Neutral Citation Number: [2024] UKUT 00316 (LC)

Case No: LC-2024-129

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
IN THE MATTER OF A NOTICE OF REFERENCE

Royal Courts of Justice

8 October 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Compulsory Purchase – small parcel of land acquired for new road scheme – injurious affection to retained house, buildings and land – disturbance compensation

BETWEEN

MRS MARGARET JONES **Claimant**

and

WELSH GOVERNMENT

Respondent

Re: Barnfield
Forge Row
Gilwern
Abergavenny
NP8 0HA

Diane Martin TD MRICS FAAV

DETERMINATION ON WRITTEN REPRESENTATIONS

The following cases are referred to in this decision:

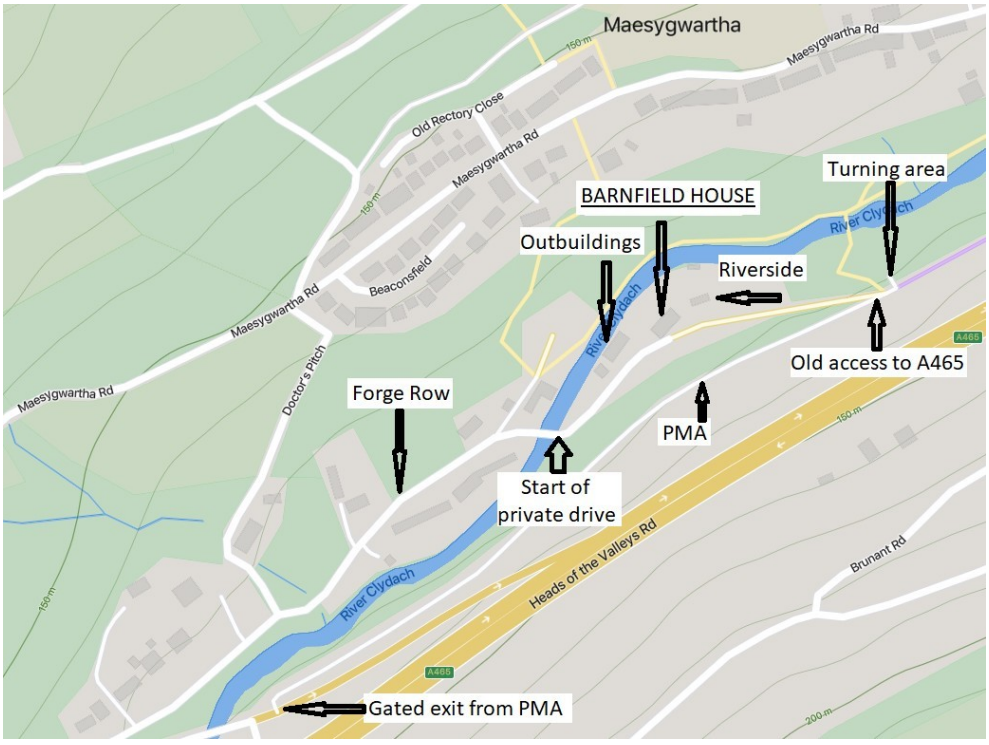
Castlefield Properties Limited v National Highways Ltd [2023] UKUT 217 (LC)
Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 11

Introduction

1. Barnfield ("the property") is a three bedroom stone built detached house situated in a rural riverside setting to the south west of the village of Gilwern, some two miles west of Abergavenny. Mrs Jones and her family have owned the property for over 20 years. The house, together with stables and outbuildings, sits in a plot of 2.6 acres which formerly adjoined the unimproved A465 Heads of the Valleys road from Abergavenny to Merthyr Tydfil. The main access to the property, and its neighbouring property Riverside, is along a private unsurfaced track which turns off Forge Row and crosses a small stone bridge. The private track continues through the property and up an incline to join what was the old A465.

2. On 26 October 2014 a compulsory purchase order was made to enable a major upgrade of the five mile stretch of the A465 between Gilwern (to the east) and Brymawr (to the west) from a three lane carriageway to a dual carriageway. Notice to treat and notice of entry were served on 28 November 2014 but it was not until 6 November 2017 that possession was taken of a very small parcel of land at the property for the scheme. This is the valuation date for the compensation claim made by Mrs Jones. It is agreed that works to the southern (furthest) carriageway began in 2015 and that construction which directly impacted the property continued from November 2017 until June 2019. The new road was opened in November 2021.

3. The new dual carriageway is sited on a large embankment above the level of the old road, of which only the original outer carriageway remains. That carriageway has been repurposed as a gated private means of access ("PMA") designed for use by Welsh Water and the South Wales Trunk Road Agency to gain access for maintenance. It is understood that documentation granting legal vehicular rights of access along it to the property and Riverside is still to be completed. At the eastern end of the PMA is a hammer-head turning area and at the western end is a locked exit gate, for which the owners of the two properties have held keys since June 2023. The plan below shows the key features described.



4. Compensation has been agreed for 8 sq m of land taken at £400, for an easement over 0.2 acres at £405, and for a licence over an area of 9 sq m at £63, together with a sum of £500 for claimant's time. Basic loss payment is agreed at £30.00 and an occupier's loss payment at the minimum of £300.

5. The outstanding matters referred to the Tribunal are a compensation claim for injurious affection, and a disturbance compensation claim for the cost of alternative livery provision during construction and the cost of control of Japanese Knotweed, said to have been introduced during construction.

6. The reference was made on 26 February 2024 by the claimant's agent, Mr Kenneth Cooper FRICS of The William Ricketts Partnership in Whitchurch, Cardiff.

7. The respondent was represented by Berry Smith of Cardiff. Ms Lisa Bryan BSc (Hons) MRICS of the Valuation Office Agency was instructed to provide expert evidence for the respondent, which was submitted with the statement of case.

8. The parties agreed that the matter could be dealt with by written representations and a site inspection, in order to minimise costs. Mr Cooper submitted a response to the respondent's expert report and I conducted a site inspection on 10 September 2024, accompanied by Mr Cooper, Ms Bryan and Ms Lasky of Berry Smith. I inspected the property and the new PMA, and saw from the roadside nine properties referred to in valuation evidence as comparable sales.

9. The reference was made six years and three months after the date of entry, but no point on limitation was taken by the respondent.

The claim for injurious affection under s.7 Compulsory Purchase Act 1965

The legal background

10. The case of *Castlefield Properties Limited v National Highways Ltd* [2023] UKUT 217 (LC) concerned, in part, the assessment of compensation under section 7 of the Compulsory Purchase Act 1965 for injurious affection to retained land caused by alterations to its access and delays in putting in place new legal rights of access.

11. Section 7 provides:

> "In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act."

12. In *Castlefield* the sole access to the retained land was stopped up and a replacement access was to be provided as an easement across the land of a neighbouring owner, using the respondent's powers of compulsory acquisition. In the event, a legal right of access was still not in place nine years after the date when part of the property was taken and the claimant sought compensation for injurious affection and disturbance losses resulting from that delay. Paragraph [18] of the decision is helpful in setting out the basis for injurious affection compensation as follows:

> "18. The assessment of this form of compensation is generally achieved by determining the value of the retained land before severance, i.e. on the valuation date but disregarding the effect of the acquiring authority's scheme, and deducting from it the value of the retained land after severance, i.e. on the same date but taking into account the effect of the scheme and of the severance of the retained land from the land taken. The necessary assessment must be carried out as at the date of entry, in this case, 10 November 2014."

13. At paragraph [21] it continued:

> "... As a general rule, without an express contractual or statutory instruction to do so (and there is none in section 7) it would always be wrong to value land as if with knowledge of matters which were not known, and could not have been known, at the valuation date…"

The positions of the parties

14. For the property in this case the valuation date is 6 November 2017 and the assessment of injurious affection requires as a first step an assessment of its value at that date disregarding the road improvement scheme, i.e. in a "no-scheme world". The property currently extends to 2.6 acres but, in 2019, Mrs Jones transferred to her son two small parcels of land at the western end of the property so, at the valuation date, it extended to a larger parcel of around three acres. This difference in area has not been said to have any effect on its value.

15. For the claimant, Mr Cooper submitted that the no-scheme world value of the property was £700,000, whilst it is the opinion of the respondent's expert, Ms Bryan, that the no-scheme world value was £406,000.

16. The second step in the assessment is to determine the value of the retained land at the valuation date, after loss of the part taken and having regard to all the matters which would have been known or anticipated at that date by a reasonably prudent and properly advised purchaser. Mr Cooper submitted that the loss of value due to injurious affection was 4% or £28,000, i.e. that the value of the retained property was reduced to £672,000. In Ms Bryan's opinion there is insufficient evidence to justify any claim for injurious affection.

Evidence of the no-scheme world value of the retained land as at 6 November 2017

17. The split level detached stone house is unchanged from the valuation date and comprises three bedrooms, two reception rooms, kitchen, utility, boot room, larder, conservatory, downstairs shower room, upstairs family bathroom. The floor area of the property is agreed to be 203 sq m using the Valuation Office Agency basis of measurement of Reduced Cover Area ("RCA"), equivalent to gross external area. It has mains electricity and water, private drainage and oil fired central heating. At the valuation date the total area of the property was estimated to be 3 acres, including the length of unsurfaced private driveway, over which there is a public footpath, two parcels of rough grazing and an enclosure with three buildings used as barns/stables/garages.

18. Mr Cooper had acted for the claimant, and other claimants under the scheme, since its commencement and was able to provide photographs taken in September 2017 just ahead of the valuation date. Ms Bryan was first instructed with regard to negotiations for compensation on the property in September 2022, taking over from a colleague with whom Mr Cooper had

been in negotiation and relying on that colleague's notes for information relevant to the valuation date. She was subsequently instructed to provide an expert report on 5 April 2024.

19. In her report Ms Bryan analysed nine local property sales which took place between January 2014 and January 2022, using the Nationwide House Price Index for Wales to adjust the sale prices to the valuation date. Two of these transactions concern immediate neighbours of the property, two are located nearby in Forge Row, and the remainder are properties within a quarter of a mile radius. Analysing the adjusted sale prices by floor area, the range of evidence is from £1,191 per sq m for the largest property to £3,194 per sq m,for the smallest property. Ms Bryan's two preferred comparables were Forge House (£1,464 per sq m) and Dan y Lan (£2,670 per sq m), both of which had a small area of land in addition to the house and garden. This led her to place a value on the property of £2,000 per sq m or £406,000.

20. The analysed evidence is summarised below, ranked from high to low value per sq m. Mr Cooper's value for the property is at the top of the range and Ms Bryan's value sits midway.

Property	Street	Det?	Beds	Acres	Sq m	Date	Price	Index	Adj price	Adj £/sq m
BARNFIELD - C	Forge Row	Det	3	2.6	203	06/11/17	£700,000	1	£700,000	£3,448
Riverside	Forge Row	Det	3	0.3	93	16/01/22	£395,000	0.749	£295,777	£3,194
Dan Y Lan	Station Road	Det	4	5	172	25/11/14	£431,000	1.065	£459,162	£2,670
Tan Danycoed	Church Road	Det	4	0.6	161	23/01/14	£395,000	1.078	£425,982	£2,649
The Woodlands	Maes Y Gwartha Rd	Det	3	3	130	17/02/16	£320,000	1.066	£341,164	£2,624
BARNFIELD - AA	Forge Row	Det	3	2.6	203	06/11/17	£406,000	1	£406,000	£2,000
Tanglewood	Forge Row	Det	4	0.5	91	03/10/14	£163,000	1.065	£173,651	£1,908
1 Forge Row	Forge Row	End terr	3		101	16/01/15	£158,000	1.084	£171,299	£1,696
Forge House	Forge Row	Det	5	2.9	300	12/05/16	£425,000	1.034	£439,301	£1,464
Bethlehem Manse	Maes Y Gwartha Rd	Semi		0.3	167	17/07/15	£195,000	1.027	£200,353	£1,200
Bryn Y Haul	Church Road	Det	5	0.3	325	16/03/18	£390,000	0.993	£387,214	£1,191

21. Mr Cooper initially provided no evidence to support his submitted value of £700,000, other than comparison with the asking price of £570,000 for the property in sales particulars which appear to be dated 2007. Ms Bryan carried out research into attempts to sell the property, in April 2008 and May 2009 at an asking price on each occasion of £560,000, followed in September 2010 by a reduced asking price of £549,950. She concluded that, as the property was withdrawn from the market unsold on each occasion, the asking price had been ambitious.

22. In his reply Mr Cooper explained that the house had been placed on the market when a colleague in his firm had been acting for Mrs Jones and her (now late) husband in regard to a proposed blight notice for an earlier version of the road scheme, but the matter was not pursued further after Mr Jones passed away in June 2011. He submitted that the threat of the scheme and its consequences for the property and the local market were being overlooked in Ms Bryan's valuation figures and analysis. The contractors for the scheme had been appointed in March 2011, the Welsh Government wrote to potential claimants in October 2013 advising of the proposed compulsory purchase order, which was approved in March 2014. The scheme was a major infrastructure project and disruption to local road users and homeowners was inevitable as a result of its construction. This prospect would have had an impact on the sale prices analysed by Ms Bryan as comparable evidence and he submitted that her value of £406,000 did not reflect value in a no-scheme world at 6 November 2017.

23. Mr Cooper placed some reliance on the adjusted sale price of Riverside, the immediate neighbour to the property which shares its access. It was sold in January 2022, shortly after construction was completed in November 2021, at a price of £3,194 per sq m, when indexed back to the valuation date. However, the floor area of Riverside, at 93 sq m, is very small by comparison with the other detached properties and it would be expected to command a higher price per sq m.

24. I agree with Mr Cooper that sales of residential property in the immediate locality of construction of a major new road, whether ahead of or during the construction phase, would have been affected by the existence of the scheme. Each property would have been affected differently, depending on proximity to the construction and whether any land was to be taken, but none of the sales took place in a no-scheme world. The evidence analysed by Ms Bryan is helpful, but only as evidence of values in the scheme world. I am not assisted by Mr Cooper's reference to previous asking prices for the property, some 10 years before the valuation date. Without a transaction they do not provide evidence of value, and speculation as to whether the asking price was too ambitious is no more than that.

Evidence of actual value of the retained land as at 6 November 2017

25. Given the comments I have made regarding Ms Bryan's analysis of sales, all of which took place within the world where the road scheme existed, it is more likely that her valuation of the property at £406,000 reflects its actual value at the valuation date having regard to the existence of the scheme. Without a reliable no-scheme world figure against which to compare it I can do no more than consider the possible loss of value caused at the date of valuation by reference to how much more the property would have been worth without the scheme.

26. Mr Cooper justified a claim of 4% (of unaffected value) by reference to two other injurious affection claims agreed by him with the respondent for detached properties close to and affected by the road scheme, one at 1% and one at 7%. As Ms Bryan has pointed out, the circumstances at each of those properties was very different, and settlement evidence for other properties does not assist me in determining a claim under s.7, so I did not ask to be shown them during my inspection.

27. The new road was built some 50 metres further away from the property than the original and in Ms Bryan's opinion the effect of noise on the property was therefore dramatically reduced, providing a benefit. Mr Cooper maintained that because the road was built on an embankment noise was still evident at the property and there was no benefit to be offset against factors causing depreciation. There is no empirical evidence to support either position.

28. The key issue in dispute between the parties regarding the claim for injurious affection is the extent to which the original access from the property onto the old A465 provided a valuable benefit which has been lost as a result of the scheme. Photographs from 2017 show that the surface of the track was partially metalled along its length and that there was a small layby at the exit into which a vehicle could pull before joining the inner of two lanes of eastward bound traffic on the main road. The sharp angle between the track and the road would only allow a vehicle to leave and head eastwards. To enter the track a vehicle would have had to be travelling westwards and to have waited to cross two lanes of eastward bound traffic. In summary, there were limitations on access to and exit from the track and the relatively steep incline, which remains unchanged, was a further limitation.

29. It was Ms Bryan's opinion that replacement of the previous secondary means of access by an alternative right to use the hard surfaced PMA to gain access to the A465, albeit via a longer

route requiring locked gates to be opened, had not caused a demonstrable loss in value of the property. If a vehicle such as an oil delivery tanker was unwilling or unable to use the main access from Forge Row, arrangements could made for it to gain access along the PMA, to turn in the new turning head and drive down to the property.

30. Mr Cooper said that before the scheme commercial vehicles, such as oil delivery tankers, preferred this as a means of access to the property, rather than the longer route round into Forge Row and over the small stone bridge. He said that this does not happen now because of the practical difficulties of getting up and out onto the PMA, having to turn in the hammer head and then navigate a series of gates to get to the exit. Moreover, walkers using the footpath along the PMA have often parked their cars outside the locked exit gate, thereby blocking access through it. He accepted that parking spaces have now been created opposite the locked gate which should alleviate this problem.

31. It is not disputed that the incline of the track as it rises up to the level of the old road is unchanged as a result of the scheme and, from my inspection, I believe it would always have been somewhat difficult for large heavy road vehicles to make an exit from it. However, for lighter vehicles, especially ones with the benefit of four wheel drive, the track would have been a useful alternative means of access to and from the property. There is a gate half way down, controlled by the owners, but otherwise it has no hindrances. By contrast, the new alternative means of access has a number of gates, with one or more padlocks, and it is not a short cut by comparison with the exit via Forge Row.

32. Ms Bryan commented that the sale of Riverside in 2022 appeared to have been at a very good price, unaffected by the same alteration to its alternative means of access. I accept that comment, but observe that Riverside is a small domestic property with only a right of access over the track rather than ownership of it. By contrast, the track is owned and controlled as part of the property, which has buildings suitable for small scale equestrian use and space for numerous vehicles to be parked in the yard, so more use of the alternative access would be expected.

Discussion

33. The assessment of injurious affection is to be made as at 6 November 2017, taking into account only what was known, or could reasonably have been anticipated, at that date about the likely impact which construction of the new road would have on the property. The loss of direct access to the A465 would have been known, along with details of the proposed alternative route along the PMA. The fact that nearly seven years later the property still has no legal right of access along the PMA, and that keys to the padlocks on gates would not be supplied until mid-2023, would not have been anticipated. But there would inevitably have been uncertainty about the nature of the alternative access and how it would work in practice. Prospective purchasers in the market for a property affected by uncertainty exercise caution by discounting the price they are willing to pay, and the amount of that discount would be the amount of injurious affection to be paid as compensation in this case.

34. Mr Cooper placed a figure of £28,000 on the injurious affection caused by the scheme. If this figure was added back to Ms Bryan's assessment of market value at £406,000 it would suggest a no-scheme world value of £434,000 or £2,138 per sq m. Ms Bryan's two preferred comparables were Forge House and Dan-y-Lan. Forge House is a 300 sq m five bedroom house in grounds of 2.9 acres, located across the river from the property. It sold for an adjusted price of £439,301 (£1,335 per sq m). Dan y Lan is a 172 sq m four bedroom house with five acres of land, situated in an elevated position south of the new road. It sold for an

adjusted price of £459,162 (£2,670 per sq m). Neither property was directly affected by the road scheme, although both would have suffered from the inconvenience of disruption during road construction, a fact which would have been anticipated at their dates of sale. I was able to see both properties from the roadside, and I have seen the online sales details for each provided by Ms Bryan.

35. In my judgment a purchaser making a discount for the uncertainty of the new access would reduce their offer by a round figure, rather than a percentage, and I consider that the round figure would be £20,000. Assuming Ms Bryan's value of £406,000, that would suggest a no-scheme world value of £426,000 or £2,099 per sq m. That value sits comfortably with the sales evidence of Forge House and Dan y Lan, which were sold in a world where the scheme existed but was not going to affect either property directly.

36. The claim for injurious affection is determined at £20,000.

The claims for disturbance compensation

37. The principle of equivalence, which requires a claimant to be fully and fairly compensated for loss following compulsory acquisition, was reviewed in detail by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 11. He confirmed that compensation should cover disturbance loss as well as the market value of the land itself, provided that three conditions are satisfied. Firstly, there must be a causal connection between the acquisition and the loss in question. Secondly, the loss must not be too remote from the acquisition. Thirdly, the claimant must have complied with their duty to mitigate their loss. To quote Lord Nicholls (at page 6):

> "The law expects those who claim compensation to behave reasonably. If a reasonable person in the position of the claimant would have taken steps to reduce the loss, and the claimant failed to do so, he cannot fairly expect to be compensated for the loss or the unreasonable part of it. Likewise if a reasonable person in the position of the claimant would not have incurred, or would not incur, the expenditure being claimed, fairness does not require that the authority should be responsible for such expenditure."

38. The first of two claims for disturbance compensation on behalf of the claimant is for £1,580 spent on the cost of livery, away from the property, for her daughter's thoroughbred horse, made necessary as a result of gates being left open and disturbance from blasting during the construction works. The full livery service was provided at Smugglers Run (now Smugglers Equestrian Centre) some 14 miles south near Manmoel. The evidence of this expenditure is five cheque stubs, with dates from 23 November 2015 to 23 November 2016, for amounts of £350, £350, £300, £300 and £280, totalling £1,580. The business that provided the service is no longer in existence and there are no records available from the new business to evidence receipt of the payments.

39. Ms Bryan has a file note from her predecessor dated 25 September 2017 in which the requirement for livery is noted but not agreed. She says she is unable to agree any reimbursement without better details of the service provided (e.g. length of time) and evidence of the expenditure.

40. I consider that the cost of a period of livery for a horse affected by disturbance from nearby construction in the early stages of the scheme does, in this case, meet the tests laid down in

Shun Fung. Whilst there could be better evidence of the cost of that livery, I am satisfied that the expenditure was incurred and I award disturbance compensation at £1,580.

41. The second claim for disturbance compensation concerns the sum of £6,000 plus VAT estimated for the control of Japanese Knotweed ("JKW") over a five year period. Mr Cooper says that he saw no evidence of JKW on the property during his inspections prior to the road scheme and notified the respondent as soon as it became evident in 2017. In his opinion it has spread into the property as a result of the construction works.

42. Ms Bryan has file notes from her predecessor that evidence discussions over Japanese Knotweed and a suggestion, without commitment, that three quotations should be obtained for the cost of control. Emails submitted in evidence show a quote obtained in August 2022 from Complete Weed Control for £695 per year (plus VAT) for three years. An update in January 2024 shows an increase to £834 per year (plus VAT) for the first three years with a conclusion that control could take longer than five years and estimating the total cost at £6,000 plus VAT. This is the amount claimed by the claimant.

43. Ms Bryan comments that the quotations do not include plans to show the location and extent of JKW and she does not have evidence that its presence on the property has resulted from the scheme.

44. Considering the three tests laid down in *Shun Fung*, whilst there is no hard evidence to establish the causal connection between the scheme and the JKW problem, I do not consider the claim to be too remote and I accept Mr Cooper's observation as a professional adviser who has been involved with the property since before the scheme commenced. Delay of many years has potentially caused the problem to worsen and has undoubtedly caused the estimated cost of control to increase very significantly. Early agreement on the part of the respondent to undertake the treatment, or reimburse its cost, would have provided the best mitigation of loss.

45. As things stand now, the cost of treatment is estimated at £7,200. A prospective purchaser would take a negative view of the presence of JKW on the property, albeit in a field rather than a garden in proximity to buildings, and be likely to reduce their offer to account for the cost of treatment. I consider that the disturbance claim for the cost of JKW control is valid, and that the sum claimed would, in the alternative, manifest itself as additional loss under injurious affection. I therefore award compensation of £7,200 for this head of claim.

Determination

46. I determine the reference as follows, before statutory interest and professional fees:

Agreed items of claim:	**Amount**	
Value of land taken	£400.00	
Value of easement	£404.70	
Occupation under licence	£63.00	
Claimant's time	£500.00	
Basic loss payment	£30.00	
Occupier's loss payment (minimum)	£300.00	
Sub-total		£1,697.70
Determined items of claim:		
Injurious affection	£20,000.00	
Disturbance claim: - Livery costs - Japanese Knotweed control	 £1,580.00 £7,200.00	
Sub-total		£28,780.00
Total compensation before statutory interest and professional fees		**£30,477.70**

Diane Martin TD MRICS FAAV

4 October 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.