THE HIGH COURT

[2021] IEHC 501

[2020/1071 SS]

BETWEEN

TIMOTHY MCCARTHY

CLAIMANT

AND

THE ELECTRICITY SUPPLY BOARD

RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 16th day of July, 2021.

1. Somewhat surprisingly, prior to the decision of the Supreme Court in *ESB v. Gormley* [1985] IR 129 the Electricity Supply Board ("the ESB") was able to exercise a statutory power to place any electric line above or below ground across private land, and to attach to "any wall, house, or other building any bracket or other fixture required for the carrying or support of an electric line or any electrical apparatus" without the private landowner having any statutory right to compensation for these activities. Sometimes these works by the ESB could significantly affect the enjoyment by the private landowner of his or her land. For example, in *Gormley* the ESB intended to erect an electric line and three electricity pylons on Ms. Gormley's land, and to lop or cut tree shrubs and/or hedges which obstructed or interfered with the electric line or with the erection of the line. While ex-gratia compensation (in an amount determined by the ESB) was available to Ms. Gormley, the Supreme Court held that she had an entitlement to compensation in "an amount assessed by an independent arbiter or tribunal". The fact that the ESB had agreed rates of ex-gratia payment with the Irish Farmers Association was no substitute for an entitlement to statutory compensation, independently assessed and taking into account the circumstances of each case.

2. The Oireachtas acted quickly to pass amending legislation, and the Electricity (Supply) (Amendment) Act 1985 introduced such a statutory entitlement. Section 53 of the Electricity (Supply) Act 1927 provided the ESB with the power to require that electric lines be placed across land, including private land. Section 53(5) of the 1927 Act was amended by the 1985 Act, to read as follows:-

> "(5) If the owner or occupier of such land or building fails within the seven days aforesaid to give his consent in accordance with the foregoing subsection, the Board or the authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated in the said notice, subject to the entitlement of such owner or occupier to be paid compensation in respect of the exercise by the Board or authorised undertaker of the powers conferred by this subsection and of the powers conferred by subsection (9) of this section, such compensation to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919 , the Board for this purpose being deemed to be a public authority."

3. The 1919 Act, to which Section 53 (5) of the 1927 Act (in its amended form) refers, is a very brief piece of legislation by modern standards. Including the provisions applying the Act to Scotland and Ireland, and the commencement and interpretation provisions, it runs to twelve sections.

4. Section 2 of the 1919 Act set out the rules for the assessment of compensation:-

" 2. In assessing compensation, an official arbitrator the assess- shall act in accordance with the following rules:-

(1) No allowance shall be made on account of the acquisition being compulsory
(2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise: Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant:
(3) The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority: Provided that any fide offer for the purchase of the land made before the passing of this Act which may be brought to the notice of the arbitrator shall be taken into consideration:
(4) Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account
(5) Where the land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbitrator is satisfied that reinstatement in some other place is bonâ, fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement:
(6) The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

For the purposes of this section an official arbitrator shall be entitled to be furnished with such returns and assessments as he may require."

5. Section 6 of 1919 Act provides for the finality of the award of the Official Arbitrator but also enables (and occasionally requires) the Official Arbitrator to state a special case for the opinion of this Court. Section 6 reads as follows:-

"6.—(1) The decision of an official arbitrator upon any question of fact, shall be final and binding on the parties, and the persons claiming under them respectively, but the official arbitrator may, and shall, if the High Court so directs, state at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and may state his award as to the whole or part thereof in the form of a special case for the opinion of the High Court.

(2) The decision of the High Court upon any case so stated shall be final and conclusive, and shall not be subject to appeal to any other Court."

6. In fact, of recent times there has been a spate of decisions requiring a number of arbitrators to state cases to this Court on a variety of issues arising during the course of proceedings before those arbitrators. They include the following:-

(i) ESB v. Good & Kelleher (Quinn J.);

(ii) ESB v. Boyle & Payne (Twomey J.); and

(iii) Rossmore Property Ltd. v. Ffrench O'Carroll & ESB (Quinn J.).

7. The current special case is also one which the High Court has directed be stated by Mr. Boyle, the Property Arbitrator in the claim taken by Mr. McCarthy. It concerns solely the operation of Section 5 of the 1919 Act. This section relates to the costs of an arbitration. I will set it out in full:-

"5.—(1)Where the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by an official arbitrator to that claimant does not exceed the sum offered, the official arbitrator shall, unless for special reasons he thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made.

(2) If the official arbitrator is satisfied that a claimant has failed to deliver to the acquiring authority a notice in writing of the amount claimed by him giving sufficient particulars and in sufficient time to enable the acquiring authority to make a proper offer, the foregoing provisions of this section shall apply as if an unconditional offer had been made by the acquiring authority at the time when in the opinion of the official arbitrator sufficient particulars should have been furnished and the claimant had been awarded a sum not exceeding the amount of such offer.

The notice of claim shall state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated, and when such a notice of claim has been delivered the acquiring authority may, at any time within six weeks after the delivery thereof, withdraw any notice to treat which has been served on the

claimant or on any other person interested in the land authorised to be acquired, but shall be liable to pay compensation to any such claimant or other person for any loss or expenses occasioned by the notice to treat having been given to him and withdrawn, and the amount of such compensation shall, in default of agreement, be determined by an official arbitrator.

(3) Where a claimant has made an unconditional offer in writing to accept any sum as compensation and has complied with the provisions of the last preceding subsection, and the sum awarded is equal to or exceeds that sum, the official arbitrator shall, unless for special reasons he thinks proper not to do so, order the acquiring authority to bear their own costs and to pay the costs of the claimant so far as such costs were incurred after the offer was made.

(4) Subject as aforesaid, the costs of an arbitration under this Act shall be in the discretion of the official arbitrator who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and the official arbitrator may in any case disallow the cost of counsel.

(5) An official arbitrator may himself tax the amount of costs ordered to be paid, or may direct in what manner they are to be taxed.

(6) Where an official arbitrator orders the claimant to pay the costs, or any part of the costs, of the acquiring authority, the acquiring authority may deduct the amount so payable by the claimant from the amount of the compensation payable to him.

(7) Without prejudice to any other method of recovery, the amount of costs ordered to be paid by a claimant, or such part thereof as is not covered by such deductions as aforesaid shall be recoverable from him by the acquiring authority summarily as a civil debt.

(8) For the purpose of this section, costs include any fees, charges, and expenses of the arbitration or award."

8. As will be seen, the section is designed to provide the acquiring authority (in this case, the ESB) with an opportunity to make an offer in respect of the claim by the landowner. If accepted, the offer will bring the proceedings to an end in the main; like many other proceedings, and most court cases, there may well be important but essentially adjectival disputes between the parties about matters such as the measurement or taxation of costs. However, the main dispute between the parties will be resolved and a potentially lengthy hearing about the valuation of the lands, and the opportunities denied to the landowner as a result of the actions of the ESB, will be avoided. On the other hand, if the offer is refused then the landowner is at risk of adverse cost consequences in the event that he does not beat the offer.

9. The natural instinct of a Claimant in any proceedings is to avoid the risk posed by this form of unconditional offer. That is so whether it is made in the form of a lodgement, or

a Calderbank letter, or the sort of offer provided for in Section 5(1) of the 1919 Act. Notably, in this case a plethora of reservations were raised by Mr. McCarthy's Counsel about the relevant offer letter issued by the ESB. Some of these reservations involved questions which could easily have been clarified had Mr. McCarthy's solicitor sought to do so. Counsel for Mr. McCarthy conceded, at the end of his submission, that no efforts were made to clarify any of these concerns, subsequently ventilated at the hearing of the case stated. While this approach is understandable, it has led to a situation where the ESB's offer has not been accepted by Mr. McCarthy, notwithstanding the fact that (if appropriate clarifications had been received, if indeed they were every really required) the offer might well have been one which he found agreeable. That is particularly so in circumstances where the award of compensation made by the Property Arbitrator was, in fact, less than the amount of compensation put forward by the ESB in its letter of offer.

10. What the approach of Mr. McCarthy and his legal team fails to take into account is that the provisions of Section 5 of the 1919 Act provide Claimants with an opportunity as well as a danger. The danger is obvious; if they fail to beat a properly framed offer then they could suffer (potentially severely) consequences when the question of costs is to be determined by the Property Arbitrator. The opportunity, however, is that the ESB may well make an offer at a relatively early stage in the course of a claim which the landowner is prepared to accept, thereby bringing to an end a process which I suspect very few Claimants find to be other than burdensome and difficult. The statutory provision facilitates the making of such offers by the ESB and, by its mere presence, encourages the ESB to put forward offers which are realistic and competitive; it is simply a waste of time for the ESB to make offers which have neither of these characteristics.

11. These observations do not, of course, bear on or influence the decision I make on the very specific question which the Property Arbitrator has asked me to address. However, I make them because I feel that, too often, Claimants (or the lawyers representing them) treat offers of this sort as evils to be warded off as opposed to ways in which disputes can brought a satisfactory end.

12. As I mentioned, by Order of the 18th of January 2019 (and having delivered a reserved judgment on the 14th of December 2018) Quinn J. directed Mr. Boyle, the Property Arbitrator in McCarthy's case, to state a special case on the following question of law:-

> "Does the letter dated the 21st day of June 2017 constitute a valid unconditional offer for the purposes of Section 5(1) of the Acquisition of Land (Assessment) of Compensation Act 1919?"

13. While the special case contains a great amount of detailed facts and refers to a range of documentation (including a lengthy transcript of a hearing before Mr. Boyle on the 29th of June 2017 and Mr. Boyle's award) I do not feel it is necessary to go into all of that. I will now set out the facts as I see them to be relevant to the question I have been asked to decide.

14. On the 21st of March 2016 the ESB served a wayleave notice on Mr. McCarthy pursuant to Section 53 of the 1927 Act, to which I have already referred.

15. Mr. McCarthy submitted a claim for compensation to the ESB on the 9th of September 2016. On the 24th of September 2016 Mr. McCarthy sought the appointment of a property arbitrator to assess the level of compensation. Mr. Boyle was nominated to act as the Property Arbitrator in this dispute on the 21st November 2017.

16. On the 8th of February 2017 the ESB made an offer to Mr. McCarthy, in writing, in these terms:-

> "We refer to this claim in which the Arbitration was due to commence on 21 February 2017.
>
> Pursuant to Section 5 (1) of the Acquisition of Land (Assessment of Compensation) Act 1919, the Electricity Supply Board hereby makes an unconditional offer to pay the sum of [redacted] in full and final settlement of your client's claim for compensation, and to pay the reasonable costs incurred by your client up to the date of this letter plus reasonable costs to cover the taking of advice in respect of this offer, those costs to be taxed in default of agreement."

17. This offer was not accepted by Mr McCarthy. By letter dated 21st of June 2017, the ESB made a further offer to Mr. McCarthy:-

> "We refer to the above Reference to Arbitration, which was listed for hearing on 28th – 30th June 2017.
>
> Pursuant to Section 5(1) of the Acquisition of Land (Assessment of Compensation) Act 1919, the Electricity Supply Board hereby makes an unconditional offer to pay the sum of [redacted] in full and final settlement of your client's claim for compensation.
>
> In addition, the Electricity Supply Board makes an unconditional offer to pay:
>
> The amount as directed by the Property Arbitrator to be paid in respect of your client's costs of and incidental to, the preparation of the claim (i.e., the pre-reference costs); and
>
> The amount as directed by the Property Arbitrator to be paid in respect of your client's costs of Reference to Arbitration, whether as taxed by the Property Arbitrator, or as taxed in the manner directed by the Property Arbitrator; and
>
> The reasonable costs incurred by your client in taking advice in relation to this offer."

18. Obviously, this is the relevant letter for the purpose of the case stated to me.

19. The hearing before the Property Arbitrator (to include evidence and submissions) took place on the 29th of June 2017, the 30th of June 2017, the 11th of September 2017, the 25th of September 2017 and the 26th of September 2017.

20. On the 4th of January 2018, the Property Arbitrator awarded Mr. McCarthy the sum of €65,102.50 in compensation. The sum offered by the ESB in the letter of the 21st of June 2017 in respect of compensation was higher than the sum ultimately awarded by the Property Arbitrator. In his original claim for compensation, of the 9th of September 2016 (to which I have already referred) Mr. McCarthy's "compensation consultants" sought a sum of €707,000 being the "subtotal of claim for compensation". On top of that, these consultants sought the following:-

> "Together with claimants Valuers fees the claimants legal costs including the costs of conveyance, the claimant's costs of planning consultants, engineers, ergonomists and any other professional advisers fees reasonably incurred in support of the claim and any accommodation was to be agreed with the landowner. Vat is payable on all fees as appropriate."

21. While technically the claim for compensation includes these "pre-reference costs" I was informed by Counsel for the ESB in opening the application that these are often not identified. He said (at day 1, page 32):-

> "Ideally, Judge, this should be specified in the claim for compensation, the statement of claim, and any part of the award ultimately made by the arbitrator. But a practice has arisen whereby they are not in fact identified in the claim document and after the arbitrator makes his award he then entertains a submission of what the pre-reference costs are. He then fixes those and adds them to the award."

22. On this question of pre-reference costs, their notification to the ESB and their assessment, Counsel for Mr. McCarthy said (at day one, page 140):-

> "And my Friend told you this is done by way of written submission. In my experience, no, it is done by, more often than not, by costs accountants addressing the Property Arbitrator who then makes a subsequent award with regard to costs."

23. For the purpose of this ruling, there is no material difference between the parties. It is quite plain that the pre-reference costs claimed by Mr. McCarthy were not notified to the ESB at any time prior to letter of the 21st of June 2017. This is not a criticism of Mr. McCarthy, his legal team or his "compensation consultants", as I am told that this is a general practice and the failure to notify the figures to the ESB in this case is not unusual. However, critically not only is no sum claimed by way of compensation in this case for the pre-reference costs but also the assessment of the pre-reference costs is ultimately made by the Property Arbitrator (whether by way of submissions, or input from costs accountants, or a combination of the two).

24. As I see them, these are the relevant facts for the purpose of the decision I have to make. That decision obliges me to consider the requirements of Section 5(1) of the 1919 Act. Helpfully, there is some guidance from the Irish Courts in the form of the judgment of the Supreme Court in Manning v. Shackleton [1996] 3 IR 85. In that case, the central issue was whether or not an offer of a specific sum of money in conjunction with a proposal by the acquiring authority that certain works would be carried out on the relevant lands constituted an unconditional offer. The view of the Supreme Court was that it did not. However, in deciding that issue (which was quite different to the issue which I have to determine) Keane J. gave a very useful summary of the approach to be taken in assessing whether or not an offer complied with the provisions of Section 5(1). At page 98 of the judgment, he said:-

> "There can be no room for doubt as to whether the letter constituted an 'unconditional offer' within the meaning of s. 5, sub-section 1. In Fisher v. Great Western Railway Company [1911] 1 K.B. 551 where a railway company offered a claimant a sum of £50 in settlement of his claim and also offered to construct a road "as soon as practicable", Buckley L.J. said of the corresponding provision of the Land Clauses Consolidation Act, 1845, at p. 558:—
>
> > 'The object of the statute is that the claimant shall be entitled before incurring the costs of arbitration to say 'I will not go on, because there has been offered to me all that I can get'. He ought to be able to say when he accepts or rejects the offer, 'I am satisfied'. He cannot do that if the circumstances are such that the railway company have it still in their power either to make or not to make the road . . . It seems to me that at the moment when the offer is made the claimant must be in a position to say that it will or will not satisfy the pecuniary claim which he has against the promoters.'
>
> The law is also stated in McDermott and Woulfe, Compulsory Purchase and Compensation in Ireland: Law and Practice, at p. 191 as follows:—
>
> > 'The unconditional offer must be in writing, be unconditional, and it must specify a certain sum as compensation only. It should not be a sum including costs nor a sum as compensation together with the execution of works.'
>
> That is clearly a correct statement of the law."

25. Drawing on the wording of Section 5(1), and the portion of *Manning v. Shackleton*, to which I have referred, Counsel for the ESB submit that the offer need only specify "a certain sum as compensation" and that the offer made of this sum must be unconditional. The need for the offer to be in writing, while a statutory requirement, need not be addressed further here as there is no doubt that the offer is in that form.

26. Relying upon this analysis, the ESB's Counsel submits that the requirements of Section 5(1), are met even if there is no reference to an offer of costs.

27. However, the ESB does not confine itself to this submission. It goes on to argue that the offer also incorporates unconditional proposals to pay (1) pre-reference costs; (2) costs of the reference; and (3) reasonable costs in taking advice in relation to the offer. The ESB suggest, therefore, that (even if it must go beyond making an unconditional offer to pay a sum in compensation) it has met all of the requirements of Section 5(1).

28. I will now deal, in sequence, with the many arguments made by Counsel for Mr. McCarthy which, he says, lead to the conclusion that the answer to the case stated should be in the negative.

A. There Were Two Offers

29. As I have described, prior to the letter of the 21st of June 2017, the ESB had made another offer which it stated was in compliance with Section 5(1). Mr. McCarthy's Counsel submits that "both offers cannot be unconditional, and as a consequence both cannot be valid" (paragraph 1.3 of the McCarthy submissions).

30. No authority is put forward to support this contention. By contrast, seventeen authorities are put forward to support the unremarkable proposition (in the previous paragraph of the submissions) that the question of law on a case stated should not be anchored in "assertions, hypothesis or matters not found as fact by the Property Arbitrator". Be that as it may, I do not think that Section 5(1) either should or must be read in the way suggested by the Claimant. There is nothing in the Act which prevents a series of unconditional offers being made. Even if one accepts for the purpose of this argument (and for that purpose alone) that the first unconditional offer cannot be withdrawn there is no reason either in logic or in the construction of the Statute as to why more than one unconditional offer cannot be available for acceptance by the landowner at any one time. In the written submission, the only legal argument put forward on behalf of Mr. McCarthy is that the reference in Section 5(1) is to "an unconditional offer in writing". As the reference to offer is in the singular, it is argued only one offer can be made. Counsel for Mr. McCarthy pray in aid Sections 4 and 18 of the Interpretation Act 2005 to support the proposition that, in this case, the singular does not include the plural, as "a contrary interpretation appears […]" on the part of the legislature in respect of Section 5 of the 1919 Act as a whole. I do not accept this submission. The entire purpose of Section 5(1) is to create circumstances where claims are settled. It does so by providing (long before the advent of the Calderbank letter) a statutory facility for the acquiring authority to make an offer the unwise refusal of which could well be very damaging to the Claimant; on the other hand, a good offer, if accepted, leads to a satisfactory result for both sides.

31. It is almost inevitable in the course of any claim (whether it be a personal injuries claim, a commercial claim, or a claim of the nature provided for in the 1919 Act) that things can change during its gestation. New facts become available, new analysis is carried out, fresh vouching documents are provided by the Claimant. Any of these could lead to a radical reappraisal of the amount a claim is worth. It would be completely at odds with the intention of the legislature in enacting Section 5(1) that the acquiring authority will be confined to one shot at goal during the whole of the match. If anything, the sense of the

provision is that the acquiring authority should adjust its offer if and when it sees the need to do so, as this is consistent with the whole purpose of the Section which I have outlined already.

32. I do not find that the reference by Mr. McCarthy's Counsel to Section 5(2) advances his position; this subsection relates to a situation where the acquiring authority has not been given sufficient information to make any unconditional offer at all, and if anything underscores the desire of the legislature that the acquiring authority must be in a position to deal with a claim by way of unconditional offer rather than be confined to just disputing it at hearing. If anything, this provision is consistent with the acquiring authority being able to make more than one unconditional offer in respect of an individual claim.

33. It is worth considering in some small detail the practical mischiefs which Counsel for Mr. McCarthy say could emerge in the event that more than one offer under Section 5(1) were permitted.

34. It is suggested that "multiple unconditional offers" would enable the ESB to "abuse and confuse the process". The specific abuse and confusion alleged is that a number of sealed offers would be handed into the Property Arbitrator. I do not see how that is to the advantage of the acquiring authority. If anything the message sent to the Property Arbitrator is that the acquiring authority is all over the place and is uncertain about the level of offer to submit. This is unlikely to favourably impress the Property Arbitrator.

35. Another specific example given by Counsel for Mr. McCarthy (in their written submissions) is worth recording. At paragraph 3.17 they say:-

> "The acquiring authority could offer €10,000 three months out, and if it was not accepted, then offer €20,000 two months out, and then €50,000 on the eve of the arbitration. The Claimant does not have certainty and the process is confused and complicated without sensible purpose."

36. The "sensible purpose" if, of course, that the acquiring authority can revise its position (often, but not necessarily, on the basis of fresh information or analysis) and make an offer which the Claimant must then consider. If the value of the claim is met by any of the offers, then the Claimant is in a position to accept the relevant offer and settle the issue of compensation. Even if all offers are alive at the same time, which is the main reason why Mr. McCarthy's lawyers say the last offer is not an unconditional offer, the Claimant can decide which one to accept. On the scenario described in Mr. McCarthy's written submissions, it is pretty plain which of the offers would be accepted by the Claimant if they were all in place simultaneously. The idea that there will be some overwhelming confusion on the part of the Claimant is, to put it mildly, fanciful.

37. Equally, the subsequent suggestion in the McCarthy written submissions that the existence of several offers on the go at the one time would lead to confusion as to which one the Claimant was in a position to accept again seems to me rather farfetched. We are not dealing in this case (or, indeed, in the *Kelleher* case) with a situation where the

offer has gone down. In both cases the offer has been improved upon. If the Claimant is in the business of accepting one or other offer, it would be the most recent one which, plainly, was intended to be open for acceptance by him both at the time it is sent and subsequently.

38. I therefore find nothing in the Statute that prevents more than one unconditional offer being made in respect of any given claim. It is not for me to now decide whether the first offer can be withdrawn or, in this case, has been withdrawn. The existence and character of the offer made by the ESB on the 8th of February 2017 does not prevent the letter of the 21st of June 2017 constituting an "unconditional offer".

B. The Offer in Respect of Pre-reference Costs

39. We have already seen that the pre-reference costs, though often unquantified, form part of the claim for compensation. We have also seen that the normal approach, and the approach to be adopted in this case, is for the pre-reference costs to be assessed by the Arbitrator after he has made his award of compensation. Given the fact that no particulars of pre-reference costs were provided by Mr. McCarthy, it would have been open to the ESB to apply under Section 5(2) of the 1919 Act to the Property Arbitrator for a direction requiring Mr. McCarthy to give details of those costs. As we already seen, Section 5(2) of the Act is designed to assist the acquiring authority to make a meaningful and informed unconditional offer to meet the claim. Given the practice which has grown up in respect of pre-reference costs, as I have described it earlier in this judgment, I am not convinced that any such application would ultimately have been fruitful.

40. The ESB has taken an alternative approach. In the light of the practice that I have described, it has separated out the pre-reference costs from the rest of the compensatory element, and it has provided an "unconditional offer to pay [Mr. McCarthy's] pre-reference costs, as if these were not part of his claim for compensation". (McCarthy submissions, at paragraph 4.8).

41. It is striking that the Counsel for Mr. McCarthy describe the offer in respect of the pre-reference costs in the way that they do. They accept that the letter includes an unconditional offer to pay those costs. The fact that they are not under the same rubric as the rest of the sum to be paid in compensation is irrelevant. To return of the language of Buckley L.J. in *Fisher*, at least as far as the pre-reference costs are concerned is Mr. McCarthy being offered "all that (he) can get". He is, and there is no dispute that he is.

42. Again, the problem which Counsel for Mr. McCarthy extrapolate will arise from the form of the ESB offer is worth outlining in full. It appears at paragraph 4.9 of the McCarthy written submissions:-

> "This is the equivalent of a letter in a personal injury action offering to pay the sum of €100,000 in full and final settlement of the Plaintiff's claim for damages, and, in addition, an offer of €50,000 to pay the Plaintiff's special damage. In circumstances where the Plaintiff's claim for damages includes his claim for special

damages, there is an obvious ambiguity in such an offer as to whether a Defendant is proposing a settlement that would add up to €100,000 (including special damages), or €150,000, being €100,000 for damages and €50,000 in addition for special damages. The distinction between compensation and pre-reference costs are similar to a distinction between something that is coloured and something that is blue; the former includes the latter."

43. In considering this, and certain of the other submissions made on Mr. McCarthy's behalf by his solicitor and Counsel, I was reminded on more than one occasion of the title of Pirandello's "Six Characters in Search of an Author". Here were three lawyers in search of a problem or, at the very least, an ambiguity. I simply cannot read the letter of the 21st of June 2017 in the way suggested by Mr. McCarthy. The letter offers the redacted amount in settlement of Mr. McCarthy's claim for compensation but continues, crucially, by saying that three other sums will be paid "in addition" to the specific sum identified in the second paragraph of the letter. One of these sums is the pre-reference costs. It is impossible to read the letter of offer in a way that suggests that the pre-reference costs are a subset of the redacted amount described at paragraph two of the correspondence.

C. The Taxing of Pre-reference Costs

44. The ESB's letter is criticised, under this heading, because it fails to provide for the listing of the claim before the Property Arbitrator for the taxation or assessment of pre-reference costs, and no provision as to how the costs of the hearing should be addressed. It was also said that the jurisdiction of the Property Arbitrator is at an end as the claim has been settled, and there is no certainty that he will assume the jurisdiction to deal with pre-reference costs.

45. Mr. Boyle was nominated "to hear and determine the questions […]" raised in Mr. McCarthy's application set out in the letter to ESB of the 9th of September 2016. I have already referred to that letter, which was sent by Mr. McCarthy's compensation consultants. That identified two separate strands to the claim for compensation. The first were the specific items which, as I have noted, amounted to a subtotal of €707,000. The second is the pre-reference costs.

46. It is clear from the letter of the 21st of June 2017 that, while the claim for €707,000 would have been settled by the acceptance on the part of Mr. McCarthy of the redacted figure offered by the ESB, the question of the pre-reference costs remained to be determined by the Property Arbitrator. As such, the Property Arbitrator's mission to hear and determine the amount of the pre-reference costs had not come to an end. He was still obliged to carry out that function. I therefore find misplaced the concerns expressed on behalf of Mr. McCarthy that it was really up to the Property Arbitrator to decide whether or not he would "assume the jurisdiction to do so […]". As to the costs of the hearing to determine the pre-reference costs, for the reasons which I have just outlined these remain costs in the arbitration and will be caught by the ESB's unconditional offer to pay "the amount as directed by the Property Arbitrator to be paid in respect of (Mr. McCarthy's) costs of the reference to arbitration". Contrary to what is submitted on

behalf of Mr. McCarthy, therefore, provision is made in the offer for the costs of the hearing dealing with the assessment of the pre-reference costs.

D. Reasonable Costs

47. In its letter of offer, the ESB says it will pay the reasonable costs incurred by Mr. McCarthy in taking advice in relation to the offer. If such costs fall within the remit of the Reference to Arbitration, then they could of course be measured by the Property Arbitrator or referred by him for taxation; Section 5(5) of the 1919 Act. The parties therefore appear to have proceeded on the basis (in the argument before me) that these are not costs of Mr. McCarthy that may fall within the unconditional offer by the ESB to pay whatever costs in the Reference to Arbitration are directed by the Property Arbitrator and, in turn, taxed on foot of such direction.

48. If the costs of taking advice on the ESB offer do not constitute costs that can be awarded by the Property Arbitrator in the context of the arbitration, then these would be costs which are irrecoverable by Mr. McCarthy regardless of how the arbitration goes. Put another way, were it not for the offer by the ESB to pay these specific legal fees Mr. McCarthy might never be reimbursed in respect of them.

49. Apart altogether from this general proposition, namely that the costs of this advice may not be recoverable by Mr. McCarthy in any event, I will consider the two specific difficulties identified by Mr. McCarthy's Counsel.

50. The first is that the word "reasonable" is not a term of art in the taxation or adjudication of costs. This is simply wrong. As Counsel for the ESB was able to remind me on opening the case, Schedule 1 to the Legal Services Regulation Act 2015 sets down the principles relating to legal costs and, in doing so, uses the concept of reasonableness as a defining one in assessing the costs to be paid. In particular, it requires a Legal Cost Adjudicator to assess if costs have being "reasonably incurred" and that costs are "reasonable in amount".

51. In determining that costs are "reasonable in amount" the Legal Costs Adjudicator must consider (where applicable) ten different matters. In respect of one of the specific matters to be considered in assessing whether costs are reasonable in amount (with regard to expert witnesses) the Legal Costs Adjudicator must in turn assess whether those specific costs both were necessary and reasonable.

52. While the 2015 Act was not commenced until the 7th of October 2019, there is no doubt that from 2015 onwards the Oireachtas felt able to legislate on the question of legal costs, safe in the knowledge that the concept of "reasonableness" was not an unfamiliar or challenging one as far as those measuring costs were concerned.

53. The second issue raised by Counsel for Mr. McCarthy on this point is that there could be a dispute about what constituted "reasonable costs" and that is no mechanism by which that dispute can be resolved. Ultimately any dispute about whether or not costs are "reasonable" can be resolved by litigation. It would clearly be undesirable if a dispute

about what constituted the reasonable costs of taking advice on a single one-page letter would lead to a fresh set of proceedings. It is also difficult to see how that could be allowed to happen, though given the level of dispute between the parties in this case stated (and in the two other cases stated I have heard) one cannot exclude the possibility that further litigation might ensue. However, it is equally possible there could be an entrenched dispute about the taxation of the costs of the arbitration (should those costs be referred to taxation) and an appeal from any decision of the officer charged with assessing the amount to be paid by the ESB in respect Mr. McCarthy's costs. One can never shut off the possibility of further (potentially lengthy) disputes and litigation about the quantum of costs, absent agreement on a specific sum to be paid in that regard. However, it is clear that Section 5 of the 1919 Act does not require that all loose ends be tied up in the unconditional offer. It is not necessary that an offer in respect of costs be made in a certain sum, which is then accepted by the landowner. Even if the ESB is wrong, and Section 5(1) requires more than an unconditional offer of a sum in respect of compensation alone, the most that the subsection requires is that there is some way in which the sums due (notably in respect of costs) on foot of acceptance of the offer can be ascertained. As Counsel for the ESB submits, even if there is a dispute about what fee would be reasonable for advising on the letter of offer that can ultimately be decided by the appropriate Court. Courts have to decide, in different circumstances, all the time what is "reasonable" in many different contexts; that can be done here, should it be necessary to do so.

E. Submission of the Claim

54. Again, this concern relates to pre-reference costs. It is submitted that pre-reference costs traditionally incorporate the costs of the preparation and submission of the claim for compensation. However, the letter of offer refers solely to Mr. McCarthy's "costs of and incidental to, the preparation of the claim (i.e. the pre-reference costs) […]". It is suggested therefore that the ESB is trying to avoid paying the costs of submission of the claim for compensation. However, I think this again places a strange interpretation on the letter of offer. The correct interpretation is that the relevant portion of the letter offers to pay Mr. McCarthy's pre-reference costs in the amount as directed by the Arbitrator. Indeed, the McCarthy written submissions themselves raise the possibility that (at its height) any apparent inconsistency would be seen as a "typographical error" as opposed to anything more significant. In addition, the importance of any deliberate omission of the costs of the "submission of the claim for compensation" is unclear. It is difficult to see why the ESB would offer to pay sums in respect of Mr. McCarthy's costs of and incidental to, the preparation of the claim, but deliberately hold back from paying whatever costs arise from the submission of the prepared claim. I think a fair reading of the letter can only be that all pre-reference costs are being paid in as much as they are directed to be paid by the Property Arbitrator. Put another way, I think that the ESB would not have a leg to stand on were it to argue that any extra costs arising or attendant on the submission to arbitration were not to be paid by it.

F. Jurisdiction of the Arbitrator/Lack of an Agreed Award

55. Under this heading of the McCarthy written submissions, a number of fairly disparate points are raised.

56. On Mr. McCarthy's costs of the Reference to Arbitration, in my view, the letter of offer inevitably requires the ESB to pay Mr. McCarthy's costs (as taxed) up to the date of the letter. This is confirmed by counsel for the ESB. Mr. McCarthy could not have accepted the offer before it was made.

57. If Mr. McCarthy took an inordinate amount of time to accept the offer, and particularly if significant costs were built up over that period, it is of course open to the ESB to submit to the Property Arbitrator that Mr. McCarthy should not be awarded all of his costs up to the date of acceptance. There may, indeed be a number of submissions as to costs that would be made should the scenario I have just described actually occur. However, this does not prevent the offer being an unconditional one. The ESB have offered unconditionally to pay Mr. McCarthy's costs as directed by the Property Arbitrator. The offer to pay these costs is not, for example, conditional on what the Property Arbitrator may direct. At the time the offer is received by Mr. McCarthy, he is in the best position of any party to dictate what happens in respect of the costs of the Reference to Arbitration. If the sum proposed in respect of compensation is one he is prepared to accept, and he then acts promptly (or at least in a reasonable time) in agreeing to the offer made by the ESB, it is difficult to see how he could be refused any of his costs in respect of the reference to arbitration which post-date the letter of offer. If, as Mr. McCarthy's Counsel argue, there is need for an award in order to give the Property Arbitrator the jurisdiction to tax costs then the payment by the ESB of the costs of such an award would flow from the acceptance by Mr. McCarthy of the offer.

58. However, there is no certainty that Mr. McCarthy (or any other claimant) will act with dispatch in accepting an unconditional offer. The legislation sets down no period for the acceptance of an offer under Section 5(1). The position taken by Mr. McCarthy is that, if the offer requires acceptance within a specified time, it is not unconditional and that the offer cannot be withdrawn. What the legislation certainly does not require is that a body such as the ESB, in making an unconditional offer under Section 5, is left at the risk of it being accepted at any time prior to the making of the award by the Property Arbitrator while nonetheless being under an obligation to pay the costs of the Claimant up to the acceptance of the unconditional offer. That would create the utterly surreal situation. The Claimant would be encouraged to sit on a good offer from an acquiring authority, see if the ball broke in his favour during the course of the arbitration, and then (if it did not) accept the original offer and pocket a very large award of costs which would represent legal and consultancy expenses that he had incurred in pursuing an inflated claim. Even more strangely, it would encourage lawyers and advisers to urge claimants to try their luck at a hearing confident in the knowledge that their costs will be paid. I am absolutely sure that this is not an approach that would recommend itself to any of the persons advising or acting for the Claimant in these proceedings. However, the absurdity of these scenarios go to emphasise the point that for a letter to be an unconditional offer within the meaning of the relevant provision it does not require the acquiring authority to

commit to paying the Claimant's costs on an ongoing basis after the offer has been received.

59. I have concluded that the various objections raised on behalf of the Claimant in this section of written submissions do not lead me to conclude that the offer made on the 21st of June 2017 was not an unconditional offer within the meaning of Section 5(1) of the 1919 Act.

G. Decision

60. I have considered carefully all of the material provided to me, the written submissions of the parties, and the oral submissions of the parties. In particular, I have considered at length at the letter of the 21st of June 2017. I have come to view that it is an unconditional offer within the meaning of Section 5 of the 1919 Act. While my analysis of the submissions made on behalf Mr. McCarthy has been structured to mirror the written submissions made on his behalf, the written submissions foreshadow the oral submissions, which needless to say I have closely examined.

61. It is plain that I have decided that the letter of the 21st of June 2017 is an unconditional offer without deciding the underlying submission made on behalf of the ESB, namely that, where a specific sum is offered unconditionally in respect of the compensation sought by the landowner, there is no need to address issues of costs in the letter of offer. While I have sympathy for this submission as a matter of construction of the subsection, it is the unnecessary for me to decide the matter in the light of the views I have formed about the specific objections raised on behalf of Mr. McCarthy.

62. I will therefore answer the question in the special case stated in the affirmative. I will list the matter at 10am on the 27th of July 2020 to deal with any outstanding issues.