

UPPER TRIBUNAL (LANDS CHAMBER)



[2023] UKUT 214 (LC)

UTLC Number: LC-2023-44

Royal Courts of Justice
Strand, London WC2A 2LL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF A NOTICE OF REFERENCE

COMPENSATION – Land Compensation Act 1973 Part I – dwelling house – depreciation in value as a result of physical factors caused by use of short spur of new highway into development site – compensation assessed at £10,000

BETWEEN

DAVID TREVOR FISK

Claimant

-and-

SUFFOLK COUNTY COUNCIL

Respondent

Re: 39 Grimwade Close,
Brantham,
Suffolk,
CO11 1QY

Diane Martin MRICS FAAV
Determination on written representations

Decision Date: 7 September 2023

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Introduction

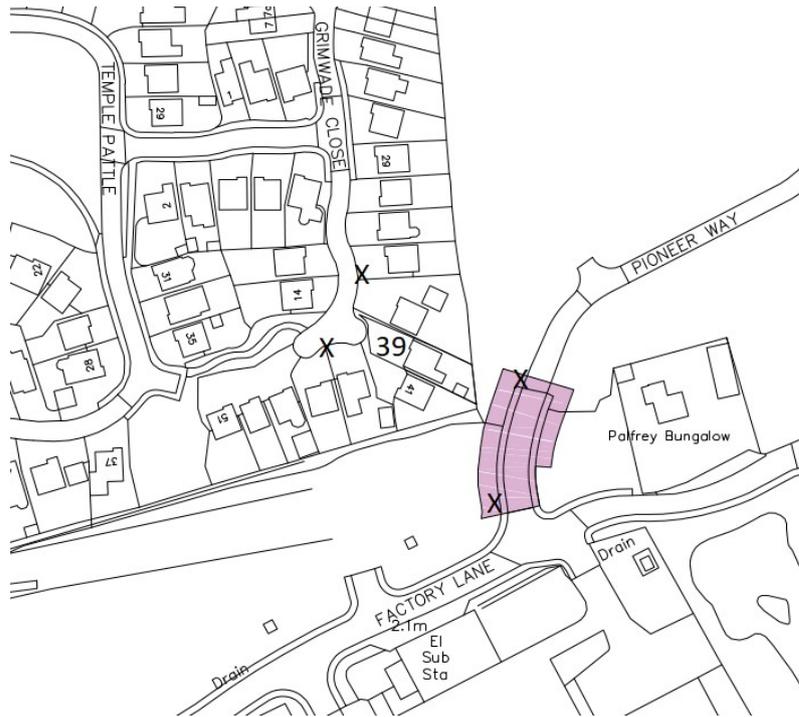
1. This is a reference to determine a claim for compensation under Part I of the Land Compensation Act 1973 (“the Act”) made by Mr David Fisk (“the claimant”), who is joint owner with Mrs Ann Fisk of 39 Grimwade Close, Brantham, Suffolk CO11 1QY (“the property”).
2. The claim is unusual in that it arises from a single claimant in relation to a 40m spur of new road which was constructed to give access to a new development of over 280 houses on the edge of Brantham, known as Stour View. The spur forms the southern end of Pioneer Way, which is the future spine road through Stour View. Until all phases of the development are completed, which is estimated to be in 2027, the southern access to Pioneer Way will only be used for access by construction traffic, whilst residential traffic will enter at the northern end. Meanwhile, documents show that the spur has already been dedicated as a highway and is technically open to public traffic.
3. The claimant wrote to the respondent on 6 September 2021 claiming compensation of £35,000, assessed as at 1 September 2021. This was the date he had been advised by his solicitor was the first claim day as defined in the Act, founded on the understanding that the spur was a “private road” until September 2021. However, if this had been the case then the first claim day would not have been until one year and a day after that. Following unsuccessful negotiations, including disagreement over the appropriate valuation date, the claimant made a reference to this Tribunal on 30 January 2023. In its response the council admitted that the claimant was eligible to make a claim under the Act, but submitted that the first claim day was 21 January 2021, one year and a day after the date of dedication as a highway, maintainable at public expense. Both parties requested that the matter be dealt with under the written representations procedure and the council stated that it wished to instruct a valuation expert.
4. I held a case management hearing on 23 March 2023, attended by the claimant and the council’s solicitor, to clarify the requirements for evidence and establish an agreed timescale for filing and serving of that evidence. At the hearing it was agreed that a dispute over the valuation date was not proportionate to the nature of the claim and the council agreed that the valuation date for the purposes of this reference would be 1 September 2021, which was later than the first claim day and in the claimant’s favour as it allowed for any growth in property values during 2021. This agreement was made to enable the dispute to be determined in a proportionate manner without unnecessary delay or expense, on the basis that no other claims had been made under the Act in respect of this section of road, but with no admission that it was correct in law.
5. I made a site inspection on 12 July 2023, to view the property and the spur road. I also viewed the locations of comparable properties referred to in valuation evidence.

Factual background

6. The property is a detached three bedroom house of brick under tile, situated on an estate of similar houses built in the mid 1990s. It originally had four bedrooms, two of which have since been adapted to provide one larger room and storage space. The ground floor

provides a lounge, dining room, large kitchen and WC. A single storey brick extension, used as a study, has been added to the dining room at the rear. The integral garage has been divided into a general storage area and a utility room. The small rear garden is landscaped to provide lawn, borders, paved sitting areas and a summer house.

7. A gate in the garden fence gives access to the land behind, on which Pioneer Way has been constructed. The claimant said that he had for many years used the strip of land running outside his garden fence for growing vegetables. A path used to run up the edge of the field beyond the gardens and the land had at one time been used as allotments.
8. The first plan below shows the location of the property (39) at the bottom right corner of existing development and its proximity to the new road Pioneer Way. The shaded section is the spur adopted by the Council, constructed as a standard carriageway with a footway on each side. The position of two street lamps, described as “modern low lighting columns with directional LED illumination”, is shown as X. The closest one is approximately 22 metres from the rear façade of the property. The location of street lamps near the property in Grimwade Close is also shown as X.
9. The respondent confirmed that the lighting heads on the lamps were changed on 10 December 2021 from the original LED to an alternative LED that enabled them to be dimmed. This was part of a wider replacement project implemented across the county. Part-night lighting, where lamps are turned off between 11.30 pm and 6.00 am, is usually adopted in residential areas and it is now also in use for the two lamps in Pioneer Way. It is not clear when part-night lighting was adopted for these lamps but the respondent stated that it was likely to have commenced shortly after the replacement of the heads. When the claimant first wrote to the council on 6 September 2021 to make his claim, and therefore at the valuation date, the lights were remaining on all night.
10. To overcome drainage problems the spur road was built on raised ground so that its surface level is raised by an estimated 2 metres above the level of the property’s garden. In late 2021 (estimated by the respondents) the developers erected a length of approximately 27 metres of timber acoustic fencing outside the footpath, on the side of the road nearest the property, in an attempt to address some of the claimant’s concerns over noise disturbance.
11. On my inspection visit I was able to drive along the spur, as if it were a public road, and then I encountered a Taylor Wimpey sign which indicated the entrance to the development site. I am therefore satisfied that the spur is open to public traffic, even if that traffic must turn around at the entrance to the site.



12. At the valuation date the spur road was in use during working hours by construction traffic. This will continue to be the only regular use by traffic until completion of the development, estimated to be in 2027. After that date Pioneer Way will be a major access route for the Stour View development.

13. The plan below shows the proposed layout of the finished development in the vicinity of the property. There will be no housing or parking immediately behind it and trees in the boundary fence are to be retained. The houses nearest to the Property are scheduled to be completed in 2025.



Statutory provisions for entitlement to and assessment of compensation

14. Section 1 of the Act sets out the right to compensation as follows:

“1. -Right to compensation.

- (1) Where the value of an interest in land is depreciated by physical factors caused by the use of public works, then, if -
 - (a) the interest qualifies for compensation under this Part of this Act; and
 - (b) the person entitled to the interest makes a claim after the time provided by and otherwise in accordance with this Part of this Act,
compensation for that depreciation shall, subject to the provisions of this Part of this Act, be payable by the responsible authority to the person making the claim (hereinafter referred to as “the claimant”).
- (2) The physical factors mentioned in subsection (1) above are noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance.
- (3) The public works mentioned in subsection (1) above are –
 - (a) any highway;
 - ...
- (4) The responsible authority mentioned in subsection (1) above is, in relation to a highway, the appropriate highway authority...
- (5) ...the source of the physical factors must be situated on or in the public works the use of which is alleged to be their cause.
...
- (9) Subject to section 9 below, “the relevant date” in this part of the Act means –
 - (a) in relation to a claim in respect of a highway, the date on which it was first open to public traffic.”

15. S.9, referred to in s. 1(9), covers the situation where a highway already open to public traffic has been altered.

16. Section 2 sets out the types of interest which qualify for compensation. It is not in dispute that the claimant had a qualifying interest at the relevant date. Section 3(2) deals with the date for making claims and s.4 deals with the assessment of compensation as follows:

“3. - Claims

...

- (2) Subject to the provisions of this section and of sections 12 and 14 below, no claim shall be made before the expiration of twelve months from the relevant date; and the day next following the expiration of the said twelve months is in this Part of this Act referred to as “*the first claim day*”.

...

4. – Assessment of compensation: general provisions

(1) The compensation payable on any claim shall be assessed by reference to prices current on the first claim day.

(2) In assessing depreciation due to the physical factors caused by the use of any public works, account shall be taken of the use of those works as it exists on the first claim day and of any intensification that may then be reasonably expected of the use of those works in the state in which they are on that date.

...

(4) The value of the interest in respect of which the claim is made shall be assessed

—

...

(b) subject to section 5 below, in accordance with rules (2) to (4) of the rules set out in section 5 of the Land Compensation Act 1961;

...”

17. Of the rules referred to in section 4(4)(b) it is only rule (2) in section 5 of the Land Compensation Act 1961 which is relevant in this case:

“(2) The value of land shall ... be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise...”

Evidence of physical factors

18. In order to assess whether any loss in value has arisen as a result of “physical factors caused by the use of the public works” it is necessary to identify what new physical factors were affecting the property at the valuation date. In his letter of claim, dated 6 September 2021, the claimant stated that his house now suffered from all night lighting of the rear of the house and the rear garden, from the street lamp on the raised road. This meant that he and his wife could no longer sleep with windows and curtains open, and it had also affected the growth of plants in the garden. In the two years since construction had started, daytime noise had been caused from as early as 5.45 am by construction vehicles, equipment and staff passing the house on the spur road. Once the road was open to all residents of Stour View in the future, noise would be created at all hours of day and night by residents using the road in vehicles and on foot. When there was an easterly wind, fumes and exhaust emissions from vehicles passing the property at a raised level had been experienced in the rear garden. The claimant was also concerned that in future the open area outside his garden fence, which is lower than the road, would be used by groups of children and teenagers to gather for smoking and drinking, creating a different sort of noisy environment.
19. At the time of my inspection, in the late morning on a Wednesday, there were very few vehicle movements into and out of Pioneer Way over the spur road, but I was able to understand the proximity of the road to the property, and the way in which it is raised above the level of the garden. I noted the position of the closest street lamp, and of the acoustic fencing. My enquiries regarding the type of lighting, the lighting hours and the

date that the fence was provided were answered subsequently by the council, as set out in the background section.

20. It was clear to me that lighting from the street lamps on Pioneer Way was potentially the most intrusive physical factor likely to affect the value of the property. Undoubtedly, at the valuation date when they were lit all night that was particularly intrusive. Now that the lighting hours have been reduced to those of a normal residential street, that factor is much diminished, but I received no submissions or evidence that this would have been an expectation at the valuation date.
21. No evidence was provided to quantify the levels and extent of noise and pollution caused by construction traffic entering and leaving the site at the valuation date. However, the provision of acoustic fencing in late 2021 is evidence that the potential impact of noise from the spur road was taken seriously. Again, I received no evidence that a prospective purchaser at the valuation date could have expected this mitigation measure to be put in place.

Valuation approach

22. It is accepted practice that compensation under the Act for loss of value arising from physical factors should be assessed by comparing, at the valuation date, the market value of the claim property subject to the physical factors, known as the “switched on” value, with its hypothetical market value assuming those factors were “switched off”. The important point is that it is only loss of value arising from any of the specified physical factors caused by use of the works that can be compensated. Loss of value arising from any other aspect of the works which could affect the market for the property, such as loss of view or outlook, loss of amenity or convenience, cannot be compensated.
23. Valuation evidence is therefore required to establish the switched on or actual value of the property at 1 September 2021, and also a hypothetical value at that date with the physical factors switched off, but all other circumstances of the new development in place.

Valuation evidence

24. In making his claim for compensation of £35,000, the claimant relied on a letter dated 1 September 2021, written by Mr Tony Cathro of Fenn Wright, estate agents based in Manningtree, Essex. The claimant explained that Mr Cathro had over 30 years’ experience of selling residential property in the area and was the contracted selling agent for the new houses in Stour View, so there could be no-one better informed on property values in Brantham. Mr Cathro’s single page letter was an appraisal of the property, of the type made in anticipation of an instruction to sell, although the claimant understood it to be a valuation. In the letter Mr Cathro stated:

“I believe that if the property were offered for sale in the current market it would be possible to attract interest in the region of £375,000 (three hundred and seventy five thousand pounds). However, if the property still backed on to open land without the intrusion of the road or street lights directly behind the property I would expect it to

achieve in the region of £410,000 (four hundred and ten thousand pounds), subject to contract.”

25. At the case management hearing I explained to the claimant the limitations of the letter as evidence, but he confirmed that he did not wish to instruct an expert to produce a report. He was therefore given 21 days to produce a schedule of comparable sales data from the calendar year of 2021 which he wished the Tribunal to take into consideration. The respondent’s expert report was to be submitted 21 days later, taking into account the claimant’s evidence of sales.
26. The claimant provided details, extracted from rightmove.co.uk, of 13 sales in 2021 of four bedroom detached houses in the locality, which included sales in the nearby villages of East Bergholt, Capel St Mary and Stutton . He also provided details of the sale in May 2022 of 9 Hardy Close, which had been on the market since the spring of 2021. It is situated against a raised and busy road, and the claimant compared its sale price with that of 10 and 26 Hardy Close, which were both four bedroom detached houses sold in 2021, although not included in his original selection from Rightmove. A total of 16 property sales were therefore in evidence.
27. The respondent had outsourced its property services to Concertus Design and Property Consultants, who instructed Mr Roger Moore BSc BA(Hons) MRICS of Lambert Smith Hampton (“LSH”) to prepare an expert report on the compensation due to the claimant. Mr Moore is a director in the compulsory purchase team at LSH, with over 35 years’ experience in dealing with compulsory purchase and property valuation. He had previously been in negotiations with the claimant over this matter on behalf of Concertus, but had informed them of his duty to the Tribunal and his report complied with the requirements of the RICS set out in the 4th edition of the RICS Practice Statement and Guidance Note “Surveyors acting as expert witnesses”. Mr Moore produced a helpful spreadsheet and location plan of sales evidence, which included 14 of the sales referred to by the claimant, but not 9 or 26 Hardy Close.

The switched off value of the property

28. Mr Moore assumed that all purchasers in the market at the valuation date would have had full knowledge of the ongoing development of Stour View, so he said that sales of similar houses in roads adjacent to the property would provide evidence suitable for assessment of the hypothetical switched off value. The range of sales provided a general tone for the value of four bedroom detached houses in the locality, but Mr Moore placed most weight on the sales of two properties in the same residential estate as the property. 10 Hardy Close sold in June 2021 for £365,000 and 12 Browning Road in March 2021 for £410,000. Using the Nationwide House Price Index he adjusted the sale prices to the valuation date at £372,000 and £439,000 respectively. 10 Hardy Close had other houses to the front and rear, and a smaller footprint than the property so would be less valuable. 12 Browning Road had a front aspect looking out over green space within the estate and had been extended at ground floor level, both factors accounting for its higher sale price. The location was better than that of the property.

29. Mr Moore had also obtained, from the Land Director for Taylor Wimpey Homes, the prices agreed (at the reservation stage) for sales in Stour View of similar four bedroom detached houses with a small garage and garden. Only two sales had been agreed in 2021. The sale of No. 243 was agreed in May 2021 at £390,000. Using indexation that would be the equivalent of £398,000 at the valuation date. No. 50 had been agreed at £420,000 in November 2021, the equivalent of £408,000 at the valuation date.
30. Taking into account the evidence of actual sales and agreements for sale, it was Mr Moore’s opinion that the switched off value of the property at the valuation date was £400,000.
31. This can be compared with the claimant’s view, based on Mr Cathro’s letter, that the value of his house without the scheme at that date would have been £410,000. However, in his letter Mr Cathro referred to this price as one he would expect to achieve in a scenario where “...the property still backed onto open land...”. The switched off value can only assume that the physical factors arising from use are not present, and Mr Cathro’s assumption goes well beyond that. His figure is not a valuation supported by evidence of other sales, but it may well reflect the hypothetical value of the property in a world where the Stour View development was not taking place. In that respect it aligns with Mr Moore’s figure, which I would expect to be a lower one given the much more limited assumption.
32. I have reviewed the full range of 16 comparable sales provided by the claimant, and seen each in its location to judge how that factor could have affected its sale price. With evidence of 12 sales of similar sized houses in Brantham, there is no need to consider the sales in other villages. I agree with Mr Moore that the most weight should be given to the sales of houses within the same residential estate as the property, since that reduces the number of factors for which adjustments need to be made. For example, I note that several of the other Brantham sales are located beside a busy main road, which is a very different location, and some are close to a railway line and pub. However, a number of those houses have the benefit of an extensive rural view to the rear. In both respects they have important differences from the property which will have affected their sale price and make them less helpful as evidence.
33. I place very little weight on the prices said to have been agreed for new properties in Stour View since, as Mr Moore confirmed, the agreement of a price at reservation was not a binding contract. But those prices do give a feel for the market at the valuation date.
34. I consider that the best evidence is found in the sales of 10 and 26 Hardy Close and 12 Browning Road. Those sales are summarised below:

Property	Beds	Bath/ shower	Parking	Sale date	Sale price	Adjusted to 1-9-21	Comment
12 Browning Road	4	3	Drive	Mar-21	£410,000	£439,000	Good front outlook, small rear garden
26 Hardy Close	4	2	Garage	Apr-21	£369,995	£377,500	Undeveloped at rear
10 Hardy Close	4	2	Garage	Jun-21	£365,000	£372,000	Overlooked at rear

35. The adjusted sale price of 12 Browning Road sits so far above the evidence from Hardy Close that it suggests possibly special circumstances and certainly a different market for property situated on a quiet road overlooking a central green by comparison with properties in a cul de sac. Browning Road is also a more recent development than Hardy Close, with layout and design features reducing the appearance of uniformity and density which Hardy Close has. Grimwade Close is similar to Browning Road in age and design, but similar to Hardy Close in being a cul de sac, so I would expect the switched off value of the property to sit between the two price points and I agree with Mr Moore's assessment of that value at £400,000.

Switched on value

36. The claimant relied heavily on the sale of 9 Hardy Close as evidence of the impact which location beside a raised main estate road can have on the value of a property. 9 Hardy Close is 10 years older than the property and was sold as a four bedroom detached house, with a bathroom and shower room and an integral garage. It was described as having “a good size rear garden and larger than normal frontage with additional garden area to the side”. It was first offered for sale in April 2021 and eventually sold in May 2022 for £351,000, which compares with its highest asking price of £410,000.
37. My inspection confirmed that 9 Hardy Close is badly compromised by its location, in a way that is much more severe than will be the case at the property. It sits at the end of a cul-de-sac very close to and just below the level of Brooklands Road, a principal spine road through the adjacent residential area. There is a street lamp beside it in the raised road. The reason that 9 Hardy Close sits so close to the road (approximately six metres away at its closest point) is that the embankment to the road forms part of its rear garden, which is generous in area but compromised for many typical uses. Mr Moore made enquiries of the agent who sold 9 Hardy Close and was told that it had not been maintained in good condition, which would also have affected the time it took to sell and its eventual sale price.
38. The sale price can be adjusted for time to the equivalent of £322,300 at the valuation date, and the details can be compared with the other sales in Hardy Close previously referred to, as set out below:

Property	Beds	Bath/ shower	Parking	Sale date	Sale price	Adjusted to 1-9-21	Comment
26 Hardy Close	4	2	Garage	Apr-21	£369,995	£377,500	Undeveloped at rear
10 Hardy Close	4	2	Garage	Jun-21	£365,000	£372,000	Overlooked at rear
9 Hardy Close	4	2	Garage	May-22	£351,000	£322,300	Close to raised road, compromised garden; tired décor

39. The adjusted sale price of 9 Hardy Close sits £55,000 below that of 26 Hardy Close, which is located opposite on the same road, and £50,000 below that of 10 Hardy Close, which is not a neighbour but located on a different part of the road. Both were four bedroom detached houses of the same age and design, but with smaller gardens. Amongst

the various reasons why 9 Hardy Close might have compared so unfavourably with the other two houses, its location is likely to be the most important one given its very close proximity to the road. The claimant maintained that this evidence supported his claim for loss of value at £35,000, but did not attempt to isolate the element of the price differential which could be attributed to physical factors only.

40. Mr Moore looked at the agreed reservation prices for four bedroom houses of a particular design in the Stour View development, to see if a price difference could be identified between a property next to Pioneer Way and one on a side road. He was told that Taylor Wimpey did not make a price differentiation for location within the estate, but he identified an adjusted price difference of £10,000 between the two properties referred to earlier. No. 243, with an adjusted price of £398,000, was located on the corner of a junction between Pioneer Way and a side road, while No. 50, with an adjusted sale price of £408,000, was located further away down a side road. Mr Moore made an assumption that 60%, or £6,000, of that difference would be attributable to physical factors, which reflected 1.5% of the higher value of £408,000.
41. Mr Moore commented that No. 243 would suffer more traffic noise than the property, because of its location closer to Pioneer Way and on a junction, and because the noise would arise from a greater length of road than from the 40 metre spur. The effect of street lighting from two roads would be similar to that at the property. It was his opinion that the impact of physical factors on the property would be only one third of that at No. 243, and therefore the loss of value arising would be only 0.5% of the switched off value of £400,000, that is £2,000.
42. It was acknowledged by Mr Moore that it is difficult to analyse evidence for small differences and to value to the level of accuracy suggested by these figures. However, it was his opinion that the physical factors arising from the spur would have only a minor adverse impact on the property, for which a purchaser might make a marginal adjustment in their bid. His assessment of that adjustment and the compensation due was a nominal sum of £2,000.
43. The assessment of the impact of physical factors on the property must be made at the valuation date, although within a few months of the claimant writing his letter of claim, dated 6 September 2021, the worst of those factors were alleviated by the switch to part-night lighting and the provision of an acoustic fence. Would a purchaser at the valuation date have expected these alleviating measures to be put in place? I consider that a switch to part-night lighting could have been expected to happen at some point, since it is both appropriate for a residential area and a significant energy saving measure for a council, but there would have been no certainty as to when it would happen. The provision of an acoustic fence appears to have been a specific response to the claim, and as such it would not have been expected by a purchaser.
44. It is very common for land on the edge of villages and towns to be developed, leaving houses which were originally on the boundary with open land in a back-to-back situation with other houses. This case is more unusual in that the property will back on to an open area within the development, but with a raised spine road and raised street lighting 22 metres away from the rear elevation. At the valuation date a purchaser would have seen the street lamp behind the house, and known that it stayed on all night, but expected a

change to part-night lighting at some point in the future. They would have known that the road behind would be used by construction traffic during working hours for some five to six years, and that there would be noise arising from that traffic. It is possible that they would not have looked beyond that period to consider whether intensification would arise from the future use by residential traffic.

45. I note Mr Moore's opinion that a difference in price of £6,000 between No. 243 and No. 50 in Stour View (1.5% of switched off value), could have arisen from the difference in physical factors that they would be expected to experience as a result of their locations. I agree with him that in a residential property market it is not possible to discern small differences with accuracy, only to estimate the amount of discount that a purchaser might expect to negotiate in recognition of something disagreeable to them.
46. In my judgment a purchaser would have discounted their bid for the property at the valuation date to account in particular for the disadvantage of all night street lighting to the rear, in addition to normal street lighting at the front. Traffic noise to the rear would be less unusual in the market, but a factor in the purchaser's mind. A seller does not have to accept the reduced bid of a purchaser but, as the claimant has demonstrated with No. 9 Hardy Close, if a property suffers from a less desirable location it can take longer to sell, and the eventual sale will usually be at a lower price anyway.
47. I consider that a purchaser would frame their discount as a round sum, rather than a percentage. In this case, I consider that the purchaser would have sought and achieved a discount of £10,000, which is 2.5% of the switched off value. I therefore award the sum of £10,000 as compensation under the Act.

Diane Martin MRICS FAAV

7 September 2023

Right of appeal

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

of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.