Neutral Citation No: [2018] NICA 43 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **WEI10778** *Delivered:* **23/11/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE LANDS TRIBUNAL FOR NORTHERN IRELAND

NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED

Appellant;

-and-

BRICKKILN WASTE LIMITED

Respondent;

JOHN RICHARD CUTHBERT

Respondent;

ROY AND IVY McKIBBIN

Respondents;

ARLENE CASSIDY

Respondent.

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Before: Sir John Gillen, Sir Ronald Weatherup and Sir Reg Weir

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Rt Hon Sir Reg Weir (Delivering the judgment of the court)

The nature of the appeals

[1] These four appeals arise by way of cases stated by Henry M Spence, the Member of the Lands Tribunal for Northern Ireland ("the Member"). While the facts of each and the issues arising differ from one case to another they all spring from the same statutory root and it has therefore been convenient to deal with them sequentially at one hearing and again in this one judgment. That root is Schedule 4 paragraphs 10 and 11 of the Electricity (Northern Ireland) Order 1992 ("the Order").

The background

[2] As is well known, a public electricity transmission and distribution system is carried either over ground by wires strung between towers or poles and/or by

cables placed underground. Whether placed over or underground, the necessary apparatus is placed upon, over or under the land which it traverses. Such interference with land not in the ownership of the undertaker would, in the absence of agreement or other lawful authority, constitute an actionable trespass.

[3] The means by which an electricity undertaking such as, in this case, Northern Ireland Electricity Networks Limited ("NIE") avoids committing such trespass is by securing a "wayleave" from the owner and/or the occupier of any land affected by the placing of its equipment and cabling. Normally such wayleaves are negotiated by way of voluntary agreement and sums are paid annually for the presence of the equipment in accordance with tables of rates that vary according to the nature and scale of the particular installation. That voluntary arrangement was formerly in place in relation to each of the installations placed upon the four land holdings with which we are here concerned. However, again in each case, those voluntary wayleaves were terminated by their grantors who called upon the undertaker, NIE, to remove its equipment from on and/or above their respective lands.

The statutory framework

[4] This NIE was unable and therefore unwilling to do as each of the installations formed a small but essential part of a complex system which it would have found impossible to realign at the behest of individual owners or occupiers. It therefore invoked the provisions of Schedule 4 paragraph 10 of the Order which it was entitled to do as a "licence holder" as defined by Articles 3 and 10 of the Order.

[5] The provisions of paragraph 10 of the Schedule allow the licence holder to give notice to an owner or occupier requiring them to give a wayleave ("NWL") within a period of not less than 21 days specified in the notice. Where, as in each of the present cases, the equipment was already in situ the NWL affords consent for the licence holder to keep the electric line installed on, under or over the land and to have access to the land for the purpose of inspecting, maintaining, adjusting, repairing or altering the electric line (paragraph 10(2)(b)).

[6] In each of the present cases such notices were given but the NWLs were not in consequence provided voluntarily. NIE therefore applied to the Department of Enterprise, Trade and Investment ("DETI") for the grant by that Department of the NWLs. DETI afforded to the owners of each of the lands affected the opportunity to be heard, appointed a wayleave officer to hear representations and make recommendations. In each case it was recommended that a NWL be granted and in each case DETI accepted the recommendation and made a NWL for the retention of the lines and equipment. No point was taken before the Tribunal or this court as to the validity of those statutory NWLs.

[7] The NWLs each contained standard terms and conditions which DETI was empowered to impose (Schedule 4, paragraph 10(4)). The following of those terms

and conditions are of particular importance in the context of two of the present cases and are therefore set out here in full:

> "5. The Department shall have power to review, revoke or vary the terms and conditions of this consent at any time as it may consider proper, but subject thereto, it shall remain in force until so reviewed or revoked.
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> ……..
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> 7(a) Should the Owner at any time during the continuance of this Consent bona fide intend to develop any part of his lands across which the electric line is placed in such manner as would interfere with the electric line or place NIE in breach of any statutory regulations concerning the construction and placing of electric lines and would thereby necessitate the removal, resiting or alteration of the electric line he shall notify the Department of his intention and the Department shall … review its consent.
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> ……
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> (c) If on such review the Department sees fit to require the electric line to remain in its present position NIE shall pay to the Owner compensation in such an amount as is equal to the diminution in the development value of the lands caused by the existence of the electric line on the lands provided nevertheless that the payment of such compensation by NIE is subject to the Owner executing in favour of NIE an easement in fee simple free from encumbrances for the electric line across his lands."

[8] Paragraph 11 of the Schedule contains compensation provisions supplementary to paragraph 10. They are as follows:

> "11(1) Where a wayleave is granted to a licence holder under paragraph 10 –
>
> (a) the occupier of the land; and
>
> (b) where the occupier is not also the owner of the land, the owner,

may recover from the licence holder compensation in respect of the grant.

(2) Where in the exercise of any right conferred by such a wayleave any damage is caused to property, the licence holder shall make good or pay compensation in respect of that damage; and where in consequence of the exercise of such a right a person is disturbed in his enjoyment of any property the licence holder shall pay compensation in respect of that disturbance.

(3) Compensation under this paragraph may be recovered as a lump sum or by periodical payments or partly in one way and partly in the other.

(4) Any question of disputed compensation under this paragraph shall be referred to and determined by the Lands Tribunal; and Articles 4 and 5 of the Land Compensation (Northern Ireland) Order 1982 shall apply to any such determination."

[9] A reading together of paragraphs 10 and 11 of the Schedule together with standard conditions 5, 7(a) and (c) of the wayleaves granted by DETI indicates:

(1) That compensation is recoverable in respect of the grant.

(2) That that compensation may be in a lump sum or by way of periodic payments or partly in one way and partly in the other.

(3) The compensation may be for damage caused to property in the course of installing or maintaining the equipment and may also be for disturbance caused by the exercise of the wayleave, for example the presence of towers or poles on the land.

(4) That if the owner or occupier of the affected land subsequently wishes during the continuance of the NWL to carry out development of that land in a manner that would interfere with the electrical installation unless it were removed, resited or altered he can notify DETI which will then review the consent. If as a result DETI determines that the line should remain where and as it is then NIE is to compensate the owner in an amount equal to the diminution in the development value of the lands caused by the existence of the line.

(5) In return the owner is to execute an easement in fee simple for the line that will continue to cross the lands.

(6) Any question of disputed compensation shall be referred to the Lands Tribunal.

The present individual claims

[10] The Lands Tribunal received a number of claims for compensation in respect of the making of involuntary NWLs whose factual circumstances varied considerably. It therefore sought to identify a number of cases in different broad categories with the object of establishing an approach to each of those categories so as to provide guidance for the resolution of other claims with broadly similar factual circumstances.

The Brickkiln Waste Claim R/41/2009

[11] This single claim relates to two portions of land at Electra Road, Maydown, Londonderry which for the purposes of its presentation and consideration were referred to as "Reference Land South" and "Reference Land North" which are separated from one another by a spine road. The Southern lands, extending to some 20 acres, were at all material times partly developed and partly undeveloped while the Northern lands of some 12 acres have always been and remain undeveloped and in agricultural use. The development on the Southern lands consists of an "environmental waste park" constructed since the land was acquired by its present owner. The electrical installation over the lands had been in place by virtue of voluntary wayleaves since 1960 and did not prejudice or obstruct the subsequent development of those lands. In order to facilitate that development certain adjustments were made by NIE to the height of the transmission line and it was accepted by the Lands Tribunal that:

> "The claimant has been able to develop the Reference Land in accordance with all planning applications that it has made and permissions that it has received to date despite the presence of the power lines, pylons and poles and that no relevant further planning applications are currently pending."

[12] On the Northern lands there exists in addition to the electrical installation a gas pipeline installed pursuant to an easement in favour of the gas undertaker which itself considerably constrains the potential of those lands for development. There are and have been no proposals or applications in respect of any such development and the land continues in agricultural use.

[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."

[14] The Tribunal then turned to consider the Northern lands. It recognised the considerable restraint on development imposed by the gas pipeline and the restrictive terms of the grant of the easement in respect of that which the Tribunal understandably concluded would be strictly enforced. It was however satisfied [49] that, nevertheless, some development could be facilitated but considered that the equipment would add to the difficulty of developing these already blighted [by the gas pipe] lands, with a resulting negative impact on market value. It then went on as follows:

> "The Tribunal accepts that Condition 7 would be available to the claimant or its successor in title if specific bona fide development was prevented in the future. But in the circumstances of the already significantly blighted site this was not as beneficial as simply having the equipment removed and this would be reflected in the market value. Based on an intuitive approach the Tribunal considers that a diminution is market value of 10% would be reasonable in all the circumstances."

It assessed the Market Value of the Northern lands at £300,000 and therefore awarded compensation of £30,000 as the diminution in market value of the reference property caused by the grant of the NWL.

[15] NIE was dissatisfied with the outcome in relation to the Northern lands and has raised a number of questions for determination by this court. In the event the court's answer to the first of the three questions will render irrelevant to the present reference the succeeding questions and this court considers that those should await determination in a case (or cases) to which they are directly relevant. The question with which this court is concerned is stated in the following terms:

> "Whether the Member was entitled to resort to the so-called 'intuitive approach' and to deploy it as he did at paragraph [49] instead of the evidential approach he had applied to the Reference Land South?"

[16] Before proceeding to consider this question it must be pointed out that an "intuitive approach" was not in fact employed by the Tribunal in determining whether compensation was payable for the effect upon the Northern lands of the presence of the equipment under a NWL but, having first decided that it was so payable, it *then* applied the "intuitive" approach to the assessment of the amount of that compensation.

Has a compensatable loss arisen?

[17] The starting point for the determination of this question derives from several passages in the decision of the Tribunal which apply to both the Southern and the Northern portions of the reference land and are worthy of particular note:

> "7(iii) In our view, there should be no difficulty in applying the principle of equivalence to compensation in that the claimant should be paid neither less nor more than his loss provided that, in the course of doing so, the relevant statutory framework is applied and the specific facts of the case are taken into account.
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> 7(v) … The claimant has owned the Reference Land for approximately ten years. During the whole of those ten years the equipment of the respondent has been present on the Reference Land. Prior to purchase by the claimant the equipment was present in accordance with voluntary wayleave agreements dating back to 1959. During the period of its ownership of the Reference Land the claimant has not been significantly inhibited from completing any of the development that it has sought to carry out. There are no extant applications for planning permission in respect of development that would be inhibited by the presence of the equipment. The respondent has not obtained nor has the claimant lost any land or interest in land.
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> 21. The Tribunal agrees with Mr Crothers (the respondent's expert chartered surveyor) a central consideration was whether the equipment presented an impediment of valuation significance and that could only be measured by the effect, if any, on the development capacity of the lands."

[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:

> "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.
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> 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."

[19] However, when the Tribunal turned to carry out the same exercise in respect of the Northern lands, notwithstanding that the same considerations ought logically to have applied, the Tribunal somehow arrived at a different conclusion:

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

Unfortunately the Tribunal did not explain the reasoning behind its differing approach and decision beyond referring to "these already blighted lands" which must be a reference to the effect of the gas pipe and the terms of its protective

easement. We consider that to compensate the owner for this reason is effectively to lay the blight already caused by, and presumably already compensated for, the gas pipe at the door of NIE. Any present inhibition on the development of the Northern land is caused by the gas pipeline. If in the future some form of development for the Northern lands can be devised and obtains the requisite permissions and if NIE cannot or will not amend its electrical installation to enable the achievement of that development and DETI affirms that the installation is to remain so that the proposed development is inhibited either in whole or in part, the owner will at that point be entitled to receive compensation equal to the diminution in the development value of the lands in return for the grant of an easement in fee simple for the electric line. But not before.

[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.

[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.

[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 judgment.

The claim of Roy and Ivy McKibbin - R/52/2011

[23] Mr and Mrs McKibbin have owned their semi-detached house at Glenholm Park, Belfast, since 1965. Glenholm Park is part of an extensive development of houses in the Four Winds area of South Belfast. From the photographs in evidence it is apparent that the side garden of the property is largely

occupied by the legs of a very tall electricity tower in that garden which dwarfs the McKibbin's home. The hall door is 4 metres from the tower.

[24] During their ownership of the property these claimants have entered into a number of voluntary wayleave agreements with NIE to allow the pylon and the lines connected to it to remain on their property. However, by a notice of 29 January 2009 given on behalf of these claimants the last of these voluntary agreements was terminated and the removal of the NIE equipment was requested. Then followed the standard process in such cases as earlier described, resulting in the grant by DETI of a NWL on 19 May 2011. The present claim, as in all these cases, is for compensation in respect of this grant as a result of an alleged resulting diminution in the value of the property.

[25] Experienced Chartered Surveyors were appointed on either side to prove or disprove the existence of a diminution in value. They applied themselves with energy, the Tribunal being provided with details of allegedly comparable sales of other houses in support of that claimed diminution. The Member was unimpressed and concluded that the applicant's surveyor had failed to establish that the sales evidence presented supported the proposition of a diminution. He described it as "inconclusive".

[26] However, that was not the end of the matter. The applicants had also provided evidence:

(i) That their enjoyment of their house and garden was impaired by the presence of birds which sit upon the tower leaving droppings on the garden and car port beneath, that the presence of the equipment causes NIE to periodically prune the trees in their garden to avoid interference with the electrical conduction, that the wires make a "singing" noise in certain weather conditions and that they have difficulty in maintain their garden as the legs of the tower get in the way. They describe the tower in their garden as "a monstrosity", a description which from the photographs does not seem an exaggeration.

(ii) A 2004 Report by Simms and Dent on the effect of electricity distribution equipment upon the value of residential property in England and Scotland supported a diminution in the value of property in those jurisdictions due to High Voltage Overhead Transmission Lines of between 6% and17% and the presence of a pylon a diminution of up to 20.7% compared with similar property sited 250 metres away.

(iii) A Bank of Ireland policy document on mortgage lending in cases where properties are affected by high power lines passing over the house or garden stated:

> "The Bank would not wish to lend on properties where high power lines pass over the house or garden site except in exceptional circumstances."

(iv) The public perception, whether or not well-founded, that the health of those living in proximity to power lines may be adversely affected.

[27] The Tribunal concluded that, notwithstanding the absence of supporting sales evidence, these factors could impact upon the market value of the McKibbin property. The Member then adopted what he called a "stand back and look" approach to the effect of these factors and concluded that "any prospective purchaser would reduce their bid for the reference property to reflect the presence of the pylon in the side garden" and he assessed that reduction as being 10% of the market value or £15,500.

[28] The appellant, being dissatisfied with this outcome, has raised two questions for the opinion of this court:

(i) whether the Member was entitled to resort to the so-called "intuitive approach" and/or the "stand back and look approach" and to deploy it as he did at paragraph 54 instead of the evidential approach; and

(ii) whether the Member was entitled to select 10% as the diminution of market value as he did at paragraph 54.

[29] The first thing to be said in relation to the first of these questions is that the Member plainly did take an "evidential" approach. The evidence that he took account of has been summarised above. What he did not do, because he was not satisfied with it, was to accept that the *sales* evidence supported a diminution in value. While relevant available sales evidence properly interpreted is plainly of great value in assessing whether a diminution in value has occurred and, if so, in assessing its extent, it cannot be the case that where sales evidence is, as here, inconclusive or even non-existent that a Tribunal may not look at other evidence to determine whether there has been a diminution in value and to assess the extent of any such that may be found. This court accordingly answers the first question "yes".

[30] As to the second question, whether the Member was entitled to make his own assessment of the extent of the diminution, we begin by recalling that the Member is a Chartered Valuation Surveyor with much experience both in practice and subsequently as the Member of the Tribunal. In this matter he arrived at his figure of 10% having regard to those factors from the evidence which he particularised. In *Moffatt v Moffatt* [2015] NICA 61 Gillen LJ said as follows:

> "There are many well trammelled authorities for the proposition that an appeal will not be entertained from an order which it was within the discretion of the

> judge to make unless it has been shown that he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, that he took into account irrelevant matters or that the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible."

In *Abbey Homesteads (Developments) Ltd v Northhamptonshire County Council* [1992] 2 EGLR 18, a decision of the English Court of Appeal, criticism was offered of the fact that the President of the English Lands Tribunal had decided to reduce a percentage contended for by a claimant by saying "I think Mr W is rather optimistic in assuming that the prospective purchaser would be willing to pay as much as 95% of the full open market residential value of the land. As a matter of caution I would substitute 85%". This criticism received short shrift from the Court. Glidewell LJ said:

> "I find no error of law in that approach. The decision by the president to discount full residential value was not based specifically on evidence. It was a matter of his judgment. The tribunal, as we were reminded, is a specialist tribunal, specifically charged with dealing, among other things with problems of compensation. There is no material upon which we could disagree with that judgment of the president."

[31] This court discerns none of the disqualifying factors in the careful decision of the Tribunal. Having examined the evidential factors which the Member identified as bearing upon his decision and the photographs of the installation at the claimant's property it considers that the expert Member was fully entitled to assess the diminution in value at 10% and, had it had to make its own lay assessment, would have arrived at a figure certainly no less than that. The second question is accordingly answered "yes".

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.

[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:

(i) Whether the Member implemented correctly and lawfully the material principles in determining costs and, in particular, whether:

(a) the case properly falls to be regarded as "within the ambit of compulsory acquisition" as recorded at paragraph 11 of Part II;

(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(1) 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 for 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*."

[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 *McKibbin* be paid by NIE but make no order as to the costs of any other party.