THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 83

RECORD NUMBER: 2019/741 JR

BETWEEN

ELECTRICITY SUPPLY BOARD

APPLICANT

AND

PAUL GOOD

RESPONDENT

AND

PETER O'REILLY

NOTICE PARTY

AND

ROSE O'REILLY

NOTICE PARTY

Judgment of Mr. Justice Mark Heslin delivered on the 22nd day of February 2023

Introduction

1. Section 53 of the Electricity (Supply) Act, 1927, as amended (the "1927 Act") empowers the Applicant to place electric lines across land. Section 4 of the ESB (Electronic Communications Networks Act) 2014 contains a definition of an electric line.

2. The line in question is the "Arva to Shankill No.2 110kV line" ("the line") which, as might be expected, runs through various properties in the ownership of various parties, including the Notice Parties who reside in Cavan.

3. Although the Act does not use the term 'wayleave', a notice issued by the Applicant pursuant to s. 53(3) is commonly called a 'wayleave notice'. It is acknowledged that, in this case, the requisite wayleave notices were given in accordance with Section 53 (3) of the 1927 Act.

4. Neither the issuing of a wayleave notice, nor access to lands, requires the consent of the landowner where the matter falls within the statutory powers under section 53.

5. In the present case the Applicant issued two wayleave notices to the Notice Parties, both of which were dated 15 February 2011.

6. These proceedings concern the assessment by the Respondent of compensation payable by the Applicant (also referred to in this judgment as "the ESB") to the owner or occupier of lands (i.e. the Notice Parties) by virtue of the exercise by the Applicant of powers to place an electricity line across their lands.

7. The Respondent did not play any active part in the proceedings. The Applicant's claim is resisted by the Notice Parties.

Relief sought

8. By order made on 23 October 2019 (Noonan J) the Applicant was granted leave to apply by way of an application for judicial review for the reliefs in paragraph D of their Statement, filed on 18 October 2019, on the grounds set out in paragraph E thereof. The relief sought by the Applicant is in the following terms:

1. An order of *certiorari,* by way of judicial review, quashing the Awards made by the Respondent, dated 8 July 2019 and stamped on 25 July 2019, on a reference to arbitration pursuant to the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919.

2. A declaration, by way of judicial review, that in purporting to issue the Awards, dated 8 July 2019 and stamped on 25 July 2019, the Respondent erred in law and infringed fair procedures and the Applicant's legitimate expectations such that his award is void and of no legal effect.

3. A stay on the awards pending the determination of these proceedings.

Wayleave Notices 112 and 113 (15 February 2011)

9. Copies of the two Wayleave Notices, both dated 15 February 2011, which were sent by the Applicant to the Notice Parties comprise "Exhibit MB1" to the verifying affidavit sworn, on 17 October 2019, by Mr Michael Bourke, solicitor for the Applicant (i.e. "wayleave 112" or "112" and "wayleave 113" or "113"). Wayleave 112 was addressed to the First and Second Notice Parties, whereas the Wayleave 113 was addressed to the First Notice Party (and nothing turns on the foregoing). Both were signed by an Authorised Officer of the Applicant and begin in the following terms:

> *"I hereby give you notice that the Electricity Supply Board, pursuant to the powers conferred on the Board by Section 53 of the Electricity (Supply) Act 1927, as amended by subsequent Acts, intends to place an electric line as defined by Section 46 of the Electricity Supply (Amendment) Act 1945 above ground across your lands situate in the*
>
> *Townland of Corraweelis*

Barony of Upper Loughtee
County of Cavan.

The nature of the said line and the position and manner in which it is intended that it be placed is set forth in the Schedule hereto attached.

If within seven days from the receipt of this Notice you consent to such entry the same will be on the terms of the Board's policy endorsed on the back hereof. If you do not so consent the board will direct the line as authorised by section 53 (5) of the Electricity (Supply) Act 1927 as amended. In this event the board will be prepared to act in accordance with the same terms of the said policy (excluding the provisions of Clause 6 thereof) and you will be entitled to have compensation assessed by agreement or in accordance with the said Act.

I also give notice that the Electricity Supply Board, pursuant to the powers conferred on the Board by Section 98 of the Electricity (Supply) Act 1927, as amended by Section 5 of the Electricity Supply (Amendment) Act 1941, and Section 45 of the Electricity Regulation Act, 1999, intends after a period of seven days from the date of service of this Notice to lop or cut certain trees, shrubs or hedges which obstruct or interfere with the electricity wires or with the action of such wires.

The location of the said trees, shrubs and hedges and the extent of the intended lopping or cutting is set forth in the schedule hereto attached" (emphasis added).

10. Each wayleave notice was in identical terms but the schedules to same related to separate portions of the Notice Parties' lands. Thus, each gave rise to a separate claim by them for compensation. Although later in this judgment I will look in some detail at the Respondent's award in respect of each claim, it is useful to distinguish between both wayleaves by setting out, at this point, how each of the "subject properties" were described by the Respondent in the awards issued by him.

Wayleave 112 "Subject property"

"The subject property comprises an irregularly shaped holding of c.6.11 hectares with a current use as meadow/grazing/silage. The 110 kv line runs in a north/south direction for c. 230 metres, with one poleset within the holding."

Wayleave 113 "Subject property"

"The subject property comprises an irregularly shaped holding of c.7.29 hectares with a current use as meadow/grazing/silage. The 110 kv line runs in a north/south direction for c. 120 metres, with one poleset within the holding."

ESBI letter (15 February 2011)

11. To better understand the project in question and the process which the service of both wayleaves triggered, it is helpful to refer to the contents of separate correspondence which was sent to the

Notice Parties, on the same day as the wayleave notices were served (i.e. 15 February 2011) by ESBI Engineering and Facility Management Ltd ("ESBI"). Mr Burke avers, at paragraph 6 of his affidavit, that ESBI is a company appointed *"… As consultants to Eirgrid and ESB in relation to the project…"*. ESBI sent 2 letters. The first was headed "*Re: Arva -Shanlkill 2 110kV Line – Wayleave No. 112"*. The second concerned Wayleave No. 113. Both letters stated inter alia:

> *"Please find enclosed documentation in relation to the new Arva – Shankill 2 110kV line. This includes a project Briefing Document, a Wayleave Notice and a map which indicates the proposed position of the line and structures in relation to your property.*
>
> *As you may be aware the project has been progressed through the planning process by EirGrid and ESB and when operational will improve the reliability of electricity supply to all customers and provide for future growth and investment within County Cavan.*
>
> *ESBI have been appointed consultants to EirGrid and ESB in relation to this project. It is the intention of ESB to commence the construction programme shortly and we will visit all landowners along the route prior to commencement to discuss the project further.*
>
> *We also wish to inform you that the IFA has been in negotiations with EirGrid and the ESB in relation to the terms under which this line will be built. These negotiations are concluded and an agreement has been reached with the IFA as to the terms under which this project will be completed. A flexibility of access payment will be made to you in recognition of the fact that your cooperation with the build serves to facilitate greater efficiencies in the overall management of the project.*
>
> *Landowners who co-operate with the construction programme on their lands facilitating the orderly completion of each straight will receive a total flexibility of access payment of €11,000 per poleset and €22,000 per steel tower. These will be in the staged payments outlined below. In cases where structures straddle properties the sums will be shared. In addition, further payments are made where a poleset is supported by stay wires. For landowners who do not have structures but whose lands are crossed by conductor wire only a single payment of €2,500 will be made in return for their cooperation with the build.*
>
> *The payment schedule and conditions are as follows:*

Payment	*Condition*	*Per tower*	*Per poleset*	*Conductor wire only*
1	*Paid at time of contractor access*	*€10,000*	*€5,000*	*€2,500*
2	*Paid on completion of a straight. A straight comprises of all intermediate polesets between two angle*	*€7,000*	*€3,500*	

	towers with conductor fully strung on the straight			
3	*Paid when the line is fully constructed and ready to be energised*	*€5,000*	*€2,500*	
Total		*€22,000*	*€11,000*	*€2,500*

Payments 2 and 3 are conditional upon unrestricted access being given to the land as required to facilitate construction and will not be paid where access is denied or unreasonably delayed or where access is facilitated only after the serving by ESB of a Date & Time Notice. No exceptions will be made to these conditions.

You are also entitled to be fully compensated for any land damage that may take place on your land arising from the construction of the line. The works on your land will be conducted with the minimum possible disruption to your farming practice and with the greatest build efficiency possible.

We look forward to a meeting with you in the coming weeks to discuss the project in greater detail" (emphasis added).

Landowner Agreements (30 November 2011)

12. On 30 November 2011, the Notice Parties entered into 'Landowner Agreements' with Eirgrid. With respect to wayleave 112, para. 4 of the Landowner Agreement stated:

"In return for unobstructed access to construct the said line and all associated works, the sum of ***€11,000*** *will be paid in the following stages:*

Payment	*Condition*	*Amount*
1.	*Paid at the time of access to the land*	*€5,000*
2.	*Paid on completion of the straight to conductor stringing stage*	*€3,500*
3.	*Paid on completion of the entire line*	*€2,500*
	Total	***€11,000***

13. Para. 4 of the Landowner Agreement with respect to Wayleave 113 stated:

"In return for unobstructed access to construct the said line and all associated works, the sum of €22,000 will be paid in the following stages:

Payment	*Condition*	*Amount*
1.	*Paid at the time of access to the land*	*€10,000*

2.	*Paid on completion of the straight to conductor stringing stage*	*€7,000*
3.	*Paid on completion of the entire line*	*€5,000*
	Total	***€22,000***

14. Paras. 6 - 8 of each Landowner Agreement stated that:

"6. This payment excludes land damage which shall be considered outside of this agreement.

7. The landowner will be entitled to the appropriate annual mast interference payment (including any arrears) in respect of the structures constructed on his/her land as part of the Arva-Shankill 2 110kv line if applicable.

8. Eirgrid and ESB will be permitted access to lands in the future in order to carry out inspections and maintenance on the lines. Any damage caused by future inspections or maintenance work will be compensated at the then rates."

15. There is no dispute about the fact that the Notice Parties received the aforesaid payments, totalling €33,000.00, from the Applicant and exhibit "MB4" to Mr Burke's 17 October 2019 affidavit comprises "*Cheque Acknowledgement Forms*" signed, on the 30 November 2011 and 27 November 2012, in respect of the relevant payments. The entitlement of the Notice Parties to receive these payments, outside of compensation pursuant to s.53 of the 1927 Act, is not in issue in these proceedings.

A brief chronology

16. Almost 6 years later, the Notice Parties submitted a claim to the ESB seeking compensation pursuant to section 53 of the 1927 Act. This comprised a claim of €32,750 for the "*Acquisition of Wayleave*" 112, plus a claim amounting to €48,000 for *"Injurious Affection to retained lands".* In addition, the sum of €5,000 was sought for "*Other losses arising from or incidental to the wayleave to include owners time in dealing with the Pre-reference/ Reference".*

17. In relation to wayleave 113, the sum of €11,650 was sought for the ""*Acquisition of Wayleave*", and a further sum amounting to €20,000 was claimed for "*Injurious Affection to retained lands".* €50,000 was sought for "*Loss of sites*" and a further €5000 was claimed for "*Other losses arising from or incidental to the wayleave to include owners time in dealing with the Pre-reference/ Reference".*

18. In all, €85,750 was sought in respect of Wayleave 112, and €86,650 was claimed in relation to Wayleave 113, giving a total of €172,400 claimed by way of a 23 May 2018 letter from Messrs Tuohy O'Toole, Estate Agents, Valuers and Valuation Surveyors ("TOT"). For the purposes of this judgment, the following brief summary of what occurred thereafter will suffice.

19. On 5 November 2018, application was made for the nomination of a property arbitrator and on 17 January 2019 Mr Paul Good (the "property arbitrator") was appointed.

20. On 22 January 2019, the property arbitrator gave directions and listed the matter for hearing on 24 and 25 April 2019.

21. On 8 February 2019 ESB sought an adjournment pending the determination of separate proceedings (ultimately decided, on 16 July 2021, by O'Moore J – see *Payne v ESB* [2021] IEHC 512 concerning flexibility of access or "FOA" payments).

22. On 16 February 2019, the application for an adjournment was declined.

23. On 17 February 2019, the property arbitrator deemed the Notice Parties claims sufficiently particularised.

24. On 14 March 2019, ESB delivered a formal Reply to the claim.

25. On 9 May 2019, the Notice Parties requested an adjournment to consider the FOA payments issue. The ESB also wrote to the property arbitrator, noting his position regarding FOA payments and requesting an adjournment if the issue was to be reopened.

26. On 10 May 2019, the property arbitrator wrote to the parties advising that he intended to proceed with the hearing.

27. On 15 May 2019, the Notice Parties delivered written submissions and the hearing commenced. At the conclusion of the hearing the property arbitrator gave liberty to the ESB to make written submissions.

28. On 12 June 2019, the ESB delivered written submissions.

29. On 8 July 2019, the property arbitrator issued his awards which are challenged in the present proceedings.

30. It is fair to say that there are three principal bases upon which the Applicants claim an entitlement to relief and these can be summarised as follows.

1. Infringement of fair procedures/Legitimate expectation

31. The first issue related to FOA payments and comprised a claim that the Respondent made final determinations contrary to the Applicant's legitimate expectation as to the approach the Respondent intended to take to the issue, in breach of fair procedures. On the evening before the hearing, the claim under this heading was abandoned. On the morning of the hearing, counsel for the Applicant explained that his client took this course in circumstances where a

decision of this court has rendered the underlying issue (concerning the deductibility of FOA payments) *nihil ad rem.* This was a reference to the decision by O'Moore J in *Payne v ESB* [2021] IEHC 512. The central issue in that case concerned whether FOA payments made to Mr Payne as outlined in a letter sent on behalf of EirGrid amounted to the payment of compensation pursuant to s.53. In construing the letter in question, in context, O'Moore J found that "*…the linkage between cooperation and the payment is absolutely clear"* and he went on to hold that "*It is not an advance payment of compensation for any loss he might suffer as a result of the exercise by the ESB of their statutory powers under the 1927 Act".*

32. It is clear from the decision in *Payne v ESB* that the outcome hinged on how the payments had been described in the relevant letter. O'Moore J explained this at paras. 41 to 43, as follows:

> "*41. The consequence of my decision is that Mr. Payne will receive both the compensation assessed by the Property Arbitrator and the sum of €66,000 paid to him by EirGrid. In the view of the ESB, that is a very generous payment. The ESB may well be right on this point. However, the payment made by EirGrid is one made to secure the cooperation of Mr. Payne. The ESB may have paid a lot for that cooperation, but the ESB has chosen to make these payments and on these terms.*
>
> *42. In their written submissions, Counsel for the ESB describe "these upfront payments of substantial sums of compensation […]" as having advantages for the landowner as well as for the ESB (paragraph 50 of the written submissions). Had the payments been so described in the relevant letter my decision may have been different. If this was an early payment of compensation it would indeed be advantageous to the landowner. However, that is not how it was so described.*
>
> *43. It would certainly have been open to the ESB to write (either directly or through any agent) to a landowner such as Mr. Payne offering payments of the same sort as were actually offered to him, but making it clear that these payments would be set against any compensation to which he was entitled. The letter could have pointed out the significant advantage to Mr. Payne of receiving these early payments, even if they were subsequently set against an award of compensation. Indeed, the ESB could have sweetened the offer to Mr. Payne by saying that, even if he pursued a claim for compensation and was awarded a smaller amount, the ESB will not look for a repayment of the difference between the money paid on the sum awarded. All of this could have been done. None of it was*."

33. Later, at para. 46, O'Moore J stated the following with respect to the source of the payments (public funds) and the impact of same, in the context of the manner described, when offered:

> *"46. There are a number of associated submissions made on behalf of the ESB. Firstly, it is stressed that the FOA sums paid are public funds, that ESB has already paid €1,917,000 in FOA payments on the Kinnegad / Mullingar 110 Kv line alone, and that ultimately these payments will impact on the cost of electricity. All of this is true. These considerations would*

have made it all the more important for the ESB, Atkins or EirGrid in offering these payments to ensure that they could properly have been set against any compensation payable…"

34. The fact that the hearing before me took place in the wake of the decision in *ESB v Payne* meant that it was conducted on the basis that the FOA issue (which had featured heavily in the pleadings and written submissions) was abandoned by the Applicant, and the following two core issues comprised the Applicant's case insofar as the trial was concerned.

2. Error of law – Injurious Affection compensation / devaluation of entire property on the basis of possible future access by ESB

35. The second issue concerns the application by the Respondent of devaluation percentages (10% and 5%, respectively) as regards the Notice Parties' claims. The Applicant contends that, in so doing, the Respondent erred in law by inter alia (i) failing to have regard for the statutory provision in S. 53 (5) and 53(9) of the 1927 Act which provides for compensation in the event of future access; (ii) awarding compensation for 'injurious affection' to the remainder of the landholding, in circumstances where no land was subject to a compulsory acquisition and the Notice Parties remain the full owners of all lands; and (iii) in circumstances where s. 68 of the Lands Clauses Consolidation Act, 1845 (the "1845 Act" - which provides a right to compensation in respect of lands injuriously affected by the execution of works) is not incorporated in the 1927 Act.

3. Lack of fair procedures – late introduction of additional claims

36. The third issue comprises a claim that, in deciding to allow a late amendment of the Notice Parties' claims, the Respondent acted in breach of fair procedures and failed to address, properly and lawfully, the requirements of the 1919 Act, in particular, S.5(2) thereof.

Submissions

37. As will become clear, a fundamental question arising in these proceedings is whether the 1927 Act incorporates a right to compensation for 'injurious affection'. This question is far from straightforward. Before proceeding further, I want to express my very sincere thanks to Mr Sreenan SC for the Applicant, and to Mr Bland SC for the Notice Party. Both made oral submissions with clarity, sophistication and skill. These supplemented detailed written submissions which were provided to the court. All were of great assistance, in particular, as regards the foregoing question. During the course of this decision I will refer to the principal submissions and to certain authorities which appear to me to be of most assistance in resolving the issues in dispute.

3 headings of loss

38. During the Hearing, counsel for the Applicant submitted that, in the "CPO" context (i.e. regarding Compulsory Purchase Orders) the common approach to the valuation of compensation is with respect to 3 headings, namely: (i) the 'take' (i.e. the land actually taken, compulsorily); (ii) disturbance; and (iii) injurious affection.

39. In the context of a wayleave, both sides accept that the Applicant does *not* acquire ownership of the title to the land across which the line is placed. Although there was some debate about the proper characterisation of the power enjoyed by the Applicant, such as the extent to which it created any interest in land and whether such interest could be disposed of (see s. 11 (4) of the Land and Conveyancing Law Reform Act 2009), the Applicant acknowledged that the invocation of the s.53 right involved what Mr Justice Feeney described in this court's decision in *Cooney v. Cooney* [ex tempore decision delivered on 27 May 2009] as being "…*the exercise of the burdensome right that the ESB acquired by statute*" (emphasis added).

40. The foregoing seems to me to be the significant point and, for the purposes of determining the issues in dispute in the present case, nothing would seem to turn on whether the exercise by the ESB of its 'section 53 powers' gives rise to a legal interest, whatever its proper description, which is, for example, capable of sale. On this issue, however, it seems uncontroversial to say that it is the ESB's interest, inasmuch as it is they who create it by exercising s.53 powers and it is they (or their nominee) who place the line across land. If it is an interest capable of being sold, it seems to be an interest for the ESB to sell, and I cannot readily see how any landowner could dispose of such an interest. However, the foregoing comments appear somewhat beside the point, given that it is common case that a "*burdensome right"* is created by the exercise of section 53 powers.

Cooney v Cooney

41. In *Cooney v Cooney*, the ESB entered upon the lands of the deceased and placed pylons and an electric line on same, pursuant to its section 53 powers. Prior to the landowner's death, and before entering onto this land, the ESB served the appropriate wayleave notices. The dispute concerned whether or not the right of the landowner in question to receive compensation passed with the lands. Feeney J was satisfied that it did not, holding that "*the right to compensation became the property of the deceased at the time that the works were carried out*" and going on to hold that "*the deceased could have sold the lands together with the right to receive the unquantified compensation, but that would have required a separate transfer of the right to receive such compensation*".

42. Of more relevance for present purposes is the learned judge's analysis of what I will refer to in this judgment as the 'statutory scheme' or the 'scheme' (namely, the scheme comprising of the 1927 Act; the 1919 Act; and the Rules made thereunder). The analysis by Feeney J (between pages 5 and 7) was in the following terms:

> "*The scheme provided for under* ***the act gives the entitlement to the ESB to erect lines and pylons but the ESB does not acquire any ownership and the lands remain the property of the owner****. This court must therefore have regard to the precise legislative framework and the process laid down in statute.*
>
> *In this case the ESB operated under the amended act which allowed and permitted them to enter on to the deceased's land and to place electric pylons and electric lines thereon. The*

act permitted the course of action without reference to the consent of the owner and permitted such work to be carried out prior to the compensation being ascertained or paid. That is what happened in this case. The procedure laid down in the legislation does not require the owner to execute a deed of wayleave or any instrument to give effect to the right of the ESB to lay an electric line or erect a pylon. Such a right is acquired by statute. It is the operation of the provisions of the statute which entitles the ESB to enter and carry out works.

As indicated above, the original un-amended 1927 act did not provide for any independent assessment of compensation. In the case of the ESB v Gormley, the Supreme Court in determining that the absence of a procedure for compensation which could be independently assessed rendered the act unconstitutional identified that the statutory right acquired by the ESB to lay wires and placed pylons was a burdensome right over land protected by the constitutional guarantee to private property. As stated by Finlay CJ (at p. 500) the power given to lay wires and direct pylons under the 1927 [Act] as amended:

> *'…must be interpreted as granting to the plaintiff (the ESB) a power compulsorily to impose a burdensome right over land.*
>
> *That is, in the instant case, the right to place below and above the land of the defendant three large structures connected by wires carrying electricity; to keep them there permanently, if necessary, and to enter the lands from time to time for the purposes of repairing and maintaining them.*
>
> *The results of the exercise of that power are, firstly, that the use of the land for agriculture is permanently interfered with to a greater or lesser extent, depending on whether, at any time, the area in which the masts are situated is used for grazing or tillage; secondly, that in the case of any particular landowner who wished to erect a building or other structure on the portion of the land occupied by one of those masts he would be prevented from doing so; and thirdly, that in the case of this defendant's land, at least, there is major permanent damage to the amenity of the lands surrounding the house.'*

The 1927 act was amended to provide for independently assessed compensation. The compensation is in respect of the exercise of the burdensome right that the ESB acquired by statute. The compensation is in respect of the exercise by the ESB of its statutory powers to place electric lines and/or pylons on the land. The act requires the owner to permit such lines and/or pylons on his land and provides compensation for such works. It is a once off payment for having the line and pylons on his land. The owner remains the full owner of the lands and the ESB acquires no ownership. The entitlement to compensation arises out of the carrying out of the works and the owner becomes entitled to compensation when such works are carried out. If the lands are sold or transferred thereafter by the owner, the land is sold or transferred with the ESB lines and/or pylons thereon and the new owner takes the lands

with such structures and without any right to compensation for the continued presence of the lines or pylons on the lands. The payment of compensation is a once off payment at the time of the works and not a continuing payment for the presence of the lines and/or pylons. ***The scheme provided for in the act is fundamentally different from the scheme providing for compulsory purchase which provides for the purchase of lands and compensation to be paid for such purchase.***

The court is satisfied that the scheme under the 1927 legislation, as amended, cannot be equated to a compulsory purchase regime provided for in legislation" (emphasis added).

43. Although I will refer to the case in greater detail later in this judgment, in *ESB v Gormley* [1985] IR 129, the Supreme Court granted a declaration of unconstitutionality with respect to section 53 (5) of the 1927 Act, as it then was. Section 53(5) in its current form represents a legislative response to the decision in *Gormley* and creates a *right* to receive compensation (the pre-existing position having involved *ex gratia* payments made by the ESB to landowners). As the headnote to the reported decision states, the Supreme Court in *Gormley* held: *"2. That the power to lay an electricity transmission line compulsorily was a power to impose a burdensome right over land, which in this instance was a requirement of the common good."*

'Corridor'

44. The term 'corridor' of land featured in the evidence given by both sides, during the hearing which took place before the Respondent. In the manner discussed later in this judgment, the Respondent also employed the same term 'corridor' in his Awards.

45. The term 'corridor' recognises the reality that in addition to (i) the width of the line itself; (ii) infrastructure, such as (in an 'overhead line' example) pylons or poles to support the line, would be required along the route of the line; and (iii) were development contemplated, a Planning Authority might well require that no structure be erected within a minimum distance either side of the direct route of the line. A combination of such factors produces the reality of a 'corridor' of land, the ownership of which does not change but the use of which may well be adversely affected. Whilst I will discuss the topic again presently, it seems to me that the *lands* across which a line is *placed* by the ESB in the exercise of s.53 powers, comprise the *corridor* of land in each particular case.

46. These proceedings do not constitute an appeal and, therefore, this court is not concerned with the merits of the Respondent's decision. However, with a view to giving some idea of the dimensions of a corridor, during evidence before the Respondent, reference was made, *inter alia*, to a corridor size of 46m (i.e. 23 metres either side of the overhead line).

Compensation for (i) the 'take' (not in dispute)

47. Although title to land is *not* acquired by the Applicant in a s.53 scenario, the ESB acknowledges that, under the relevant statutory scheme, the Notice Parties were entitled to compensation for

(i) the '*take*' (being the diminution in value of the relevant '*corridor*' of land corresponding to the route taken by the electric line across the land and incorporating a distance either side of the line).

Compensation for (ii) disturbance (not in dispute)

48. The Applicant also acknowledges that the Notice Parties are entitled to compensation for (ii) '*disturbance*'.

Compensation for (iii) injurious affection (in dispute)

49. Whilst there is no dispute as to the Notice Parties' entitlement to be compensated for (i) and (ii) they also contend that they have an entitlement to compensation for (iii) 'injurious affection'. Whilst the Notice Parties assert that their entitlement to compensation for injurious affection does *not* depend upon legislation, it is useful at this juncture to look at the statute which introduced the term 'injurious affection'.

The 1845 Act

50. Section 63 of the 1845 Act states:

> *"In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise* ***injuriously affecting*** *such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith*" (emphasis added).

51. In light of this provision, it seems fair to say that the essence of 'injurious affection' is a claim to be entitled to compensation, not only for the value of land "*purchased or taken*" from a landowner, but to *other* lands, arising from the exercise of the power to purchase.

52. In "*Compulsory Purchase and Compensation in Ireland; Law and Practice*" [Galligan & McGrath; Bloomsbury Professional; Second edition; 2013] the learned authors state, at para. 30.48, that:

> "*The right to* ***compensation for injurious affection given by the Lands Clauses Consolidation Act 1845, S 63 is restricted to cases where the injurious affection results from the exercise of statutory powers on lands acquired*** *from the claimant. We must look to s.68 for the right to compensation for injurious affection where no lands are acquired from the claimant, or where the lands taken are not 'held with' the lands affected*" (emphasis added).

53. Section 68 of 1845 Act provides:

> "*If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or* ***injuriously affected by the execution of the works****, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith… such party*

may have the same settled either by arbitration or by the verdict of a jury as he shall think fit…" (emphasis added).

No reliance by the Applicant on the 1845 Act

54. Before proceeding further, it should be noted that submissions made during the hearing by Counsel for the Notice Parties, on the topic of the 1845 Act (and s.68 in particular), included the following:

"ESB's reliance on section 68 of the Land Clauses Consolidation Act of 1845 is wholly misconceived and, in my respectful submission, I find it baffling to see how it is relevant";

"…it is exquisitely difficult, if not impossible, to make a successful claim under section 68";

"…I haven't made a claim under Section 68. I don't think I could possibly make a claim under section 68. You can't make a claim under section 68 for the exercise of a statutory right on your land. It is for the impact of injurious effect on your land as a result of public works outside of your land".

55. The Notice Parties assert that they do *not* have to rely (and they make explicit that they do *not* rely) on the 1845 Act (be that ss. 63 or 68) as a basis for this asserted entitlement. It seems fair to say, however, that the *nature* of their asserted right reflects that right set out in s.63 of the 1845 Act.

56. Before leaving the 1845 Act for the time being, it seems uncontroversial to say that (i) the very term 'injurious affection' and (ii) the right to compensation for injurious affection were introduced by the 1845 Act, i.e. they are creatures of statute, created by legislation, as opposed to arising otherwise.

The 1927 Act

57. Section 53 (1) sets out the Applicant's statutory power to place electric lines over land, in the following terms:

"*The Board and also any authorised undertaker **may** subject to the provisions of this section and of regulations made by the Board under this Act **place** any **electric line** above or below ground **across any land** not being a street, road, railway, or tramway*" (emphasis added).

58. Section 53 (2) gives the Applicant the power to attach fixtures to support an electric line or apparatus, whereas s.53 (3) requires notice to be given. As mentioned earlier, it is common case that notice was given and I previously quoted the text of wayleave 112. Section 53 (4) concerns a situation where consent is given within 7 days of service.

Compensation

59. Section 53(5) goes on to provide the following:

"*If the owner or occupier of such land or building fails within the 7 days aforesaid to give his consent in accordance with the foregoing subsection, the Board or the authorised undertaker*

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

60. Section 53 (9) of the 1927 Act provides:

"*Where the Board or an authorised undertaker is authorised by or under this section to place or retain any electric line across any land or to attach or retain any fixture on any building the Board or such authorised undertaker (as the case may be)* ***may at any time enter on such land or building for the purpose of placing, repairing, or altering*** *such line or such fixture or any line or apparatus supported by such fixture*" (emphasis added).

61. The aforesaid wording in s.53(5) constitutes the amendment made by the Oireachtas in response to the Supreme Court's decision in *Gormley*. The Acquisition of Land (Assessment of Compensation) Act 1919 as amended (the "1919 Act"), which is referred to in S.53(3), was already in place and provided a mechanism for the determination of compensation with respect to compulsory purchases by the State. It is useful to look at its terms.

The 1919 Act

62. The preamble to the 1919 act describes it as:

"*An Act to amend the law as to the Assessment of Compensation in respect of Land acquired compulsorily for public purposes and the costs in proceedings thereon*" (emphasis added).

63. To place an electric line across land is *not* to acquire land compulsorily. Despite this distinction, the legislature decided, when enacting the 1927 Act, to use the existing 'architecture' of the 1919 Act for the assessment of compensation payable in respect of the use by the ESB of its s.53 powers.

64. Notwithstanding the fact that the 1919 Act was introduced to amend the law concerning the assessment of compensation in relation to land *compulsorily purchased* for public purposes, it seems to me that the legislature's decision to use the mechanism of the 1919 Act for the purpose of calculating compensation payable to landowners as a result of the exercise by the ESB of powers pursuant to the 1927 Act did not, however, 'convert' what was and remains (i) the ESB's power to place an electric line *across land,* into (ii) the *acquisition of land* by the ESB. Hence principles which might be widely accepted as applying to "compensation" in the CPO context, do not automatically apply to what is a materially different context.

65. In its amended form, Section 1(1) of the 1919 Act provides the following:

"Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local public authority, ***any question of disputed compensation****, and, where any part of the land to be acquired is subject to a lease which comprises lands not required, any question as to the apportionment of the rent payable under the lease,* ***shall be referred to and determined by the arbitration of a property arbitrator*** *nominated for the purposes of such reference and determination by the Reference Committee in accordance with the rules made by the reference committee under this section"* (emphasis added).

66. The foregoing method for identifying a property arbitrator replaced original wording which referred to the "…*determination by the arbitration of one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with the rules made by the Reference Committee under this section*." Nothing turns on that issue for the purposes of this decision.

Rules

67. Section 2 of the 1919 Act concerns "*Rules for the assessment of compensation*" and provides the following:

"*S 2.* ***In assessing compensation****, an official* ***arbitrator shall act in accordance with the following rules****:—*

(1) No allowance shall be made on account of the acquisition being compulsory:

(2) The value of land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise: Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant:

(3) The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority: Provided that any bonâ fide offer for the purchase of the land made before the passing of this Act which may be brought to the notice of the arbitrator shall be taken into consideration:

(4) Where the value of the land is increased by reason of the use thereof or of any premises they are on in a manner which could be re-strained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account:

(5) Where the land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbitrator is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement:

(6) The ***provisions of Rule (2) shall not affect the assessment of compensation for*** *disturbance or* ***any other matter not directly based on the value of land***" (emphasis added).

68. The mandatory term "*shall*" is employed in s.2. In other words, the property arbitrator, in assessing compensation payable for the exercise by the ESB of its s.53 powers, is mandated to do so in accordance with these Rules. In addition to preserving claims for 'disturbance' (being the second of the three heads of claim in the CPO context, the first being for the 'take') Rule (6) of s.2 explicitly preserves compensation claims "*not directly based on the value of land*" (emphasis added). Injurious affection claims *are* squarely based on the value of land. Thus, the existence of an injurious affection claim seems to me to be entirely incompatible with a mandatory rule in the 1919 Act, which comprises part of the relevant statutory scheme.

Injurious affection

69. As mentioned previously, a key submission made on behalf of the Notice Parties is that there is no need for them to rely on the 1845 Act and this stance is articulated in paragraphs 7.7 and 7.8 of their Statement of Opposition, as follows:

"7.7 The reference to compensation for injurious affection for public works under section 68 of the Lands Clauses Consolidation Act 1845 is misconceived and that provision is irrelevant to the matters before the Respondent.

7.8 Injurious affection is the valuation term for the devaluation of retained lands by reason of the acquisition. Where an electric line is placed on land, the term describes ***the devaluation of the remainder of the land*** *by reason of the proximity of the line"* (emphasis added).

70. It is clear from the foregoing that, in addition to seeking compensation for (i) the '*take*' (being lands across which the line is placed); and for (ii) *disturbance*; the Notice Parties also claim an entitlement to compensation for (iii) the "*remainder*". It seems to me that the *remainder* is, in fact, *other* lands (and I shall use this latter term in this judgment) i.e. lands across which *no* line is placed.

71. Rather than having to rely on the 1845 Act, to make this 'injurious affection' claim in respect of other lands, the Notice Parties submit that 'injurious affection' is an aspect of compensation payable to them under the 'principle of equivalence' i.e. that the landowner be 'made whole' by receiving compensation for *every* aspect of loss under all 3 headings which I referred to previously, namely (i) for the 'take'; (ii) for disturbance; and (iii) for injurious affection to retained/other lands. This principle of equivalence, contend the Notice Parties, underpins all approaches to valuation, whether in respect of lands compulsory purchased, or the exercise by the Applicant of its section 53 powers.

72. The Notice Parties contended that, regardless of the fact that the 1845 Act was not incorporated into s.53, a proper interpretation of s.53(5) is that it requires the payment of "*unrestricted, unlimited compensation*", subject to the 1919 Act, an aspect of which, *per* the principle of equivalence, is to pay injurious affection compensation (i.e. loss concerning other land outside the 'take') in addition to compensation for the 'take' and for disturbance. This was explained with sophistication, skill and force by Counsel for the Notice Parties, including in the following exchange in response to my questions about what the Notice Parties contend to be the *nature* of their injurious affection claim (i.e. its 'life' outside of the 1845 Act and its existence as an entitlement even if not referred to, explicitly, in legislation):

> **"MR. JUSTICE HESLIN:** *That's very helpful, Mr. Bland. I have just one question, which I'll be putting to Mr. Sreenan as well, and this is doubtless due to how obtuse I am. But as I understand the Applicant's case to be, well an element of it, injurious affection, the Applicant says, is a claim found in the 1845 Act and, so the Applicant's argument goes, if the 1845 Act is not explicitly incorporated into the present statutory scheme, and by that I mean the 1927 Act and the 1919 Act, then there is no injurious affection claim.*
>
> **MR. BLAND:** *Hmm.*
>
> **MR. JUSTICE HESLIN:** *If I'm correct in the understanding of that being the position adopted by the Applicant,* ***what do you say is the nature of injurious affection as a claim? In other words do you say it has a life outside of a creation of statute? Do you say it's not simply a creature of statute? In other words, what do you say is its independent existence?***
>
> **MR. BLAND***: No, Judge, that is the question perhaps in that part of the case, because it seems to be the greatest emphasis was placed by Mr. Sreenan on the 1845 Act.* ***The term "injurious affection" entered into CPO law with the Act of 1845, which basically was the introductory Act for the law of compulsory purchase and compensation. And as a description for the impact on retained land being land other than the land take, it has stuck. It is a little bit unfortunate that it has stuck so rigidly because it gives rise to the argument that it cannot arise outside of where the Act of 1845 is incorporated****. I say, Judge, where the Act of 1845 is incorporated, such as the most frequently exercised acquisition provision, which is the Housing Act of 1966, the entitlement to injurious affection can be found to commence with the express statement that it is available in the Act of 1845. That is not to say, as I think is stated, you can find it on a close reading of McKone, that is not to say that the entitlement to injurious affection cannot be claimed where the Act of 1845 is not incorporated. I say, Judge, that injurious affection, what we call injurious affection is an aspect of full compensation under the principle of equivalence as can be seen in the reliance on that principle in the cases from the other jurisdictions that I have opened all relating to statutory electricity wayleaves.*

In all of those cases, injurious affection can grant it as a heading of compensation, because they all flow from an unrestricted right to compensation, the word "compensation". I say, Judge, that if you have a bald right to compensation, as in some of those Acts, and as in Section 53(5), compensation in respect of the exercise of statutory powers, I say that that includes all of the headings, insofar as they arise, in traditional valuation terms because otherwise there would not be full compensation. I say, Judge, that ***the word "compensation" imports injurious affection. If the legislature intended to confer a right to compensation for only the value of the land-take, or only for disturbance or for a lesser amount than full injurious affection, then the provision should state so.***

I say that if you need in any case to determine whether injurious affection arises, you go to the compensation provision and you see if that is consistent with or inconsistent with injurious affection. ***It is put beyond doubt, when the Act of 1845 is incorporated, but it does not depend on the incorporation of the Act of 1845.*** *If that was the case, if it was the case that it depended on the incorporation of the Act of 1845, and that it only arose in the event of the acquisition of an interest, well then we have my example of the case of the right-of-way that is being extinguished leaving my land landlocked, or we have the example of a case of enormously valuable development land that is sterilised because of an electric line going through it.*

In short, Judge, the Act of 1845, ***the fact that the Act of 1845 is not incorporated in Section 53(5) does not take away from the fact that the obligation of the acquiring authority is to pay unrestricted, unlimited compensation subject to the 1919 Act****, and the only limitations on compensation are that as developed in the jurisprudence, and that in the Act, and we know that, Judge, because that's what the Supreme Court required for in Gormley.*

MR. JUSTICE HESLIN: *Thank you very much indeed. That's very helpful*" (emphasis added).

73. Considerable emphasis is laid by the Notice Parties on the use of the word "*compensation*" in the phrase in s. 53: "…*subject to the entitlement of such owner or occupier to be paid* ***compensation*** *in respect of the exercise by the board or authorised undertaker of the powers conferred by this subsection…"* (emphasis added). The gravamen of the submission made with such skill and force by counsel for the Notice Parties is that it cannot be compensation unless *every* loss suffered by a landowner, irrespective of the heading under which it arises, is paid for including loss of value to *other* lands (i.e. lands which are not directly under, or above, the route of the electric line or part of a 'corridor' of land which is 'sterilised' in the sense that building on the corridor is prohibited by reason of proximity to the line).

74. Nowhere in s.53 is it provided that compensation for the exercise of the ESB's 's.53 rights' is to be assessed with reference to the Lands Clauses Consolidation Act 1845 (the "1845 Act"). It is

not in dispute that the 1845 Act is also known as the "Land Clauses" Act. As previously noted, a claim for '*injurious affection*' appears to have been a creation of the Act of 1845, in the context of compensation for compulsory purchases. The preamble to the 1845 Act describes it as:

> "*An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the taking of Lands for Undertakings of a public nature*".

75. Section 1 begins:

> "***This Act shall apply to every undertaking authorised by any Act which shall hereafter be passed and which shall authorise the purchase or taking of lands for such undertaking,*** *and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or accepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together there with as forming one Act.*
>
> *And with respect to the construction of this Act and of Acts to be incorporated therewith, be it enacted as follows*" (emphasis added).

76. In light of: (i) the conclusion by the Supreme Court in *Gormely* that s.53 gave the ESB the power to "*compulsorily impose a burdensome right over land*" (which, seems to me, to be materially different to acquiring or taking lands); (ii) the analysis by Feeney J in *Cooney v Cooney* of the statutory scheme, *post* the amendment of s.53, (including his conclusions that "*the ESB does not acquire any ownership and the lands remain the property of the owner"* and that the scheme *per* the 1927 Act "*…is fundamentally different from the scheme providing for compulsory purchase which provides for the purchase of lands and compensation to be paid for such purchase"*); and (iii) the plain meaning of the provisions of s.53, I take the view that, in exercising its s.53 powers, the ESB is *not* involved in "*…the purchase or taking of lands…".* Thus, *prima facie*, the 1845 Act has no application in the s.53 context. I am fortified in this view by the following.

S. 45 of the 1927 Act (incorporating the 1845 Act in the CPO context)

77. As can be seen from section 1 of the 1845 Act, *had* s.53 involved the purchase or taking of lands by the ESB (and for the foregoing reasons, I am satisfied it does *not*) the provisions of the 1845 Act would be incorporated into the 1927 Act "*…save so far as they shall be expressly varied or accepted by…*" the 1927 Act. In the manner examined, there is no express acceptance in s.53 of the provisions of the 1845 Act. Furthermore, it seems to me that this Court is entitled to hold that the legislature made a deliberate choice *not* to permit the calculation of compensation pursuant to the exercise of s.53 powers, with reference to the 1845 Act. I take this view because, in stark contrast to the position with respect to s.53, the legislature plainly made the conscious choice to *include* the 1845 Act (described as the "Land Clauses Acts") in s.45 of the 1927 Act.

Under the heading of "*Compulsory Acquisition of Land, et cetera, by the Board*", s.45 of the 1927 Act begins:

"(1) If and whenever the Board thinks proper to acquire compulsorily any land or to acquire or use compulsorily any easement or other right over land or any right of impounding, diverging, or abstracting water for the purpose of the exercise of any of the powers or the performance of any of the duties or functions conferred or imposed on it by this Act, the Board may by special order declare its intention so to acquire such land or so to acquire or use such right, and every such special order shall operate to confer on the Board full power to acquire compulsorily the land or to acquire or use compulsorily the right mentioned therein under and in accordance with this section…

(2) The Board shall not make a special order under this section in relation to the compulsory acquisition of a right of impounding, diverting, or abstracting water without previous consultation with the Minister for Fisheries.

(3) The Board shall not make a special order under this section in relation to the compulsory acquisition of a right of impounding, diverting, or abstracting water in or from any canal without previous consultation with the Minister.

(4) Before making a special order under this section, the Board—

(a) shall deposit and keep open for inspection in its principal office or some other suitable place such plans, specifications, and other documents as will show fully and clearly the land or right intended to be acquired or used by virtue of the order, and

(b) shall give notice, in such manner as it may consider best adapted for informing persons likely to be affected by the order, of its intention to consider the making thereof and of the manner in which representations and objections in respect of the order may be made, and

(c) shall, if it considers it expedient so to do, cause a public inquiry to be held in regard to the making of the order."

78. For reasons already explained, it seems to me that the compulsory acquisition scenarios addressed in section 45 are materially different to the exercise by the ESB of wayleave powers pursuant to section 53. Consistent with such a distinction (and recalling that the 1845 Act was *not* included as part of the architecture for valuing compensation payable under section 53) section 45(5) goes on to provide that it *is* included here, in that s.45(5) states:

*"A **special order** made under this section **may incorporate** –*

(a) the Acquisition of Land Assessment of Compensation Act 1919, with the modification that the expression 'public authority' shall include the board or a holder of an

authorisation under section 16 of the Electricity Regulation Act 1999 as the case may be, and

(b) *the **Lands Clauses Acts** so far as same are not inconsistent with the said acquisition of Land Assessment of Compensation Act 1919 or with this section"* (emphasis added).

Deliberate exclusion

79. In other words, we are not dealing with the situation where the legislature simply made no mention of the 1845 Act when enacting, and amending, the 1927 Act. On the contrary they decided to include it with reference to s.45, but it was not included with regard to s.53. In light of the above, I take the view that the deliberate *inclusion* of the 1845 Act, with reference to s.45, allows for a finding that there was a deliberate *exclusion* of the 1845 Act, with reference to s.53.

McKone Estates v Kildare Co. Council

80. In *McKone Estates Ltd v. Kildare County Council* [1984] ILRM 313, O'Hanlon J was dealing with a consultative case stated by an arbitrator, against the backdrop of s.68 of the Local Government (Planning and Development) Act 1963, which provided: *"A claim under this Act for payment of compensation shall in default of agreement, be determined by arbitration under the Act of 1919 in the like manner in all respects as if such claim arose in relation to the compulsory acquisition of land, but subject to the proviso that the arbitrator shall have jurisdiction to make a nil award."*

81. O'Hanlon J proceeded to set out the competing arguments and his conclusion on the issue as follows:

"*S. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, lays down a number of rules to be applied by an official arbitrator in assessing compensation under the Act. Rule (2) provides that the value of land shall, generally speaking, be taken to be the amount which a willing seller might expect to realise on the open market, but Rule (6) goes on to say that 'the provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land'.*

The Rules comprised in s. 2 of the Act of 1919 have been added to by s. 69 of the Planning Act of 1963 and the 4th Schedule of that Act. One of the added Rules is Rule (16) which provides that in the case of land incapable of reasonably beneficial use which is purchased by a planning authority under s. 29 of the Act of 1963, the compensation shall be the value of the land exclusive of any allowance for disturbance or severance. The argument put forward on behalf of the developers was that as claims under s. 29 were expressly deprived of a disturbance or severance factor, it should be inferred that it was to be included in respect of claims under s. 55; furthermore that Rule (6) in s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919 enables such a claim to be brought in when compensation is to be assessed in accordance with the provisions of that Act.

The contrary argument put forward by Mr Geoghegan was to the following effect. ***The Rules contained in s. 2 of the Act of 1919 do not confer any new right of compensation but merely provide the procedure for measuring the compensation to be awarded under the provisions of some other statute. Where a statutory provision for the award of compensation in respect of acquisition of land or diminution of an interest in land incorporates the provisions of the Land Clauses Acts this, in turn, gives rise to an entitlement to claim for injurious affection to other lands, but unless the statute creating the right to receive compensation does so expressly or by incorporating other statutory provisions which do so, such right is not created merely by incorporating the procedures laid down by the Act of 1919****.*

It appears to me that this is a correct reading of the situation*. The position is stated as follows in Halsbury's Laws of England , 3rd Edn. Vol. 10 at p. 147:*

> *'When part of an owner's land is taken, he may suffer damage in consequence of the injury thereby caused to his remaining land. It may, for instance, be cut into two parts, as when a road is made through an estate, or the alteration in its size or shape may render it less suitable for the purposes to which it is or could be applied …*
>
> *Whether the owner is entitled to compensation for this damage depends, as in the case of compensation under other heads, on the provisions of the special Act and other enactments incorporated therewith. Under the Lands Clauses Acts the owner of land taken is entitled to compensation for damage sustained by him by reason of such severing, or otherwise injuriously affecting his other lands.'*

And at pp. 96–98, dealing with the purpose and effect of the Acquisition of Land (Assessment of Compensation) Act, 1919:

> *'That Act provided a set of rules for the assessment of compensation, which the official arbitrator was required to follow, whether the statute authorising the compulsory purchase was passed before or after 19th August 1919.*
>
> *Rule 2 reversed the old sympathetic hypothesis of the unwilling seller and willing buyer which underlay judicial interpretation of the Lands Clauses Acts, and the purpose of rule 6 is generally to prevent misconception as to the scope of the alteration effected by rule 2 in the previous judicial basis for ascertaining the market value to the owner of the land sold and in particular to forestall the argument that a willing seller must in law be presumed to have moved out voluntarily to give vacant possession to the buyer. Rule 6 confers no new right to compensation nor does it purport to give statutory validity to every pre-1919 judicial determination on the subject of disturbance.'*

I conclude therefore, that where compensation for injurious affection of other lands is claimed, the jurisdiction to award compensation on such basis must be sought elsewhere

than in the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, and it does not appear to me that it arises in relation to a claim for compensation under s. 55 of the Act of 1963 and I can find no indication in that section or elsewhere that the provisions of the Lands Clauses Acts are to apply in relation to any such claim. This means that, in my opinion, the second question in the case stated should be answered in the negative" (emphasis added).

82. I find myself unable to agree with Counsel for the Notice Parties who submits that a "close reading" of the decision in *McKone* supports his clients' contention that an injurious affection *can* be claimed where the 1845 Act is *not* incorporated in the statute which provides the right to compensation. The passage which I have highlighted seems to me to allow this court to hold that, without the *explicit* incorporation of the 1845 Act into s.53, the Notice Parties do *not* have a valid route to seek compensation for injurious affection.

83. The decision by the legislature *not* to incorporate, in s.53, recourse to the 1845 Act (which, of course, *created* the statutory entitlement to claim for 'injurious affection', entitling a landowner to claim compensation in respect of *other* lands in the CPO context) seems to me to render untenable the proposition that a 'free standing' right (not dependent on the 1845 Act) to be compensated for injurious affection was, nevertheless, incorporated into s.53 of the 1927 Act. I take this view for the reasons already expressed *and* based on a literal interpretation of the words used in the legislation. For the same reasons, I cannot accept that there is a 'free standing' right to compensation, akin to that provided in s.63 of the 1845 Act (but not dependent on the 1845 Act) which, although not explicitly stated in s.53, can nonetheless be derived from the proper interpretation of the words used.

84. In other words, for the Notice Parties to have a valid claim for injurious affection in respect of *other* lands (i.e. outside of the 'take' comprising the *corridor* of land across which the electric line is placed) it seems to me that they must be able to rely on the 1845 Act. However, the 1845 Act was not incorporated into section 53. Furthermore, the decision in *McKone* makes clear that the 1919 Act does not, of itself, provide any jurisdiction for an expert to award compensation for injurious affection. Indeed, in the manner previously examined, Rule (6) of s.2 of the 1919 Act did *not* preserve claims for compensation based on the value of land, whereas a claim for injurious affection *is* based on a diminution in the value of retained land (i.e. land *outside* the corridor, being *other* land across which the line is not placed).

85. In short, even if it has, to date, been common practice for injurious affection claims with respect to land outside the 'corridor' to be made/paid, the decision in *McKone* fortifies me in the views expressed in this judgment to the effect that (i) a claim for injurious affection does not have an independent existence outside of the 1845 Act, and (ii) is not a claim which the Oireachtas authorised by means of the statutory scheme comprising of s.53 of the 1927 Act and the 1919 Act/Rules.

86. I have conducted the exercise of statutory interpretation in accordance with well-established principles (in particular, the 'literal rule' of construction). However, before looking at those principles in some detail, and applying them in the present case, it seems useful at this juncture to 'sketch out' a theoretical scenario, in order to examine the issues with reference to a practical example.

Theoretical scenario

87. A landowner has farmland in a particular folio (to use registered land in this scenario). It is used for grazing. The ESB, in exercise of 'section 53 powers', place a line across the land. This involves erecting a number of poles to support the line which passes across same. There is no dispute between the parties that the 'corridor' of land created by the placing of the line comprises of 25 metres 'left' and 25 metres 'right' of the direct route taken by the overhead line (i.e. a corridor width of 50 metres). In this example, the width is a function of how close to the line the local planning authority would permit any development. Both parties to these proceedings agree that, in such an example, the landowner is entitled to compensation in respect of the diminution in value of the 'corridor' of land representing the route of the line as well (as compensation for disturbance).

88. Before proceeding further with this notional scenario, it seems worth observing that the ESB, in furtherance of the common good, will be involved in placing a line which potentially crosses multiple folios, which may be big or small, long or short. Indeed, it seems fair to say that the length of the corridor through each separate folio will, in reality, be something of an 'accident of history' i.e. it will depend on issues such as previous sub-divisions of larger plots, previous transfers of ownership of land, and the configuration of various landholdings, all being things outside the ESB's control (and a *fait accompli* before any line is placed across such multiple landholdings as may happen to represent the route). Similarly, the extent to which a particular landowner (a) owns land immediately outside of the corridor but within the *same* folio; (b) owns land immediately outside that corridor but held on a *different* folio, whether exclusively or jointly owned with another party; and (c) whether the land immediately adjoining the corridor is in the ownership of a different person or legal entity, will also be accidents of history (yet, these realities could potentially be of significance if the right to compensation under s.53 includes a claim for injurious affection as regards other lands, outside the corridor).

89. In the foregoing scenario, ESB accept that, if the land comprising the corridor had development potential, compensation would need to take this into account. In other words, the diminution in value of lands comprising the corridor would be greater for lands with development plans or potential than if land use was limited to, say, grazing, and on the ESB's case, the proper construction of s.53(5) would require the payment of this increased compensation. A significant point of difference between the parties is that, on the case made by the Notice Parties, if a property arbitrator, regardless of whether planning permission had been sought or granted, were to come to the view that a theoretical purchaser of an, as yet, unbuilt house located on lands *outside* the corridor was potentially willing to pay less for such a house as a result of the presence

of the line on lands not included in the 'plot' which such a theoretical purchaser might acquire (e.g. because the view from the unbuilt house would include the line which, prior to the works under s.53, did not appear on the landscape) the ESB is liable to pay the landowner such compensation as the valuer might assess for this aspect.

90. The principal said by the Notice Parties to underpin this entitlement is that of injurious affection to lands outside the corridor. To give this example is not to suggest that such loss is not known to valuation experts. Rather, it is to highlight that this is loss of an indirect, not direct type, as regards the placing of a line across land. I take this view because, first, it relates to *other* land across which no line is placed. Second, it is calculated on the basis of *future* scenarios as regards development potential of other lands (as opposed to the situation in *Gormley,* where there was an impact on the amenities of an *existing* Georgian manor house on a large riverside estate).

Legislative interpretation

91. At this point it also seems appropriate to make reference to certain well-established principles of statutory construction. What is commonly described as the 'literal rule' is the primary rule of statutory interpretation. In other words, the basic principle is that words used in legislation should be given their ordinary and plain meaning. Section 5 of the Interpretation Act, 2005 (the "2005 Act") which relates to *"Construing ambiguous or obscure provisions, etc."* does allow an exception to the literal approach, but this is only where a literal interpretation would defeat the intention of the legislature. Another well-established principle is that legislation "*be construed according to the intention expressed in the Acts themselves"* [See *Howard v. Commissioners of Public Works* [1994] 1 IR 101, Blaney J. (at 151-153) where Blaney J. quoted with approval from *Craies on Statute Law* (7th Edn, 1971, at 65)].

92. Whilst recognising that the primary approach to statutory interpretation is the literal rule, McKechnie J, in the Supreme Court's decision in *CM v. Minister for Health and Children* [2017] IESC 76, stated the following (from para. 57):-

> *"[57] As might be obvious, if the objective intent of parliament is self-evident from the ordinary and natural meaning of the words or phrases used, then the task is at an end, and the court's function has been performed. Whilst it has long been said that the words themselves, in their plain meaning, best declare such wish, that and multiple other similar expressions must be properly understood. I would therefore add the following, as being part of and complementary to this primary approach to legislative construction. The Court may:*
>
> *(i) Look at any legislative history of relevance; indeed, in D.B., Geoghegan J. felt that the non-statutory scheme established in December 1995 was '…for all practical purposes a legislative antecedent and part of the [1997 Act's] legislative history' (p. 58).*
>
> *(ii)* ***Consider the subject matter being dealt with, the provisions put in place for that purpose, and the harm, injury or damage – the legislative objective – which the same were intended to address****.*

What Lord Blackburn said as far back as 1877 remains as apt today as when it was first stated:

> *'The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to* ***determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used, and the object in view****.'*
>
> *(Direct United States Cable Company v. Anglo-American Telegraph Company (1877) 2 App. Cas. 394).*

In 1953, Lord Goddard C.J. in R v. Wimbledon Justices, ex parte Derwent [1953] 1 Q.B. 380 stated that:

> *'…the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at …'*

(iii) Have regard to both the proximate and general context in which the phrase or provision occurs, including any other such phrase or provision, or indeed the Act as a whole, which may illuminate the correct meaning of the disputed provision. In In Re Macmanaway [1951] A.C. 161, Lord Radcliffe said at p. 169 that:

> *'The primary duty of a court of law is to find* ***the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act use the words in dispute.'***

(iv) Have regard to the long title of and preamble to the Act (see, for example, East Donegal Co-Operative Livestock Mart Ltd v Attorney General [1970] I.R. 317 and Minister for Agriculture v Information Commissioner [2000] 1 I.R. 309).

[58] Accordingly, a consideration of both ***the narrower and broader context of any disputed provision, including the subject matter of the legislation itself, is an integral part of the literal approach****, as is the legislative history, the subject matter of the Act and, to use an almost obsolete phrase,* ***the 'mischief' which was sought to be remedied by its provisions****. In identifying such matters, the same is not intended, quite evidently, as a prescriptive ruling on this approach"* (emphasis added).

93. McKechnie J. put the task of this court in the following terms in *Dunnes Stores v. Revenue Commissioners* [2019] IESC 50:

> *"64. As has been said time and time again,* ***the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of***

***Parliament**. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail."*

Harm, injury or damage

94. What is the harm, injury or damage which s.53 was put in place to address? It seems to me that to answer this question involves looking at the words used in the Act to see what the ordinary meaning of those words reveal about the legislative objective which gave rise to the power granted to the ESB and nature of the power exercisable by the ESB (or its authorised nominee) because it is the exercise of that power, which gives rise to the right to compensation. The core objective, and the power granted to achieve it, is plainly revealed by the words used throughout s.53, as follows:

"…***place** any electric **line** above or below ground **across** any **land…**" (see s.53(1));

"…***placing*** an electric ***line across*** any ***land…***" (See s.53(3));

"…*may **place** such **line across** such **land*…" (See s.53(5));

"….***placed** any electric **line across** any **land*…" (See s.53(6));

"…***retention** of such **line**…**across**…such **land*…(See s.53(7));

"…***placing** or retention of an electric **line across** any **land*…(See s.53(8));

"…***place** or retain any electric **line across** any **land*…(See s.53(9));

95. This court is entitled to take it that, when enacting s. 53. the legislature was aware that a direct consequence of the exercise of s.53 power (i.e. the placing of a line across land) would be the creation of a 'corridor' of land which the landowner continued to own, but the use of which might well be affected in an adverse manner, and the value of which might well be materially diminished. As discussed earlier, the length of each corridor will be determined by the route across a given owner's lands. The width will be determined by, for example, what distance, left or right, from the direct route of the line (be it passing over or under ground) the relevant planning authority prohibited the erection of any structure. If that distance was, say 23 metres either side of the direct route of the line, then the corridor width would be 46 metres and the length would be a function of where the line entered a given owner's lands, the route it took and where it exited.

96. Without straining or departing from the ordinary meaning of the words used in s.53, and acknowledging that several involve repetition, the following questions and answers seem relevant:

- **Q**: what *land* is s.53 concerned with?
- **A**: the land *across* which a line is *placed,* (in practical terms the 'corridor' of land);

- **Q**: what *land* is essential to the exercise of s. 53 power?
- **A:** again, the land *across* which the line is *placed;*

- **Q:** what *land* is not required for the exercise of s.53 power?
- **A**: the land across which the line is *not* placed (i.e. other or retained land outside the corridor);

- **Q:** if the sum total of all the land owned by the landowner comprised *only* of the corridor of land across which the land was placed, could the ESB still exercise s.53 effectively?
- **A**: Yes;

- **Q**: if, in addition to owning the land corridor across which the line is placed, someone also owns *other* land, across which no line is placed, does this fact (and/or the size of, or plans for, or potential of this additional/other land) add or subtract in any way from the ESB's ability to exercise s.53 power effectively?
- **A:** No.

97. It seems to me that the fundamental power granted under s.53 is to *place* a line *across* someone's *land.* The land across which the line is placed comprises the corridor of land (as opposed to, say, the *entire* acreage of land which happened to be held in the same folio, in a registered land scenario, comprising of both (i) the *corridor* and (ii) the remainder (i.e. *other* lands). It seems to me that the harm to the landowner is having a line *placed across* their *land*. The land across which a line is placed is *not* the remainder. The compensation provided for seems to me to be directed at the *land* across which the line is *placed*, not other land. It seems to me from a reading of the plain meaning of the words used that this this was the harm which the legislature had in mind, and it was this land, not other land, the legislature had in mind when granting the right to compensation.

98. In other words, the legislature clearly contemplated this burden on the landowner and created a right to receive compensation for it, which seems from my reading of the 1927 Act to be directed at the land across which a line is placed, not other land. For reasons explained in this judgment, it seems to me that the word *land*, in the context of an owner's right to receive compensation is the land *across* which a line is *placed*, not the entire land which happens to be in their ownership. If the legislature also intended to create the obligation on the ESB to compensate for harm said to arise to *other* lands, across which *no* line was placed it does not seem to me, based on the ordinary meaning of the words used in s.53, that this was put in sufficiently clear terms to be identified.

99. It will be recalled that, pursuant to Section 1(1) of the 1919 Act "*…any question of disputed compensation…"* shall be determined by a property arbitrator*.* A factual dispute as to the width

of the corridor in a given case seems to me to be such a question. In other words, if, having considered the factual evidence before him or her in a given case, an expert valuer decided that the width of the 'corridor' of land across which the line was placed (irrespective of whether that line was placed below or above ground) extended to, say, 50m their view would hold sway (even if the ESB argued for *less* and the claimant argued for *more),* to take a purely notional figures, rather than to suggest that this court has any valuation role or expertise, which it does *not*. Such a decision is not one of principle i.e. it is not about whether the scheme provides compensation for injurious affection to other/retained lands, (and in my view it does not). Rather, it is a decision of fact as to the size of a particular corridor in a specific case based on such evidence as may be tendered. Similarly, if the expert valuer decided that the land comprised within the corridor had very significant development - potential and, consequently, a very high value (whereas the ESB argued, for example, that in the absence of planning permission sought, or granted, it had only agricultural value) the expert's view would be determinative of this question and such compensation as the property arbitrator assessed would be payable. The foregoing questions relate directly to the burden imposed on the landowner with respect to the land across which the line is placed by virtue of the exercise of section 53 powers. They are also questions as to *how* much compensation is payable and how it is assessed, rather than *what* the legislation was/was not enacted to compensate for.

Unrestricted, unlimited compensation

100. Later in this judgment I will quote the classic statement of the 'principle of equivalence' as articulated by Lord Nicholls in *Director of Buildings v. Shun Fung Ironworks Limited* [1995] 2 AC 111, at 125 (in essence, that a claimant be compensated "*fairly and fully*" for their loss). In the present case, the Notice Parties contended that, regardless of the fact that the 1845 Act (which introduced injurious affection into CPO law) was *not* incorporated into s.53, the proper interpretation of s.53(5) is that it requires the payment of "*unrestricted, unlimited compensation*" and (*per* the principle of equivalence) they have a right to compensation for injurious affection i.e. loss concerning *other* land *outside* the 'take', in addition to compensation for the 'take' itself, and for disturbance. Given that, unlike the position in the CPO context, no land is taken away, the 'take' for present purposes is the 'corridor' of land across which an electric line is placed.

Ordinary meaning

101. To my mind, the entitlement to received full compensation, subject to the determination of a valuation expert, for all losses concerning the land across which the line is placed (being the corridor in any given case) is consistent with the 'principle of equivalence'. However, based on a literal interpretation of s.53, it does not seem that a right to compensation for injurious affection to *other* land across which *no* line is placed (e.g. the potential diminution in value of such other land, were future development to take place on this other land, as opposed to on the 'corridor') is to be found in s.53(5) with sufficient clarity. Section 53 clearly enshrines a right to compensation for the direct burden of a line being placed across land, but a claim for injurious

affection to other land is an indirect burden for which the words found in s.53, in their ordinary meaning, do not seem to provide, in my view.

To imply a burden

102. In my view there is a material difference between (a) being compensated for having a line placed and passing *across* land, whether below or above ground (i.e. all losses relating to the corridor of land); and (b) being compensated in respect of *other* lands outside the corridor (i.e. land which happens to be in the same ownership, but across which no line is placed and upon which no pole, pylon or fixture is placed – and references throughout this judgment to *"other"* lands is to such). S.53 clearly creates the entitlement to be compensated for (a) but in the absence of *express* language, it seems to me that this Court would have to *imply* into s.53(5) words which are not already there, in order to create the right for a landowner to (b) and to create the equivalent burden on the ESB, which the Notice Parties contend for.

103. I do not believe that it is permissible to *imply* such a burden/right given that (i) s.53 is capable of being understood, and operating, *without* the implication of a right to injurious affection compensation and (ii) having regard to the consequences, including for the 'public purse', were this court to imply a burden not obviously present in the plain meaning of the words used by the Oireachtas.

A right akin to s.63

104. Given that the exercise of s.53 powers is not a 'compulsory acquisition' scenario (addressed in s.45, where the 1845 Act *was* explicitly incorporated), and given that s.63 of the 1845 Act (had it been incorporated, which it was not) would appear to apply to the latter, but *not* the former scenario, it also seems to me that the Notice Parties are, in reality, contending for a right which extends even *beyond* the provisions of the 1845 Act which created the injurious affection concept (i.e. a right to receive compensation akin to s.63).

What s.53(5) could have stated but does not state

105. This fortifies me in the view that, had the Oireachtas intended to give to a landowner the right to claim compensation, and the obligation on the ESB to pay it, in relation to lands across which no line was placed (i.e. retained/other lands, outside the corridor in a given case), this could and would have been expressed in clear language. In essence, regardless of what may have been the practice, to date, of skilled professional valuers, possessed of a wealth of expertise (which this court entirely lacks) the difficulty for this court is that s.53(5) *could* have stated, but does *not* include the words highlighted in bold as follows:

> "*If the owner or occupier of such land or building fails within the 7 days aforesaid to give his consent in accordance with the foregoing subsection, the Board or the authorised undertaker with the consent of the Board but not otherwise may place such line across such land or attach such fixture to such building in the position and manner stated in the said notice, subject to the entitlement of such owner or occupier to be paid compensation, in respect of the exercise by the Board or authorised undertaker of the powers conferred by this subsection and of the powers conferred by subsection (9) of this section, such*

compensation ***[including for injurious affection to other lands across which the line is not placed]*** *to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919, the Board for this purpose being deemed to be a public authority*" (emphasis added).

Additional right

106. The wording *[in bold]* is my insertion. Plainly there are a variety of other ways in which such an entitlement could have been expressed, such as *["including for injurious affection to the remainder"]* or simply *["including for injurious affection to other lands"]*. My point is that what the Notice Parties argue for seems to be an *additional* right, over and above what is currently expressed in s.53(5). This additional right could have been expressed in clear language, and the fact that it is not means that I am unable to identify it.

107. In my views, the ordinary meaning of the words actually used does indeed give a landowner a right to "*unrestricted, unlimited compensation"* but (i) it concerns the land across which the line is placed (in practical, terms the relevant 'corridor' of land directly affected); and (ii) in the event of a dispute, this compensation it is subject to determination by an expert property arbitrator.

108. The fact that the Oireachtas has conferred on the property arbitrator decision-making power in respect of calculating compensation seems to me to mean that if, based on evidence before them, the expert identified a loss or losses affecting the corridor in the particular case, and awarded compensation for it, their view *qua* expert valuer cannot be second-guessed. Thus, and by way of illustration only, if a property valuer was satisfied on the evidence that a building was to be erected on land within the 'corridor' and awarded compensation for what the property arbitrator deems to be the value of lost profits, this court has no jurisdiction to interfere. Furthermore, given the jurisdiction conferred on the expert, the absence of an issued planning permission would not seem to me to prohibit the awarding of compensation for such loss in circumstances where the expert's decision was evidence based. Moreover, and as touched on earlier, any dispute as to the dimensions of the corridor in a particular case would also seem to me to be a matter exclusively for the valuer. I express the foregoing views because it seems to me that such issues, and any disputes on those issues, stem directly from the realty of a *line* passing *across* land (i.e. it is the electric line which forms the central point, both physically and metaphorically, of any such corridor, and, where overhead, it is the same corridor which will contain supporting infrastructure for the line).

109. However, I cannot divine from the ordinary meaning of the words used the intention of the legislature to create an obligation on the ESB to pay compensation for any and all losses said to arise with respect to *other* land, which the appointed valuer might determine payable. I take this view in circumstances where the insertion after the word "*compensation*" of just four words, namely: "*including for injurious affection*" would have provided the clarity, which I find to be lacking.

110. This observation seems all the more relevant given that the Notice Parties contend that s.53 includes a right to be paid for injurious affection which (i) is akin to, but stands apart from and is not dependent upon, the very Act (of 1845) which created such a claim; and (ii) the right asserted by the Notice Parties seems to be in the nature of a right under s.63, not s.68, thereof.

111. If that was the intention of the legislature, it does not seem to me to have been expressed in sufficiently clear terms for me to be confident that such an obligation, and the corresponding right, is established in section 53(5).

The meaning of 'compensation'

112. I have come to the foregoing views after a careful consideration of all the authorities put before the Court including various authorities from the neighbouring jurisdiction. In *Welford & Ors v. EDF Energy Networks (LPN)* [2007] EWCH Civ 293, under the heading of "*The general approach to the award of compensation under the statutory provisions*", Lord Justice Thomas stated (at para 14):

> "*…there was no dispute between us as to the correctness of the general approach which, as set out at paragraph 10 above, had been taken by the Tribunal. Although paragraph 7 to Schedule 4 expressly distinguishes between compensation under sub-paragraph (1) for diminution in value of the land and under sub-paragraph (2) for disturbance, the compensation payable under the whole of paragraph 7 is* ***to be assessed on the general principles applicable to the payment of compensation for compulsory acquisition which recognises these two separate heads as elements of the claim for compensation - injurious affection and disturbance****. The distinction drawn in paragraph 7 of Schedule 4 is a necessary distinction in relation to compensation for the grant of a wayleave for a fixed period to enable occupiers and owners of chattels to recover compensation for disturbance*" (emphasis added).

113. As I observed earlier, general principles applicable to the payment of compensation in the CPO context do not seem to me to apply, automatically, to what is, I am satisfied, a different context insofar as the exercise of s. 53 powers

Compensation and the 'principle of equivalence'

114. The Notice Parties also lay emphasis on certain statements by Lord Justice Briggs in *National Grid Electricity Transmissions plc v Arnold White Estates Ltd* [2014] EWCA Civ 216, including (from para. 14):

> "*14.… it was broadly common ground that, like other statutory provisions for compensation for the compulsory acquisition of, or of a right over, private property, compensation for the grant of a statutory wayleave is to be quantified in accordance with what has come to be known among compulsory purchase lawyers as the principle of equivalence. In its earliest and classic form, the principle is encapsulated in Horn v Sunderland Corporation [1941] 2 KB 26, at 40, per Scott LJ. Speaking of the Acquisition of Land (Assessment of Compensation) Act 1919, he said:*

'the word ' compensation' almost of itself carried the corollary that the laws to the seller must be completely made up to him, on the ground that, unless he received a price that fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice.'

15. More recently in Director of Buildings v. Shun Fung Ironworks Limited [1995] 2 AC 111, at 125, Lord Nicholls, giving the judgement of the Privy Council on an appeal from Hong Kong, described the principle of equivalence, both in Hong Kong and English law about compensation for compulsory acquisition, as follows:

'The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowances to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its 2 facets, that all claims for compensation succeed or fail.'

He added, pertinently for present purposes:

'Land may, of course, have a special value to a claimant over and above the price it would fetch if sold in the open market. Fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority'."

115. For the reasons set out in this judgment neither the meaning of compensation in the CPO context nor the principle of equivalence is dispositive of the 'injurious affection question'. Rather that question hinges on the provisions of the statutory scheme and the meaning of the words used in s.53 which in, in my view create no right to injurious affection compensation.

116. I also considered the decision in *Wyness v. Scottish Hydro Power Distribution plc* [2020] 4 WLUK 364. In that case, cable was subject to a voluntary waiver agreement between the Applicant and the Respondents. The Applicant terminated the voluntary wayleave, as a consequence of which the Respondent's applied for a statutory wayleave under certain legislation. Scottish ministers granted the application and the introduction to the decision proceeds to explain that:

"*As a consequence the Applicant contends that he has lost his legal right to require the Respondents to remove their equipment from his land. It is submitted that this was a valuable right since his land contained a 'golden key' or ransom strip in respect of the operation of the South Camaloun turbine. This is on the contention that there were no*

reasonable alternative routes to export the South Camaloun electricity other than through Meikle Camaloun. Scenarios are presented in which the value of the ransom strip is assessed with regard to the commercial value of the South Camaloun wind turbine".

117. Paras 39 and 40 of the decision appear in the following terms:

"*39. The question at this stage is whether the Applicant has made a sufficient case to justify proceeding to a full hearing. We would propose to apply the usual test, i.e. whether the Applicant's case is bound to fail while reading his pleadings and other material at their highest in his favour.*

40.We would deal firstly with the analysis of the nature of the Applicant's case. In terms of paragraph 7(1) of Schedule 4 to the 1989 Act he is entitled as landowner to recover "compensation in respect of the grant" of the necessary way leave. In this respect we are attracted to the analysis adopted by the Lands Tribunal for Northern Ireland in McKibben v Northern Ireland Electricity Limited at paragraphs 14-17. There the approach was for the measurement of loss as 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"). In our view the Applicant's application and documents fairly set out a case for "compensation in respect of the grant", namely the difference between the unencumbered and encumbered values of his land. This is in the sense that he offers to prove that the encumbered value is diminished on account of the loss of opportunity to negotiate with those behind the operation of the South Camaloun turbine".

118. It does not appear to me that that view, expressed at a preliminary stage of proceedings in Scotland with respect to the operation of different legislation is of any assistance in determining the questions before this court. With respect to the other authorities from our near - neighbour, it seems to me that, despite the clarity with which the 'principle of equivalence' is set out therein (with particular reference to the compulsory purchase of land, which is *not* the scenario with which this court is dealing) statements of general principle regarding the meaning of compensation cannot determine the outcome of this Court's task, which is to ascertain the meaning of the term as employed in specific legislation.

Context

119. The word "*compensation*" is, of course, used in s.53, but it is not used in a vacuum. It is not used in the context of a compulsory purchase of land taken permanently from the owner. Thus, it seems necessary for this Court to ask: 'What is the *context* in which the word *compensation* is used in s.53?'.

120. The background or general context is, plainly, that a body created by the State (or its nominee) is carrying out essential work for the public good and expending public monies in that regard. As para. 2 of the headnote in *Gormley* states, the Supreme Court held:

"*That the power to lay an electricity transmission line compulsorily was a power to impose a burdensome right over land which in this instance was a* ***requirement of the common good****"* (emphasis added).

121. However, the specific context in which a landowner is given an entitlement to be paid compensation is the exercise by the ESB of a power to *place* a line *across* land. It is uncontroversial to say that such a line will not zig-zag, top to bottom, and left-to-right, such that the line (and the 'corridor' it gives rise to) will completely cover every owner's lands, i.e. criss-crossing over (or under) same, in a 'grid' pattern and very obviously affecting the *entire* of the lands.

122. Rather, the line, which, per s.53 (1) is placed "*…above or below ground* ***across*** *land…"* (emphasis added) will take a specific route. This Court is entitled to take it that a line will typically enter land at one point and leave at another, thus, directly affecting a specific corridor of land i.e. a sub-set or *portion*, of the *entire* lands in the particular folio (to take registered land in this example). That being the context and although the following involves repetition, it seems to me that if the legislature intended that compensation would be in respect of lands *across* which the line did *not* run (i.e outside of the corridor, whatever its dimensions and value as determined by the expert valuer) the legislature could and would have said so. This is particularly the case, given the fact that injurious affection describes the devaluation of retained lands in a compulsory acquisition scenario (which this is not). Thus, if the Oireachtas intended to create an equivalent right in a *different* scenario, namely a right to claim for and (subject to an expert's determination) receive compensation for devaluation of *other* lands, neither compulsorily purchased nor across which the line runs, by reason of the proximity of such lands to the line (in practical terms a corridor in the centre of which is the line) the Oireachtas did not make this sufficiently clear in my view.

123. Therefore, I cannot be satisfied that the plain meaning of the words used gives a right which is nowhere made explicit. Nor is there any ambiguity which would justify a departure from the literal approach to construction, in my view. If this court poses a question such as: 'is the diminution in value of *other* lands, across which the line is *not* placed, by reason of their proximity to the 'corridor' of land (in the centre of which is the line, and in respect of which 'corridor' the diminution in value, including development value, <u>is</u> fully compensated), the mischief or loss which the legislature intended the 1927 Act to address?' For the reasons expressed in this judgment, albeit not without hesitation given the skill and sophistication of Mr Bland's submissions, I have come to the view that it is <u>not</u>.

124. As I indicated earlier, quite apart from a literal interpretation of the words used in s.53(5), the proposition that an injurious affection claim (at the heart of which is a claim for damage said to be caused to *other* land *not* covered by the wayleave) was to be compensated under s.53, also seems to me to run contrary to the legislature's decision not to include the 1845 Act in the statutory scheme in respect of compensation for the use of s.53 wayleave rights, but to permit recourse to the 1845 Act in s.45 scenarios. As I also touched on earlier, the concept of injurious

affection is a creation of statute (the 1845 Act) and I am not persuaded that it has a separate existence as a right to compensation unless it is explicitly stated in the legislative scheme to be permissible as a head of claim for compensation. I take this view for several reasons:

(1) It is a view based on a consideration of the legislation under discussion, in light of the literal rule;

(2) For the legislative scheme to permit compensation to be claimed and paid in respect of *other* lands across which the electric line would *not* pass, would self-evidently involve an *increased* burden, over and above payment of compensation for the direct effect (i.e. in addition to payment of full independently-assessed compensation regarding the devaluation of the 'corridor' across which the line is placed);

(3) To accept the submissions by the Notice Parties would, in reality, be for this court *imply* such an *increased* burden;

(4) If the will of the Irish people, as expressed through legislation enacted by the Oireachtas, is that injurious affection claims, with respect to *other* lands *outside* of the corridor of land across which the line is placed, <u>are</u> to be paid, it seems to me necessary for this to be stated in <u>explicit</u> terms;

(5) It seems to me that it would be an impermissible exercise in judicial law-making to impose on the ESB (or its "authorised undertaker") a *very* significant financial burden which does not clearly arise from a literal interpretation of the plain words used in the legislation and their natural meaning;

(6) I say *very* significant, because this court cannot be blind to the potential multiplier effect, stemming from the reality that electric lines run the length and breadth of the country, crossing innumerable separate landholdings.

125. Earlier I quoted a passage from the English Court of Appeal's decision in *National Grid Electricity Transmission Plc* upon which the Notice Parties placed considerable reliance. However, the following extract from later in the same decision seems appropriate to refer to:

"*21. A theme running through Mr Purchas' submissions was an attempt to analyse compensation for the grant of a way leave by the use of language and concepts derived from legislation and cases about compulsory purchase. Thus he sought to analyse the provision of 'compensation in respect of the grant' in paragraph 7(1) as if it had to be divided into compensation for the taking of property and compensation for injurious affection, and to analyse the separate right to compensation for disturbance in paragraph 7(2) as if it was in substance the same as the statutory right to compensation for disturbance arising from dispossession from land compulsorily acquired. This may be an easy and instinctive form of analysis to someone steeped in the law of compulsory purchase. Indeed, a comparable approach can be discerned in the submission of Mr Bartlett QC (again for National Grid) in Macleod v. National Grid Co. Plc [1998] 2 EGLR 217, at 223 M.*

22. For my part, I did not find that mode of analysis either illuminating or helpful. This is primarily because, from 1845, the relevant statutory provisions contemplated compensation for compulsory purchase as falling into quite different classes than those contemplated by

paragraph 7 of schedule 4 in relation to wayleaves. The division adopted in relation to compulsory purchase is in 2 classes: (1) compensation for the value to the owner of the land taken and (2) compensation for injurious affection to his other land: see per Scott LJ in the Horn case at page 43. ***In relation to wayleaves, the two types are (1) compensation in respect of the grant and (2) compensation for damage or disturbance by the exercise of the rights granted. There is in reality no land taken or other land retained in a way leave case because, in short contrast to compulsory purchase, no land or interest in land previously vested in the owner's compulsorily acquired at all. A way leave may itself be an interesting land, but it comes into existence for the first time by virtue of the grant***" (emphasis added).

126. In light of the foregoing, there would appear to be, in England, a clear distinction between the compensation entitlement regarding (1) compulsory purchases, where injurious affection, *per* the 1845 Act, *can* be claimed; and (2) statutory wayleaves, where injurious affection does *not* apply and the compensation is in respect of (i) the 'take' i.e. the grant of the wayleave itself and (ii) disturbance.

127. My reading of the statutory scheme in *this* State is that compensation for (i) and (ii) are provided for in clear terms, but I am unable to identify with clarity the entitlement to make (iii) i.e. a claim for injurious affection in respect of *other* lands not directly affected by the wayleave.

128. This view does not seem to me to be inconsistent with any authority opened, or any academic commentary. I say this in circumstance where the Court's attention was drawn to extracts from "*Compulsory Purchase and Compensation in Ireland*" [Galligan and McGrath; Second Edition; paras 30.48 – 30.72]; and to *Compulsory Purchase and Compensation in Ireland* [McDermott & Woulfe p. 279 -287] and I carefully considered same.

129. It also seems appropriate to observe that the 1845 Act was, very obviously, in - being long before the enactment of the 1927 Act and had been on the statute books for well over a century before the Supreme Court delivered its judgment in *Gormley*. Despite this fact, and as Mr Sreenan points out, it was not argued in *Gormley* and there is no suggestion in the Supreme Court's judgment, that there already existed any remedy for any part of the loss of a landowner said to result from the exercise of s.53 powers by the ESB (i.e. by means of a right to compensation for injurious affection of land, per the 1845 Act). Still less was it argued before, or suggested by, the Supreme Court in *Gormley* that, ever since the introduction of the 1845 Act, but independent of same, a landowner enjoyed the right to compensation for injurious affection (i.e. for any devaluation of the balance/remainder/other land *outside* of where the line is placed, by reason of the proximity of the line, namely a right akin to that provided in s.63 of the 1845 Act but not dependent on it). This is despite the fact that, on the particular facts, the Supreme Court recognised "*…major permanent damage to the amenity of the lands surrounding the house*" (see *ESB v Gormley* p.150 per Finlay CJ). The house in question was described (p.148) as being: "*a Georgian residence known as Farmleigh Manor",* and the then Chief Justice

stated that: " *it is clear that the house itself is one of considerable quality and charm and that the park lands in front of the house are well laid out with timber and shrubs constituting picturesque surroundings for the house."*

130. It is clear from the judgment in *Gormley* that the permanent damage to the amenity stemmed from the location and visibility of the masts, in question. That would appear to me to be damage to *other* lands coming within the rubric of injurious affection, as the Notice Parties would have it. However, the inescapable logic of the Notice Parties' argument (bearing in mind that they make explicit that they have no need to rely on the 1845 Act and contend that a right, of the very sort which the 1845 Act introduced, exists independently of that Act) is that Mrs Gormley *already* enjoyed a right to compensation for injurious affection, which right has existed since 1845. Thus, it is curious to say the least that it did not feature at all in *Gormley.*

Constitutionality of s.53(5)

131. Among the submissions made on behalf of the Notice Parties with respect to the decision in *Gormley* is to suggest that if s.53(5), which was introduced in the wake of *Gormley,* does *not* include the right to compensation for injurious affection, the constitutionality of s.53(5) is "*in question"*. Several comments seem appropriate:

(1) These proceedings do not comprise a challenge to the constitutionality of s.53;

(2) The legislation enjoys the presumption of constitutionality;

(3) It does not seem to me that the response of the Oireachtas to the finding of unconstitutionality in *Gormley* necessarily hinged on, or was dictated by, the very particular circumstances of that case;

(4) By that I mean, riverside Georgian manor houses of quality and charm with beautiful views situate on large estates are likely to represent a very small *fraction* of the property stock in this State, yet the Oireachtas was required to fashion a legislative response which took account of the property rights of *all,* as protected by Article 40.3.2, and in the context of Article 43;

(5) The Supreme Court did not suggest that the only appropriate legislative response to unconstitutionality was a right to be compensated for all losses regardless of how remote (i.e. what the Notice Parties describe as "*unrestricted unlimited compensation*" including to other lands outside the corridor of land across which the line is placed).

(6) It does not seem to me that the Supreme Court's judgment was prescriptive about *what* should be compensated for (with respect to the difference between direct, as opposed to indirect losses). Finlay CJ put matters as follow:

> "*The Court does not accept the contention that the payment of compensation, ex-gratia, in an amount determined by the plaintiff is to be equated with a right to compensation, lacking, as it does* ***the essential ingredient of the ultimate right to have the amount assessed by an independent arbiter or Tribunal***" (emphasis added).

Thus, the key was that there be a *right* to receive compensation and, whilst not laying down *what* was 'compensatable', the Supreme Court made clear that *how* it should be assessed was by an independent party (such as an expert valuer) as opposed to being assessed by the ESB itself;

(7) It seems to me that the task for this court is to interpret the words actually used in section 53, guided by the well-established rules of statutory construction to which I referred in this judgment;

(8) Leaving aside the reality that this is not a challenge to the constitutionality of s.53, and acknowledging entirely that the Notice Party contends that a right to compensation for injurious affection can be found in the proper interpretation of s.53, it does not appear that the interpretation I have set out in this judgment is incompatible with the Constitution. Thus, it does not appear to me that the interpretation of s.53 which I have set out in this judgment offends the 'double construction' rule (see *McDonald v Bord na gCon (No. 2)* [1965] IR 217).

(9) Given the emphasis placed by the Notice Parties on the decision in *Gormley*, it is also useful to recall that the key question was distilled to whether the requirements of the common good made the situation one of those rare cases where *no* compensation at all was necessary. This can be seen from the following passage from the decision of Finlay CJ:

> "*Whether the granting of such powers to the Plaintiff without the provision of any obligation to pay adequate compensation constitutes a failure as far as practicable to respect, defend or vindicate the property rights of the Defendant in these lands in breach of Article 40.3.1 of the Constitution or a failure, as best the State may, to protect those rights from unjust attack in breach of Article 40.3.2, is a question which falls to be decided in accordance with the principles laid down by this Court in Dreher v. The Irish Land Commission [1984] ILRM 94 where, in his judgment, with which all the other members of the Court agreed, Walsh J. at p. 96, states:*
>
> > *"The State in exercising its powers under Article 43 must act in accordance with the requirements of social justice but clearly what is social justice in any particular case must depend on the circumstances of the case. In Article 40.3.2. "the State undertakes by its laws to protect as best it may from unjust attack and in the case of injustice done vindicate..... (the) property rights of every citizen". I think it is clear that any State action that is authorised by Article 43 of the Constitution and conforms to that Article, cannot by definition be unjust for the purposes of Article 40.3.2. It may well be that in some particular cases social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the State as being required by the exigencies of the common good."*
>
> *Having regard to the social benefits of electricity and its contribution to the economic welfare of the State, the uncontradicted evidence adduced in this case of the necessity for and value of this transmission line to the national supply system leads to an inescapable conclusion that the power to lay it compulsorily is a requirement of the common good.*

> ***The vital question remains****, however, as to* ***whether the requirements of social justice or of the common good make this one of the "particular cases"*** *referred to by Walsh J. in Dreher v. The I.L.C.,* ***where payment of compensation is not necessary***" (emphasis added)

Finlay CJ proceeded to set out the Supreme Court's reasoning for the finding of invalidity and, in addition to the presence in the 1927 Act of section 45 (providing powers of compulsory acquisition) "*which is accompanied by an express right to compensation*", the learned judge also stated:

> "*On the evidence the Plaintiff in the laying of this transmission line does in fact pay compensation which it asserts is reasonable and the guidelines governing which have been agreed with the Irish Farmers' Association. It must, therefore, be concluded that the imposition of a statutory obligation to pay compensation which in the absence of agreement fell in any particular case to be independently assessed could not impose an additional cost on the Plaintiff in the erection of this line which would be inconsistent with social justice or with the requirements of the common good*."

132. However, no comment was made by the Supreme Court on (1) the quantum of compensation paid, *via* negotiations with the IFA; (2) what was to be paid, mandatorily, in the future; or (3) what headings of loss were/were not to be included. Rather the central issue was the *right* of a landowner to receive compensation, as a corollary of the exercise by the ESB of their statutory power, with such compensation to be *independently* assessed, not determined by the ESB.

Additional cost

133. It also seems appropriate to quote the following passage from *Gormley* wherein Finlay CJ considered the practicability of a right to compensation (as opposed to the payment *ex gratia*) in the context of protecting Ms Gormley's property rights from unjust attack:

> "*On the evidence* ***the plaintiff in the laying of this transmission line does in fact pay compensation, which it asserts is reasonable and the guidelines governing which have been agreed with the Irish Farmers' Association. It must, therefore, be concluded that the imposition of a statutory obligation to pay compensation which in the absence of agreement fell in any particular case to be independently assessed could not impose an additional cost on the plaintiff in the erection of this line which would be inconsistent with social justice or with the requirements of the common good****. The provision by s. 45 of the Act of 1927 of the power of compulsory acquisition of land and the power compulsorily to acquire or use any easement or other right over land, which is accompanied by an express right to compensation, appears clearly to cover the acquisition of the rights over the defendant's lands, which the plaintiff seeks to enforce under s. 53, and could have been availed of by the plaintiff for that purpose. The protection of the defendant, therefore, by law, against the unjust attack consisting of the*

acquisition of these rights without a corresponding right to compensation, is clearly practicable" (emphasis added).

134. As regards the reference by Finlay CJ to compensation "*agreed with the Irish Farmers' Association*", I quoted earlier in this judgment from the letter sent by EirGrid to the Notice Parties on 15 February 2011 which stated inter alia that:

> "*…the IFA has been in negotiations with EirGrid and the ESB in relation to the terms under which this line will be built. These negotiations are concluded and an agreement has been reached with the IFA as to the terms under which this project will be completed. A flexibility of access payment will be made to you in recognition of the fact that your cooperation with the build serves to facilitate greater efficiencies in the overall management of the project. Landowners who cooperate with the construction programme on their lands facilitating the orderly completion of each straight will receive a total flexibility of access payment of €11,000 per pole set and €22,000 per steel tower.*"

135. Although the then Chief Justice used the term "*compensation*", as I noted earlier it has recently been decided in *ESB v Payne* that, due to the explicit terms upon which FOA payments were offered, they did not amount to compensation and, thus, were not deductible from s.53 compensation.

136. However, leaving aside how payments negotiated by the IFA are characterised, it seems fair to suggest that the Supreme Court laid considerable emphasis on the fact that payments (albeit on an *ex gratia* basis) were already being made, and this suggested that no additional cost burden would be imposed on the ESB, were the court to find that Ms Gormley enjoyed a *right* to receive such payments (as opposed to receiving an *ex gratia* payment). The point I wish to emphasise is that the Supreme Court did not concern itself with *what* headings of loss were, or were not, encompassed within the *ex gratia* payment which the IFA had negotiated, the payment of which rendered it practicable to impose a right/find unconstitutionality in the absence of such a right.

137. Three observations seem appropriate (1) the Supreme Court did *not* take the attitude that the right to payment of compensation must include a right to injurious affection; (2) had it done so, it is difficult to see how it could have come to the view that a potentially very substantial increase in cost would *not* be the effect; and (3) for the reasons explained with such clarity in the decision in *ESB v Payne,* the ESB do, in fact, make *both* FOA payments (negotiated by the IFA) and compensation payments (*per* s.53, determined by a property arbitrator).

Injurious affection claim in this case

138. In the manner previously explained, the statutory scheme with respect to compensation for the exercise by the ESB of s. 53 powers does not seem to me to include a right to compensation for injurious affection in respect of *other* lands over which no electric line is placed (whether they be described as the 'remainder' or 'retained' lands, although both these

terms seem to me to be more appropriate to a CPO scenario, which this is *not*, given that ownership of *all* lands is retained).

139. Furthermore, whereas the Rule set out in s.2(6) of the 1919 Act does not affect the assessment of compensation for any matter "…*not directly based on the value of land*", a claim that retained land has been injuriously affected is based on the value of land. To see a concrete example, the following represents the injurious affection claim as made on 23 May 2018 by Tuohy O'Toole, Valuers, in relation to wayleave 112:

> *"Injurious affection to retained lands*
>
> *a) Loss of rights and value to outer corridor and retained lands €28,000*
>
> *b) Permanent disturbance €20,000"*

140. With regard to "*a)",* the Schedule which accompanied the claim made clear this was the claim for "*Injurious affection to retained farmlands*", calculated by reference to that land being "*11.68*" acres, with a "*Rate per acre*" of "*€12,000*" to which a "*devaluation amount*" of "*20%"* was applied, resulting in the sum of "*€28,032*", rounded down to €28,000.

141. In short, this is a claim which is directly based on the value of the retained land and, in my view is inconsistent with the terms of the 1919 Act, pursuant to which compensation claims must be assessed, bearing in mind that the 1845 Act was not incorporated in s.53 of the 1927 Act. Once again, this is not a comment by this court on *how* a claim is assessed (something within the exclusive domain of an expert valuer) but on *what* is, and is not, 'compensatable' under the statutory scheme. In short, the right to compensation relates to the land across which a line is placed (i.e. the corridor in any given case). Loss to same is *what* is to be compensated and *how* that is calculated is within the exclusive remit of the property arbitrator, where a dispute arises.

Acquisition of wayleave / claims regarding the 'take'

142. Earlier I made reference to the 23 May 2018 claim which was submitted to the ESB by TOT, the valuer representing the Notice Parties. With respect to wayleave 112, the sum of €32,750 was claimed under the heading *"Acquisition of Wayleave*". This clearly appears to be the claim which I have referred to in this judgment as (i) the 'take' claim, in that it relates to the land across which the line is placed and its diminution in value.

143. The schedule to the said letter of claim gave a breakdown of how that sum was calculated. It noted that the relevant folio comprised of 15.09 acres. However, for the purpose of calculating this claim, TOT did not value the *entire* 15.09 acres. Rather, the *lesser* area of "*3.41*" acres was valued, in circumstances where the wayleave was stated to be of "*Length 230 m*". It is not in dispute that the 3.41 acre calculation was a product of that length, multiplied by the width of a 'corridor' comprising a portion of land either side of the direct route of the electric line. In the letter of claim, the 3.41 acres was said to have a "*Rate per acre*" of "*€12,000*" to which a

"*devaluation percentage*" of "*80%"* was applied, giving a figure of €32,736 (i.e. the sum claimed).

144. A similar approach was taken in respect of the claim for wayleave 113, in that the schedule to the 23 May 2018 claim identifies the total folio area as being "18.01" acres, but the valuation is based on the *lesser* area of "1.82" acres. The length of the wayleave is stated to be "123 m" and the "rate per acre" is said to be "€8,000" (presumably to reflect the poorer nature of the land). Applying a "Devaluation Amount" of "80%" produced the sum claimed, of €11,650.

145. The foregoing approach seems to me to have been entirely consistent with the proper interpretation of the terms of the statutory scheme, in particular, s.53(5) of the 1927 Act and s.2(2) of the 1919 Act. The Notice Parties' valuer did not make a claim in respect of the "Acquisition of wayleave" based on a valuation of the *entire* of the Notice Parties' lands, but articulated the claim in terms of that *lesser* portion of land comprising a corridor below which the electric line was placed /across which the overhead line travelled, and came up with a figure said to represent the devaluation of that corridor of land.

***What* the 1927 Act provides compensates for v. *How* compensation is assessed**

146. I am extremely conscious of the difference between *what* is to be compensated for under the 1927 Act and *how* compensation is to be calculated. These proceedings and this judgment concern the former, not the latter. The Oireachtas has decided to leave the *how* in the hands of a suitably qualified expert such as the Respondent. Nor has this court any expertise in valuation and the present proceedings are plainly not an appeal against the quantum of an award decided upon by such an eminent and experienced expert. Nothing in this judgment is intended to second-guess the Respondent's undoubted expertise or his right to determine how valuations are to be arrived at. My observations concern the *what* (i.e. what is, and is not, 'compensatable' in light of the statutory scheme comprising of the 1927 Act; the 1919 Act; and the Rules made thereunder) not the *how* (i.e. the method by which compensation is assessed).

The approach of both valuers – a corridor

147. In the present case, with regard to the question of compensation payable in respect of the wayleave, both valuers took the view that *what* was to be compensated for was the effect of the line on that section of the lands (i.e. 'corridor') within in the immediate vicinity of the path of the line. That approach accords with this Court's interpretation of the provisions of the statutory scheme.

148. What I have referred to as a 'corridor' is also described as a 'safety corridor' in the Respondent's Awards. The calculation and valuation, by the respective valuers, of a *safety corridor* (i.e. a section of land either side of the direct route of the overhead electric line) in the context of the specific claim for the acquisition of wayleave 112 was *not* a valuation of the *entire* lands of the Notice Parties. The following comprise extracts on this issue from the Respondent's award in respect of wayleave 112:

- With respect to the claim submitted by Mr Tuohy, the Respondent states that: "*He used a corridor width of 60 m to arrive at his area*" (see the top of internal page 3 of the transcript of the hearing which took place before the Respondent);

- With respect to evidence by Mr Jarlath Murray, engineer, the Respondent went on to state: "*he quoted from the 1934 Act to confirm his opinion that the basic corridor width was 55 m";*

- With regard to the evidence of the Respondent's valuer, Mr Boyle, page 3 of the Respondent's award refers to "*Safety Corridor of 0.6462 hectares @ 15% diminution: €1,916.00*";

- With respect to evidence from Mr Pat Kelly on behalf of the ESB, the bottom of internal page 3 of the Respondent's award states that: "*He also quoted specific dimensions for the safety corridor on this holding prepared by ESBI which Mr Boyle used to calculate his corridor area"*;

- Towards the bottom of internal page 5 of this award the Respondent states that: "***In order to assess the compensation payable in respect of the wayleave, both valuers have chosen to place a value on that section of the lands that are within the 'safety corridor'***" (emphasis added).

149. Reflective of the fact that the same approach was taken by the respective valuers in relation to the claim in relation to the acquisition of wayleave 113, the Respondent's award contains similar statements to those I have quoted above. To illustrate this fact, it is sufficient to note the following:

- At the top of internal page 3 of the wayleave 113 award, the Respondent states the following with respect to Mr Tuohy, the Notice Parties' valuer: *"He used a corridor width of 60 m to arrive at his area";*

- Regarding Mr Boyle's valuation on behalf of the Applicant, the Respondent notes: "*Safety Corridor of 0.2829 hectares - €19,786 per hectare @ 15% diminution: €839.00"*

- Towards the bottom of internal page 5 of this award the Respondent states that: "***In order to assess the compensation payable in respect of the wayleave, both valuers have chosen to place a value on that section of the lands that are within the 'safety corridor'***." (emphasis added).

150. Counsel for the Applicant submitted, without objection, that the foregoing reflects the standard approach to valuation in cases of this type. The gravamen of submissions on this issue by Counsel for the Notice Parties was to emphasise that, whilst such an approach to valuation was

valid, the Respondent was entirely at large with respect to all questions of valuation and could adopt different approaches.

151. I accept the foregoing proposition entirely, subject, however, to the important point that, in deploying his expertise as regards valuation approaches (namely, the *how*), the Respondent expert can only do so within the 'guardrails' of the powers created by the statutory scheme (specifically, *what* was to be compensated for). In other words, he lacks the power to award compensation (regardless of the approach taken to its calculation) if the loss is not 'compensatable' under the scheme, or if his approach involves a fundamental error of law.

152. To make a claim with reference to the valuation of that section, or *corridor,* of lands affected by the passing, across same, of the electric line (as opposed the *entire* lands) seems to me to be entirely consistent with the provisions of the 1927 Act and the approach mandated by the 1919 Act. This is not a compulsory purchase of the entire lands held by the landowner and the said approach involves a focus on the lands across which the line is placed (i.e. the trajectory taken by the electric line and the infrastructure placed on land to support it) with a taking into account of the reality that, even if a line can be measured in centimetres, a greater width (which the respective valuers measured in metres), either side of the line, is affected by the line being placed across the land (e.g. if a planning authority required that no structure be erected within a certain distance of the line).

***Entire* land holding v. *Corridor* of land across which line is placed**

153. Despite this being the approach adopted by both sides in relation to valuing compensation for the acquisition of the wayleave, the Respondent declined this approach, in favour of his own. This is clear from the Respondent's awards. Internal page 6 of his award regarding Wayleave 112 begins with the words:

> "*However, in this instance, I have taken a percentage of the value of the* ***entire*** *holding (including the corridor) with the objective of combining Mr Tuohy's claim for injurious affection to the remainder of the holding with his claim in respect of the safety corridor rather than treating them separately"* (emphasis added).

Future access

154. In other words, instead of valuing the affected *corridor*, the Respondent made an award of injurious affection in respect of the *entire* landholding. To see the why the Respondent adopted this approach, it is appropriate to quote the reasoning which followed:

> *"I have noted Mr Boyle's opinion that the placing of the line within the holding has no detrimental effect on the overall holding other than perhaps within the 'safety corridor' and that he has consequently allowed no compensation for the remainder of the holding.*
>
> *In this instance, however, the line is placed to the rear of the holding with access for machinery, et cetera being across the main portion of the site and thus,* ***in the event that the ESB require access in the future****, as for the subsequent placement of the fibre-optic*

cable, ***the remainder of the site will be, in my opinion, materially affected****. I have used a percentage figure that, in my opinion, combines both that factor and any additional detrimental effect of the lines specifically on that section of the lands that lie within the 'safety corridor'. In this particular claim, I consider that a figure of 10% is appropriate"* (emphasis added).

155. The following can be said in relation to this award:

(1) It comprises a decision to award damages for injurious affection to *other* lands across which the line does *not* pass; and

(2) A material reason for taking this approach was potential *future* access on the part of the ESB.

'Injurious affection' error

156. With respect to (1), for the reasons expressed in this judgment, it is not sufficiently clear to me, based on a literal interpretation of s.53, that the legislature created a right to receive compensation in respect of lands across which the ESB did *not* place a line (i.e. outside the corridor).

157. It is not sufficiently clear to me, from the plain meaning of the words used in the statutory scheme (comprising of the 1927 Act, the 1919 Act and the Rules made thereunder), that it was the *will* of the Oireachtas to impose on the body exercising s.53 powers the burden of paying not only compensation for (i) the 'take' of land across which the line is placed; and (ii) disturbance; but also (iii) injurious affection of other lands *outside* the 'take'.

158. For these reasons, I have come to the view that for the property arbitrator to make an award for injurious affection in respect of other lands outside of the corridor was an error of law, being a decision which lacked jurisdiction.

159. In a preliminary objection pleaded in statement of opposition, the Notice Parties contend that the Respondent's awards are not amenable to judicial review. They point out (entirely correctly) that no *mala fides* or misconduct is pleaded against the property arbitrator. They assert, because of this, that there is no basis to seek judicial review. I find myself unable to agree.

160. Order 84, Rule 22 (2A) of the Rules of the Superior Courts ("RSC"), and the requirement for an allegation of *mala fides* or misconduct, is confined to "*proceedings in or before a court*" (which the process before the property arbitrator was not). The Notice Parties go on to assert that all decisions by the Respondent were *within* his jurisdiction and wholly to be determined within the arbitration procedure.

161. I want to emphasise in the clearest of terms that no issue of *mala fides* or misconduct arises in this case, nor is it pleaded. That does not, however, insulate the property arbitrator's decisions from judicial review. In *ESB v. Boyle & Anor.* [2019] IEHC 475 Twomey J held (at para 14) that:

"…it is clear from the High Court decision of Shackleton v. Cork County Council [2007] IEHC 241 that ***the exercise of powers by a property arbitrator are amenable to judicial review****, since at para. 9.5 of that judgment, Clarke J. (as he then was) states:*

> *'Argument was addressed in the course of the hearing before me concerning the extent to which it would be inappropriate for the court to interfere with the decision of the arbitrator in this case. It was accepted that a decision of an arbitrator in a case such as this was open to judicial review. It should be recalled that a property arbitrator exercising the powers of such an arbitrator under statute is carrying out a public law function. The court should, of course, exercise significant deference to the decisions of such an arbitrator. However it seems to me that* ***it follows from the fact that a property arbitrator is carrying out a public law function and is thus amenable to judicial review, that the ordinary rules of judicial review apply****'"* (emphasis added).

162. The property arbitrator's jurisdiction is one conferred by statute. With respect to the exercise of such a jurisdiction Henchy J stated the following in the oft-cited decision of the Supreme Court in *The State (Lynch) v. Cooney & Anor*. [1982] IR 337 (at 380):

"*It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set out as* ***a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful - such as by misinterpreting the law, or by misapplying*** *it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters.* ***Otherwise, the exercise of the power will be held to be invalid for being ultra vires***" (emphasis added).

163. On the same issue, Keane J stated the following in *Radio Limerick One Limited v. Irish Radio and Television Commission* [1997] 2 IR 291:

"*… It would seem self-evident that,* ***if the exercise of the statutory discretion is grounded on an erroneous view of the law, it should not normally be allowed to stand****. Thus, in the present case, if the only ground on which the Commission terminated the Applicants contract was the carrying out of the outside broadcasts and they were wrong in law in treating as they did, those broadcasts as advertisement within the meaning of the Act, it is difficult [to see] how the decision could be described as "reasonable" either in the Wednesbury sense or on the application of the criteria proposed by Henchy J in Keegan*" (emphasis added).

164. The foregoing was cited by Clarke J (as he then was) in his decision in *Cork County Council v. Shackleton* [2007] IEHC 241, wherein the learned judge described the property arbitrator's "*…functions under the relevant legislation… as quasi-judicial in nature"* and went on to hold that

the property arbitrator had erred in law with respect to the construction of statutory provisions concerning the method of calculation of housing units and quashed the decision in question. At para. 7 of his judgment, Clarke J stated:

> "*It seems to me to follow that, where there has been a significant error in the interpretation of a material statutory provision leading to a decision of the property arbitrator being wrong in law, any such decision should, prima facie, be quashed*".

165. In the earlier decision of Budd J in *Blascaod Mor Teo v. Commissioners of Public Works (No.3)* [1998] IEHC 38, the learned judge concluded that: *"A property arbitrator, when acting under the 1919 Act, is exercising a judicial function."*

166. For the reasons set out in this judgment, I cannot accept the submission made on behalf of the Notice Parties to the effect that all decisions made by the property arbitrator were decisions on questions of *fact.* As I have been at pains to stress in this judgment, *how* the property arbitrator values compensation is exclusively a matter for his expertise. However, his or her jurisdiction extends only so far as the legislature has provided, *per* s.53, insofar as *what* is to be compensated for. Thus, guided by the principles in the aforementioned authorities, I have come to the view that there was a fundamental error made, rendering the decision to award compensation for injurious affection *ultra vires*, having regard to this Court's interpretation of the statutory scheme.

Error

167. In using the term 'error' I do not suggest for a moment that this was a conscious or obvious error. Far from it. The property arbitrator is a valuation expert, not a lawyer, but to illustrate how the error made was not at all obvious, I need only say the following. First, this court had the benefit of submissions made with consummate skill, over the course of two full days, by two eminent Senior Counsel, steeped in relevant expertise, who argued very cogently and convincingly for diametrically opposed positions on the relevant issue. Second, even with benefit of oral and written submissions, and having carefully considered all of the authorities, the answer to the interpretation question was certainly not immediately apparent to me. In other words, given the manner in which the issue had to be 'wrestled with' by legal professionals, and by this Court, there is absolutely no question of culpability on the part of the property arbitrator, and it is in the foregoing context that I used the term 'error'. It is, however, a *fundamental* error of law, having regard to the interpretation of s.53 to which I have come. It is fundamental because the consequence of this court's interpretation of the statutory scheme is that the Respondent made a decision which is not underpinned by the necessary statutory power, or *vires*. Thus it is an *ultra vires* decision.

168. In my view, to have departed from an approach contended for by the valuers on both sides, does not necessarily mean that an arbitrator's decision is infirm. This is because, in deciding that an expert valuer would determine compensation, the legislature was very obviously conscious that such an expert would bring their *own* experience, insight and expertise to bear on the

question before them. With respect to what I have called the 'injurious affection error', I am very mindful of the *deference* which this court must show to the property arbitrator's decision–making, and very much aware that this court's jurisdiction to set aside decisions by property arbitrators should be exercised "*sparingly"* [See *Doyle v. Kildare Co. Council & Anor*. [1996] ILRM 252 at 265 *per* Hamilton CJ].

169. However, irrespective of their expertise (and the property arbitrator in the present case appears to be an expert of vast experience who, according to the evidence before this court, approached the task with professionalism and scrupulous fairness) an award made *outside* of jurisdiction is one which this court is required, in my view, to set aside as it involves an error so fundamental that it cannot be permitted to stand.

170. I am satisfied that this decision is not at all inconsistent with the principles identified in *Manning v. Shackleton* [1996] 3 IR 85. I acknowledge entirely that, as Keane J. stated, at p.96 (in the context of a compulsory purchase order, for road improvement purposes, of a portion of a farm and the Applicant's request for a written judgment from the arbitrator): "*… it must also be remembered that the key policy of this legislation was to afford to the parties a machinery for determining the value of the compulsorily acquired land which would avoid the necessity for litigation and be final and binding*" (emphasis added). However, I cannot accept that an element of any such policy is that fundamental errors, resulting in decisions which lack jurisdiction, are permissible.

171. My decision also seems to be entirely consistent with the principles outlined in *Marshall v. Capital Holdings Ltd t/a Sunworld* [2006] IEHC 271, wherein Murphy J made clear that "*The court has a common law jurisdiction to set aside an award of an arbitrator where an error of law appears on the face of the award. Such an error must be so fundamental that the court cannot stand aside and allow it to remain unchallenged."* I am satisfied that this is the position here.

'Future compensation' error

172. As regards (2) (i.e. that a material reason for the Respondent's approach was potential *future* access on the part of the ESB), I am satisfied that the will of the people as expressed through the legislation enacted creates an entitlement to compensation where the ESB has *exercised* its powers under s.53, but does *not* confer on a landowner any entitlement to compensation for the *possibility* of their *future* exercise. Yet that is the approach which the Respondent took.

173. For the reasons expressed in this judgment, this seems to me to be an inadvertent but fundamental error which, of itself, requires this court to intervene. This is in circumstances where a literal interpretation of ss. 53(5) and 53(9), together, convinces me that the 1927 Act provides not only an entitlement to compensation for the *original* placing of any electric line across land (i.e. the exercise with which the Respondent's hearing was concerned) but explicitly contemplates the possibility of *future* access being required (*per* s.53(9)) for such matters as placing, repairing, or altering and, in the event of such future access occurring (but not otherwise), a right to further compensation arises.

Once off

174. Counsel for the Notice Parties submitted that on a proper construction of s.53 there was no right to further compensation in the event of future access. He submitted, relying on *Cooney v. Cooney*, that the "*orthodox interpretation*" of s.53 is that it provides a "*once off"* right to compensation. The phrase "*once off"* is indeed used in *Cooney,* but it is important to understand the context. Feeney J deploys that phrase immediately after stating that "*The entitlement to compensation arises out of the carrying out of the works and the owner becomes entitled to compensation when such works are carried out."* This was plainly a reference to the *original* works.

175. I am fortified in this view because of the facts in *Cooney*, where there had *only* been original works, as opposed to re-entry subsequent to the original works. In other words, there was no second claim for compensation in *Cooney.* Rather, what was at issue in *Cooney* was not the right to claim further compensation (in respect of further entry, *per* s.53(9)) but who was entitled to the compensation payable by the ESB in respect of the original works, wayleave notices having been served before the demise of the original owner, but in circumstances where he had passed away before the payment had been made. It was in that context that Feeney J stated; "*The payment of compensation is a* ***once off payment at the time of the works*** *and not a continuing payment for the presence of the lines and/or pylons"* (emphasis added). Indeed, the pointing out by Feeney J that this is compensation payable "*at the time of the works*" highlights the fact that it is *not* payment of anticipated compensation for some, as yet undone, future works at a *different* time (or at *no* time, in the event no future access/works take place). Yet, in reality, the Respondent has made an award for future access which may or may not ever occur. That seems to me to offend the proper interpretation of s.53 and run contrary to the intention of the legislature as expressed in the plain meaning of ss. 53(5) and 53 (9) when read together, as they must be in order to be properly understood.

Access

176. As well as a submission to the effect that the words "*owner or occupier*" in s.53(5) were confined to the *original* owner, it was submitted on behalf of the Notice Parties that, if s.59(9) was intended to create a new right to compensation, there would be no reference to "*placing".* It was also submitted that the award made by the Respondent recognised an obligation on the Notice Parties to keep all routes of access available across the relevant land to facilitate inspection. This was put in the following terms by Counsel for the Notice Parties during oral submissions:

> *"…the right covered by Section 53(9) does not include the right of entry at all times by day and by night, by all available means of access without the need for any notice to inspect, for anything short of repairing or altering. So if that is something that the property arbitrator has to have in mind, he has to bear in mind that where the wayleave notice does not identify a specific route that the ESB are going to use, they can use any route across the land.* ***I have to keep all routes across my land from all available access, across the fields, any way ESB want to go, available for ESB to come on with vehicles to inspect the***

line, no matter what impact it has on the privacy, security and amenity of my property*. And, Judge, that's exactly what Mr Good does. He has regard to the subsequent entry for the fibre-optic cable and the potential of subsequent entry into the future…"* (emphasis added).

177. It does not seem to me that the foregoing is an accurate characterisation of matters, having regard to the provisions of s.53. I am unable to find in that section an obligation upon the Notice Parties, concerning their future conduct (as regards keeping available into the future all available access routes), in the terms their Counsel sketched out so vividly. Not being under future obligations of the type asserted above, the Notice Parties are not entitled to future compensation for same. In the manner presently discussed, s.53 simply does not provide any such entitlement.

178. Furthermore, and remaining with the topic of *future access* in the context of *inspection* and *compensation,* it seems relevant to quote, once more, the following clause which appears in both of the 30 November 2011 'Landowner Agreements' signed by the Notice Parties, in return for which they received a total of €33,000:

"8. Eirgrid and ***ESB will be permitted access to lands in the future*** *in order to carry out inspections and maintenance on the lines.* ***Any damage caused by future inspections or maintenance work will be compensated*** *at the then rates"* (emphasis added).

179. The foregoing would clearly appear to be a contractual right, underpinned by consideration, which removes entirely the evidential basis for the submission that the ESB has no right to inspect into the future. On the contrary, it makes clear that, not only have the Notice Parties granted and been paid for such a right, any damage caused by future inspections will be compensated for, as the Notice Parties have, since 2011, known and agreed.

180. In saying the foregoing, I do not suggest that a proper reading of s.53(9) allows for a finding that the words "***may at any time enter*** *on such land or building*" (emphasis added) mean that the ESB cannot enter if the purpose is for *inspection* (rather than *"placing, repairing or altering such line or such fixture…"*).

Right to inspect

181. It is certainly true that the word *inspection* is not explicitly used in s.53(9) but the proper interpretation of the section seems to me to confer on the ESB a power of entry to inspect. I take this view because (1) there is an explicit power of entry *at any time* for the purpose of "*placing, repairing or altering*" a line or fixture; and (2) in order to know whether a line, in situ, needs to be repaired it seems self-evident that such a line would need to be inspected. Thus, the right of entry in order to repair seems to me to import, as a *sine qua non,* the right of entry to inspect (to ascertain if/to what extent repair is needed).

182. To look at it another way, if the section is not interpreted in that fashion, it would seem to rob the ESB of their very ability to repair, and sets at naught their explicit power of entry for the

purposes of repair (unless one subscribes to the view that the only repair-rights conferred on the ESB are exercisable in a 'factual vacuum' i.e. without the ESB having any right to see, in advance of repair, whether something needs repairing, or the extent of the repair needed). Keeping in mind the nature of the powers conferred under s.53, and their common good aspect, it would seem to me to be a perverse construction to hold other than s.53(9) imports inspection as a natural consequence of the explicit right to enter in order to repair.

Owner and Occupier

183. Furthermore, notwithstanding the undoubted skill with which the contrary submission is made, I am satisfied that (based on a literal interpretation of the s.53) the words "*owner and occupier*" used in s.53(5) are not confined to the *original* owner or occupier. Indeed, it would be to create a mischief to give those words such an interpretation, in that it would defeat an obvious purpose of the provision itself, in circumstances where the placing of an electric line and supporting infrastructure (be it poles, pylons or fixtures) across land might well survive several changes of ownership of the land in question.

'and'

184. Nor can I accept that the use of the word "*placing*" in s.53(9) (noting, in passing, that the ordinary meaning of the word *placing* would also encompass the act of *replacing*) has the effect of setting at nought the plain meaning of the words used in s.53, which makes explicit that the power of the ESB to place a line across the land of an owner or occupier is "*…subject to the entitlement of such owner of occupier to be paid compensation in respect of the exercise…*" by the ESB of "*…the powers conferred by this subsection* ***and*** *of the powers conferred by subsection (9) of this section…*"(emphasis added). The conjunction "*and*" appears for a reason, making it clear that the entitlement to compensation arises not only under a s.53(5) scenario, but also if and when s.53(9) powers are exercised.

Fundamental error

185. For these reasons, it seems to me that to award compensation for potential *future* access constituted a fundamental error on the part of the Respondent and resulted in an award which was made outside the jurisdiction conferred on the Respondent. This was an error of law by a skilled and experienced valuer who could not be blamed for same. However, it is not an error as to the *how* of valuation, but a fundamental error as to *what* can properly be compensated for under the statutory scheme, the making of which resulted in an *ultra vires* decision. In other words, regardless of how skilled, insightful and careful the analysis from a *valuation* perspective (and doubtless the awards were all these), from a *legal* perspective, they were made outside of the 'guardrails' laid down by the statutory scheme and lacked the necessary jurisdiction *per* the statutory scheme, irrespective of the specific amounts involved.

186. Thus, even if I am entirely wrong in my view that no 'stand–alone' right to be compensated for injurious affection survived the conscious decision by the legislature to exclude the operation of the 1845 Act from the scheme in respect of compensation for the exercise by the ESB of s.53

powers, and even if I am wrong in finding no right in s.53 to receive injurious affection compensation in respect of other/retained lands across which no line is placed, the evidence before this court still discloses what Clarke J (as he then) described at para 109 of his judgment in *Cork County Council v. Shackleton* [2011] 1 I.R. 84 as a "*… significant error in the interpretation of a material statutory provision leading to a decision of the property arbitrator being wrong in law".*

Late delivery of revised claims

187. Having decided that the ESB is entitled to relief on the foregoing ground, I now turn to look at the argument based on the late delivery by the Notice Parties of revised claims.

S.5 of the 1919 Act – unconditional offer

188. A significant feature of the statutory framework can be seen at s.5 of the 1919 Act which, under the heading of "Provisions as to costs", provides:

> "*5.—(1) Where the acquiring authority has made* ***an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by an official arbitrator to that claimant does not exceed the sum offered, the official arbitrator shall, unless for special reasons he thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority*** *so far as such costs were incurred after the offer was made.*
>
> *(2) If the official arbitrator is satisfied that* ***a claimant has failed to deliver to the acquiring authority a notice in writing of the amount claimed by him giving sufficient particulars and in sufficient time to enable the acquiring authority to make a proper offer****, the foregoing provisions of this section shall apply as if an unconditional offer had been made by the acquiring authority at the time when in the opinion of the official arbitrator sufficient particulars should have been furnished and the claimant had been awarded a sum not exceeding the amount of such offer.*
>
> *The notice of claim shall state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated, and when such a notice of claim has been delivered the acquiring authority may, at any time within six weeks after the delivery thereof, withdraw any notice to treat which has been served on the claimant or on any other person interested in the land authorised to be acquired, but shall be liable to pay compensation to any such claimant or other person for any loss or expenses occasioned by the notice to treat having been given to him and withdrawn, and the amount of such compensation shall, in default of agreement, be determined by an official arbitrator.*
>
> *(3) Where a claimant has made an unconditional offer in writing to accept any sum as compensation and has complied with the provisions of the last preceding subsection, and the sum awarded is equal to or exceeds that sum, the official arbitrator shall, unless*

for special reasons he thinks proper not to do so, order the acquiring authority to bear their own costs and to pay the costs of the claimant so far as such costs were incurred after the offer was made" (emphasis added).

189. It is uncontroversial to say that it is in the interest of parties to disputes and in the public interest generally, that the possibility of a resolution is promoted, as opposed to disputed hearings taking place with the attendant drain on time, cost, and other resources. This seems to me to hold as true in the context of arbitration as in relation to legal proceedings before the courts. Reflective of this principle, s.5(1) of the 1919 Act makes explicit statutory provision for what is nowadays described as a *'Calderbank'* letter. Section 5(2) emphasises the importance of a claimant (i.e. the Notice Parties) given to the acquiring authority (i.e. the Applicant) *"sufficient particulars and in sufficient time to enable the acquiring authority to make a proper offer".*

190. It is against that legislative backdrop, the Applicant asserts that the late introduction by the Notice Parties of additional claims gave rise to a breach of fair procedures and an error of law. The gravamen of the Applicant's submission is that this increased the Notice Parties' chances of 'beating' the unconditional offer which had been made some four months previously, but not accepted.

191. At 'first blush' what the Applicant's argue has considerable force. However, it seems to me the determination of this issue hinges on the specific facts. What is relevant to this issue can be summarised as follows:

1. On 23 May 2018, the Notice Parties submitted their claims for compensation, via Messrs Tuohy O'Toole;

2. On 17 January 2019 Mr Good was appointed as property arbitrator;

3. On 22 January 2019, the property arbitrator directed that expert reports "*should be exchanged between the parties not less than 14 days prior to the hearing*";

4. On 16 February 2019, the property arbitrator deemed the Notice Parties claims sufficiently particularised;

5. On 14 March 2019 the Applicant delivered a formal Reply;

6. On 10 May 2019 the property arbitrator wrote to the parties to advise that he intended to proceed with the hearing;

7. The Notice Parties did not furnish their expert reports until 14 May 2019, at which point additional claims were made, in particular, (a) a claim for loss of sites was introduced in respect of wayleave 112; (b) a claim concerning a fibre-optic cable was introduced in relation to both 112 and 113; (c) a claim for injurious affection to site potential along

residual road frontage regarding 113 was introduced; and (d) the Notice Party made a claim in relation to the application of S.I. No. 337/2016 Safety, Health and Welfare at Work (Electromagnetic Fields) Regulation 2016 (the "Regulations");

8. In response to the original claim for loss of sites which was made on 23 May 2018 in relation (then only) to Wayleave 113, the Applicant's Reply pleaded: "*there is not, and will not be, any loss of sight as a result of the service of the wayleave notice or the placement of an electric line above the ground across the claimants' lands. The Respondent will advance expert evidence that there is no impact on the development potential of the claimant's lands. The prejudice to the foregoing, any loss or 'potential' sites must be assessed in light of the claimant's duty to mitigate their loss and in consideration of the other available sites on the claimant's lands";*

9. Had the Applicants regarded these additional claims as causing prejudice, it was open to them to make an application to the property arbitrator for an adjournment;

10. At the hearing which took place on 15 May 2019, the Applicant did not make any application for an adjournment (whether based on the contention that, in light of the additional claims received on 14 May 2019, the Applicant wished to give consideration to the making of an increased unconditional offer, or on the basis that any other prejudice was perceived to arise e.g. in terms of the Applicant's ability to tender evidence on 15 May in opposition to the increased claims);

11. There is no evidence before this court which would allow for a finding that, had an adjournment been sought, the property arbitrator would not have granted same;

12. As a matter of fact, the Applicant never sought to put an increased unconditional offer, with reference to the increased claim (be that 'without prejudice' to the continued validity of the original unconditional offer insofar as the original claim, dated 23 May 2018, was concerned, or otherwise);

13. The Applicant did not insist on a ruling on 15 May 2019 that the additional claims should be excluded. Rather, in written submissions on 12 June 2019, the Applicant argued that "*these additional new claims*" should be excluded;

14. All claims, original and additional, were addressed in evidence by expert witnesses on both sides;

15. The property arbitrator made clear in his Awards that he did not take the Regulations into consideration or place any value on the laying of the fibre-optic cable (stating, at para. 9.5: *"I have not taken into consideration the effects of the Electromagnetic Fields*

Regulations 2016 as they are post the valuation date, nor have I placed a value on the fibre-optic cable….);

16. With respect to the claim for loss of development value, the property Arbitrator made a ruling at the hearing (which has not been challenged) that the Notice Parties' valuer was entitled to review his valuation following engagement with the Applicant's (i.e. ESB's) valuer and on consideration of the planning evidence, (see p.98 of transcript of the hearing before the Respondent);

17. At no stage did any witness proffered by the Applicant assert that they were prejudiced as a result of the late delivery of additional claims or asserted that they could not address all claims by means of their evidence;

18. At p. 176 of the transcript of the hearing before the Property Arbitrator contains the following question (put by Mr Bland SC, for the Notice Parties) and answer (given by Mr Boyle, the Applicant's valuer) after the latter confirmed that he and Mr Tuohy (the Applicant's valuer) had engaged on circa five occasions when they discussed a number of cases, including the present one:-

> **"Q**: *You also agree to me, it is not in the nature of Mr Tuohy to deal with you other than fairly, professionally and* ***you have no complaint whatsoever, that you were prejudiced*** *on any information gave to you or didn't give to you at those meetings?*
>
> **A**: *I would say myself and Mr Tuohy have a good working relationship*" (emphasis added)

The foregoing plainly afforded the Applicant's valuer the opportunity to assert prejudice as regards meeting what were, by then, the belatedly updated claims. No such opportunity was taken and I am entitled to hold that this is because no prejudice arose to the ESB.

19. Following the exchange of correspondence between the parties (6 June to 3 July, 2019) the Applicant delivered submissions on 12 June 2019;

20. On 8 July 2019 the property arbitrator issued his awards;

21. On 25 July 2019 the awards were stamped;

22. On 22 October 2019 ESB applied for and was granted leave to bring the present proceedings

192. The will of the people, expressed though the statutory scheme is that the property arbitrator determines matters. Commenting on an arbitration process, albeit in a different context, McCarthy J stated in *Keenan v. Shield insurance company limited* [1998] IR 89 that *"it ill becomes the courts to show any readiness to interfere in such a process".*

193. Article 5(3) of The Acquisition of Land (Assessment of Compensation) Rules 1920 (the "1920 Rules") made by the Reference Committee pursuant to the 1919 Act provide:

> "(3) *Subject to the provisions of the Act and of these Rules the proceedings before an arbitrator shall be such as the arbitrator, subject to any special directions of the Reference Committee, may* ***in his discretion think fit***" (emphasis added).

194. The aforesaid discretion must be exercised fairly and in accordance with the principles of natural and constitutional justice. However, the Applicant has not established that the *contrary* occurred in the process under consideration.

Prejudice

195. It also seems to me that the property arbitrator who conducted the entire process, including the hearing, was in the *ideal* position to identify if prejudice, actual or apprehended, arose. He identified none. Nor can this court identify such prejudice, or any breach of fair procedures, which would justify the very significant step of trespassing on the jurisdiction of the property arbitrator with respect to the conduct of proceedings before him.

196. In short, I take the view that to set aside the Awards on this ground would be to fail to show due deference to the exercise by the property arbitrator of his discretion in conducting a process which was his to conduct. I am satisfied that the Applicant has failed to establish an entitlement to relief on this ground.

Costs considerations

197. Having explained the reasons for this Court's decisions, I feel that, in these very particular circumstances, it would be appropriate to take the somewhat unusual step of setting out, in some detail, certain observations in relation to the question of costs.

198. The starting point for the consideration must, of course, be the 'normal rule' that 'costs' should 'follow the event', which rule is given statutory expression in section 169 of the Legal Services Regulation Act 2015. However, in the present case, my preliminary but strongly held view, is that there are a range of factors which argue forcefully for a *departure* from the normal rule.

199. It will be recalled that the 3 core aspects of the Applicant's claim concerned:

(1) Alleged lack of fair procedures/infringement of legitimate expectation related to the issue of FOA payments;

(2) Alleged error of law regarding injurious affection compensation / devaluation of entire property on the basis of possible future access by ESB; and

(3) Alleged lack of fair procedures – late introduction of additional claims.

200. The claim under heading (1) was abandoned and, thus, took up no time during the hearing but it is fair to say that it featured heavily in pleadings and in the written submissions prepared by both sides. Obvious issues concern the extent to which:

(a) the Applicant, who abandoned that issue, should discharge their own costs regarding it; and

(b) the Notice Parties are entitled to their costs associated with engagement on that issue up to the point of which was abandoned (taking into account the decision in *Payne v ESB*).

201. For the reasons explained in this judgment, the Applicant was unsuccessful with respect of its claim under heading (3). Even though this issue took up a relatively small minority of the 2 full days at hearing, fairness would seem to require that an any costs order reflect this.

202. With respect to heading (2) it will be recalled that it was in the context of making an *injurious affection* award, that the property arbitrator awarded compensation for future access in respect of the original exercise of s.53 powers by the ESB. It is entirely fair to say that the issue which took up the 'lion's share' of the time during the 2-day hearing before me concerned what I have referred to as the 'injurious affection question' (specifically, whether the property arbitrator had jurisdiction to award compensation for injurious affection). This was also, without a doubt, the most significant issue in the case.

203. Under the heading of "*Finality of award and statement of special cases*", s.6 of the 1919 Act provides:

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

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

204. In light of the above, the property arbitrator could have been *required* to state a case to this court, had ESB made the relevant application and the view been taken that a question of law required determination.

205. It seems entirely uncontroversial to say that whether the property arbitrator had jurisdiction to award compensation for injurious affection is such a question.

206. It is equally clear that, *prior* to the property arbitrator handing down his awards, this was a fundamentally important question, the answer to which the ESB submitted was in the negative. This is clear from para. 62 of ESB's 33-page written submissions, dated 12 June 2019, which began as following:

> "***It is submitted that*** *in circumstances where the claimant's lands are not the subject of a compulsory acquisition and the claimants remain the full owners of the lands after the works,* ***there is no entitlement to a claim for injurious affection*** *under s. 68 of the 1845 Act…"* (emphasis added).

207. However, despite (i) this being a fundamental question of law which was 'live'; and (ii) despite being aware that ESB could call for a case to be stated to this court; and (iii) could apply, if necessary, for the property arbitrator to be *compelled* to state a case, were he to refuse a request to do so, ESB went only as far as to make the following submission in the balance of para.62:

> "***If the arbitrator has any doubt in relation to this, it is submitted that he should state a case*** *to the High Court, pursuant to s.6 of the 1919 Act. The case stated procedure is addressed below"* (emphasis added).

208. In my view, there is a material difference between (a) indicating that *if* the property arbitrator had any doubt about a question he should state a case; and (b) requesting that a case *be* stated by the property arbitrator, with respect to the question. In my view, ESB did (a) not (b).

209. In circumstances where I am satisfied that, as a matter of fact, the ESB never called upon the property arbitrator to state a case, there is simply no evidence to allow for a finding that the latter would have refused.

210. However, even in the event of a refusal, an application to compel the property arbitrator to state the case is far from complex. In circumstances where there was, in fact, no request, there was no refusal and no application to compel.

211. I am satisfied that the foregoing does not deprive the Applicant of relief in the present proceedings given the fundamental nature of the errors identified in this judgment, but it seems to me to be a very significant factor when it comes to the question of costs, given that the majority of time during the hearing was taken up by or concerned with the injurious affection question (which could have been the basis for a case stated).

212. That being so, it seems to me that fairness requires the court to consider the consequences for the Notice Parties, as regards costs, *had* the ESB ensured that a case was stated, and

answered, on the injurious affection question *prior* to the delivery by the property arbitrator of his awards.

213. It seems to me that, had this occurred, the property arbitrator's awards – which would have been made in the wake of clarification on that question – would have been materially different (and, as I say, it was in the context of impermissibly awarding injurious affection compensation that the property arbitrator fell into error by awarding future compensation for the original exercise of s.53 powers).

214. In addition to the foregoing, the majority of time at the 2-day trial (and the attendant costs) could have been saved.

215. It also seems relevant to observe that the Notice Parties are neither valuers nor lawyers. Thus, their insight into the *vires* of a property arbitrator to award compensation for injurious affection was, at all times, entirely dependent on others.

216. Furthermore, the injurious affection question was a 'thorny' one, even for experienced legal professionals and for this court.

217. The Notice Parties' were no doubt anxious to 'hold on to' such award as the property arbitrator had made in their favour, but that was the entire extent of their interest.

218. By contrast, the ESB had and has much 'wider' considerations than the quantum of the particular awards made by the property arbitrator in the Notice Parties' favour. Indeed, during oral submissions with reference to the Applicant's claim under heading (3), it was contended that what might be, in this particular case, a relatively insignificant sum (€2,500 awarded in respect of the 'late' claim) was nonetheless significant because, submitted Counsel for the ESB, given the other cases which the ESB had to deal with: "*… the multiplier effect is relevant to the public authority…"*

219. Furthermore, although it is true that the Notice Parties opposed the Applicant's claim for judicial review, it seems fair to say that this was a choice somewhat thrust upon them, due to a decision by the Chief State Solicitor's Office not to participate by way of defending the Respondent's awards. In other words, but for that decision, the Notice Parties could have 'sat by the sidelines' and awaited the outcome of proceedings litigated by the Applicant and Respondent, respectively.

220. My point is that the Notice Parties never had any vested interest in defending the Respondent's *vires* or decision-making, as opposed to wanting to receive their award.

221. In addition, by performing the role of *legitimi contradictores,* it seems to me that the Notice Parties have, in very real terms, been of service to the Applicant and to the public generally.

222. Insofar as the Applicant is concerned, the central issue in respect of the case which the ESB could (and to my mind should) have called upon the Property Arbitrator to state, namely the

injurious affection question, has been addressed, due to the participation of the Notice Parties and the experienced legal team they fielded.

223. As regards the public, the submissions made with consummate skill and sophistication by counsel on *both* sides has enabled this court to provide clarification on a novel question, which is of far wider relevance than the 'four walls' of any award in the Notice Parties' favour.

224. This did not involve a situation where, for example, individuals identified an exclusively personal advantage in challenging a decision which had been made adverse to them and sought to quash it. On the contrary, this is litigation foisted on the Notice Parties due to the unhappiness of the Applicant with the decision of the Respondent.

225. It is true, as I have said, that the Notice Parties wished to 'hold on' to their awards, but to ask the following questions illustrates the invidious position which the Notice Parties found themselves in and highlights, in my view, that a 'bespoke' response to the costs issue is required in this case (recalling, too, that the first of the three core issues was abandoned by the Applicant before the hearing, whereas and the third issue was one in which the Applicant was entirely unsuccessful):

Q: Was the Respondent's approach to the exercise of his statutory power *ever* within the control of the Notice Parties? **A:** No;

Q: What would be the position if the Respondent's awards had been fully *compliant* with the powers conferred by 1927 Act? **A:** No costs' liability for the Notice Parties;

Q: What would be the position if the Respondent had defended his awards in these proceedings? **A:** Again, no costs' liability for the Notice Parties;

Q: Were the Notice Parties entitled to assume that such awards as they might receive were made lawfully? **A:** Yes;

Q: In the absence of the Respondent defending the awards, was there any other party to do so other than the notice parties (bearing in mind that, without doubt, the Notice Parties were and are entitled to awards of compensation)? **A:** No;

Q: In these proceedings, were the Notice Parties concerned about the *wider* implications (e.g. the "*multiplier effect"* on the Applicant of compensation claims made by others) of the approach taken by the Respondent? **A:** No;

Q: Was the Applicant concerned about the *wider* implications of the approach taken by the Respondent, given the multiplier effect? **A:** Yes;

Q: Do the present proceedings raise *novel* issues, or issues of *general public importance*? **A**: Yes, the 'injurious affection question' is plainly *both* and it lay at the heart of the

Applicant's case (Note: it would *not* have been novel, had a case been stated prior to the awards);

Q: Does their general public importance matter, in any way, to the Notice Parties? **A:** No

Q: Does their general public importance matter to the Applicant? **A:** Yes

Q: Had the Applicant stated a case on the injurious affection, what effect is that likely to have had on the Notice Parties' liability for costs?
A: It is *possible* the Respondent's awards would have fully complied with his statutory powers, resulting in no litigation and no costs. It is *certain* that his awards would have been guided by the outcome of a case stated and, thus, the Notice Parties would not have had to expend costs on the single biggest issue in these proceedings.

226. In *Dunne v. Minister for the Environment* [2008] 2 IR 775, the Supreme Court made clear (see para. 26) that a court has a discretionary jurisdiction to depart from the general rule that costs follow the event, stating that:

"…*the Court has a discretionary jurisdiction to vary or depart from that rule of law* ***if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction****…It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant, but it is the factors or combination of factors in the context of the individual case which determine the issue. Accordingly, any departure from the general rule is one which must be decided by a Court in the circumstances of each case*" (emphasis added).

227. In the manner explained in this judgment, the central issue in the case is one, not only of considerable complexity, but of considerable public importance. Although of no concern to the Notice Parties beyond their awards, the outcome of this court's determination of the 'injurious affection question' was always going to have very significant consequences for the ESB, and potentially far-reaching effects for the 'public purse'.

228. In other words, at the heart of these proceedings was an issue of public interest. That the issue was determined in these proceedings, without doubt, contributed to their length, complexity and cost (as opposed to that issue having been determined earlier by way of a case stated) but it was certainly in the public interest that the issue *be* judicially determined.

229. The 'injurious affection question' and related issues were weighty and complex, and required this court to give them very careful consideration, with which task, as I say, Counsel for the Notice Parties played a vital role, as did his 'opposite number'.

230. The answer to the core question of whether the statutory scheme entitled the Respondent to award compensation for injurious affection to other lands was not at all obvious, but the answer can fairly be described as one of systemic importance, given the proliferation throughout the entire State, in the public interest, of electric lines and their supporting infrastructure. Nor did that central question appear to have been examined and determined in earlier proceedings.

231. It also seems to me that the views I have expressed on the costs issue accord with the principles outlined in the Divisional Court's decision in *Collins v. Minister for Finance* [2014] IEHC 79 (Kelly, Finlay Geoghegan and Hogan JJ.) wherein the Court referred to the types of cases where a departure from the 'normal rule' may be warranted (see paras. 13 - 18). At para. 15, in *Collins*, the Court referred to issues of "far reaching importance in an area of the law with general application". At para. 16, the Court referred to cases where the judgment "clarified an otherwise obscure or unexplored area of the law"; and, at para. 17, the Court referred to cases in which the issues raised were "of special and general public importance".

232. Given the very particular circumstances of this case and the combination of factors to which I have referred, it seems to me to be one which falls into a very special and rare category and my preliminary – but, as I say, strongly held - view is this is a case where justice requires that the Notice Parties be awarded, if not all, then a very significant proportion comprising the majority of their costs. To do so would, in my view, not be at all inconsistent with the provisions of s.169 of the 2015 Act and/or Order 99 in its current form. Not to do so would, in my view, be to create an injustice.

233. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

234. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days.