

AWARD OF ARBITRATOR

In the matter of the ELECTRICITY (SUPPLY) ACT 1927, as amended, the ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT 1919, the ACQUISITION OF LAND (REFERENCE COMMITTEE) ACT 1925 and the ARBITRATION ACTS 1954 / 2010

And in the matter of a statutory claim for compensation in respect of the Bandon to Kinsale 38kv Line Project

The Claimants: Gerard Coughlan, Mary Coughlan and Fergal Coughlan (the registered owners of the subject lands)

The Respondent: Electricity Supply Board (ESB)

Address of Subject Premises: Lands at Ballycoughlan, Innishannon, County Cork.
(The Property)

Arbitrator: Paul Good frics fscsi

Venue: The Midland Park Hotel, Portlaoise, Co. Laois.

Hearing Dates: 14th /15th December 2017

In Attendance:

On behalf of the Claimants: Mr O Hickey SC
Mr James Long, Solicitor
Mr Richard Collins, Valuer and Agricultural Consultant

On behalf of the Respondent: Mr J Punch SC
M/s A Carroll BL
Mr M Burke Solicitor
Mr D Kirwan (ESB)
Mr Tom Corr, Valuer and Agricultural Consultant

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1. Background

a) On the 2nd December 2013, a Wayleave Notice was served on Gerard Coughlan, as provided for under the terms of the 1927 Act and subsequent amendments. Further Wayleave Notices were served on Mary Coughlan (22nd December 2013 and 22nd September 2016) and on Fergal Coughlan (22nd December 2015).

b) On the 22nd February 2017, a claim was submitted to ESB on behalf of the Coughlans.

c) The Claimants and the Respondent failed to reach agreement as to the compensation to be paid and, consequently, on the 6th May 2017, an application for the Nomination of a Property Arbitrator was made to the Reference Committee by the Claimant, Gerard Coughlan.

d) On the 26th July 2017, the Reference Committee nominated me, Paul Good of The School House, Ardattin, County Carlow, as Property Arbitrator, pursuant to the provisions of the Property Values (Arbitration and Appeals) Act 1960.

e) On the 15th September 2017, the Parties were notified of the Arbitrators Directions.

f) On the 4th October 2017, a revised Claim was submitted to the ESB.

g) On the 1st December 2017, a Reply to the Statement of Claim was sent to the claimants by the ESB.

2. Documents exchanged / submitted prior to the Hearing included:

Copies of their respective Precis of Evidence were, I understand, exchanged by Mr Corr and Mr Collins.

3. Procedure

As indicated, the matter was dealt with by way of Oral Hearing.

4. Agreed Facts.

a) The subject property comprises a dairy farm holding comprising c. 100 acres together with an adjoining house. The subject property has been roughly bisected by the 38 Kv line for a total length of c. 810 metres, supported by three pole sets and three single poles

b) The market value of the subject lands, including the original dwelling and farm yard, has been agreed between the parties' valuers at € 1,675,000.00.

c) The market value of the separate modern house is agreed between the valuers at € 325,000.

5. Valuation Date.

The date of entry was 7th October 2016.

6. THE CLAIMANTS' CASE

The Claimants case was presented by Richard Collins of FBA Consultants.

His calculation of the compensation payable was as follows:

	€
1. 90.75 acres including the original farm house, the farm yard and buildings - (devaluation at 12.5%)	192,500.00
2. 9.25 acres (the area directly affected by the wayleave restrictions) (devaluation at 25%)	- 33,750.00
3. The adjoining house (devaluation at 10%)	- <u>32,500.00</u>
TOTAL CLAIM	€ 258,750.00
	plus costs

Mr Collins cited one comparison of two adjoining holdings in Kilkenny which were sold at public auction on the same afternoon, one of which had an electricity line crossing it and achieved a lesser sum per acre.

Mr Collins was cross-examined. His devaluation of the farm buildings and land was based on the right held by the Respondents at any time to enter on and cross the lands at any point, if there was a requirement to carry out repair works, etc. in the future. His calculation of the area directly affected

by the wayleave was based on a width of 46 metres. He did not consider that the “before and after” method of valuation used by the Respondent’s valuer was the correct method to use although it might prove a useful check, if the appropriate comparable evidence was available. He cited the Gormley case where it was held that the ESB’s right to acquire a wayleave or easement over land was to impose a burdensome right over that land. There was discussion regarding the relevance of settlements arrived at in cases where Bord Gais and other authorities were acquiring wayleaves for the placing of utilities underground.

7. THE RESPONDENTS’ CASE

The Respondents case was presented by Mr Tom Corr, Valuer and Agronomist. He used the “before and after” method of valuation to arrive at his conclusions. Based on his personal opinion, he placed a “Nil” value on the impact of the works on the value of the holding but, nonetheless, provided for a figure of € 9,364.00 as compensation for the rights acquired by the Respondent to which he added the sum of € 5,100.00 in respect of the 3 pole sets and the 3 single poles, giving a total sum in compensation of € 14,464.00. His compensation figure was based on a wayleave corridor of c. 34 metres in width. He considered that the placing of the line had no effect on the value of the houses. He provided a number of case studies and details of land sales.

He was cross-examined at length by Mr Hickey. There was considerable discussion regarding the case studies and comparisons during which Mr Corr acknowledged that his conclusions drawn from these were based on his experiences and intuition rather than on direct comparisons of similar holdings. There was also considerable discussion concerning the use by Mr Corr of the “before and after” method of valuation only for the purpose of assessing the compensation payable in this case. There was also a brief discussion on a property study prepared by Mr Corr’s firm in conjunction with Insight Statistical Consulting.

Mr Diarmuid Kiernan of the ESB clarified the difference between the terms “transmission” and “distribution” lines as used by his company. During this conversation, he referred to certain works that were carried out by the claimant but financed by the Respondent including the planting of trees behind the house and the movement of fences. My Award, as set out below, is in addition to the sum of € 10,000.00 that I understand from Mr Kiernan has already been paid to the Claimants together with any other sums that may have been similarly paid.

8. SUBSEQUENT LEGAL SUBMISSIONS

It was agreed at the Hearing that Mr Punch would make such legal submissions as he wished in writing with Mr Hickey being given the opportunity to respond.

Mr Punch’s submission arrived in late January. It is essentially a treatise based on the Rules as set out in the 1919 Act, leading to the proposition (Paras 5.11 and 8) that the Claimant has suffered no compensatable loss under the legislation as a result of the acquisition of the statutory wayleave. Mr Hickey’s response rebuts most of the main points made by Mr Punch. He refutes the statement that “in terms of land, value can be assessed *only* by reference to ‘before and after’ values”, an assertion that is made on a number of occasions. He reiterates the judgement in the Gormley -v- ESB case where it was held that an electricity wayleave is ‘a burdensome right over land’. The two barristers have conflicting views on the relevance as comparisons of settlements of compensation payable in respect of other utility wayleaves.

9. FINDINGS OF THE ARBITRATOR AND THE REASONS THEREFOR

Note: The three preceding Sections are not intended to be a detailed outline of each of the valuers' submissions and their respective cross-examinations or of the barristers' legal submissions but are merely my best effort to briefly summarize the main points made. The documentation and transcripts are available to the parties for a more detailed account.

Having inspected the subject property and having considered all of the documentation before me and the evidence presented by the parties, my findings and the reasons therefor are set out hereunder.

1. Mr Collins had arrived at his assessment of the compensation payable by allowing for a percentage devaluation of the wayleave area and adding a separate percentage devaluation of the remainder of the holding, including the original house and the farm buildings and yard. He has made a further allowance in respect of the devaluation of the modern house. He provided one comparison of two immediately adjoining properties, sold at the same auction, one with and one without an electricity line over. As a comparison, this was useful although limited in application by certain other factors affecting the respective values. He also provided details of a number of settlements relating to a nearby water scheme. These were also interesting but, again, of limited, if any, assistance.
2. Mr Corr based his estimate of the compensation payable solely on the 'before and after' method, coming to the conclusion that there was no loss in the value of the land. In support of his contention, he provided a number of case studies and comparisons. Unfortunately, none of the comparisons provided information regarding the price paid for similar neighbouring properties with no electricity lines which resulted in his comparisons being of limited assistance only. Essentially, as indicated previously, it was conceded by Mr Corr that his evidence was based on his opinion / intuition rather than on specific transactional evidence. With regard to the houses, he considered the line to be sufficiently distant to have no ill effect. In conclusion however, in recognition of the Gormley judgement, he did make an 'ex gratia' allowance for the fact that the line and poles had been placed on the lands by calculating a percentage devaluation based on his 'safety corridor' area and adding for the poles.
3. The Gormley judgement is particularly relevant in its conclusion that the exercise by the Respondents of their legal power to enter on land and erect poles / pylons and string wires between, with the right to return on to the land in the future for repair, maintenance or adjustments to the system, creates a burdensome right over the lands. To my mind, it must be accepted by any reasonable person that, if a farmer (or indeed any other property owner) has a holding that is free from encumbrance and which is subsequently made subject to an electricity wayleave, there must be an inevitable loss in value to that owner. The quantum of that loss is obviously subject to variation, depending on the circumstances of the individual case. For example, there would be a material difference between a few metres of wire crossing over the corner of a holding and a substantial length of wiring with poles / pylons passing through the centre of a large farm.
4. The modern house would have had uninterrupted views over a rural landscape. The arrival of the poles and lines would have changed this. My understanding from Mr Kiernan's comments is that the trees were planted to the rear of the house to mitigate the effect on the view of the poles, etc.

5. It would appear to me that the use of the terms 'transmission' and 'distributor' is primarily an in-house matter for the Respondents. To the lay person, any electricity line, whether 38kv, 110kv, 220kv or 400kv, is still just a wire(s) carrying electricity from one place to another. It is interesting though that it seems that, the higher the voltage, the further the lines are raised above ground level. With regard to the previous existence of the electricity supply to the house and yard, virtually every property in the country would have some level of wiring for that purpose but only a few have imposed on them an independent system of wires on poles / pylons passing across their property.

9. AWARD

I hereby award and determine

- a) That the compensation payable by the Respondent to the Claimants in respect of the erection of the pole sets and electricity lines across their property shall be the sum of **€ 109,000.00 (One Hundred and Nine Thousand euro)**
 - b) That the Respondent pay to the Claimants compensation for the costs, if any, properly incurred by them in the preparation and submission of their claim to the Respondent. In default of agreement, such compensation is to be determined by me and separately awarded.
 - c) That, subject to the provisions of Section 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, the Respondent pay to the Claimants their costs and expenses incidental to the reference to arbitration and to the taking up of the Award, which costs in default of agreement are to be taxed either by me or by a Taxing Master of the High Court, at my discretion.
 - d) That the Respondent pay the fee of € 1,903.50 charged in respect of this Award (S.I. No.115 of 1999) or reimburse the Claimants for the amount of € 1,903.50 in the event of same being paid by them.
10. I certify that it was proper for the Claimants to engage the Solicitor, the Senior Counsel and the Expert Witness, Mr Richard Collins who was engaged to prepare the case and give evidence at the Hearing.

The Arbitrator hereby notifies the Parties of this Award made on this 19th day of April 2018

Signed: Paul Good

PAUL GOOD Property Arbitrator



Signed and sealed in the presence of:

Stephen M. Good