TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

ELECTRICITY (NORTHERN IRELAND) ORDER 1992

IN THE MATTER OF A REFERENCE

R/21/2019

BETWEEN

MR PATRICK DOYLE - 1ST APPLICANT

MRS SONIA RUIZ – 2ND APPLICANT

AND

NORTHERN IRELAND ELECTRICITY NETWORKS LIMITED – RESPONDENT

Re: 36 Glenbawn Park, Belfast

Lands Tribunal for Northern Ireland –

The Honourable Mr Justice Horner, President and

Henry Spence MRICS Dip.Rating IRRV (Hons), Member

Background

1. Mr Patrick Doyle ("the 1st applicant") is the owner-occupier of a semi-detached house located at 36 Glenbawn Park, Twinbrook, Belfast ("the reference property"), having lived there since childhood.

2. The 1st applicant is currently the co-owner of the reference property which he holds with his mother. He has advised the Tribunal that his mother has no current interest in the reference property and is not involved in the proceedings before the Tribunal. This is unusual because as co-owner, Mrs Doyle, will be entitled to 50% of any compensation. The Tribunal does not know Mrs Doyle's attitude to the application except what it has been told by the 1st Applicant. At the very least the Tribunal would reasonably have expected evidence from her as to the living conditions at the reference property, and in particular, on the effect of electrical transmission lines which oversail the reference property. In the light of our conclusion as to the reliability of the evidence of the 1st and 2nd applicants, her failure to give sworn testimony is significant.

3. Northern Ireland Electricity Networks Limited ("the respondent") electrical transmission lines oversail the rear corner of the house and garden of the reference property. These consist of twelve 275kV lines and an earth wire. None of the respondent's equipment is sited on the reference property but a substantial pylon is located in an adjacent field, some 10 to 15 metres from the house. The lines and equipment pre-date the construction of the reference property in 1989.

4. The Doyle family originally purchased the reference property in March 2006 under the Northern Ireland Housing Executive ("NIHE") "right to buy" scheme. When asked by the Tribunal the 1st applicant advised that, at the time of purchase, no reduction to the "right to buy" market value was sought by the Doyle family, to reflect the presence of the nearby pylon and/or the oversail lines.

5. The respondent's lines have oversailed the reference property for many years on foot of a voluntary wayleave agreement ("VWL") which originated on 23rd January 1980. This VWL was, however, terminated by the 1st applicant on 12th August 2015.

6. The respondent then made an application to the now Department of the Economy ("the Department") to retain its lines and it was subsequently granted a Necessary Wayleave ("NWL") on 22nd June 2018, in pursuance of its powers under the Electricity (Northern Ireland) Order 1992 ("the 1992 Order").

7. Mrs Sonia Ruiz ("the 2nd applicant") has advised the Tribunal that she is a "tenant" of the 1st applicant and she has resided in the reference property with her two daughters for approximately five years, although she failed to submit a copy of her "tenancy agreement" to the Tribunal. The decision not to put the document which apparently regulated the legal relationship between the applicants before the Tribunal was a deliberate one. It was taken knowing full well that the onus was on the applicants to prove their case and their entitlement to compensation under the 1992 Order.

8. Having been unable to agree compensation arising out the grant of the NWL to the respondent both applicants have submitted compensation claims to the Tribunal. The references were made on 31st October 2018. The correct amount of compensation payable, if any, is, therefore, the issue to be decided by the Tribunal.

9. The NWL was granted on 22nd June 2018 ("the valuation date") and the parties were agreed that this was the correct date for the assessment of compensation.

10. During the course of the hearing Mr Shaw QC was cross-examining the 1st applicant on various matters relating to the basis upon which the 2nd applicant occupied the reference property, the nature of her relationship with the 1st applicant and the source of the money the 2nd applicant was receiving for caring for Mrs Doyle. The 1st applicant denied that he had any romantic relationship with the 2nd applicant. He said that the payment from the 2nd applicant of £300 gross was by way of housing benefit and that the 2nd applicant's income was derived from her role as full-time carer of his mother. It was not clear to the Tribunal whether the 2nd applicant received benefits such as Personal Independence Payments or whether she was paid a wage by the DHSS. The Tribunal for want of evidence has been unable to make findings as to (i) what money, if any, the 2nd applicant received for looking after Mrs Doyle and from whom it came; and (ii) what money, if any, was paid, by whom, and on what basis, to permit the 2nd applicant to stay in the reference property with her children. Indeed, it seemed to the Tribunal that a deliberate decision was taken to limit the information it was given about the circumstances in which the 2nd applicant resided in the reference property.

11. In the circumstances the Tribunal considered the cross-examination by Mr Shaw QC of the 1st applicant to be reasonable, proportionate and relevant especially in the absence of any independent written evidence as to the nature of the 1st and 2nd applicants' legal relationship. However, the 1st applicant was apparently overwhelmed and he left the witness box unable to continue to answer the questions which were being put to him. A report from a consultant psychiatrist was obtained and on the basis of this report the Tribunal introduced measures to allow the 1st applicant to continue his evidence without reaching a final conclusion as to the reason why he had left the witness box. In the meantime the Tribunal reserved its opinion on what had happened until the 1st applicant had completed his testimony and it had all the necessary information to reach a final conclusion.

12. The Tribunal has concluded on the basis of all the evidence, and for the reasons which appear later in the judgment that the 1st applicant was an unreliable historian prone to exaggeration and embellishment. The Tribunal do not consider that he is a vulnerable witness, but rather

that he did not wish to answer relevant questions which he perceived would damage the case that he and the 2nd applicant were making to the Tribunal.

13. The Tribunal does not have the necessary reliable information to permit it to come to definite conclusions about:

(a) the nature of the applicants' relationship;

(b) the basis upon which housing benefit or other benefits were being paid to the 1st applicant;

(c) the precise nature of the legal relationship between the 1st and 2nd applicants.

14. The Tribunal simply records that the applicants must prove their respective cases by placing the necessary reliable proofs before the Tribunal. A failure to do so on either part, means that either one or both, has to accept the consequences if they fail to prove their cases to the requisite standard.

Procedural Matters

15. Mr Niall Hunt QC instructed by John F Gibbons & Co solicitors represented the 1st and 2nd applicants. The respondent was represented by Mr Stephen Shaw QC, instructed by the respondent's "in house" solicitors.

16. Expert evidence with regard to the amount of compensation to be paid was submitted by the 1st applicant and the respondent. Mr Frank Cassidy provided expert evidence on behalf of the 1st applicant and Mr Kenneth Crothers provided expert evidence on behalf of the respondent. Mr Cassidy and Mr Crothers are experienced chartered surveyors.

17. The Tribunal is grateful to the legal representatives and expert valuers for their submissions and evidence.

Position of the Parties

18. The 1st applicant sought compensation under the following heads of claim:

i. Diminution in Market Value £11,200

ii.	Loss of Wayleave Payments	£2 per annum
iii.	Loss of legal rights	not quantified
iv.	Disturbance/Injurious Affection	not quantified
v.	Loss of footprint of actual land taken	not quantified
vi.	Special losses	
	• Window cleaning	past loss £288 future loss £1,440
	• Power hosing	new power washer every 10 years £150 past washing £196 future washing £1,000
	• Professional cleaning and repair	past loss £152 future loss £2,000 tumble dryer £300 additional washing etc £400 future expenditure £2,000
vii.	Costs	to be decided
viii.	Interest on compensation	to be decided

19. The 2nd applicant sought compensation under the following heads of claim:

i.	Loss of legal rights	not quantified
ii.	Disturbance/Injurious affection	not quantified
iii.	Special losses	
	• Additional expenditure tumble drying	£640 future expenditure £3,200
	• Additional for washes	£400 future loss £2,000
iv.	Costs	to be decided
v.	Interest	to be decided

20. The respondent's position was that both applicants had submitted exaggerated claims and the Tribunal was invited to reject the claims and award costs against the applicants.

The Statute

21. Paragraph 11 of schedule 4 to the 1992 Order contains the relevant compensation provisions:

> "11(1) Where a wayleave is granted to a licence holder under paragraph 10 –
>
> (a) the occupiers 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 exercise of any right conferred by such a wayleave any damage is caused to any 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 or 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."

Authorities

22. The Tribunal was referred to the following authorities:

- Turris Investments Limited and Central Electricity Generating Board REF/31/1980 and REF/105/1987

- AR Naylor and Southern Electricity Board REF/94/1992
- Alastair Hyman Rudin Macleod and The National Grid Company PLC LCA/170/96
- Opinion GS Brown Construction Limited v SP Transmission Limited LTS/COMP/2002/2
- (1) Terence Welford (2) Colin Phillips (3) IOD Skip Hire Limited and EDF Energy Networks (LPN) PLC LCA/30/2004
- Neville James Stynes and Barbara Stynes and Western Power (East Midlands) PLC [2013] EWCA Civ 216
- Brickkiln Waste Limited v Northern Ireland Electricity Part 1 R/41/2009
- Mr Roy and Mrs Ivy McKibben v Northern Ireland Electricity Part 1 R/52/2011
- Mrs Arlene Cassidy v Northern Ireland Electricity Part 1 R/49/2011
- Brickkiln Waste Limited v Northern Ireland Electricity Part 2 R/41/2009
- John Richard Cuthbert v Northern Ireland Electricity Part 1 R/26/2011
- Streamville LLP v SONI and Northern Ireland Electricity R/22/2016
- Northern Ireland Electricity Networks v Brickkiln Waste Limited, John Richard Cuthbert, Roy and Ivy McKibben, Arlene Cassidy [2018] NICA 43
- Lands Tribunal Order (Scott) R/50/2011 – 23rd October 2019
- Julie Wallace & Ors v Manchester City Council CCRTF 97/1165/2

The 1st Applicant's Evidence

23. The 1st applicant provided oral and written evidence to the Tribunal. He informed the Tribunal that the pylon was right beside his home and some three years ago an estate agent advised him that "his house had been devalued because of the pylon."

24. He advised that one of the most difficult things living beside the pylon was the number of birds that swarm and roost on the pylon and power lines and the associated problems with the substantial amount of guano deposited by the birds. He listed the knock on effects:

- Could not use the garden as much as he would have liked during the Covid 19 crisis.
- Could not invite friends over to socialise and was unable to make use of his barbeques.
- Embarrassed by the state of the property.
- Could not hang washing on a clothes line with the resultant increased use of a tumble dryer.
- Could not do much gardening or have a reasonable lawn and flowerbeds.
- Could no longer grow fruit which he used to do.
- Could not use a "Vegas Lay-Z-Spa" which he purchased some years ago.
- The property required constant power washing.
- Gutters and drains got clogged and had to be cleaned regularly.
- Windows needed to be cleaned once a month.

25. The 1st applicant also referred the Tribunal to alleged noise issues associated with the birds and the respondent's equipment:

- The birds swarm on the pylon all year round and are really loud. They were at their loudest in the morning.
- The electricity lines themselves were very noisy and the noise was worse than it used to be.
- A buzzing could be heard and it was worse in winter or in times of wet weather.

26. Health was also a concern for the 1st applicant, being located so close to a pylon:

- He had read about links to cancer and leukaemia and he did not know about these risks when he purchased the property.

- Not being able to sleep because of the noise and the associated stress and anxiety of being disturbed.

27. The 1st applicant confirmed to the Tribunal that the reference property had double glazing.

28. It was accepted by the parties at the start of the hearing that the respondent was only legally bound by the 1992 Order to consider compensation arising out of the grant of the NWL, which was restricted to the oversail lines. No account, therefore, could be taken of the effects of the pylon in the adjacent field.

29. The 1st applicant confirmed to the Tribunal that he was unaware that no account could be taken of the effects of the pylon until after the start of the hearing. The Tribunal finds it unsatisfactory to put it as neutrally as possible that neither his expert or legal representatives had made him aware of this very relevant issue. The Tribunal is faced with the very difficult task of separating the effects of the oversail lines from the effect of the pylon and it would have assisted if the 1st applicant's evidence had been directed solely to the impact of the oversail lines.

30. Mr Shaw QC submitted that the 1st applicant was both prone to exaggeration and inaccuracy in describing the alleged adverse impact of the overhead lines and birds, wherever they may be located. To illustrate the inflationary tendencies of the 1st applicant he highlighted:

    i. The suggested anxiety about health concerns associated with overhead lines did not feature in the case advanced by the 1st applicant to the wayleave officer appointed by the Department.

    ii. Fully conscious of the alleged problem of overhead line birds depositing guano in the rear garden, the 1st applicant invested to enhance its amenities with a hot-tub as well as a second barbecue.

    iii. The 1st applicant's evidence of the absence of any regular cleaning regime was telling. If, as was his evidence, the equipment had not been cleaned in years, the accumulation of guano shown in the photographs was unremarkable.

iv. Regarding the sound supposedly produced by overhead lines, the wayleave officer considered the complaint, weighed the expert information available to him and rejected the case put forward by the 1st applicant.

v. Likewise the wayleave officer found no evidence of the supposed roosting and excessive guano at the premises.

31. The Tribunal considered the 1st applicant's evidence taken as a whole to be both contradictory and inconsistent. It did not consider it to be either reliable or accurate.

31. Mr Hunt QC accepted that the 1st applicant's evidence may have been unsatisfactory in some respects. He considered that such evidence had to be viewed in the context of much of it having been provided before any accommodation for his needs was made and it was a very subjective matter for each person as to how each negative factor affected them and what annoyed them the most.

The Tribunal notes that the 1st applicant only became overwhelmed when Mr Shaw QC began to explore his evidence and highlight obvious inconsistencies and contradictions in it.

32. Mr Hunt QC submitted, however, that the 1st applicant's evidence was supported significantly by the evidence when one considered:

i. The photos and videos which revealed a problem that could not just be ignored.

ii. The corroborating evidence of the 2nd applicant.

iii. Mr Cassidy's evidence.

iv. Even if there was an element of exaggeration, there was no doubt that the 1st applicant was exasperated and fixated with the issues he had to live with.

v. The Tribunal's visit to the property and experiencing the equipment first hand. It was impossible to "stand back and look" and not see a significant impact from the oversail lines, right over the top of the house.

33. The Tribunal also notes, however, as suggested by Mr Shaw QC, that the written submissions proceeded on the mistaken basis that the pylon was a proper part of the claim and he noted

the 1st applicant's witness statement was submitted to the Tribunal a significant period of time prior to him being "overwhelmed" in the witness box.

34. Mr Shaw QC suggested that once the irrelevance of the pylon was recognised there was little left to the 1st applicant's claim. This was the difficulty faced by the Tribunal, separating the effect of the overhead lines from the effect of the pylon.

35. With regard to the alleged noise levels from the respondent's oversail lines the Tribunal is disappointed that a professional report measuring and detailing the noise levels at the reference property had not been submitted. It means the Tribunal were left to assess the subjective evidence of the applicants and to form a view from their own site visit. Given that the wayleave officer had effectively dismissed the complaint of excessive noise, then the Tribunal could reasonably have expected independent, expert evidence to contradict his conclusion, if it was disputed. The fact that no such expert testimony was forthcoming is telling in itself. The Tribunal members were not aware of any excessive noise from their visit to the site.

36. The Tribunal also notes that the back bedroom, which was obviously most affected by the alleged noise problems, was occupied by the 2nd applicant's two daughters and had been occupied by them since arrival some five years previous. The 1st applicant had stated in his evidence to the wayleave officer that he was unable to use the rear bedroom. This was but a further example of the unreliability and inconsistencies of the evidence of the 1st applicant.

The 2nd Applicant's Evidence

37. The 2nd applicant also gave evidence of the alleged problems caused by the respondent's equipment and which affected her family's quality of life, most of which were due to the noise coming from the pylon and power lines and the birds which swarmed and roosted on them.

38. With regard to noise the 2nd applicant submitted:

    i. The birds were extremely loud. There were lots of them and they could be heard throughout the year.

ii. The noise was worst in the early mornings, often at 5am to 6am, which disturbed her and her daughters' sleep.

iii. The birds could also be heard getting in to the roof space and moving around in there.

iv. There was also a buzzing noise which came from the power lines. This was louder at night and in the early mornings. It was a very annoying buzzing.

39. The 2nd applicant considered the major issue connected with the birds was the incredible amount of bird guano which fell on to the reference property with the result that:

i. The family could not spend time in the garden.

ii. She could not invite friends over to socialise outside.

iii. Her daughters could not have friends over to play and spend time outdoors.

iv. Washing could not be hung on a clothes line.

v. A friend had donated a trampoline as a gift to the children but it was made unusable by bird guano.

vi. She could not garden as a hobby.

vii. Her car, which was parked in the driveway, was consistently getting covered by bird guano.

viii. She was unable to play in the garden with her dog.

40. The 2nd applicant was also concerned with the suggestion that living near a pylon could damage her health.

41. Mr Hunt QC asked the Tribunal to note that the 2nd applicant's evidence corroborated the submissions of the 1st applicant.

42. When questioned by Mr Shaw QC, the 2nd applicant conceded that the greatest impact was from birds close to the pylon.

43. Mr Shaw QC considered it was baffling that the 2nd applicant, who was "footloose" as a "tenant", would be willing to reside in premises if she were genuinely concerned about the health impact on herself and her teenage daughters.

44. The Tribunal notes that the 2nd applicant confirmed she also was unaware that the effect of the pylon could not be taken into account when assessing compensation. The Tribunal found the evidence of the 2nd applicant to be unreliable, to be inconsistent with the evidence of the WLO and not only inconsistent with her actions but also the findings the Tribunal made when it visited the site.

Wayleave Officer's Report

45. The respondent referred the Tribunal to a report by Mr Patrick O'Hagan who was an independent wayleave officer (WLO) appointed by the Department on 29th June 2017 to consider the respondent's application to retain its electricity transmission lines over the reference property.

46. In his report the WLO summarised the 1st applicant's statement of case to the Department:

> "**Impact on Amenity of Dwelling by Virtue of Proximity of Pylon**
>
> (a) The proximity of the dwelling to the pylon referenced 747, being less than fifteen (15 no.) metres, means that noise generated by the equipment during 'damp' or wet weather, when moisture condenses on the equipment, is audible within the dwelling, and has an impact on the amenity of the landowner.
>
> (b) The level of noise is such as to prevent the use of one of the bedrooms within the dwelling.
>
> (c) Effective physical 'screening' between the dwelling and the pylon cannot be installed due to the limited distance between the dwelling and the pylon.
>
> **Physical Location of the Support Equipment (Pylon 747)**

(a) The proximity of the dwelling to the pylon referenced 747 and the visual 'over-powering' appearance of the pylon above the dwelling, impacts significantly on the appearance of the dwelling.

Commercial Considerations

(a) Based on property valuation advice, the visually 'over-powering' appearance of the pylon beside the dwelling, and the overhead cabling above the dwelling, has an impact on the potential sales values of the subject premises, by comparison with similar properties.

Impact on Amenity

(a) The landowners state that the cable passing over the subject premises, acts as a perch and roost for large numbers of birds, and the defecation of the perching birds has impacted on the use of the rere garden to the property.

(b) The landowners also state that concentration of the birds arising from the proximity of the pylon, has resulted in birds entering the eaves of the property, causing damage to the property."

47. The Tribunal notes:

i. The vast majority of the 1st applicant's concerns expressed to the WLO related to the pylon.

ii. The 1st applicant's concern that "the level of noise is such as to prevent the use of one of the bedrooms within the dwelling" was untruthful. It has been established in evidence that the 2nd applicant's daughters occupied the affected rear bedroom and had done so for some five years.

iii. The 1st applicant did not express any concerns about health issues to the WLO.

48. The WLO listed his conclusions and recommendations. The Tribunal finds the following to be relevant to the proceedings:

> "**Summary of Findings**
>
> 66. Inspection of the dwelling, and examination of the garden areas around the dwelling found no indication of either:
>
> i. identifiable deposits of bird guano on hard or soft surfaces around the dwelling, and/or, on the fabric of the dwelling; or
>
> ii. significant damage to the garden surface which might typically occur due to a concentration of bird droppings arising from roosting of birds on overhead equipment.
>
> Based on these observations there was no evidence to support the existence of extensive or intensive 'bird roosting' with associated fouling.
>
> 67.…
>
> 68.…
>
> 69.…
>
> 70. Plainly, the impact of 'noise' is of significance to the landowner, who has described the impact of the noise being generated by the equipment, as being sufficient to preclude the use of one bedroom within the dwelling.
>
> The visit to the property occurred during the day and warm weather, and, therefore, in the absence of optimal conditions for 'noise' generation, being during wet or humid weather, physical consideration of the actual noise being generated was not feasible.
>
> 71. However, contemporary research into 'noise' generated by electrical equipment and the empirically measurable impact of noise on the surroundings to electrical equipment has been carried out by Messrs 'Eirgrid' which organisation fulfils a similar function to NIEN

by providing network services for electrical transmission in the Republic of Ireland.

72.…

73. The published Eirgrid research is pertinent and relevant since it is based on 'field research' carried out on the island of Ireland, within a geographical region approximately 200 miles from the landowners dwelling.

The geographical proximity, and the location of both the research sites, and the landowner's dwelling, being in-land from the coast, ensures that environmental conditions are similar, thus permitting extrapolation of the results.

74.…

75. The conclusion of the study, based on both a review of the special literature, and empirical testing in conditions which are virtually identical with the surroundings to the landowners dwelling, is unequivocal, and, establishes the premise that lines with transmission voltage of less than 350kV generate only limited sound, which cannot be defined as 'noise.'

76.…

77.…

78.… it is apparent that the existing glazing format would offer a level of protection from the generated noise when it occurs.

79.…

80.…

81.…

82.…

83.…

> 84. The concerns of the landowner are specific, and generally recognisable, but there is little evidential support for their existence, or their having an impact on the landowner's property, or the landowner 'use and enjoyment' of the property. I do not find the effects of that equipment (specifically the noise occasionally generated) to have such an impact on the landowners use and enjoyment to justify removal or relocation of that equipment."

49. The Tribunal notes that the WLO found:

i. No evidence to support the existence of "extensive or intensive bird roosting", with associated fouling.

ii. Lines with transmission voltage of less than 300kV generated only limited sound, which could not be defined as "noise."

iii. The existing double glazing offered a level of protection from the generated noise when it occurred.

iv. In relation to the landowners specific concerns there was little evidential support to confirm that they would have an impact on the landowners use and enjoyment of the property.

51. These findings mirrored what the Tribunal found on its site visit and were inconsistent with the claims being advanced by both applicants.

The Basis of Compensation

50. Where the Department grants to the respondent a NWL under the 1992 Order the landowners may recover from the respondent "compensation in respect of the grant", pursuant to paragraph 11(1) of Schedule 4 to the 1992 Order. Any compensatable loss, therefore, must be directly attributable to the grant of the NWL.

51. The measurement of that loss has been detailed in the Northern Ireland Lands Tribunal authorities of Brickkiln, Cuthbert, Cassidy, McKibben and the subsequent Court of Appeal decisions on these references. See Brickkiln Part 2 paragraphs 18 to 20:

"18. Both parties were agreed that the principle of equivalence, as outlined in Horn should apply, that is the claimant should be paid neither more or less than his loss, caused by the grant of the NWL. In assessing that loss, however, the relevant statutory framework as outlined in the 1992 Order must be applied and the specific facts of the subject case should be taken into account.

19. As a consequence of the grant of the NWL, the claimant had lost his legal right to determine the respondent's licence and have its equipment removed and it is the measurement of that loss to which the principle of equivalence is to be applied. The Tribunal agrees with Mr Orr QC, the correct measurement of that loss is the diminution in market value of the claimant's lands, that is the difference in market value with the equipment removed ("un-encumbered") and the equipment in place ("encumbered"). That is the measurement of compensation agreed and confirmed in all of the UK decided authorities.

20. The assessment of compensation must, however, reflect the terms of the relevant statutory framework in this jurisdiction. Although the language of the English statute is similar to the 1992 Order the terms of the NWL in each jurisdiction differ and in particular condition 7 of the subject NWL which allows for either the removal of the equipment or the payment of compensation when a 'bona fide' intention to develop the lands have been hindered by the presence of the equipment."

52. In the subject reference the parties were agreed that the correct measurement of compensation was the diminution in market value, if any, of the reference property due to the presence of the respondent's equipment.

53. The burden of proof rested with the applicants see Cassidy paragraph 36:

> "… The task for Mr Cassidy, however, was to prove conclusively by way of market evidence that on the valuation date the retention of the respondent's overhead lines had caused a diminution in market value of the reference property. For the reasons stated previously the Tribunal considers that he has failed to do so."

And paragraph 20 of the Court of Appeal decision:

> "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 …"

54. On inspection of the reference property it was clear to the Tribunal that the presence of the pylon in the adjoining field would have a major impact on its market value. In assessing diminution in market value the pylon will have an impact on both the "un-encumbered" and "encumbered" market values, that is the "un-encumbered" value will be assessed on the basis that the pylon is in situ but none of the respondent's equipment oversails the reference property. The "encumbered" value will reflect the presence of the pylon and the oversailing lines. It is the additional impact on market value of the oversail lines, if any, which the Tribunal will have to assess.

55. Article 11(2) of the Order allows for additional compensation to be paid where "in the exercise of any rights conferred by such a wayleave any damage is caused to any property … and where in consequence of the exercise of any right a person is disturbed in his enjoyment of any property …"

56. The applicants had outlined the basis of their claims for compensation in their Notice of Reference to the Tribunal:

> "**Notice of Compensation Claimed**
>
> Statutory Compensation pursuant to Article 11(1) and (2) of Schedule 4 to the Electricity (Northern Ireland) Order 1992, being compensation in respect of the grant of the NWL and further

compensation in respect of disturbance to the use and enjoyment of the property."

The Tribunal's Inspection

57. The Tribunal inspected the reference property around 2pm on Wednesday 19th May. At that time weather conditions were dry and calm. The Tribunal found:

    i. No evidence of bird guano anywhere on the reference property, including the rear garden, barbeque, trampoline, windows of the house, pathway and car parked at the front.

    ii. There were no birds present on the pylon or oversail lines.

    iii. There was no "buzzing" or noise from the lines or the pylon.

58. The Tribunal observed that the location of the pylon in the adjacent field would have an obvious impact on the market value of the reference property. Any additional impact of the oversail lines was the issue to be proved by the applicants.

Un-encumbered Market Value

59. Mr Cassidy provided the following factual information about the reference property which was not disputed:

    i. Semi-detached house constructed around 1989 as part of a Housing Executive development.

    ii. Windows are PVC double glazed.

    iii. There are front, rear and side gardens.

    iv. Heating is provided by radiators from a gas fired boiler.

    v. The roofspace provides storage accommodation only.

    vi. Nett internal area is 81.6m^2.

    vii. The property appeared to be in a reasonable state of repair throughout.

60. He advised the Tribunal that he had researched sales figures in the general vicinity of the reference property and in his opinion the market value of the reference property at the valuation date, with no overhead conductors, was: £80,000.

61. In arriving at this valuation he had regard to the following comparables:

i. **25 Glenbawn Park, Belfast**
Semi-detached, two storey house
Sold October 2018
Selling price £75,000

ii. **19 Glenbawn Square, Belfast**
Mid-terraced, two bedroom, two storey, double glazed
Sold November 2018 for £75,000

iii. **22 Glenbawn Square, Belfast**
Mid-terraced, two storey, three bedroom
Sold January 2019
Selling price £69,950

iv. **21 Glenbawn Square, Belfast**
End terrace three bedroom house
Sold January 2019
Selling price £65,000

v. **6 Glenbawn Drive, Belfast**
Two storey, three bedrooms, end-terrace house
Beside a forest area
Sold December 2017
Selling price £70,000

vi. **96 Glenbawn Avenue, Belfast**
Two storey, corner site, no rere garden
Sold September 2018
Selling price £76,000

62. He disregarded the sale price of £65,000 achieved for comparable (iv) and, ignoring that sale, prices ranged from £70,000 to £76,000. He then disregarded the sale prices of comparables (v) and (vi) as they were achieved 6 months or more from the valuation date.

63. Two further comparables were disregarded by Mr Cassidy: comparable (ii) as it was mid-terrace and located in a busy square and comparable (vi) as it had no rere garden and was on a busy road.

64. He therefore considered comparable (i), sold at £75,000 October 2018, to be the best comparable but in his opinion nearby overhead cables had an impact on its sale price. Based on this comparable he assessed the un-encumbered market value of the reference property at £80,000.

65. The Tribunal pointed out to Mr Cassidy that the presence of the pylon in the field adjacent to the reference property would have a similar or greater depreciating effect on the un-encumbered value of the reference property. Mr Cassidy did not consider that it would and stood by his assessment of £80,000.

66. Mr Crothers relied on similar comparables as to Mr Cassidy and also agreed that comparable (i) was the best comparable in terms of location, style, size and date of sale.

67. Doing the best he could, based upon the comparables available, and on the assumption that the oversailing lines were to be removed, he assessed the un-encumbered value of the reference property at £75,000.

68. The Tribunal rejects Mr Cassidy's assessment of the un-encumbered value, as by his admission, it did not take in to account the presence of the nearby pylon and the Tribunal prefers Mr Crothers' assessment of £75,000.

The Encumbered Value

Mr Cassidy's Evidence

Market Sales Evidence

69. Mr Cassidy considered the "traditional approach" of looking at comparable sales evidence to be difficult as the perfect comparable was unlikely to exist. Any two similar houses could have a host of factors to differentiate them before considering the impact of electrical apparatus. Mr Shaw QC asked the Tribunal to note that comparable sales evidence was the valuation method adopted by the Tribunal in the jurisprudence in this jurisdiction.

70. Mr Cassidy then produced comparables which he considered demonstrated a diminution in market value:

i. 12 Windermere Road, Belfast

This house was agreed for sale at £210,000. The purchaser chose the Bank of Ireland as a lender but Mr Cassidy understands the valuer for the bank assessed the property at nil valuation. The purchaser then got a loan from First Trust but only at reduced value of £195,000, a 7.1% reduction in price. The property was agreed for sale in early July 2019. It was Mr Cassidy's opinion that the price reduction was purely for the presence of oversail lines.

The Tribunal notes that none of this information has been corroborated by the valuer/estate agent involved in the sale. No explanation was offered as to why Mr Cassidy did not seek to verify the information to ensure it was reliable.

ii. 6 Upper Malvern Crescent, Belfast

This property was placed on the market for sale in August 2019 at £142,500. Mr Cassidy considered this to be a very low price for the locality and the selling agents advised him that this was due to the presence of overhead cables. He was also informed that the sale was agreed at £142,000 but following the surveyor's inspection it eventually completed at £137,500. Again the Tribunal notes that none of this evidence has been corroborated.

Mr Cassidy then listed sales of other "un-encumbered" properties in the locality:

	Date Sold	**Sold**
11 Upper Malvern Road	September 2019	£170,000
19 Upper Malvern Drive	September 2019	£177,500
100 Upper Malvern Park	October 2019	£165,000
6 Upper Malvern Park	February 2020	£178,000
12 Upper Malvern Road	March 2020	£173,000
7 Landgrove Crescent	Agreed January 2020	£179,950

He noted that properties without "cables" sold at around £175,000 and No 6 Upper Malvern Crescent, with "cables", sold at £137,500. This, in his opinion, meant that there was a 21% reduction for the presence of cables. This was a very "broad brush" approach to comparable evidence.

The Tribunal would have needed a more detailed examination of this comparable and finds it difficult to assess how much of the 21% reduction was down to the presence of electrical equipment, if any, and how much was down to other factors.

iii. Glenkeen House Sales

Mr Cassidy noted that No 48 had cables and was sold in March 2019 for £81,000.

At around the same time No 128 sold for £94,000. This, he considered, represented a 14% reduction for the presence of cables.

He also advised that No 11 sold for £78,000. It was initially offered for sale at £89,950 and was subsequently sold for £78,000. He considered this property should be disregarded as a comparable, however, as it was a bank repossession.

71. Mr Crothers placed no reliance on Mr Cassidy's "relevant comparable sales from NI Housing Market." He submitted that this information comprised only copies of agents sales brochures and provided no evidence whether, and if so how, the properties were affected by electrical apparatus. The Tribunal agrees. Mr Cassidy's uncorroborated evidence was of limited assistance as he must surely have appreciated.

Northern Ireland Settlements by Grant of Easement

72. Mr Cassidy understood that the respondent had settled two cases in Belfast on the following terms:

i. Settlement of £10,000 for an owner in postcode BT10.

ii. Settlement of £31,000 for an owner in postcode BT17. He understood that this represented 10% of the value of the house.

He asked the Tribunal to note that these cases were by deed of easement, the same basis as the agreements in England. He considered these comparables to be relevant because 100% of the payment was for the effect of the equipment.

The Tribunal notes that in these settlements no payments were made for disturbance or "special losses", which were being claimed in the subject reference.

73. Mr Crothers' enquiries ascertained that the settlement of £10,000 related to a semi-detached house in Finaghy, at 44 Ormonde Park, Belfast in BT10, not BT6. He considered that the facts and the agreed terms could be distinguished from those in the subject reference:

i. There was a tower in the garden of the property. In the subject reference there is no such tower.

ii. This case was a deed of grant of easement which he considered differed radically from a NWL:

- the grant was for a fixed term of 999 years, in contrast to the uncertain term of the NWL, with no prospect of review by the Department in the manner provided by the subject NWL.

There was no provision for a further claim for compensation in circumstances where development was impeded by the easement, as provided for in the subject NWL, as the area of the easement was sterilised from development for the duration of the term.

74. The Tribunal notes the 10% settlement figure for the effect of a pylon, which concurred with the Tribunal's decision in McKibben. In the subject reference, however, there was no pylon to be accounted for, only the oversail of power lines.

75. Re the settlement of £31,000, Mr Crothers ascertained this to be a detached chalet bungalow at 44 Viewfort Park, Dunmurry. He had been advised by the respondent that the figure again represented a diminution of 10%, but the settlement had not yet been ratified. As in the previous settlement, he considered that the facts and agreed terms could be distinguished from the subject reference. The Tribunal agrees.

The Principal of Diminution in England

76. Mr Cassidy referred the Tribunal to following settlements from the jurisdiction in England:

Address	**Kvs**	**Amounts Paid**	**Compensation**
1 Beckwith Road, Yarn	400	£5,250	5%
37 Cemetery Road, Royton	132	£6,000	3.75%
12A Morgan Drive, Kent	275	£8,500	4.75%
106 Shearwater Road, Stockport	275	£10,000	4.75%

He considered that these comparables demonstrated there was an established valuation process for dealing with similar cases in England. He noted that the compensation payable was purely for the effect of the apparatus and nothing else and he considered these to be a more reliable guide than the market sales evidence from this jurisdiction. He understood the legislation in both jurisdictions to be similar, that was "compensation in respect of the grant."

77. Mr Crothers derived no assistance from the English settlements, which were grants of easements and, which he considered differed in substance from NWLs in this jurisdiction.

78. However, if they did fall to be considered, he submitted all the known facts should be taken into account.

79. He expanded the table to include the number of conductors and the actual settlement figures:

Address	Kvs	Conductors	Valuation	Claim	Settlement	%
Beckwith Road	400	24+1	£105,000	£7,500	£5,250	5
Cemetery Road	132	6	£160,000	£33,000	£6,000	3.75
Morgan Drive	275	12+1	£170,000	£15,000	£8,075	4.75
Shearwater Road	275	12+1	£200,000	£17,000	£10,000	4.75

80. Mr Crothers made two observations:

    i. There was no nexus between the voltage of the lines and the percentage of house value agreed as compensation.

    ii. The proposition that there was a settled and established scheme of compensation England sat uncomfortably with the stark differences between the amount of the claims and the settled compensation in all the cited cases.

81. The Tribunal agrees with Mr Crothers, from the evidence provided by Mr Cassidy there does not seem to be a settled scheme in England. Rather it appears to be a process of negotiation based on the facts in each individual case.

Also, in England, the percentages used were originally based on an apparent analysis of market sales evidence. The Tribunal has been unable to ascertain what percentages, if any, were justified by the market evidence in this jurisdiction.

82. Compensation has to be determined by what loss is actually suffered. This depends on the local market and how it reacts to particular circumstances. Only limited assistance can be obtained from evidence from other jurisdictions because those other markets may react differently to the way in which the local market reacts to the same change of circumstances.

Other Sources of Evidence

83. Mr Cassidy listed nine other sources of evidence which informed his opinion:

i. Statements of the 1st and 2nd applicants

Mr Cassidy considered that all of the factors listed by the 1st and 2nd applicants including noise, guano, health issues, loss of amenity and caused by the respondent's equipment, would have a detrimental impact on the market value of the reference property.

ii. Perception of Possible Health Issues

Mr Cassidy's opinion was that there was a general perception in the market that Electromagnetic Fields caused by the respondent's equipment may have health consequences.

He referred the Tribunal to a report from "Simms and Dent" entitled – "High Voltage Overhead Power Lines and Property Values: A Residential Study in the UK." He considered the following extracts to be relevant:

> "Using the frequency analysis to determine the impact on selling price at various distances from the nearest pylon indicates that the value of property from within 100 metres of the HVOTL (high voltage overhead transmission lines) is reduced by 6 to 17 per cent (an average of 11.5 per cent). The presence of a pylon was found to have a more significant impact on value than the HVOTL and could reduce value by up to 20.7 per cent compared to similar property sited 250 metres away."

And

> "The findings from both valuers' perceptional study indicated that valuers and agents perceive an average value reduction of 5-10 per cent indicating that both may underestimate the impact of the HVOTL's on value …"

Mr Cassidy asked the Tribunal to note that the study found the closer a property was to power lines the more diminished the value and the reference property could not be closer to the respondent's oversail lines.

84. Mr Crothers opinion was that this paper essentially reflected the inconclusive concerns that were well-known within the property professions and had been in the minds of valuers and others for many years. As a result he considered that any such concerns were bound to have been reflected in the prices paid for properties affected by electrical apparatus. He noted that all of these issues had been ventilated and weighed in the raft of cases already decided by the Tribunal.

85. The Tribunal agrees with Mr Crothers, it is the impact on market value, if any, arising out of the perceived health issues which the Tribunal must consider.

iii. <u>Valuation Report by David Cottrill</u>

86. Mr Cassidy advised the Tribunal that he had been provided with a copy of a report by Mr David Cottrill who was the expert for Western Power in the case of <u>Stynes v Western Power</u>.

In that report Mr Cottrill provided an "analysis of the impact of electrical apparatus on urban property" which he considered may impact on a purchaser's perception of property near electrical apparatus:

Objective Elements

- distance from tower to dwelling
- distance to conductors
- number of conductors

- approximate height of tower
- number of tower legs on properties
- opportunity to plant a tree screen to shield tower
- difficulty of obtaining a mortgage

Subjective Elements

- visual impact – from principal rooms, garden and access
- aspect – is the apparatus at front, side or rear of the house? Is it a high ground? Angle of view from principal windows
- fear of EMFs – proximity of conductors and current publicity concerning perceived health effects
- fear of conductor breakage
- corona discharge – degree of noise from insulators in damp conditions
- access for maintenance – will access by company cause difficulties
- is the apparatus within the domestic garden or next door
- fear of nuisance from droppings arising from birds which perch on the apparatus

Mr Cassidy considered all of these factors to be relevant and he noted that the Stynes case involved a minor oversail which Mr Cottrill valued at 3.75% diminution in market value and permanent loss at £6,375. In the subject reference Mr Cassidy considered the claimants' property to be "much more significantly" impacted.

87. Mr Shaw QC submitted that Mr Cassidy was willing to pluck what seemed to be helpful passages out of the report from Mr Cottrill in the case of Stynes but conceded in cross-examination that he had not read the full report and remarkably, neither had he read the decision in Stynes, nor indeed any of the case law, on the grounds that he was not a lawyer.

88. The Tribunal notes the contents of Mr Cottrill's report but derives little assistance from it. The Tribunal is concerned with the impact on market value, if any, which the evidence in this jurisdiction demonstrated.

iv. The Attitude of Lending Institutions

89. Mr Cassidy supplied a list of lenders whose policies made clear the reluctance and in most cases, the refusal to lend on properties affected by power lines. These included Bank of Ireland, Sainsburys, Money Supermarket, Virgin Money, Precise Mortgages. Mr Hunt QC noted that the position had deteriorated since the McKibben reference, with more lenders now refusing to lend and the list was not exhaustive.

90. Mr Crothers referred to the title documents of the reference property which showed that mortgages had been raised over the years from several lenders:

- Swift First plc
- AIB Group (UK) plc
- Bank of Scotland plc Halifax Division

91. He was also aware that mortgages had been raised on several properties in the "Four Winds" area of south east Belfast which were impacted by electricity apparatus.

92. The Tribunal notes the differing attitudes of lending institutions to the presence of electrical apparatus.

v. RICS Guidance

93. The Tribunal was referred to the Royal Institution of Chartered Surveyors (RICS) Professional Guidance UK Surveyors of Residential Properties 3rd Edition May 2016 Re-issue – 6.3 "Risks to Occupants":

> "Many clients are aware of the risks posed by the built environment and may seek to reduce these. A survey report can help this process by identifying those elements and features that fall so far below current standards they will pose a risk to those using the building. This is not a formal health and safety risk assessment but a helpful listing of those matters that present a particular safety risk to people. These matters can be described in the main body of the report. However surveyors may want to consider concisely listing the risks in a separate section where appropriate, cross referencing to where they appear in the main body of the report. As these

> matters will reflect current research any regulation may change over time. However the following list may identify a typical range of matters."

94. Mr Cassidy advised the Tribunal that the list included "overhead power lines (EMFs) and high radon levels."

95. Mr Cassidy also made reference to the RICS Homebuyer Report Survey and Valuation Professional Guidance, in particular its guidance re "Risks to People":

> "This section focuses on those hazards that pose a direct threat to the users of the dwelling. The risk should be clearly identifiable and not too remote. Typical examples include among others overhead power lines (EMFs)."

Mr Cassidy drew attention to the clear warnings from the RICS re overhead cables.

96. The Tribunal notes the content of the RICS guidance which relates mainly to perceived health issues associated with electrical apparatus.

vi. Towers in the Republic of Ireland

97. Mr Cassidy referred the Tribunal to an extract from the Irish Daily Mail in which the Chairman of the company which was responsible for installing a new electrical network throughout the Republic of Ireland admitted that he would not like to live near a tower.

98. The Tribunal notes the comments from the Eirgrid Chairman.

vii. High Voltage Power Lines and Property Values – A Residential Study in the UK by Sally Simms and Peter Dent

99. This paper had been submitted in previous references to the Tribunal including McKibben, Cuthbert and Cassidy. Mr Cassidy asked the Tribunal to note that the results of the studies showed that the physical proximity and the visual presence of a tower had a significant and

negative impact on market value. The authors' opinion was that the value of a property within 100m of a high voltage transmission line was reduced by 6-17%, an average of 11.5%.

100. Mr Crothers noted that these issues were considered in the raft of cases previously decided by the Lands Tribunal. He submitted that the concerns listed in the report were bound to have been reflected in market values of properties affected by electrical apparatus.

101. The Tribunal agrees with Mr Crothers, it is the impact on market value, if any, which is the relevant issue.

viii. HV Timber Pole/Oversail Claims (Residential Property)

102. Mr Cassidy provided policy documents from the GB electricity industry detailing their methodology for settling minor oversail cases in Great Britain. He considered there to be an established scientific process in England, Scotland and Wales for UK power networks to calculate and pay compensation for overhead cables and equipment in the garden. He considered the most important point to be that each case had a minimum value, UK Power £1,250, SSE £1,500 which was for the most modest apparatus, not the 275Kv lines in the subject reference.

103. Mr Crothers' opinion was that the information booklet and policy documents did not assist his consideration of the issues in the subject reference. He referred the Tribunal to Brickkiln Part 2 in which the Tribunal noted that the English wayleave and compensation scheme differed from that in Northern Ireland and English practices could not be transported for application to the assessment of compensation in Northern Ireland cases.

104. The Tribunal notes the contents of the documents applicable in England but recognises the differences between the two jurisdictions with regard to NWLs, easements and statute.

105. Mr Shaw QC noted the "minimum payments" in the document of £1,250 and £1,500 but referred the Tribunal to the zero awards by the Northern Ireland Court of Appeal in Brickkiln and the Tribunal in Brickkiln (reference lands south), Cuthbert, Cassidy and Streamville.

106. Mr Hunt QC submitted:

i. In Streamville the application was specifically based on an utter failure of the applicant to offer an expert basis for the assertion that the lands were impacted to the extent of £177,000.

ii. The subject reference was clearly distinguishable from Cassidy in nature and extent as only a few of the lines crossed over the garage and garden in that case. In Cassidy the Tribunal also noted: "without much more in-depth analysis of the sales evidence the Tribunal found it inconclusive as to the impact of overhead lines on value."

It also distinguished the McKibben case as:

> "The circumstances in the subject case, that is overhead lines crossing the corner of the garden and the garage, are considerably less severe than those in McKibben. In the absence of conclusive market evidence to clearly demonstrate that this set of significantly less severe circumstances would have an impact on market value, the Tribunal finds it inappropriate to award compensation in this case."

107. The Tribunal agrees with Mr Shaw QC namely that a zero award of compensation is an option. The onus rests with the applicants to prove any loss sustained and if they fail to do so the Tribunal, as in Cassidy, may award zero compensation.

ix. Robert Gill and Dorothy Gill and Mr Aidan and Mrs Elizabeth Donaghy

108. These cases came before the Tribunal in summer 2019 but settled prior to hearing. The Tribunal was not made aware of the terms of settlement. The Tribunal understands the relevant facts in both cases to be that there was one leg of a tower in the gardens and conductors over the houses. Mr Cassidy acted for the claimants and he confirmed that in both cases it was agreed that the claimants would be paid 10% of the market value as compensation. He considered this to be the first time there had been an acceptance by the respondent that there was a diminution in value of a property due to the presence of its equipment.

109. Mr Shaw QC asked the Tribunal to note that Mr Cassidy had acted for the above applicants and presumably he was involved in the decision to accept 10%. Mr Shaw QC pointed out that Mr Cassidy was now claiming 14% in the subject reference for overhead lines, a much less severe set of circumstances.

110. Mr Cassidy considered the Tribunal to be wrong in awarding only 10% in the McKibben reference. He referred to the Court of Appeal decision in which they stated they would have "at least" awarded 10%.

111. If he considered the Tribunal to be wrong in McKibben, the Tribunal must wonder why he advised his clients, Gill and Donnelly, to accept 10% in their references before the Tribunal.

Material Facts

112. Mr Cassidy then summarised the material facts on which he relied:

i. There was a 275Kv power line and 12 conductors over the reference property.

ii. The applicants had lost legal rights over their property, to have the apparatus removed.

iii. At certain times of the day, during periods of the year, birds perched on the nearby pylon and the conductors.

iv. The birds defecated over the applicant's property, severely compromising their use and enjoyment.

v. The bird dirt meant that the applicants could not enjoy the use of their property in the normal way.

vi. The applicants had to wash their car more frequently.

vii. The applicants had to power hose the backyard/patio area more frequently.

viii. The applicants had to re-wash their clothes.

ix. There were a host of other cleaning/hygiene issues caused by bird dirt.

x. There was a perception that such apparatus could cause health problems, particularly cancer in children.

xi. There had been a system in place in England, Scotland and Wales for 30 years to compensate people with such apparatus over their houses.

xii. The compensation system applied even to minor apparatus such as very modest oversailing lines and poles.

xiii. Evidence from the system in England showed actual compensation agreed for injurious affection in relevant cases.

xiv. Evidence submitted demonstrated the diminution in the value of properties in the general Belfast area because of the presence of apparatus.

xv. Case law from the rest of the UK was considered and followed but their method of calculating the compensation was not. RICS was a UK wide body and valuation principles were the same throughout the UK.

Valuation

113. Mr Cassidy summarised his assessment of diminution in market value:

i. Unencumbered Value £80,000

ii. Average diminution in England for 275Kv lines 4.75%

iii. In the Windermere Road case the adjustment for the overhead cable was 7.1%.

iv. Upper Malvern Road case the reduction was 21%

v. In the Glenkeen case the reduction was 14%

114. It was his opinion that the closest comparable to the reference property was Glenkeen where the adjustment was 14% and on that basis he assessed the compensation due to the claimants:

£80,000 less 14% = £11,200

He considered the appropriate level of compensation, therefore, to be £11,200 plus costs.

115. The Tribunal notes:

i. Mr Cassidy had not taken into account the presence of the pylon in assessing his unencumbered value.

ii. He did not include any amount for disturbance/"special losses", as claimed by the 1st and 2nd applicants.

iii. The percentages ranged from 4.75% (England) to 21% (Upper Malvern Road). It is difficult for the Tribunal to make an assessment based on such a wide variation and the Tribunal concludes there must be factors other than the respondent's equipment at play in the sales evidence submitted by Mr Cassidy.

iv. Mr Cassidy encouraged the Tribunal to follow the system in England, Scotland and Wales and he could not understand why it was not followed, but his assessment of 14% diminution in market value in the subject reference, was over three times the average in England, which was 4.75% for the presence of similar power lines.

v. This was also 4% more than the 10% awarded in McKibben for the presence of a tower in the side garden, a much more severe set of circumstances.

Mr Crothers' Evidence

116. With regard to the encumbered value of the reference property Mr Crothers referred the Tribunal to the following comparables from Glenkeen. It was generally accepted by both parties that market values in Glenkeen were higher than those in Glenbawn:

i. 53 Glenkeen

A semi-detached house which sold for £85,950 in January 2017. There was a pylon in close proximity but the property was not subject to any rights in favour of the respondent.

ii. 48 Glenkeen

A semi-detached house which sold for £81,000 in March 2019. This property had electric lines running over the house and the front garden and was burdened by an easement in favour of the respondent for a term of 999 years from 6th November 1991.

iii. 115 Glenkeen

This house was similar to comparable (ii) but was not impacted by any lines or any rights in favour of the respondent. It sold for £78,000 March 2019.

iv. 128 Glenkeen

A semi-detached house which sold for £94,500 in April 2019. Mr Crothers stated in his evidence that this property had been extended but when questioned by Mr Hunt QC he accepted that there were outbuildings to the rere and not an extension. This property was not impacted by equipment. Mr Crothers considered it to be an "outlier" as he could find no evidence of it having been marketed.

v. 34 Glenkeen

A semi-detached bungalow which sold for £67,000 in April 2017. This property was not impacted by equipment.

117. It was Mr Crothers' opinion that the contemporaneous sales of 48 and 115 Glenkeen, were conclusively informative. No 48 was subject to an easement in favour of the respondent and had power lines running over the house and front garden and sold for £81,000 in March 2019. No 115 Glenkeen, a similar house, unaffected by any such rights or equipment sold at the same time for £78,000.

118. When questioned by Mr Hunt QC, Mr Crothers accepted that the sale of No 115 was a bank repossession and he also agreed that repossessions could "create issues." On that basis the Tribunal finds Mr Crothers market sales evidence to be inconclusive as to whether sale prices of properties with equipment in situ were impacted by the presence of electrical equipment.

Diminution in Market Value

119. The Tribunal has considered the market evidence submitted by both experts but finds it to be inconclusive as to whether compensation based on diminution in market value should be awarded in the subject reference.

120. Mr Cassidy recognised this in his report and he then listed other factors which he considered would have an impact on the encumbered market value of the reference property:

i. Statements of the 1st and 2nd applicants

These relate mainly to noise, bird guano, associated loss of amenity. The Tribunal accepts that such factors may impact on market value but in relation to these it was impossible to ascertain how much was caused by the pylon and the area around it and how much was caused by the overhead lines. The evidence submitted would point to the pylon and area around as having the major impact. In addition the evidence was inconclusive as to the extent of these factors. Further, for the reasons

already given, the Tribunal felt unable to rely on the evidence of the applicants save where there was independent, corroborating evidence.

ii. Perception of possible health issues

The Tribunal is in no doubt that if a potential purchaser were offered the choice of two identical houses, one of which had electricity lines oversail part of the house and one which had no lines, the purchaser would select the unencumbered property. Or, alternatively, he would make a reduced bid for the encumbered property. This was due to the perceived health issues, proved or otherwise, associated with electrical apparatus.

iii. Valuation Report by David Cottrill

The Tribunal notes the content of Mr Cottrill's report whereby 3.75% diminution in market value was granted for a minimal oversail of a garden. This was based on the valuer's knowledge of previously agreed settlements. In evidence, however, it was conceded by Mr Cassidy that there was not a settled scheme for dealing with these types of cases in England, rather each case was negotiated between the valuers based on the facts. In any case the housing market in this jurisdiction is different to that in England and it was the impact in this jurisdiction which the Tribunal had to establish. The Tribunal finds this evidence to be of little assistance.

iv. Attitude of Lending Institutions

Mr Cassidy had produced a list of lending institutions which were reluctant to/would not provide mortgages for properties impacted by electrical apparatus. Similarly Mr Crothers produced a list of lenders that would provide mortgages and noted that mortgages had been raised on the reference property on three occasions with different lenders. The Tribunal finds this evidence to be inconclusive as to the impact on market value.

v. RICS Guidance

The Tribunal notes the RICS Guidance which was mainly concerned with perceived health issues relating to electrical apparatus but again it provided little assistance as to the impact on market value in this jurisdiction.

vi. Towers in the Republic of Ireland

The attitude of the Chairman of Eirgrid to living near a tower was based mainly on health perceptions which the Tribunal considers is a relevant factor.

vii. Simms and Dent Report

This report is informative with regard to the impact on market value of electrical apparatus, which again was based mainly on health perceptions.

viii. Policy Documents from the GB industry

The main point made by the applicants was that minimum payments were made even in the most modest of cases in GB. The Tribunal has already established that zero compensation is an option in this jurisdiction.

ix. The Gill and Donnelly settlements

The Tribunal notes that the parties in these settlements agreed 10% diminution in value for one leg of a tower in a garden which was more severe than the position in the subject reference. The Tribunal has not been advised of any amount of compensation paid for disturbance, special losses etc. in these settlements, as claimed by the applicants in the subject reference.

121. In McKibben the Tribunal awarded compensation based on 10% diminution in value for a pylon in a side garden. In Cassidy, whereas the electrical apparatus was similar to that in the subject reference, only a few of the lines crossed over the garage and garden and the Tribunal made zero award of compensation in that case.

122. The Tribunal agrees with Mr Hunt QC that the circumstances in the subject reference are more severe than those in Cassidy, with the lines crossing the back garden and part of the house. The Tribunal can consider other evidence when the market evidence is inconclusive. See the following extracts from the Court of Appeal decision in Brickkiln & Ors in relation to McKibben:

> "[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 …
>
> (ii) A 2004 Report by Simms and Dent ….

(iii) A Bank of Ireland policy document on mortgage lending …

(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 of £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) …

[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.'"

Standing back and looking objectively at the reference property and the extent of the oversail , the Tribunal is satisfied that perceived health issues would probably have some modest effect on its market value. The tribunal is not satisfied on the evidence adduced that the other issues raised would have had any effect on the market price because of relevance and/or reliability. For example the Tribunal could reasonably have expected independent, expert corroborating evidence on the levels of noise caused by the oversail. Based on the evidence of perceived health issues which it was claimed were attributable to power lines the Tribunal considers that an award of 2.5% diminution in market value was warranted in the circumstances of the subject reference. This was the Tribunals best attempt to reflect any reliable evidence adduced. The outcome in each case, however, will depend on its own particular facts.

123. Diminution in market value is therefore assessed:

Unencumbered Value	£75,000
	x 2.5%
Diminution in market value	**£1,875**

Disturbance and other losses

The Legislation

124. Mr Shaw QC submitted that the material statutory provision that underpinned the claimants application for compensation was found at para 11 of Schedule 4 to the Order. This was not disputed. He referred the Tribunal to the two distinct limbs:

i. where compensation in respect of the grant is recoverable, para 11(1); and

ii. cases where compensation is due consequent upon "damage" or "disturbance" caused by the "exercise of any right conferred" by the NWL, para 11(2).

125. He submitted that para 11(2) provided for a case where NWL rights were exercised to cause damage to a property or disturbance, but this was not the subject reference which was concerned with the grant of the NWL. Although the applicants' employed the word

"disturbance" in their papers he considered that they could not ground their complaints in an "exercise" of rights conferred by the NWL.

126. Mr Hunt QC referred to the decision of the Court of Appeal in Brickkiln & Ors at para 9 point 3 where it stated:

> "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."

127. Mr Hunt QC submitted that the respondent was "exercising its rights under the NWL" simply by retaining the presence of, and using, the lines over the reference property.

128. He further submitted that the English authorities stated that compensation claims were to be assessed in the "widest possible terms" and hence it was incorrect for the respondent to attempt to narrow the subject claims. He suggested that the exercise for the Tribunal under 11(2) was:

- is the claimant in lawful possession?
- if yes, is the respondent using the equipment on the property?
- if yes, is the occupier "disturbed" by the usage.
- if yes, then in what ways and for how long has that disturbance lasted?
- what is an appropriate award in damages for that disturbance?

The Authorities

129. Turris Investments Limited and General Electricity Generating Board Ref/31/1980 and Ref/105/1981

This was a decision by the Lands Tribunal in England in which the Board acquired rights under a compulsory purchase order arising from the deed of a grant. It concerned a 10 acre site with planning permission for 106 houses on which development had commenced. Mr Hunt QC asked the Tribunal to note:

- the Tribunal found that "comparable" evidence was of limited value, nevertheless a significant award was made which reflected the approach in McKibben.

- the approach to injurious affection and the relevant factors, resulted in awards of 8%, 12.5% and 3% for different types of property.

- an award for "land taken" i.e. the footprint of the pylon £2,000.

- an award of £100 for the easement as a stand alone award.

130. This was a case under a compulsory purchase order in which the legislation specifically allowed payment for land taken, injurious affection and disturbance. The Tribunal finds it of little assistance.

131. AR Naylor and Southern Electricity Board Ref/94/1992

This case also concerned a compulsory purchase order. Mr Hunt QC noted:

- there was a stand alone award of £150 for rights acquired.

- the Tribunal placed a reliance on settlements not comparables. It was accepted that a level of settlement information was not available to the Lands Tribunal in this jurisdiction but the applicants considered the process in England to be of relevance to Northern Ireland.

- the expert's evidence was of only qualified assistance.

- the member in Naylor decided the case by looking at the 22% settlement in a pylon case at Venning Avenue and worked backed to make a 2% award for a very modest oversail.

- the Tribunal made separate awards of £4,000 for injurious affection and £150 for the rights.

132. Again, this was a case under a compulsory purchase order which legislation would specifically allow for the payment of injurious affection and disturbance. The Tribunal notes:

- compensation was awarded solely on rights acquired by the board. In the subject NWL the respondent does not acquire any rights.

- compensation was limited to the part of the equipment over the land.
- the Tribunal in Naylor noted that the facts in Turris were so different that they derived no assistance from it.
- the Tribunal noted that the expert's 7% claim for compensation was totally arbitrary and not supported by evidence.
- compensation awarded was based on diminution in value.

133. Alastair Hyman Rudin Macleod and The National Grid Company PLC LCA/170/96

Mr Hunt QC noted that this was the first case following the introduction of NWLs in UK legislation. He considered the salient points to be:

- the compensating authorities approach was accepted and it did not rely on comparables, rather it relied on settlements.
- there was a stand alone award for the "value of land taken" over 15 years. The Tribunal awarded this as a capitalised rent.
- there was a stand alone payment for the grant of the NWL awarded as an "occupiers payment." This was for interference with the use and enjoyment of the lands under the lines for the 15 years the lines would be in situ.
- there was a separate award for "injurious affection."

134. This case involved 34.5 acres of land with two pylons and overhead lines erected thereon. A NWL was granted but this could be determined after 15 years and could be terminated by either party with 6 months' notice. The Tribunal notes:

- it was incorrect to assess compensation on the basis of a perpetual wayleave as the wayleave was for an initial period of 15 years.
- injurious affection was the depreciation in the value of the land affected by the pylons. That is the same as diminution in value.
- Compensation was assessed solely on the legislation relating to NWLs, not compulsory purchase legislation.

- compensation was for all loss not too remote.
- no disturbance was paid or sought.
- interest was paid even though the legislation was silent.

135. <u>Brown Construction Limited v SP Transmission Limited</u>

Mr Hunt QC accepted that this case was not directly relevant but there was a general principle that the applicants were entitled to compensation in respect of any loss they suffered as a result of the grant and he noted:

- the Tribunal had "no difficulty accepting the increasing public perception of possible health risk,"

136. This case involved the retention of overhead lines on land. There was no bar, however, to development close to the lines. The Tribunal notes that there was no claim for disturbance, rather the claim was restricted to diminution in value.

137. <u>(1) Terence Welford (2) Colin Phillips (3) IOD Skip Hire Limited and EDF Energy Networks (LPN) PLC</u> LCA/30/2004

Mr Hunt QC noted:

- there was a stand alone award for the "value of the wayleave" (at £2,360).
- there was a stand alone award for "diminution in value of land."
- there was a stand alone award for "loss of profits."
- the approach to proving financial loss was the same as any claim for common law damages.

138. This case concerned a waste disposal business held together with development land and on which was situated pylons and underground cables. It was found that:

- injurious affection equalled diminution in value.

- disturbance in relation to loss of profits was due to the fact that the occupier could not start his waste business in 1996 because of the presence of underground cables. He had to wait until 2000.

- in relation to disturbance related to the profits made out of the development of the land, this would be reflected in its market value.

- the most important point was that, subsequently, the Court of Appeal found that the claimant was only entitled to disturbance if it was NOT reflected in the value of the land.

- the Tribunal must therefore ensure that any disturbance is not already reflected in any diminution in value.

139. Arnold White Estates Limited v National Grid and subsequent Court of Appeal decision

Mr Hunt QC noted:

- pure financial loss under a contract was recoverable.

- it followed the Court of Appeal approach in Welford

- an unusual set of facts relating to a large development site.

- the Court of Appeal held that "the right to compensation … is conferred in the most general terms."

140. This case concerned a 15 year NWL. The site of 19.5 acres was agreed for sale to developers but this was conditional on the removal of pylons situated on the lands. The salient points were:

- the Court applied the principle of equivalence as detailed in Horn v Sunderland.

- the Court noted that the NWL did not relate to any acquisition of land or any right over or interest in land.

- the Court also confirmed that a NWL was not an easement, it only conferred consent for the licence holder to do certain things. It did not grant an interest in land but rather it conferred an occupation of land.

- no compensation was to be paid for apparatus on land outside the subject lands.

141. <u>Neville James Stynes and Barbara Stynes and Western Power (East Midlands) PLC</u> [2013] UK UT 0214 (LC)

Mr Hunt QC considered this to be the most recent and most relevant case with regard to oversail situations. In this case the oversail was minimal at just six centimetres. He considered the following points to be relevant:

- the Upper Tribunal reviewed all of the previous case law and detailed how to approach the assessment of compensation.
- it rejected the claimant's approach namely that the pylon outwith the boundary should be taken into account.
- there was a substantial award of £4,000 for injurious affection. This included a nominal amount for the value of rights.
- there was acceptance by the compensating authority's valuer that this modest oversail diminished the value of the house by 3.75%
- the Upper Tribunal relied on the compensating valuers knowledge of many settlements and noted:

> "Sales of similar houses with and without a tower close to the property, having sold in the same locality, at or close to the date of valuation, is rarely available."

142. In this case a NWL was granted for 15 years under paragraph 7 of Schedule 4 to the 1989 Electricity Act:

> "7(1) Where a wayleave is granted to a licence holder under paragraph 6 above-
>
> (a) The occupier of 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 land or to movables, any person interested in the land or movables may recover from the licence holder 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 land or movables he may recover from the licence holder compensation in respect of that disturbance."

143. This is almost identical to paragraphs 11(1) and (2) of Schedule 4 to the 1992 Order and in relation to Welford and the differences in compensation for a permanent easement the Upper Tribunal stated:

> "… The Tribunal thought the explanation for these differences lay in the fact that paragraph 7 of Schedule 4 was designed to provide compensation for occupiers as well as owners and for damage to chattels as well as land and to cover wayleaves that might only be short lived. And it [Welford] went on to say this:
>
> > '… Despite the differences between the two sets of provisions, however, we should be reluctant to construe para 7 as it applies to a wayleave for 15 years in a way that would require a different approach to the assessment of compensation from one that would apply if a permanent easement had been acquired. Happily, we see no need to do this.'"

144. The 1992 Order, as per the 1989 Electricity Act, allows for compensation to be paid to an "occupier" of land, and the Tribunal considers it must, therefore, have envisaged compensation over and above diminution in market value being paid, as this was only payable to an owner.

145. Disregarding the authorities which were not concerned with the grant of a NWL the Tribunal summaries the relevant findings:

i. McCleod

- compensation was payable for all loss which was not too remote.
- no disturbance was sought or paid.
- interest was paid even though the legislation was silent.

ii. Welford

- compensation was paid for loss of profits.
- the claimants were only entitled to disturbance if it was not reflected in the value of the land.

iii. Arnold White

- the Court of Appeal stated that the right to compensation was "conferred in the most general terms."

iv. Stynes

- the English statute which was similar to the statue in Northern Ireland allowed for compensation to be paid to an occupier, so it envisaged compensation other than diminution in value being paid.
- even though the circumstances were very similar to the circumstances in the subject reference no disturbance for the effect of bird guano, noise or other such items was sought or paid.

146. Mr Shaw QC relied on the jurisprudence established in this jurisdiction by the Lands Tribunal and the Court of Appeal. He referred the Tribunal to its decision in Brickkiln Part 1 para 24(v) in which it decided that the loss to be measured was the loss of applicants' legal right to require the respondent to remove its equipment from the land.

147. In measuring that loss the Tribunal accepted in Brickkiln Part 1 para 24(3):

> "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 properly taken into account."

148. How this loss was to be measured was expressed by the Tribunal in Brickkiln Part 2 at paras 19 & 20:

> "19. As a consequence of the grant of the NWL the claimant has lost his legal right to determine the respondent's licence and have its equipment removed and it is the measurement of that loss to which the principle of equivalence is to be applied. The Tribunal agrees with Mr Orr QC, the correct measurement of that loss is the diminution in market value of the claimant's lands, that is the difference in market value with the equipment removed ('un-encumbered') and the equipment in place ('encumbered'). This is the measure of compensation agreed and confirmed in all of the UK cases.
>
> 20. The assessment of compensation must, however, reflect the terms of the relevant statutory framework in the jurisdiction. Although the wording of the English statute is similar to the 1992 Order the terms of the NWL in each jurisdiction differ and in particular condition 7 of the subject NWL, which allows for either the removal of the equipment or the payment of compensation when a 'bona fide' intention to develop the lands have been hindered by the presence of the equipment."

149. Mr Shaw QC noted that this framework, carefully established in principle by the Tribunal, had been applied in several subsequent decisions including Cuthbert, McKibben and Cassidy.

150. Whilst clarification was subsequently sought from the Court of Appeal as to whether the Member was entitled to resort to an "intuitive approach" instead of an "evidential approach" in both the Brickkiln and McKibben references, neither the respondent nor the claimants, by way of cross appeal, ever sought to challenge the principles set by the Tribunal in Brickkiln for assessing and measuring compensation and he noted that the Court of Appeal referred to the

"NWL territory" as now having been "mapped" (see paragraph 39 of the Court of Appeal decision).

151. He referred to Brickkiln Court of Appeal in which the original award to the claimant by the Tribunal was set aside and zero compensation substituted. He submitted that it was clear that the onus remained on the claimants to show evidence of diminution in value as a result of the grant of the NWL, before one can go and measure quantum (see Appeal decision at paragraph 21).

152. He noted that in arriving at its decision, the Court of Appeal rejected the Members use of an "intuitive" approach where a claimant had failed to demonstrate diminution in value as a consequence of the grant of the NWL (see Appeal decision paragraph 20 and 21).

153. The Court of Appeal upheld the original award of compensation in McKibben by clarifying that the Member did in fact take an "evidential" approach to establish "diminution." Mr Shaw QC noted that the Court of Appeal ruled that, since the sales evidence was inconclusive, the Member was entitled to look at other evidence (summarised in the Appeal decision at paragraph 26) to assess if there had been a diminution in value of the lands and then to assess the extent of any such diminution that may be found (see the Appeal decision at paragraphs 29 to 31).

154. The Tribunal awarded zero compensation in the Cuthbert and Cassidy cases that went unchallenged by the claimants and the issue at the Court of Appeal was confined to costs.

155. In conclusion Mr Shaw QC submitted:

- the framework for assessing and measuring compensation payable in respect of the grant of an NWL, if any, was now clearly established in Northern Ireland.
- the loss to be compensated was the loss of the owners legal right to determine the voluntary arrangement and require the respondent to remove its equipment from the land.
- The measurement of that loss was confined to the difference, if any, between the market value of the claimant's lands with the equipment removed ("un-encumbered")

and the equipment in place ("encumbered"), taking it into account the terms of the NWL.

- zero compensation was an option.

The Tribunal's Decision re Disturbance and Other Losses

156. The 1992 Order allows for compensation to be paid to "an occupier", over and above an owner. It must, therefore, have envisaged compensation over and above diminution in value being paid.

157. Paragraph 11(2) of the 1992 Order allows for compensation to be paid when "… in the exercise of any right" under the NWL "… a person is disturbed in his enjoyment of any land", the "licence holder shall pay compensation in respect of that disturbance."

158. The Tribunal agrees with Mr Hunt QC, by retaining its equipment over the reference property the respondent is exercising a right under the subject NWL.

159. The Tribunal finds, therefore, that both Mr Doyle and Mrs Ruiz are entitled to claim for disturbance associated with the grant of the NWL but that disturbance must not be too remote and must not already be reflected in the value of the land.

Mr Doyle's Claim for Disturbance/Injurious Affection

160. The Tribunal has already established that:

i. Mr Doyle is entitled in law to claim for disturbance.

ii. Any disturbance claimed must not be too remote.

iii. The disturbance claimed must not have already been reflected in the value of the land.

161. The 1st applicant had claimed disturbance/injurious affection under the following heads of claim:

i. Loss of Receipt of Wayleave Payments

ii. Loss of Rights

iii. Disturbance/Injurious Affection

iv. Loss of footprint of land "taken"

v. Special losses

162. The Tribunal will deal with these in turn:

i. <u>Loss of Receipt of Wayleave Payments</u>

163. Under the voluntary wayleave scheme the 1st applicant had a right to wayleave payments. Mr Hunt QC noted that the statutory NWL scheme did not provide for wayleave payments and this was a loss suffered.

164. Mr Shaw QC clarified that where a NWL was issued the property owner received a wayleave payment equivalent to that paid to a property owner on whose land similar equipment was held under a VWL, in accordance with a schedule of wayleave rates. This was acknowledged by the Court of Appeal in its Appeal Decision at paragraph 21.

165. The Tribunal, therefore, finds no basis for this head of claim.

ii. <u>Loss of Rights</u>

166. Mr Hunt QC submitted that the 1st applicant had lost a significant legal right to require the respondent to remove its equipment from his land. He referred to quote from Lord Justice Coghlin in <u>Brickkiln</u> Part 1:

> "the loss that right is of some significance because the nature and extent of the respondents' equipment on the land."

and Lord Justice Coghlin had also referred to the "significance of a right of property ownership being compulsory terminated by the Executive."

167. The 1st applicant had not quantified or stated how this loss should be measured. The 1992 Order recognised the loss of that right and provided for compensation to be paid. The

diminution in market value was the basis of compensation for the loss of that right and the Tribunal considers that this head of claim has already been accounted for in the diminution in market value already awarded.

iii. <u>Disturbance/Injurious Affection</u>

168. Mr Hunt QC submitted that the 1st applicant had suffered disturbance, in and around the reference property and his use and enjoyment had been diminished.

169. The Tribunal considers that this head of claim would be reflected in the market value, that is, any prospective purchaser would reduce his bid to reflect any reduced amenity or the possibility of disturbance. The Tribunal considers that this head of claim, therefore, has already been included in the 2.5% diminution in market value awarded.

170. If the Tribunal is wrong in this, however, under any claim for disturbance the burden lies with the claimant to prove his/her loss. The Tribunal summarises the evidence submitted in relation to disturbance:

a) It was difficult to separate the effect of the overhead lines from the effect of the pylon. The Tribunal's view is, however, that most of the impact on the reference property comes from the pylon and the area around it, which is not a matter that gives rise to compensation.

b) The Tribunal found the video evidence to be inconclusive and focussed mainly on the effects of the pylon, which was understandable because, at the time the videos were taken, both applicants were not aware that they could not claim for the effects of the pylon.

c) Some photographic evidence was produced of bird guano on the patio, windows, bbq, car, trampoline etc but this may have been from the lack of regular cleaning. The Tribunal notes:

- no evidence of noise or bird guano was found at the Tribunal inspection.
- Mr Crothers found no such evidence at his inspection.
- the WLO found no evidence at his inspection.

d) The 1st applicant had advised the WLO that the back bedroom could not be used due to noise from the equipment. He later admitted in evidence, however, that it had been used by the 2nd applicant's daughters since their arrival, some five years previous.

e) The 1st applicant had purchased the reference property in 2006 in full knowledge of the presence of the equipment and its effects, although he advised the Tribunal that the effects had increased over the years, even though the equipment had remained the same.

f) The 1st applicant had purchased a second barbeque and hot tub for use in the garden in full knowledge of the effects of the equipment. A trampoline had also been acquired.

g) The Tribunal was advised by the 1st applicant that the windows needed cleaning once a month. The Tribunal considers that this would be normal for any household.

h) Some limited individual "receipts" for cleaning were submitted but the Tribunal would have expected periodic receipts over a significant period of time to prove increased costs.

i) Similarly, in relation to additional electrical costs due to the increased use of a tumble dryer, the Tribunal would have expected electricity bills to have been submitted showing use/costs over and above the norm.

All in all there was an absence of independent evidence to corroborate almost all of the applicants' claims.

171. In summary the Tribunal finds that the 1st applicant has not proven any of the disturbance loss claimed.

iv. <u>Loss of footprint of actual land "taken"</u>

172. Mr Hunt QC submitted that the 1st applicant effectively had the footprint of usable land reduced by the area of the reference property which was oversailed by the lines.

173. The Tribunal considers that any reduction in usable land would be reflected in the market value, that is the diminution in market value. In any case the submitted evidence failed to prove a reduction in usable space.

v. <u>Special Losses</u>

174. These included window cleaners to attend every month, costs of additional power hosing and professional cleaning and repair of the property.

175. The Tribunal considers that any additional costs associated with the occupation of property would be reflected in its market value. If the Tribunal is wrong, as previously stated, these losses have to be proved. The 1st applicant has singularly failed to do so to the necessary standard.

176. Also, the 1st applicant has not provided any examples/authorities whereby compensation was paid for disturbance/special losses similar to those being claimed in the subject reference. In conclusion the Tribunal makes no award of compensation for disturbance/special losses to the 1st applicant.

<u>The 2nd Applicant's Claim</u>

177. The respondent's position was that the 2nd applicant lacked both a legal basis for any claim and any compensatable loss. The Tribunal has already established that the 2nd applicant, as an "occupier", had a legal basis for a disturbance claim and the question was had she suffered any compensatable loss.

178. Mr Shaw QC submitted that the 2nd applicant was not in a compensatable position as she had agreed the sum the authorities were to pay for her occupation of the reference property on her behalf, in the knowledge of the circumstances at the reference property. She moved in some five years ago and would have been fully aware of the effects, if any, of the oversail lines.

179. In addition, Mr Shaw QC submitted that she was free to move out at any time, if she was concerned about the effects of the respondent's equipment, particularly in relation to the impact on the health of her family. He further submitted she "gets what she pays for", she was fully aware of any effects of the equipment and that would be reflected in the rent she

paid. Indeed, if her rent was paid by way of a benefit, which appeared likely, so arguably there was even less reason why she should confine herself and her family to this property

180. The 2nd applicant was an "occupier" of the reference property, as required under the 1992 Order and Mr Hunt QC submitted that her rights as a tenant/occupier had been breached by the respondent's imposition of the NWL. Mr Hunt QC considered that she had suffered a loss or damages for discomfort and inconvenience.

181. The 2nd applicant had claimed for (i) loss of legal rights (ii) disturbance/injurious affection (iii) "special losses" to include increased use of tumble dryer and additional car washes. These alleged "losses" were the same, however, under the previous VWL and the new NWL. Her circumstances had not changed. She had suffered no additional "losses" due to the imposition of the NWL. In addition she had entered into a rental agreement with the 1st applicant fully aware of these circumstances and the Tribunal considers that she has suffered no additional compensatable loss due to the imposition of the NWL. The Tribunal agrees with Mr Shaw QC "she gets what she pays for", she is free to move on any time and any "losses" should be reflected in the rent she pays.

182. In any case the Tribunal considers that no convincing evidence has been submitted to prove any of the losses claimed by the 2nd applicant and it did not consider it could rely upon her testimony in the absence of reliable, corroborating evidence.

Conclusion

183. The Tribunal awards the 1st applicant compensation of £1,875 based on 2.5% diminution in the market value of the reference property due to the grant of the NWL. The claim of the 2nd applicant for compensation fails as she has not proved that she (or her family) has suffered any loss. The Tribunal will hear the parties on the issue of what order for costs it should make.

30th September 2021

The Honourable Mr Justice Horner and

Henry Spence MRICS Dip.Rating IRRV (Hons)

LANDS TRIBUNAL FOR NORTHERN IRELAND