LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

ELECTRICITY (NORTHERN IRELAND) ORDER 1992

IN THE MATTER OF AN APPLICATION FOR COSTS

R/41/2009

BETWEEN

BRICKKILN WASTE LIMITED – APPLICANT

AND

NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED – RESPONDENT

PART 4

Re: Lands at Electra Road, Maydown, Londonderry

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

Background

1. On 7th May 2009, in accordance with the provisions of the Electricity (Northern Ireland) Order 1992 ("the Electricity Order"), the then Department of Enterprise, Trade and Investment granted Northern Ireland Electricity Networks Limited ("the respondent") a Necessary Wayleave (NWL) to retain its equipment on the lands at Electra Road, Maydown, Londonderry ("the reference land").

2. Subsequently, the then landowner, Brickkiln Waste Limited ("the applicant") made a reference to the Lands Tribunal seeking compensation from the respondent for the grant of the NWL. The claim related to two portions of land referred to at hearing as the "reference land south" and the "reference land north" which were separated from each other by a spine road. This reference was the first of four "test" cases to come before the Tribunal. The others related to claimants Cuthbert, Cassidy and McKibben.

3. The applicant had sought total compensation of £763,411 which comprised £581,286 in respect of the reference land south and £181,125 in respect of the reference land north. By a decision dated 30th September 2014, the Tribunal awarded the applicant total compensation of £30,000 which comprised zero award for the reference land south and £30,000 for the reference land north.

4. In January 2015, following a separate hearing, the Tribunal awarded the applicant its costs in the reference, citing at paragraph 18:

> "18. The claimant had received an award of compensation which was £30,000 greater than any offer from the respondent and as such the Tribunal considers the claimant is entitled to its costs in the reference...".

5. The respondent then referred the matter to the Court of Appeal in Northern Ireland which issued its decision on 23rd November 2018. It's findings relevant to the subject reference are summarised at paragraphs [21], [22], [40] and [41]:

> "[21] We add that the effect of the Tribunal's decision in relation to the Northern lands, in the event of such future intended and permitted development, would be to over-compensate the owner to the extent of £30,000 since there is no provision in the scheme for credit to be given at that later stage for the compensation already awarded due to the mere making of an NWL. We therefore conclude that the Tribunal erred in making any award of compensation on this reference, whether assessed by 'an intuitive approach' or otherwise, because no loss had arisen, much less been demonstrated, due to the making of the NWL. We therefore answer the question posed 'No'. No doubt periodic payments of compensation for any loss of or inhibition on agricultural use due to the presence of equipment such as towers on the land are being and will continue to be made for so long as the line and its equipment remains as will compensation be paid in the event of any temporary loss of use or damage caused as a result of periodic repair or maintenance of the line.
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> [22] In a subsequent decision on costs the Tribunal awarded this claimant his costs of the reference on the basis that he had been awarded £30,000. As costs issues also

arise in respect of the other references with which we are here concerned it will be convenient to deal with all of those together later in this judgement."

And

"[40] The Tribunal will as a result of this judgment require to reconsider its award of costs in *Brickkiln* so as to decide whether to maintain its previous costs award in favour of the claimant now that its award of compensation has been set aside. It may be that it will decide not to differentiate its approach to the *Brickkiln* costs from that which it took in *Cuthbert* and *Cassidy* but that too will be a matter for the proper exercise of the Tribunal's discretion.

[41] As to the costs of the parties to the proceedings in this court, we make an order that the costs of the claimants in *McKibben* be paid by NIE but make no order as to costs of any other party."

6. The purpose of the subject reference is therefore to decide if the Tribunal should maintain its costs award to the applicant in light of the Court of Appeal decision to set aside the compensation award.

7. On 5th February 2016 the applicant company went into liquidation and was subsequently dissolved on 6th June 2018. The liquidator was, however, on 10th March 2016, ordered by the High Court of Justice in Northern Ireland (Chancery Division) to assign a chose in action to Mr Thomas McGlinchey, a former director of the applicant company, on the following terms:

> "That (the liquidator), upon receipt of £5,000 from [Mr McGlinchey] do assign to [Mr McGlinchey] absolutely that chose in action formerly in the Lands Tribunal and now before the Court of Appeal in Northern Ireland ...".

8. Prior to hearing an issue had been raised by the respondent as to Mr McGlinchey's right to recover costs in the subject reference. This issue had not been put before the Court of Appeal. At hearing, however, it was generally accepted by both parties that Mr McGlinchey had the right to receive both the benefit and the burden of the chose in action, as per the original applicant.

Procedural Matters

9. The Tribunal received written and oral submissions from Mr Mark Orr QC on behalf of the applicant and from Mr Stephen Shaw QC on behalf of the respondent. The Tribunal is grateful to counsel for their helpful submissions.

Position of the Parties

10. The applicant submitted that following the decision in the Court of Appeal there was no valid reason for the Tribunal to depart from its ruling to award costs to the claimants in the associated claims of Cuthbert and Cassidy, in both of which no compensation was awarded.

11. In all the circumstances, the respondent submitted that the only proper ruling the Tribunal could make was "no order as to costs".

Statute

12. Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") details the Tribunals discretion with regard to costs:

> "Costs
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> 33.-(1) Except in so far as section 5(1), (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act 1919 (g) applies and subject to paragraph (3) the costs of and incidental to any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President.
>
> (2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed by the registrar on a scale specified by the Tribunal, being a scale of costs for the time being prescribed by rules of court or by county court rules."

13. In Oxfam v Earl & Others BT/3/1995 the Tribunal considered its discretion under Rule 33:

> "The Tribunal must exercise that discretion judicially and the starting point on the question of costs is the general presumption that, unless there were special circumstances, costs follow the event, i.e. that in the ordinary way the successful party should receive its costs."

Discussion

The applicant's submissions

14. Mr Orr QC referred the Tribunal to these further extracts from the Court of Appeal decision, at paragraphs [32] to [39]:

> "The appeals in relation to costs
>
> [32] In the two references already discussed but also in the remaining two in which no compensation was awarded, namely *John Richard Cuthbert* R/26/2011, and *Arlene Cassidy* R/49/2011, the Tribunal awarded costs to the claimants.
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> [33] The award of costs to two applicants who had chosen to terminate their voluntary wayleaves and thereby invoke the involuntary NWL scheme in the hope of receiving compensation as a result and which hope had not been realised may at first blush seem unusual. It must have seemed so to NIE because in both the *Cuthbert* and *Cassidy* cases they have stated the following questions for the opinion of this court:
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> (i) Whether the Member implemented correctly and lawfully the material principles in determining costs and, in particular, whether:
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> (a) the case properly falls to be regarded as 'within the ambit of compulsory acquisition' as recorded at paragraph 11 of Part II;
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> (b) whether the Member was correct to award costs to the claimant where he/she had sought compensation in respect of the grant of the necessary wayleave over the Reference Land but recovered zero from the Lands Tribunal (even though NIE had continued to make payments to the Claimant under the necessary wayleave at a level equivalent to

payments made to landowners on foot of a voluntary wayleave): as at paragraph 51 of Part I and paragraph 3 of Part II; and

(c) whether the Tribunal was right to invoke and apply the decision of *Purfleet* as it did, inter alia, at paragraphs 11, 12 and 15 of Part II.

[34] The Tribunal's decisions on costs in both *Cuthbert* and *Cassidy* are similarly reasoned. The Member first set out Rule 33(11) of the Lands Tribunal Rules (Northern Ireland) 1976:

> 'Except in so far as Article 5 of the Land Compensation (Northern Ireland) Order applies and subject to paragraph 3 the costs of an incidental to any proceedings shall be at the discretion of the Tribunal ...'

which makes it clear that the Member well appreciated that costs are in the discretion of the Tribunal. In deciding to make the orders that he did the Member was influenced by the fact that NIE had initially disputed any possible entitlement to compensation for a land owner whose voluntary wayleave was, against his wishes, replaced by a statutory NWL. This issue had therefore first to be argued and was determined against NIE by the Tribunal's finding in *Brickkiln No 1* that the difference between the two regimes is that the claimants have thereby lost their legal right to have the equipment removed from their property and that compensation, if any, should be based on any resultant diminution in market value of the reference property caused by the grant of the NWL. To this the Member added that the correct basis of compensation for the grant of a NWL was of widespread concern, that there may be a significant number of similar cases awaiting resolution and that the issue had never previously come before the Tribunal which considered it reasonable in all those circumstances for the claimants to seek compensation in their cases.

[35] The Member went on to say that even though the claimants had lost on an issue there was no special reason to depart from the '*Purfleet* assumption' and that the claimants should have their reasonable costs though in the case of *Cassidy* confined to her legal costs and not including those of her expert valuer which had been otherwise provided for.

[36] The reference to a '*Purfleet* assumption' appears to derive from submissions made by Mr Orr QC for the claimant in *Cuthbert* concerning the decision of the English

Court of Appeal in *Purfleet Farms Ltd v Secretary of State for Transport and others* [2003] EGLR 9 in which, as a result of the appellant's land being compulsory acquired, a claim for £12.6m was made, an award of £6.66m resulted and the English Lands Tribunal reduced the award of costs to the claimant by one quarter. An appeal against that reduction was unsuccessful on the basis that the Tribunal was entitled:

> 'Where [it] makes an award of compensation that is well below the amount claimed, it is appropriate for it to consider, in the context of an award of costs, both whether the fact that the claim was exaggerated has led the claimant to incur costs that (given a more realistic evaluation of his claim) he would not have incurred and whether the explanation for the difference between the award and the amount claimed is that issues were pursued upon which the claimant had no real chance of success.' (*per* Chadwick LJ)

[37] It may therefore be seen that what the Tribunal called the '*Purfleet* assumption' really has nothing to say to the circumstances of *Cuthbert*, *Cassidy* and now, as a result of our decision, *Brickkiln.* *Purfleet* deals with the proper approach to the consideration of reducing the costs of a claimant who receives an award but has claimed far too much. It has nothing to say to a claimant whose claim ultimately failed and who therefore was awarded nothing. We accordingly answer question (c) 'No'.

[38] However, as already noted, *Purfleet* was not the only basis upon which the Tribunal founded its costs decisions in *Cuthbert* and *Cassidy.* Had NIE conceded from the outset that the imposition of an NWL in place of a voluntary arrangement had the effect of depriving the land owner of the right to have the NIE equipment removed and that such deprivation might, depending on the circumstances, give rise to a compensatable loss then the case for an award of costs to the unsuccessful claimant would arguably have been much weaker. That was not the position in these cases, as *Brickkiln No 1* evidences. This court considers that the Tribunal has not unreasonably concluded that because the claimants therefore had first to litigate that preliminary issue of principle and because that issue was a novel one for the Tribunal upon which other cases depended it was right in all the circumstances that these four particular claimants should have their costs, even where they had not ultimately recovered compensation.

[39] While that approach might be categorised by some as generous it cannot be said to be wrong in principle or otherwise outwith the discretion as to costs which is conferred upon the Tribunal. It may perhaps be wondered whether, now that the NWL territory has been mapped, future unsuccessful claims engendered by the making of imposed NWLs will receive the same benign treatment but that will be a matter for the Tribunal. This court answers the remaining questions posed:

(a) 'Yes in the context of the award of costs'.

(b) 'The Member was entitled in his discretion to make the awards of costs to the claimants in *Cuthbert* and *Cassidy*'."

15. Mr Orr QC submitted, therefore, that the applicant should have its costs in the reference for because:

(i) Liability had been denied by the respondent, as confirmed in paragraph 38 of the Court of Appeal decision. The issue of liability had to be determined in the first of what might be a large number of claims. It was a preliminary issue of principle which was determined in favour of the applicant.

(ii) Brickkiln was the first case to be heard and the outcome was a matter of concern for future claimants.

(iii) It was never suggested by the respondent that the claim made was exaggerated or inflated.

(iv) There was no valid reason for the Tribunal to depart from its ruling to grant costs in favour of the claimants in the associated Cuthbert and Cassidy cases, in which no compensation was awarded.

16. Mr Shaw QC highlighted the following from the Court of Appeal decision:

(i) Paragraph 13 which demonstrated the importance that the Court of Appeal placed on the existence of Condition 7 of the NWL.

"[13] In the case of the Southern lands the Tribunal concluded that the claimant had failed to clearly demonstrate that those lands had suffered a

diminution in value as a consequence of the grant of the NWL by DETI and accordingly made no award of compensation in respect thereof. Importantly, it added the following:

> '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.'"

(ii) The Court of Appeal's endorsement of the approach taken by the Tribunal to the assessment of compensation in respect of the reference land south and the subsequent application of that approach by the Court of Appeal in its assessment of the reference land north, as detailed in paragraphs 18 and 20 of the Court of Appeal decision:

> "[18] The Tribunal applied these considerations in assessing whether there was any loss in respect of the Southern lands and in determining that there was not concluded:
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> > '41. The Tribunal considers that the claimant had failed to clearly demonstrate that the Reference Lands South suffered a diminution in value as a consequence of the grant of the NWL on 7 May 2009. The Tribunal makes no award of compensation for the impact of the NWL on these lands.
> >
> > 42. ...'
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> [20] Accordingly, borrowing the Tribunal's own language in respect of the Southern lands, we consider that the claimant has failed to demonstrate that the Northern lands have yet suffered any diminution in value as a consequence of the grant of the NWL. As we have said, if in the future bona fide development plans with the benefit of permission should be inhibited in their implementation then compensation based on the resulting diminution in the value of the land will be paid if the equipment is not removed or suitably amended so as to enable the then permitted development to take place."

17. Mr Shaw QC then drew these further conclusions from the Court of Appeal decision, particularly in relation to the Cuthbert and Cassidy decisions:

(i) The "Purfleet assumption", previously referred to in the Cuthbert and Cassidy decisions does not apply in the subject reference, as outlined in paragraph 37 of the Court of Appeal decision.

(ii) Whilst it was within the discretion of the Member to make an award of costs to the claimants in Cuthbert and Cassidy those awards might be categorised by some as generous, as referred to in paragraph 39 of the Court of Appeal decision.

18. He summarised:

(i) Costs lie in the discretion of the Tribunal.

(ii) The "Purfleet assumption" does not apply.

(iii) Save in exceptional circumstances costs follow the event.

19. And concluded:

> The original claim for compensation by the applicant was for a sum in excess of £750,000. No compensation was awarded. It was therefore entirely reasonable and, ultimately justified for the respondent to defend itself against such a claim and it should not be penalised any further on costs. The respondent had never disputed that the applicant could claim compensation and had never denied liability. Rather it was a case of how to measure that liability and the respondent needed guidance. In all the circumstances the only proper ruling the Tribunal could make in this regard was "no order as to costs".

Conclusion

20. Having considered the submissions the Tribunal exercises its discretion under Rule 33(1) to award the applicant its costs in the reference for the following reasons:

(i) The Tribunal is content that the applicant's expert had made a genuine attempt to assess the correct compensation payable and there was never any suggestion at any stage of an exaggerated claim.

(ii) The issue in the subject reference, the correct basis of compensation for the grant of an NWL, was of widespread concern and there were a significant number of similar cases awaiting resolution. In addition this issue had never previously come before the Tribunal and "Brickkiln" was the first and lead case. See paragraph [34] of the Court of Appeal decision in relation to the award of costs to Cuthbert and Cassidy:

> "[34] ... In deciding to make the orders that he did the Member was influenced by the fact that NIE had initially disputed any possible entitlement to compensation for a land owner whose voluntary wayleave was, against his wishes, replaced by a statutory NWL ...
>
> ... To this the Member added that the correct basis of compensation for the grant of a NWL was of widespread concern, that there may be a significant number of similar cases awaiting resolution and that the issue had never previously come before the Tribunal which considered it reasonable in all those circumstances for the claimants to seek compensation in their cases."

(iii) Not to award the applicant its costs in the reference would be at variance with the Tribunal's award of costs in Cuthbert and Cassidy. See paragraphs 38 and & 39 of the Court of Appeal decision:

> "[38] However, as already noted, *Purfleet* was not the only basis upon which the Tribunal founded its costs decisions in *Cuthbert* and *Cassidy*. Had NIE conceded from the outset that the imposition of an NWL in place of a voluntary arrangement had the effect of depriving the land owner of the right to have the NIE equipment removed and that such deprivation might, depending on the circumstances, give rise to a compensatable loss then the case for an award of costs to the unsuccessful claimant would arguably have been much weaker..."

And

> "[39] While that approach might be categorised by some as generous it cannot be said to be wrong in principle or otherwise outwith the discretion as to costs which is conferred upon the Tribunal ...

(a) ...

(b) 'The Member was entitled in his discretion to make the awards of costs to the claimants in *Cuthbert* and *Cassidy*.'"

(iv) In Brickkiln Part II the applicant had been correct in its assessment of the basis for measuring compensation. See paragraph 19 of that decision:

"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."

14th May 2019

Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)
Lands Tribunal for Northern Ireland

Appearances:

Applicant: Mr Mark Orr QC instructed by Hampson Harvey, solicitors.

Respondent: Mr Stephen Shaw QC instructed by NIE, solicitors.