv) Mr McCaw had demonstrated in his evidence that further development of those areas was possible with or without the equipment.

(v) Regarding the northern portion of the site, removal of the lines would not materially enhance the development capability of the lands in light of the significant blight already caused by the gas easement.

37. It was a matter of fact that the Reference Land South had been developed to facilitate a fully operational waste management business. Ms Jobling considered this existing layout to be contrived in order to avoid construction near or under the equipment and this resulted in more open space than would be normal for this type of business. This existing layout, however, was achieved under the previous voluntary wayleave arrangements, not the present NWL and as such compensation, if any, for this existing layout could not be considered under the current claim.

38. For the benefit of the Tribunal Mr McCaw, using his architectural expertise, had produced a layout plan which he considered demonstrated that the Reference Land South could be fully developed without interference from the equipment. This plan included an additional building between the existing buildings “A” and “B” of internal dimensions 35 metres wide by 20 metres long with an internal clearance height of 7.9 metres.

39. The Tribunal is satisfied that Mr McCaw’s plan clearly demonstrated that the Reference Land South could be fully developed to facilitate the claimant’s or any successor in title’s future needs, without interference from the equipment.

40. Ms Jobling considered Mr McCaw’s proposed layout to be somewhat contrived. The Tribunal and the respondent accepts that the equipment may restrict building heights in some areas and may necessitate an alternative layout such as the one proposed by Mr McCaw. The onus, however, was on the claimant to prove that it has suffered a

loss in valuation terms. The claimant, however, had failed to provide an alternative layout, other than the one put forward by Mr McCaw, which would have achieved a higher price for the Reference Land South, had the equipment been removed. Mr Kennedy had no examples of where lands with NIE equipment had been sold for a lower price, rather he relied on the evidence of reductions for permanent easements, which the Tribunal considers to be significantly more restrictive than the subject NWL. The Tribunal notes that the Reference Land South was acquired by the claimant in and around April 2005 for £375,155. In order to provide an indication of the impact, if any, of the equipment on market value it would have been a useful exercise to ascertain how this price compared with the sales prices of similar "un-encumbered" lands in the locality in 2005 but this analysis was not carried out.

Compensation Reference Land South

41. The Tribunal considers that the claimant had failed to clearly demonstrate that the Reference Land South suffered a diminution in value as a consequence of the grant of the NWL on 7th May 2009. The Tribunal makes no award of compensation for the impact of the NWL on these lands.

42. If, however, at some future date the equipment prohibits "bona fide" development of these lands, the claimant or its successor in title will have recourse to condition 7 of the NWL which will require the removal of the equipment to allow development to take place or ensure that compensation, based on diminution in value, will be paid if the equipment is not removed.

Compensation Reference Land North

43. The Reference Land North comprises some 12 acres of undeveloped lands which were zoned for industrial use and which were bisected by an easement in favour of Bord Gais. In 2004 Bord Gais paid some £27,200 for the easement which extended to a width of 14 metres. The terms of the easement relevant to this reference are summarised below and restrict the claimant as follows:

- not to reduce the level of soil along the easement corridor.

- no building structure or permanent apparatus over or beneath the surface of the corridor.

- no trees, hedges or shrubs along the corridor.

44. It was Mr Crothers' view that the removal of the respondent's equipment would not enhance the development potential of these lands as they were already significantly blighted by the gas easement.

45. Mr McCaw considered that the northern portion of these lands could not be accessed because a road would have to be constructed over the easement and this was not permitted by the conditions thereof. He suggested an alternative approach would be to apply for new access off Electra Road but the construction of such a 6 metre wide road with at least one single footpath, servicing industrial vehicles would leave very long and narrow buildings which were not suitable for industry. He considered the same effect would occur on the south side of the easement corridor but at least these lands could be accessed off the existing spine road.

46. Mr Kennedy was of the opinion that the construction of an estate road would be possible over the gas pipeline despite the restrictions imposed by the easement and his assessment of compensation was on that basis. The Tribunal invited Mr Kennedy to reconsider his position post the hearing, however, he was subsequently given an indication from an employee of Board Gais that there would be no objection in principle in accommodating the construction of hard standings and access roadways over the easement. Such proposals, however, would be subject to full design approval and direct liaison with Bord Gais. On that basis Mr Kennedy declined to revise his assessment of compensation.

47. Mr Crothers considered that this "indication" from the Bord Gais employee was full of uncertainty, not least because it was an informal response from an employee apparently without authority from the company. Further he considered the indication to be given "in principle" and expressly subject to detailed consideration and liaison with Bord Gais. Mr Crothers view was therefore that the Tribunal should rely on the express terms of the grant when considering compensation.

48. The Tribunal agrees with Mr Crothers, the terms of the grant were clear and unequivocal and in the absence of the claimant producing any legally binding agreement to the contrary, the Tribunal must assess compensation for the Reference Land North on the basis that the express terms of the gas easement would be strictly enforced.

49. The Tribunal accepts that the presence of the gas easement significantly impedes the development of the Reference Land North. The Tribunal is satisfied, however, that some development could be facilitated but considers that the equipment would add to the difficulty of developing these already blighted lands, with a resulting negative impact on market value. The Tribunal accepts that "condition 7" would be available to the claimant or its successor in title if specific "bona fide" development was prevented in the future but it in the circumstances of this already significantly blighted site this was not as beneficial as simply having the equipment removed and this would be reflected in the market value. Based on an intuitive approach the Tribunal considers that a diminution in market value of 10% would be reasonable in all the circumstances, to reflect the effect of the grant of NWL at the valuation date.

50. Mr Kennedy had assessed the "un-encumbered" market value of the Reference Land North on the basis of £50,000 per acre but he did not explain how his comparative evidence led him to this pricing. This was also based on his understanding that construction of an access road would be permitted over the lands but for which he had no legally binding authority. The Tribunal considers this figure to be "optimistic" for a site which was bisected by the gas easement and taking a broad approach considers £25,000 per acre to be more appropriate.

51. Compensation for the grant of the NWL is therefore assessed:

12 acres at £25,000 per acre	=	£300,000
		X 10%
	Diminution in value	£30,000

52. The Tribunal awards compensation of £30,000 as the diminution in market value of the Reference Property caused by the grant of the NWL on the 7th May 2009.

ORDERS ACCORDINGLY

30th September 2014

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

Appearances

Claimant: **Mr Mark Orr QC and Mr Barry Denyer-Green BL instructed by Hampson Harvey, Solicitors.**

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