UPPER TRIBUNAL (LANDS CHAMBER)

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LT Case Number: ACQ/7/2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – preliminary issue – small part of claimant's land within the limits of deviation for Channel Tunnel Rail Link and eventually compulsorily acquired under Channel Tunnel Rail Link Act 1996 – claim advanced for value of land taken and severance and injurious affection – claim also advanced under rule 6 of Land Compensation Act 1961 section 5 for losses allegedly sustained by claimants by way of lost rents they would have received from a redevelopment of the land in 1996 but which redevelopment was deferred because of the prospective acquisition of part of the land and the general blighting effects of scheme – whether this rule 6 claim should be dismissed at a preliminary hearing in advance of any consideration of the evidence or of issues of causation remoteness or reasonableness – 'before and after' valuation method considered.

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**(1) STEWART JOHN PATTLE** **(2) CRAIG PATTLE**	**Claimants**
	and	
	THE SECRETARY OF STATE FOR TRANSPORT	**Acquiring Authority**

Re: Rod End,
Northfleet Industrial Estate,
Lower Road, Northfleet,
Kent, DA11 9SN

Before: His Honour Judge Nicholas Huskinson
A J Trott FRICS

Sitting at 43-45 Bedford Square, London WC1B 3AS
On 11 and 12 June 2009

Simon Pickles and *Gerard Van Tonder* instructed by Kingsley Smith LLP on behalf of the Claimants
Guy Roots QC instructed by Ashurst LLP on behalf of the Acquiring Authority

The following cases are referred to in this decision:

Wrexham Maelor Borough Council v MacDougall (1995) 69 P & CR 109
Dublin Corporation v Underwood (1997) 1 IR 117
Director of Buildings and Lands v Shun Fung Ironworks Limited [1995] 2 AC 111
Hughes v. Doncaster Metropolitan Borough Council [1991] 1 A.C. 382, 392
Waters v Welsh Development Agency [2004] UKHL 19
Ryde International plc v London Regional Transport (ACQ/147/2001 – decision of His Honour Judge Rich QC dated 12 February 2001); and also [2004] EWCA Civ 232
Greens Motor Holdings Limited v Preseli Pembrokeshire District Council [1991] 1 EGLR 211
Castle House Investments Ltd v City of Bradford MDC (ACQ/6/2006 dated 11 May 2007)
Maxol Oil Ltd v Department of Environment for Northern Ireland [2005] RVR 97
Wildtree Hotels v London Borough of Harrow [2000] UKHL70
Welford v EDF Energy Networks (LPN) Ltd [2007] EWCA Civ 293
Cowper Essex v Acton Local Board (1889) 14 App Cas 153
Hoveringham Gravels Ltd v Chiltern District Council (1977) 35 P&CR 295
ADP & E Farmers v Department of Transport [1988] 1 EGLR 209

DECISION

Introduction

1. There are before the Tribunal certain preliminary issues arising in a reference brought by the Claimants as owners of industrial land at Rod End on the Northfleet Industrial Estate for compensation for the compulsory acquisition by the Acquiring Authority of part of their land for the purposes of the construction of the Channel Tunnel Rail Link ("CTRL").

2. The entirety of the land owned by the Claimants at Rod End is conveniently shown edged blue on the plan at page 247 of the bundle. This land, which is approximately 1.44 hectares in size, is hereafter called "the Property". The Claimants are brothers and are the sons of the late George Henry Pattle who died on 20 March 1993. The Claimants and their father were partners in the firm Pelican Fabrications ("Pelican"), which was a joinery business started by their father and the First Claimant in about 1977. The Claimants' contentions as to the history of their use of the Property and their plans for the Property are summarised later. For the present it is necessary to note that a triangular piece of land at the south-western corner of the Property fell within the limits of deviation for certain works for the construction of the CTRL pursuant to the Channel Tunnel Rail Link Act 1996. This triangle of land amounted to about 0.045 hectares in area and is shown edged in red on the plan at page 247. Notices to treat and notices of entry were served pursuant to the CTRL Act and the Compulsory Purchase Act 1965 on the two Claimants on 7 February 2001 being notices which related only to the triangular piece of land which is hereafter called "the Reference Land". The Acquiring Authority, through Union Railways (North) Limited, took possession of the Reference Land on 25 January 2002 which is agreed to be the valuation date.

3. Outline planning permission was granted on 12 April 1995 for the development of the Property by demolishing the existing buildings and constructing 20 new units for uses within Classes B1 and B2 with associated parking and access roads. This permission was subject to conditions including condition 16 which provided that:

> "No permanent buildings or structures shall be erected or means of access laid out within the area safeguarded for the Channel Tunnel Rail Link by the directions of the Secretary of State for Transport of 24 February 1994 until after the completion of construction of the link."

There was an illustrative layout as part of the application for outline planning permission which is at page 250 of the bundle and which shows 20 units. The plan also shows the Reference Land, in that there is a diagonal line drawn on the plan showing the triangular piece of land constituting the Reference Land and showing that unit 5 and a substantial proportion of unit 4 and some other land would fall within the triangular land, such that at least units 4 and 5 would need to be relocated or lost if the Reference Land was taken.

4. The Claimants' claim for compensation can be summarised as including the following elements:

(1) The Claimants are entitled to the value of the Reference Land and to compensation for severance and injurious affection.

(2) The Claimants contend that they are also entitled to further compensation under rule 6 of section 5 of the Land Compensation Act 1961 ie

> ".... for disturbance or any other matter not directly based on the value of land"

in respect of the following losses. The Claimants contend that in the no scheme world they could and would have completed a redevelopment of the Property as an industrial estate by 1996, but that this redevelopment was deferred because of the matters mentioned below.

(3) In paragraphs 12 and 13 of the amended statement case the Claimants state as follows:

> "12. The Claimants did not proceed with the proposed development in the light of the continuing uncertainty and the associated blight caused by the CTRL.
>
> 13. Under circumstances of the continuing uncertainty about the precise route of the CTRL, and how it would affect the Claimants' development plans for the Property, the Claimants began to re-let the existing units on the Property in an attempt to mitigate their losses. This brought in rents rising from around £61,000 in 1997, to around £104,000 in 2001. These lettings included Unit 11."

(4) The Claimants contend that during the period from 1996 until the valuation date on 25 January 2002 they received substantially lower rents from the re-letting of the existing units than they would have received had they carried out a redevelopment in 1996. The Claimants claim that they are entitled to recover either as disturbance or as "any other matter not directly based on the value of land" within rule 6 of section 5 compensation for the difference between the position the Claimants would have been in if they had been able to carry out a development and re-let it in 1996 (which would have occurred in the no-scheme world) and the actual position they found themselves in over this period in the real world, whereby they received limited and lower rents for the period from 1996 to the valuation date.

5. The Acquiring Authority decided that it would be helpful for there to be a hearing of preliminary issues rather than moving straight to a full hearing on evidence. This course was resisted by the Claimants but on 7 August 2008 directions were made for there to be a preliminary hearing. Eventually the wording of the preliminary issues to be determined at the preliminary hearing was agreed and was made the subject of a consent order dated 1 May 2009. Issues (4) and (5) were in the following terms:

> "(4) Are the Claimants entitled to claim compensation in respect of losses alleged to have been incurred prior to the valuation date calculated on the assumption that,

in the absence of CTRL, the whole of the Claimants' property (as defined in the Amended Statement of Case) would have been redeveloped pursuant to the planning permission granted in 1995, whereas in reality it was not?

(5) Do any of the matters in respect of which the Claimants' Amended Statement of Case claims compensation as 'disturbance' properly fall within the scope of the right to compensation for disturbance or any other matter not directly based on the value of land preserved by rule 6 of Section 5 of the Land Compensation Act 1961?"

At the hearing before us the principal argument was directed towards these issues (4) and (5), namely whether it was open to the Claimants to claim compensation for the alleged loss of rents as described above arising between 1996 and the valuation date.

Basis of preliminary hearing

6. On behalf of the Acquiring Authority Mr Roots argued that if (which was not conceded) the Claimants deferred any proposed redevelopment of the Property by reason of anything to do with the CTRL, the deferment was because of general blight in the area and general lowering of rental levels and was not because of the prospective acquisition of part of the Property. Mr Roots referred to the original statement of case, which contained paragraph 12 but not paragraph 13 (set out above) and he also referred to condition 16 of the planning permission (also set out above). He argued that at the moment the planning permission arrived, at latest, it was clear what part of the proposed redevelopment could be proceeded with and what could not be proceeded with until the completion of the CTRL such that there was no uncertainty as to the amount (or at least as to the maximum amount) of land which would be taken from the Property. The safeguarding lines also made clear that the maximum amount that could possibly be taken was the Reference Land (ie the small triangle). Mr Roots made reference to the expert reports of Mr Charles Oliver FRICS on behalf of the Claimants and contended that there was no evidence whatsoever within those reports to support the proposition that any deferment of the redevelopment of the Property was caused by the acquisition or prospective acquisition of the Reference Land as opposed to general blight and lowering of rental levels. Mr Roots drew attention to the fact that paragraph 13 of the agreed statement of facts was an addition and was not supported by any evidence from Mr Oliver. He therefore contended that the Tribunal should proceed on the basis that the only cause of the alleged loss of rent to the Claimants was general blight (ie including lowering of rental levels) as opposed to such losses arising in anticipation of the compulsory acquisition of the Reference Land and because of the threat which such compulsory acquisition presented.

7. Mr Pickles resisted this approach. He contended that it was not appropriate at the preliminary hearing, where no evidence was being called, for the Tribunal to become involved in any questions regarding causation or reasonableness or remoteness. All these points are matters for evidence in the future if the Tribunal concludes that in principle the claims advanced in the amended statement of case can properly proceed. He submitted that unless on the facts described to the Tribunal for the purposes of the preliminary hearing it could be said to be inconceivable that the loss of rents was fairly attributable to the threat which the

prospective acquisition of part of the Reference Land presented, the Tribunal must proceed on the basis that the Claimants may be able at the hearing to establish that the loss of rents was fairly attributable to this. Mr Pickles objected to the reliance placed by Mr Roots upon the contents of Mr Oliver's reports, because there had been an exchange of e-mails which made it clear that the experts' reports were not being included for evidential purposes but merely for the purpose of having them available to refer to for the purpose of establishing the way in which the parties have formulated their cases. Mr Pickles contended that it would be fundamentally unfair to the Claimants, on a preliminary hearing constituted in the manner of the present preliminary hearing, for the Tribunal to reach final adverse conclusions of fact on the question of causation. He also produced to the Tribunal a witness statement from the first Claimant, which he relied upon insofar as it was necessary (which he denied it was) for him to establish that the Claimants had already placed before the Tribunal some evidence supporting the alleged causal link between the loss of rents and the prospective taking of the Reference Land rather than merely with general blight.

8. We consider that there is a short answer to this point which arises upon the wording of the preliminary issues as agreed between the parties and ordered by the Tribunal. It will be seen that issue (5) poses the question for the Tribunal by reference to

> ".... the matters in respect of which the Claimants' Amended Statement of Case claims compensation ...."

In other words we are required to examine the basis of the claim as advanced in the amended statement of case. We are not required to make any findings of fact (and in the absence of any evidence and cross-examination it would be entirely inappropriate for us to make any findings of fact) as to whether the Claimants are able to make good the contents of their amended statement of case. This amended statement of case contains paragraph 13 which we have set out above and which attributes the delay in the development to

> ".... the continuing uncertainty about the precise route of the CTRL and how it would affect the Claimants' development plans for the property ...."

We consider that this can properly be read as a claim that not merely was the development deferred because of the reasons in paragraph 12 of the amended statement of case (ie effectively general blight) but also because of the acquisition or prospective acquisition of a part of the Property and the threat which such compulsory acquisition presented, which is the way in which Mr Pickles contended the passage was intended to be read.

9. Accordingly we reject Mr Roots' submission that we must proceed on the basis that the only cause of the alleged loss of rents during the period 1996 to 2002 was general blight. We do so without reference to the witness statement of Mr Pattle, but the contents of this witness statement (which had been served and is before the Tribunal) confirms us in the conclusion that this is the proper course. It is right that we should summarise what is said by Mr Pattle on this point in his witness statement:

> (1) The Claimants' father started Pelican as a joinery business in 1977. By 1985 both the Claimants had become partners with their father.

(2) Initially Pelican worked from a rented unit on land adjoining the Property. However in 1983 the Property came on the market for sale and Pelican purchased the Property and moved to a unit on the property and thrived there.

(3) In 1991 a competitor of Pelican closed down its joinery business at Unit J3 and Pelican moved to that site, taking the residue of a short lease, and thus moved off the Property.

(4) The Claimants proposed to develop a unit for themselves on the Property and to move back to the Property from Unit J3 and then to develop the remainder of the Property around them. In 1992 they obtained a valuation for their bank where their development plans were mentioned.

(5) The Claimants' father became ill and died on 20 March 1993.

(6) For the time being Pelican remained at Unit J3. The Claimants had various tenants at the Property including a substantial tenant called Channeline.

(7) The Claimants were contacted by Union Railways in 1993 regarding the CTRL. In July 1993 the Claimants informed Union Railways of their intention to redevelop the Property and said that they needed to know what was going on as they had plans to start constructing their own building on the Property.

(8) Following their father's death the Claimants decided comprehensively to redevelop the Property. In February 1994 they gave instructions for the application for planning permission to be sought for such a redevelopment. An outline planning permission was obtained in April 1995.

(9) The first Claimant says that he made countless telephone calls to Union Railways to enquire how the Claimants would be affected at the Property but that Union Railways constantly gave them doubt as to the actual safeguarding area, ie the maximum amount of land to be taken. The First Claimant says that Union Railways left no doubt in his mind that the position was uncertain. He was then in March 1995 sent a plan dated December 1994 showing just the corner of the Property as being at risk of being taken.

(10) The Claimants felt that they could not take the chance on redeveloping the Property until they knew precisely what was going to happen with the CTRL. They could not afford to redevelop the Property only to have the new buildings left empty while a tunnel was being built. They were also aware of the problems for prospective tenants as Channeline had left the Property.

(11) The Claimants were also concerned that tenants would not pay the rent that would have justified new units being built. The First Claimant stated that it would simply have been a disaster to have pressed ahead with the redevelopment while the immediate area was so dramatically affected by the CTRL construction.

We repeat that it is our conclusion it is not necessary at this stage for the Claimants to be able to point to evidence before the Tribunal to support the allegations made in their amended

statement of case. However if we are wrong in this then we read the First Claimant's statement as including evidence that it was not merely the general blighting effect on rental levels but was also the prospect of a part of the Claimants' property being acquired (and having works conducted thereon) which caused the Claimants to defer their redevelopment proposals.

10. We also have a mind paragraph 18 of the amended statement of case, which complains that the Claimants regularly corresponded with the Acquiring Authority's nominated undertaker between 1993 and 2000 about precisely which part of the Property was to be acquired. We also note the reference in paragraph 30 of the amended statement of case to the "shadow of the CTRL" causing the deferment of the redevelopment.

11. Accordingly we conclude that, having regard to the manner in which this matter comes before us, we must proceed upon the basis that the Claimants allege (and may be able to prove on the evidence, this being a matter for the future) that the deferment of their redevelopment proposals was reasonably attributable to the prospective taking of a part of the Property. We record that both parties proceeded before us on the basis that questions of causation remoteness and reasonableness were not matters before us but were matters for the future. We note that, having regard to the amended statement of case (and in particular the presence of paragraph 12), it seems it would be difficult for the Claimants to assert or prove that the only cause of deferment of the redevelopment was the prospective taking of a part of the Property. It appears the Claimants assert that this was merely one cause, another cause being general blight which depressed rental levels in the area. However it was not argued before us by Mr Roots that in order for the Claimants to establish that the deferment of the redevelopment was reasonably attributable to the prospective taking of a part of the Property (so as to bring themselves within the principles of law discussed below) the Claimants have to be able to show that the prospective taking of part of the Property was the sole cause of the deferment of the redevelopment.

12. The central issue before us, ie as raised in issues (4) and (5), therefore becomes whether in principle the Claimants are entitled to claim for loss of rents for the period before the valuation date flowing from the deferment of their proposed redevelopment where:

(1) the Claimants may be able to show that the deferment of the redevelopment was reasonably attributable to the acquisition or prospective acquisition of part of the Property (ie the Reference Land or some part thereof);

(2) the allegedly lost rents which are claimed for were lost not merely from land actually acquired or prospectively to be acquired but from a substantially larger area of land (namely the Property) which merely includes the Reference Land, which was the property to be acquired and which was ultimately acquired; and

(3) the lost rents are not rents which were lost (whether by way of rent voids or lowered recoverable rents) on an existing industrial estate, but are rents which it is alleged could have been obtained from a redeveloped industrial estate which had not yet been redeveloped but which could and would have been redeveloped by the Claimants had it not been for the prospective acquisition of part of the Property.

Statutory Provisions

13. Section 4 and Schedule 4 Part II of the Channel Tunnel Rail Link Act 1996 provides so far as presently relevant, that the Compulsory Purchase Act 1965 Part I applies to an acquisition of land under section 4(1) of the 1996 Act. As a result the Land Compensation Act 1961 Section 5 applies for the purposes of the rules for assessing compensation. Section 5 is in the following terms:

> 5. Rules for assessing compensation
>
> Compensation in respect of any compulsory acquisition shall be assessed 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:
>
> (3) ....
>
> (4) Where the value of land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account:
>
> (5) ....
>
> (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:
>
> and the following provisions of this part of this Act shall have effect with respect to the assessment."

14. The Compulsory Purchase Act 1965 section 7 provides as follows:

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

It was not contended by either party that the terms of section 7 applied to enable a claim to be advanced such as the Claimants' present claim for the allegedly lost rents, nor did either party address us with any argument that the terms of section 7 were relevant to the matters presently under consideration.

Claimants' submissions

15. On behalf of the Claimants Mr Pickles advanced the following arguments:

(1) The lost rents claim, which is quantified by the Claimants at £905,219, was advanced in the original statement of case as compensation for injurious affection. However Mr Pickles disclaimed any intention or ability to claim the lost rents as injurious affection. The amended statement of case makes clear that these lost rents were claimed by way of disturbance, ie under rule 6 of section 5 of the 1961 Act. In fact in argument Mr Pickles made clear that, while if necessary he would contend that the lost rents could be claimed by way of disturbance, the Claimants' primary claim was that the lost rents fell within the alternative wording at the end of rule 6, namely they were

"…. any other matter not directly based on the value of land"

(2) A claim under the second part of rule 6 does not require the claimant to show that he is a dispossessed occupier – while that may be necessary for a claim for disturbance under the earlier part of rule 6 Mr Pickles argued that it is made clear by *Wrexham Maelor Borough Council v MacDougall* (1995) 69 P & CR 109 that this is not necessary for a claim under the second part of rule 6 and that such a claim can be advanced by someone who holds land as an investor, see *Dublin Corporation v Underwood* (1997) 1 IR 117 especially at p129 (a decision of the Supreme Court of the Republic of Ireland).

(3) Having regard to the authorities cited above, there is an accurate statement of law in the Law Commission Final Report No.286 Towards a Compulsory Purchase Code (1) Compensation at pages 36-37:

"4.15 In our view, the *Wrexham* case must be taken as binding Court of Appeal authority for the proposition that, in relation to a claim by a person with a compensatable interest:

(1) compensation under the second part of rule (6) is not limited to loss to occupiers;

(2) it is not limited to claims for costs or expenses; and

(3) it extends to any loss attributable to the compulsory acquisition, subject only to the ordinary principles of causation and remoteness.

The *Dublin* case is strong persuasive authority in support of a similar approach, at least in relation to (1) and (3), and in particular for including loss to investor owners in limited circumstances. Its persuasive weight is increased by the fact that it was arrived at independently of the reasoning in the *Wrexham* case, and after full consideration of the other leading English authorities.

4.16 At the same time regard must be had, in both cases, to the particular facts. Each case depended on a favorable finding on causation and remoteness. In the *Wrexham* case, it was held that the loss of the service agreement was the

natural and reasonable result of the acquisition and was not too remote. In *Dublin* the court attached importance to the facts that the property was held for investment purposes, and that the compensation was to be used for precisely the same purpose. A similar claim probably would not have been allowed, if, for example, an owner-occupier following compulsory purchase had chosen to rent a home, and put his money into investment property."

(4) Mr Pickles relied upon the decision of the Privy Council in *Director of Buildings and Lands v Shun Fung Ironworks Limited* [1995] 2 AC 111. He referred to the passage in the speech of Lord Nicholls at page 125 in the following terms:

> "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 allowance is 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 two facets, that all claims for compensation succeed or fail.
>
> 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. As already noted, this is well established. If he is using the land to carry on a business, the value of the land to him will include the value of his being able to conduct his business there without disturbance. Compensation should cover this disturbance loss as well as the market value of the land itself. The authority which takes the land on resumption or compulsory acquisition does not acquire the business, but the resumption or acquisition prevents the claimant from continuing his business on the land. So the claimant loses the land and, with it, the special value it had for him as the site of his business. The expenses and any losses he incurs in moving his business to a new site will ordinarily be the measure of the special loss he sustains by being deprived of the land and disturbed in his enjoyment of it. If, exceptionally, the business cannot be moved elsewhere, so it simply has to close down, prima facie his loss will be measured by the value of the business as a going concern. In practice it is customary and convenient to assess the value of the land and the disturbance loss separately, but strictly in law these are no more than two inseparable elements of a single whole in that together they make up the value of the land to the owner: see *Hughes v. Doncaster*

Metropolitan Borough Council [1991] 1 A.C. 382, 392, per Lord Bridge of Harwich."

Mr Pickles in particular referred to the principle of equivalence. He accepted that there was no overarching principle of equivalence which replaced the statutory rules for calculation of compensation, but he submitted that the statutory rules should be applied consistently with the principle of equivalence, unless of course the wording of the statutory rules compelled otherwise.

(5) He referred to *Waters v Welsh Development Agency* [2004] UKHL 19 where Lord Nicholls stated at paragraph 1:

> "Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation. That is axiomatic...."

(6) Returning to the words of Lord Nicholls in *Shun Fung* in the passage cited above, Mr Pickles submitted that the Claimants were entitled to claim for their lost rents provided they could show that these lost rents could properly be described as

> ".... losses fairly attributable to the taking of [their] land .... "

Mr Pickles further submitted that the *Shun Fung* case made clear that the loss does not have to follow temporally upon the taking of the land. There is included in matters for which compensation can be claimed losses fairly attributable to the prospective taking of the land, see per Lord Nicholls at 138A:

> "A loss sustained post scheme and pre-resumption will not fail for lack of causal connection by reason only that the loss arose before resumption, provided it arose in anticipation of resumption and because of the threat which resumption presented."

Therefore the fact that the losses claimed for in the present case were incurred before the date of entry does not prevent them being recoverable under rule 6.

(7) Mr Pickles recognised that Lord Nicholls in *Shun Fung* went on to consider three conditions which need to be considered in each case, namely (a) whether there is a causal connection between the acquisition of the land and the loss in question, (b) whether the loss is excluded as being too remote and (c) whether the losses have been incurred unreasonably (eg could the losses have been avoided by reasonable steps of mitigation). However Mr Pickles argued that none of these three matters, namely causation remoteness or reasonableness, were matters for the present preliminary hearing. They would need to be considered on the evidence, if it were held that in principle the claim for lost rents as advanced in the amended statement of case could proceed rather than being dismissed at this preliminary hearing stage.

(8) Mr Pickles accepted that if ultimately no land had been acquired from the Claimants, such that they had had part of the Property under threat of compulsory acquisition for a substantial period and had suffered from general

blight but then discovered ultimately that no land was taken, then the Claimants would have had no claim for compensation. Similarly Mr Pickles accepted that if an exceedingly small piece of the Property had been acquired, then once again the present claim could not have succeeded because there would not be any causal link between the acquisition of the land acquired and the losses claimed for. However Mr Pickles pointed out the passage at pages 138-9 in *Shun Fung*:

> "Of course, many schemes involving resumption or compulsory acquisition do not come to fruition. Meanwhile properties may be unsaleable, and no compensation will ever be payable unless special "blight" provisions apply, such as those in Chapter II of Part VI of the Town and Country Planning Act 1990 in England. The existence of this type of loss, for which the landowner may be without remedy if resumption does not take place, is not a sound reason, when resumption does take place, for drawing the compensation boundary in such a way as to exclude all pre-resumption loss."

Mr Pickles submitted that in the present case the crucial point is that the Reference Land was actually acquired, this being a significant part of the Property. The fact that the Claimants would not have been able to claim for their loss of rents if no property had ever been taken from them was no reason to approach their present claim, in circumstances where the Reference Land has actually been taken from them, with any predilection for reaching the same conclusion and for finding that these lost rents cannot be claimed for.

16. Mr Pickles turned to the wording of rule 6 and the qualification that the losses claimed for must be an other matter "not directly based on the value of land". As regards these words he advanced the following submissions:

(1) The expression "value of land" appears not just in rule 6 but also in rules 2 and 4. In rule 2 the expression value of land plainly means the capital value of the land. Mr Pickles submitted that the purpose of the words "not directly based on the value of land" in rule 6 was in order to avoid duplication. Thus the claimant receives the value of his land under rule 2 and any other matter which may inform the value of land for the purposes of rule 2 should be taken into account under rule 2.

(2) By way of example in *Ryde International plc v London Regional Transport* [2004] EWCA Civ 232 it was held in the Court of Appeal that the ability of the claimant, if the land had not been acquired, to have made profits after the valuation date by taking certain steps for the purpose of developing and selling the land was not a matter which could be claimed for under rule 6. This was because the prospective ability of whoever owned the land to make the most of the land by taking prudent steps in relation to its development and sale was something which the hypothetical purchasers, when deciding how much to bid for the land at the valuation date, would have in mind. Accordingly the ability to make these future profits was something which went to inform the question of what was the value of the land at the valuation date. However Mr Pickles

pointed out that the Court was there concerned with the ability to make future profits, which was something which could be relevant upon the question of the value of the land at the valuation date. The case was not concerned with the loss of past profits which could have been made prior to the valuation date – the loss of the ability to make these past profits was not something which would inform the value of the land at the valuation date.

(3) Mr Pickles submitted that this point was further borne out by the Lands Tribunal decision in *Greens Motor Holdings Limited v Preseli Pembrokeshire District Council* [1991] 1 EGLR 211. In that case the prospective acquisition of the relevant land had caused the rent review under the lease of that land to be deferred, thereby depriving the claimant landowner of the higher rent which in the no-scheme world that landowner would have received. This additional rent was allowable as a claim under rule 2 (not rule 6) because on a sale at the valuation date in the no-scheme world of the claimant's interest the purchaser would have been acquiring not merely the right to receive future rents but also the accrued right retrospectively to recover the additional (but so far unpaid) rent from the review date. In that case of course there was a rent review clause which had been operated but had not yet been agreed. This was capable of falling within rule 2 as being something relevant to take into consideration when assessing the value of land. Mr Pickles submitted that where one was concerned with a claim for rents lost prior to the valuation date being rents which would not be available to the hypothetical purchaser on acquiring the claimant's interest (eg because there was a rent void or because a lower reviewed rent had already been agreed being a depressed rent because of the prospective acquisition of the land) then these matters could not be taken into consideration when assessing the value of the land under rule 2. Mr Pickles submitted that where one had a matter which specifically could not be taken into consideration as informing the value of land under rule 2, then this was a good example of something which was not excluded by the closing words of rule 6 – to allow such a claim would not allow any form of double counting and also such a claim would not be for a matter directly based on the value of land, using that expression as it is used in rule 2.

(4) Mr Pickles referred to the commentary in Denyer-Green Compulsory Purchase and Compensation (8th ed) pages 316-7 where the learned author gives as an example a case of a landlord suffering in the shadow period before a compulsory acquisition from rent voids or lower rents such that the landlord has incurred real losses prior to the valuation date. The author raises the question of whether such losses can be compensatable under the second limb of rule 6 and continues as follows:

> "One argument, that is advanced against any such claim, is that such losses are related to the value of land because they are, in effect, losses of rent, and rent is related to the value of land.
>
> The words 'the value of land' were clearly used in rule (6), when the six principal rules were adopted by the Acquisition of Land (Assessment of Compensation) Act 1919, to differentiate the rule (6) claim from that

> under rule (2). The rule (2) claim is the claim for the open market value of the land taken – in other words the capital value. The words 'the value of land' in rule (6) must be a reference to the same words in rule (2). It follows that a claim that was in some way value-related, such as rents, would not be outside rule (6)."

17. Mr Pickles also relied on the decision on the preliminary issue in the *Ryde* case decided by His Honour Judge Rich QC in the Lands Tribunal on 12 February 2001 (ACQ/147/2000). There land had ultimately been acquired, but for a period prior to the valuation date the claimant had sustained losses in the nature of "holding costs" in that the claimant would, in the no-scheme world, have been able to sell the development substantially earlier than the valuation date but the shadow of the prospective acquisition meant that the claimant was unable to sell the development and had to continue to hold it. In particular Mr Pickles relied upon paragraph 12:

> "Although such losses might be categorised as disturbance of the claimant's business caused by the shadow of acquisition, I can see no difference in principle between the holding costs, as now defined in the subject case, and the losses held to be compensatable in *Shun Fung*. They are, of course, clearly not disturbance because they arise from the impossibility of selling the premises, but they are an "other matter not directly based on the value of land" within Rule 6 of s.5 of the Land Compensation Act 1961. Although, as Mr Elvin points out that rule does not create but merely preserves heads of compensation as they are presumed to have existed in 1919, he very properly accepts that if the costs are losses which fall within the principle defined in *Shun Fung* they are recoverable."

18. Accordingly Mr Pickles submitted that if the whole of the Property had been compulsorily acquired, such that the lost rents (which relate to the whole of the Property) were fairly attributable to the prospective taking of the whole of the Property (rather than merely some portion thereof) these lost rents would properly be recoverable. The next question which therefore arose was whether it made any difference that only a portion of the Property, rather than the whole Property, was prospectively to be acquired (and was ultimately acquired). Mr Pickles answered this by reference to a hypothetical case where there was an existing business on land but where only a proportion (say a quarter) of that land was within the compulsory purchase order and was ultimately acquired. In those circumstances Mr Pickles submitted that if the claimant could prove that the business being carried on on the relevant land sustained lost profits and that these lost profits were fairly attributable to the prospective taking of the quarter of the land ultimately taken, then the whole of these lost profits would be recoverable. It would not be necessary for the claimant to partition the lost profits across the land and to be limited to recovering only such proportion of the lost profits as could be said to have been lost from that piece of the land which was the subject of the compulsory acquisition. Thus if it could be said that the profits arose equally across the whole of the land, Mr Pickles submitted that the compensating authority would in those circumstances be unable to succeed on an argument that only one quarter of the profits could be recovered because only one quarter of the land had been acquired. What was crucial was whether as a matter of causation it could be proved that the lost profits were fairly attributable to the taking or prospective taking of that part of the land that was acquired. If this could be proved, then the whole of the

lost profits would be recoverable even though only a portion of the land was acquired. Accordingly in the present case the fact that the lost rents were referable to the whole of the Property while only the Reference Land was under the threat of compulsory acquisition (and was ultimately taken) does not of itself prevent the recovery of the whole of the lost profits. It may be that as a matter of causation there will be potential difficulties for the Claimants in making good their case that the whole of the lost profits was fairly attributable to the prospective acquisition of the Reference Land, but that is a matter for evidence and for the future rather than for this preliminary hearing.

19. Having regard to the foregoing Mr Pickles contended that a claim for lost rents, such as the present, could not be dismissed at a preliminary hearing such as this if the lost rents were allegedly lost from an existing development in the shadow period prior to possession being taken and where only a part (rather than the whole) of the development was taken. It would be for evidence at the hearing to show that the lost rents (ie the lost rents over the whole of the property) were fairly attributable to the prospective acquisition of the part which was acquired. The question next arose, therefore, as to whether it made any difference that in the present case there was not an existing redeveloped industrial estate but was instead an old industrial estate which was ripe for redevelopment and for which a planning permission had been granted. Mr Pickles submitted that the fact that the Claimants had not undertaken the risk of carrying out a redevelopment did not require that their claim for lost rents must be dismissed at this preliminary hearing as a matter of principle. He accepted that the fact a redevelopment had not been undertaken could result in the claim being reduced as to quantum.

20. As regards Mr Roots' reliance on the existence of blight notice procedures to enable persons falling within the relevant provisions to require the purchase of their property (the argument being that Parliament had set up the blight provisions to assist persons falling in certain categories in respect of certain losses such that if persons fell outside those categories the intention must be they should not receive compensation) Mr Pickles submitted that the provisions regarding blight notices were provisions made available to someone who wished to sell their property. However the mere fact that only certain categories of person could enjoy the blight provisions did not require a restrictive reading of the rights to compensation where, ultimately, land is actually acquired from a landowner pursuant to compulsory purchase procedures such that the landowner enjoys the rights to claim compensation under the compensation code, see for example the passage in *Shun Fung* cited at paragraph 15(8) above.

21. Mr Pickles took some comfort from the Lands Tribunal decision in *Castle House Investments Ltd v City of Bradford MDC* (ACQ/6/2006 dated 11 May 2007) where leading counsel on behalf of the acquiring authority had in that case conceded that a claim in the nature of lost rents prior to the valuation date was recoverable.

22. In summary Mr Pickles submitted that in the present case, on the assumptions which the Tribunal must make for the purpose of the preliminary hearing, there is here a case where the Claimants may be able to prove that they truly have suffered substantial loss which is fairly attributable to the taking or prospective taking of part of the Property, because in the no-scheme world the Claimants would have carried out their well settled intention to redevelop the

Property and would have completed the development by 1996 and would have enjoyed enhanced rents from then until the valuation date, whereas in the scheme world they had concluded reasonably that they could not properly carry out the redevelopment, this being not merely because of general blight but also because of the prospective acquisition of part of the Property. All matters of causation remoteness and reasonableness were for the future rather than for this preliminary hearing. There was no rational basis for excluding the Claimants from the ability to pursue this claim as advanced in the amended statement of case, which should succeed provided the Claimants could satisfy the conditions of causation remoteness and reasonableness. Mr Pickles submitted that any conclusion preventing such a claim from proceeding would be contrary to Article 1 of the First Protocol to the European Convention on Human Rights.

Acquiring Authority's submissions

23. Mr Roots argued that the Claimants could gain no assistance from the First Protocol to the ECHR having regard to the passage in the Tottell Compulsory Purchase and Compensation Service at paragraph 507, which records that the First Protocol means that compensation must be paid, but States are given a margin of appreciation as to the basis upon which compensation is assessed and that Article 1 does not guarantee a right to full compensation in all circumstances, since legitimate objectives of public interest, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. In summary therefore any right under Article 1 of the First Protocol is satisfied by the right to compensation in accordance with the compensation code.

24. Mr Roots submitted that compensation payable may be ultimately calculated as a lump sum, but each head of claim needs to be assessed separately. Further he submitted that it is not right to start from the principle of equivalence and to find some global figure of compensation to satisfy that principle and then to seek to apportion the amount between the various statutory heads of claim. Instead the assessment of compensation must start by assessing the separate statutory heads of claim in accordance with the principles applicable to those heads.

25. As regards issues (4) and (5) and the question of whether the Claimants can claim for the allegedly lost rents for the period 1996 to the valuation date, Mr Roots accepted (see paragraph 46 of his skeleton) that the authorities there cited indicate a principle which is not in dispute, namely a claim under rule 6 may be made for consequential loss even it does not stem from a loss of occupation. However he submitted that these cases, namely the *Wrexham Maelor* case and the *Dublin Corporation* case and also *Maxol Oil Ltd v Department of Environment for Northern Ireland* [2005] RVR 97 turned on facts which are so different from the present that they provide no support for the claimants. In particular he pointed out that in each of these three cases the claim was in respect of loss which could be said to be attributable to the ultimate acquisition of land which was owned by and ultimately acquired from the claimant. Mr Roots submitted that all these cases dealt with loss arising from the taking of the land itself and not from loss arising from a failure to undertake a business activity on adjacent land. Further he submitted that the types of loss claimed for in each of these three cases could not be

described as a matter "directly based on the value of land" and accordingly the claims were not excluded by the closing words of rule 6, whereas in the present case these closing words did operate to exclude the claim.

26. On this point regarding the closing words of rule 6, Mr Roots submitted that the £905,219 had been calculated by Mr Oliver by reference to the rents which would have been received if the whole property had been redeveloped in 1996, such that the sum claimed was an assessment of the difference between the value of occupation of the assumed redevelopment and the value of occupation of the existing development between 1996 and 2002. Mr Roots argued that an annual rent is the consideration agreed between landlord and tenant for the right conferred by the lease upon the tenant to occupy and use the land in question. The annual rent is, therefore, the annual value of the land. This part of the claim is therefore based directly on the value of land and is excluded by the closing words of rule 6.

27. Mr Roots referred to the *Shun Fung* case. He accepted that this showed that pre acquisition losses by way of loss of profits to an existing business could be recovered if these were reasonably attributable to the prospective acquisition of the relevant land. But the *Shun Fung* case was a case where there was in fact a loss of profits to an existing business which was actually trading and where the loss of profits could be proved as an actual reduction in turnover. Also in the *Shun Fung* case the whole of the relevant land itself was the subject of the proposed resumption by the acquiring authority and was ultimately taken from the claimant. Mr Roots contrasted that case to the present case where the claim relates to the Property the bulk of which is not being acquired. Also the claim is for a theoretical loss of profit which might have been earned from a business opportunity. A further distinction can be seen with the help of the analysis in *Ryde* in the Court of Appeal at paragraph 29, where Carnwath LJ contrasts the business of letting residential property with a trading business which is actually occupying the relevant premises, such as in *Shun Fung.*

28. Mr Roots further submitted that it cannot be right to assess compensation under rule 2 on a different factual basis as compared with the assessment of compensation under rule 6. In the present case the Claimants must seek rule 2 compensation on the basis of the state of the Reference Land at the valuation date (ie in its unredeveloped state). It would be wrong for the purpose of the rule 6 claim to assume that the Property, including the Reference Land, had been developed when in fact it had not been developed and to assess compensation under rule 6 on this basis which was factually different from the basis under rule 2. It would also be wrong to equate a hypothetical business chance (which would involve undertaking risk) with an existing business which was up and running.

29. Mr Roots, very properly, drew attention to a case of which he was aware namely *Castle House Investments* where compensation was assessed on a basis which was contrary to his submissions, in that compensation was allowed for loss of rents during the period prior to the valuation date. However he pointed out that there was no argument on the relevant point and the only question for decision by the Tribunal was the question of quantum rather than the principle of whether the head of claim was permissible. He argued that the concession in that case that such compensation could be claimed was wrongly made.

30. Mr Roots posed three questions for the purpose of analysis. The first question was whether a lost rent claim is permissible where the lost rents are allegedly lost on land all of which is ultimately taken. Mr Roots submitted that a claimant was not entitled to succeed upon such a claim and that this was so both where (a) the lost rent was fairly attributable to the prospect of the taking of the subject land pursuant to the CPO and (b) where the lost rent flowed from general blight arising from the CPO. Mr Roots submitted that Parliament had provided a solution for lost rents which was found in section 9 of the Land Compensation Act 1961 which provided in effect that if at the valuation date the property was let and if the rent passing was less than the rent which would have been passing in the no-scheme world, then it is permissible to take as the starting point for the value of land under rule 2 the rents which would have been passing but for the scheme. However this provision did not assist a claimant to recover rents actually lost in respect of an earlier period. Where such earlier rent had been lost then, unless proper analysis allowed it to be brought in as part of the rule 2 compensation (as was the case in the *Greens Motor* case) the lost rents in respect of earlier periods were not recoverable.

31. As regards the passage in the work by Mr Denyer-Green, Mr Roots submitted that this was merely the floating of an idea without the matter being fully argued and without the citation of authority. Also the learned author's observations were in relation to a case where rent had been lost on land which was compulsorily acquired rather than on land (as here) where most of the land was not compulsorily acquired.

32. Mr Roots submitted that his contentions on this first question were not inconsistent with the judgment of His Honour Judge Rich in *Ryde*. In that case there was no problem regarding remoteness or causation as the Tribunal concluded that the holding costs, if they turned out to amount to losses, were losses caused by the threat of dispossession – this was not a case where the losses were suffered by reason of general blight. Mr Roots further distinguished Judge Rich's decision in *Ryde* on the basis that what was recoverable in that case by way of holding costs could not be described as directly based on the value of land, whereas in the present case the alleged losses were directly based on the value of land.

33. Even if he were wrong on his first question (see paragraph 30 above) Mr Roots submitted that it would still be necessary to ask a second question, namely whether the Claimants could advance a claim for lost rent in respect of land not taken by the acquiring authority. As regards the example of an existing business, where only a portion (say a quarter) of the land on which the business was conducted was acquired and where the claimant reasonably struggled on with the business suffering loss of profits rather than closing down or moving, Mr Roots did not seek to say that if £x loss of profits was sustained then only a proportion (say a quarter) of this loss of profits would be recoverable to reflect the fact that only a quarter of the land on which the business was being conducted was being acquired. However Mr Roots submitted that this result would be because the reduction in profits would be the true consequence of the taking of the land taken where the claim arose in relation to a business which was already operating on the whole of the land. The distinction in the present case is that the claim is for loss of rents from a development which could have taken place on both areas (ie on that part of the Property taken, namely the Reference Land, and that part not taken) and where there was not any single

existing operation in place. In the present case there was no existing development and a smaller enterprise could proceed on the remainder of the land.

34. Mr Roots submitted that even if his contentions were wrong on his first and second points (see paragraphs 30 and 33 above) there was still a further question to be asked, namely whether a claim for lost rents could be pursued in respect of an assumed development prior to the valuation date which did not actually take place. The answer he submitted must be no. Insofar as land provides an opportunity for development, this is an ingredient in the rule 2 value. To recover separately for lost rents prior to the valuation date would compensate for loss of an investment which was not actually made. Also the owner could have used the money to pursue another investment opportunity on other land and should be assumed to get a commensurate return. Mr Roots on this point also relied upon the arguments noted above, namely that it would be wrong (and inconsistent with the Pointe Gourde principle) to calculate rule 6 losses on a factual basis which was different from that upon which the rule 2 value was assessed.

Conclusions

35. We are unable to accept Mr Roots' argument that on this preliminary hearing we can and should rule that the Claimants' claim for lost rents must fail and must be dismissed.

36. We have already noted that we must proceed upon the basis stated in paragraph 11 above. Thus we must proceed upon the basis that the Claimants may be able to prove that the deferment of their redevelopment on the Property was reasonably attributable to the prospective acquisition of the Reference Land (whether or not it was also reasonably attributable, as a separate cause, to the general blight by way of general lowering of rental levels in the area). Proceeding upon this basis and recognising (as expressly agreed by both sides) that we are not concerned with questions of causation remoteness or reasonableness, we find that the Claimants' claim for lost rents must be allowed to proceed for the following reasons, which are substantially based upon the reasons advanced by Mr Pickles.

37. It is convenient to consider first whether a claim for lost rents should be allowed to proceed (rather than being stopped at the preliminary hearing stage) where all, rather than merely part of, the land on which the rents were generated was ultimately acquired and where the rents lost arose from lettings on an existing industrial estate rather than on an estate which had as yet to be redeveloped.

38. Considering a claim made in these hypothetical circumstances, we see no difficulty in principle for the claimant to establish that the lost rents constituted losses reasonably attributable to the acquisition or prospective acquisition of the relevant land.

39. A claim under rule 6 can include a claim for losses sustained by someone who is not in occupation of the relevant land but who merely holds the land as an investor, see *Wrexham*

Maelor Borough Council v MacDougall and *Dublin Corporation v Underwood*. We respectfully agree with the Law Commission statement in its final report No.286 namely that the *Wrexham Maelor* case should be taken as authority for the proposition that in relation to a claim by a person with a compensatable interest, compensation under the second part of rule 6 is not limited to loss to occupiers; it is not limited to claims for costs or expenses; and it extends to any loss attributable to the compulsory acquisition, subject only to the ordinary principles of causation and remoteness.

40. The *Shun Fung* case makes clear that a claim under rule 6 can extend to losses reasonably attributable not merely to the actual acquisition of the land but to the prospective acquisition of the land – thus losses incurred in the shadow of acquisition and before acquisition can be claimed if they are losses which arise "in anticipation of resumption and because of the threat which resumption presented". See paragraph 15(6) above.

41. It is next necessary to consider the closing words of rule 6 which require that any other matter being claimed for is "not directly based on the value of land". We cannot accept that a claim for rents lost in the shadow period prior to the taking of land can be said to be a claim for a matter "directly based on the value of land". We note that rule 2 provides in effect a definition as to the meaning of the expression "value of land". In our view it would be proper to interpret rule 6 as though the meaning of the expression "value of land" as set out in rule 2 were incorporated in rule 6, ie as if rule 6 provided

> "(6) the provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the amount which the land if sold in the open market by a willing seller might be expected to realise".

Rents lost in the past, ie before the valuation date, are not relevant to the calculation of the value of land, unless of course the special circumstances such as were found in *Greens Motor Holdings* pertain. In that case the Lands Tribunal gave compensation for the inability to implement a rent review clause, but allowed the claim under rule 2 on the basis that the hypothetical purchaser of the land would be purchasing not only the right to enjoy the land for the future but also the right to implement retrospectively the rent review clause and recover the increased rent.

42. We accept Mr Pickle's argument that the purpose of the closing exclusionary words in rule 6 is to prevent double counting. No double counting arises here. The mere fact that the rent lost in the shadow period prior to the valuation date may be calculated as or by reference to the annual value of the land does not mean that the claim is for a matter directly (we emphasise the word directly) based on the value of land or, more precisely, directly based on the amount which the land if sold in the open market by a willing seller might be expected to realise.

43. We do not accept Mr Roots' argument that section 9 of the Land Compensation Act 1961 provides an exhaustive remedy for a claimant in these circumstances. Section 9 is concerned

with the valuation of a relevant interest. It is not concerned with the assessment of compensation for disturbance or for any other matter arising under rule 6.

44. In the hypothetical case which we are at present considering (see paragraph 37 above) we see no valid reason in principle to disallow a claim for lost rents. Such a claim would be consistent with the principle of equivalence and would be consistent with the analysis of Judge Rich in his decision on the preliminary issue in *Ryde*.

45. The question next arises as to whether such a claim becomes impermissible by reason of being:

(1) for rents lost mainly on parts of the land not subject to compulsory acquisition and not ultimately taken;

(2) for rents lost not from existing lettings on an existing industrial estate but from an omission to redevelop an old industrial estate.

46. As regards point (1) in paragraph 45 above we can see that the fact that the rents are lost mostly from land which is not acquired (and which is not potentially subject to acquisition) may make for difficulties of proof of causation for a claimant. However we are not concerned with questions of causation remoteness or reasonableness on this preliminary hearing. We see no reason in principle why the prospective acquisition of parts of a parcel of land may not be a cause to which the loss of rents on the whole of the land (rather than merely the part of the land prospectively to be acquired) is reasonably attributable. We see no reason in law why the losses claimed under the second part of rule 6 must be capable of being proved to have been sustained on and only on the land ultimately acquired. We find instructive the example raised in argument of an existing business, where only a portion, say a quarter, of the land on which the business is carried on is subject to acquisition and is ultimately acquired. It was common ground between the parties (in our judgment plainly correctly so) that if the owner of such a business reasonably continued the business but sustained loss of profits reasonably attributable to the acquisition or prospective acquisition of the land ultimately taken, then the whole of this loss of profits would be legitimately recoverable even though the profits arose from operations upon the whole of the land, rather than merely on the acquired quarter of the land. If a landowner owns an estate of units and if a portion, rather than the whole of the estate, is the subject of potential compulsory acquisition, we can see how the landowner's ability to let beneficially units on the land within the compulsory purchase order could be adversely affected and we see no reason in principle to conclude that the prospective acquisition of this portion would be incapable of causing loss of rents on the portion not taken. It might be more difficult for the landowner to establish the causal link between lost rents on the portion not taken and the prospective acquisition of the portion taken, but that would be a matter for evidence when questions of causation remoteness and reasonableness are investigated.

47. So far as concerns point (2) in paragraph 45 above, Mr Roots drew a distinction between (a) losses to an existing "letting business" on an existing industrial estate and (b) losses from being unable to redevelop an old industrial estate and set up a letting business at higher rents on the estate once redeveloped. We see no reason in principle why losses within (a) should be

compensatable but losses within (b) should not be compensatable. Once again it may be there will be difficulties of proof regarding causation or remoteness or reasonableness or indeed of quantification, under (b), but that is different from saying that such a claim must be stopped at a preliminary hearing as being a claim that is simply not open to a claimant to pursue. As regards the argument that it is wrong in principle to assess a claim under rule 6 by reference to land being in a different condition as compared with the condition of the land at the valuation date (which is the condition the land must be assumed to be in for the purposes of rule 2) we conclude:

(1) There is no reason in principle, whether by reference to Pointe Gourde or otherwise, why land must be assumed to be in the same state – the calculation under rule 2 is in order to assess the value of the land in the no-scheme world in its condition at the valuation date and taking into account Pointe Gourde principles. The calculation under rule 6 is different and involves assessing losses (whether disturbance or other matters not directly based on the value of land) sustained in the scheme world which would not have been sustained in the no scheme world.

(2) In fact the lost rent claimed by the Claimants is not being claimed by reference to land in a different state as compared with the state the land is assumed to be in (namely its unredeveloped state) for the purposes of assessing the value of the land under rule 2. The Claimants assert that the rule 6 compensation should be assessed on the basis that the land was in its unredeveloped state in 1996 but that, with substantial expenditure (which must be taken into consideration when quantum is being considered) it could have been put into a redeveloped state. Thus the starting point for the Claimants' rule 6 claim is that the property was in its unredeveloped state but that it presented an obvious opportunity for the Claimants to make profits by pursuing a long intended redevelopment for which they had planning permission and of which they contend the Acquiring Authority (or its agent) had been made aware.

48. As regards Mr Roots' reference to the statutory provisions enabling certain limited categories of person to serve blight notices, we do not see why the fact that Parliament has given certain rights to certain categories of landowner in advance of an acquisition by compulsory purchase is a reason for cutting down the rights such landowner would otherwise ultimately have when circumstances have changed and part of that landowner's property has in fact been taken pursuant to the compulsory powers, see the passage from Lord Nicholls' speech in *Shun Fung* cited at paragraph 15(8) above.

49. For all the foregoing reasons we conclude that the Claimants' claim for lost rents as advanced in their amended statement of case must be allowed to proceed.

50. By way of summary we propose to analyse the position in the light of the findings above by reference to a series of points:

(1) Where a landowner is carrying on a business on land which is the subject of compulsory purchase procedures and which is all ultimately taken by the

acquiring authority and where in the shadow period (when the prospective compulsory purchase is known about but possession has not been taken) the landowner sustains business losses which are reasonably attributable to the prospect of the compulsory acquisition, such losses are recoverable under rule 6. This is the *Shun Fung* case.

(2) The question arises whether a claim for losses is impermissible as a matter of legal principle if the "business" which the landowner is carrying out on the land is a letting business, such that the landowner is in effect an investor deriving profits from rental income of units on the land taken. We consider the answer is no, see paragraphs 37 to 44 above and see the decision of Judge Rich QC in *Ryde*. We do not read the analysis in *Ryde* in the Court of Appeal as being contrary to this. That case was concerned with a claim for profits prospectively available to the landlord after the valuation date, rather than with losses already sustained prior to that date.

(3) The question next arises whether, if only part (rather than the whole) of the land upon which such a letting business is carried on is subject to compulsory purchase and is ultimately taken, a claim for such losses is impermissible as a matter of legal principle in respect of (a) rents lost to the letting business from the land prospectively and actually taken or (b) rents lost to the letting business from the land which was never at risk of acquisition pursuant to the compulsory purchase procedures. We consider the answer is (a) no and (b) no. It will of course be necessary for the claimant landowner to establish that each category of loss is reasonably attributable to the prospective acquisition of that part of the land which is subject to the compulsory purchase and ultimately taken. The landowner may have difficulties in establishing this causal link in (b). Also questions of remoteness and reasonableness will need to be considered. But we see no reason why such a claim must necessarily fail as a matter of legal principle in advance of consideration being given on the evidence to causation remoteness and reasonableness.

(4) The question next arises as to whether, if the claim for losses to the letting business are losses calculated by reference not to lowered rents or rent voids from the land in its existing state but by reference to the land in a redeveloped state which the landowner could and would have put the land into were it not for the prospective acquisition of that part of the land which is subject to the compulsory purchase, this means that a claim for such losses is impermissible as a matter of legal principle in respect of (a) rents lost to the letting business from the land prospectively and actually taken or (b) rents lost to the letting business from land which was never at risk of acquisition pursuant to the compulsory purchase procedure. We consider the answers are (a) no and (b) no. In relation to a claim such as is considered in subparagraphs (2) and (3) above we see no reason why as a matter of law the claimant landowner must calculate his lost rents by reference to the land in its precisely existing state such that the extra rents which the landowner could have obtained from some obvious and minor refurbishment must be disregarded. Once this is conceded we see no reason in principle why a potential minor refurbishment can be taken into consideration but a potential redevelopment cannot. Once again it will of course be necessary

> for the claimant landowner to establish that each category of loss is reasonably attributable to the prospective acquisition of that part of the land which is subject to the compulsory acquisition and is ultimately taken. The landowner may have particular difficult in establishing this in case (b). There will also be questions of remoteness and reasonableness. In a case (b) situation the landowner may have difficulty in resisting an argument that he could and should reasonably have carried out his proposed redevelopment (in an abridged form) on that part of the land which was not at risk of compulsory purchase. However the claim should be allowed to proceed beyond a preliminary hearing stage so that causation remoteness and reasonableness can be considered on the evidence.

51. We add the following further points.

52. We have analysed the cases in paragraph 50 above by reference to examples where the whole of the land which is potentially subject to the compulsory purchase is ultimately taken (which is the present case, where it was only the Reference Land which was subject to prospective compulsory purchase and where the whole of the Reference Land was taken). We can see scope for further argument in circumstances where, for instance, the whole (or much) of a landowner's land is within the CPO but where only a substantially smaller part is ultimately taken. As this point does not arise here and was not argued we say no more about it.

53. In a case where the loss to the letting business is caused by the general blighting effect of the scheme and the consequent depression of rental levels, rather than by the prospective acquisition of the land (or a part of the land) on which the letting business is conducted, then we consider that such losses cannot be recovered. We did not understand Mr Pickles to argue the contrary. This is the question left open by Judge Rich QC in *Ryde* at paragraph 16. We reach this conclusion for the simple reason that such losses cannot be brought within the basic test set forth by Lord Nicholls in *Shun Fung*, namely that the losses are "fairly attributable to the taking of his land". Instead such losses are fairly attributable to the general blighting effect of the scheme. Also such losses (ie which are reasonably attributable to the general blighting effect of the scheme) would plainly be irrecoverable if none of the landowner's land was ever within the CPO or if none of his land was ultimately taken. Such a loss being irrecoverable as a matter of principle, we do not consider that such a loss (deriving merely from general blight) becomes recoverable as some form of parasitic claim if the landowner's land (or some part thereof) is subsequently taken, see for instance the analysis of Lord Hoffmann in *Wildtree Hotels v London Borough of Harrow* [2000] UKHL70 in Part 5 of his speech dealing with the second issue.

54. Neither party referred us to the Court of Appeal decision in *Welford v EDF Energy Networks (LPN) Ltd* [2007] EWCA Civ 293. We merely note the decision and observe that it does not cause us to doubt the conclusions we have reached on this preliminary issue and that, if anything, the case appears to support rather than contradict the argument advanced by Mr Pickles.

55. It was accepted by Mr Pickles that the way in which the Claimants' claim had originally been formulated was not in accordance with the compensation code. Mr Pickles made clear, for the avoidance of doubt, that he accepted that the Reference Land must be valued under rule 2 in its existing condition as at the valuation date. He also accepted that the Claimants rely on paragraph 6.15 of Mr Oliver's supplementary report of September 2008 but do not rely on paragraph 6.14. Mr Roots, perfectly understandably, asked us formally to record these concessions in our decision so that there should be no question of the Claimants subsequently seeking to resile therefrom. We do so record these matters.

56. Finally, there is a further point of dispute between the parties which arises out of the issues which they have formulated for the purposes of this preliminary hearing. The point is set out in issues (2) and (3) of the Tribunal's consent order dated 1 May 2009. In an addendum to his skeleton argument Mr Pickles proposed amendments to these issues. Although these amendments were not agreed prior to the hearing we do not understand Mr Roots to demur from them. As so amended the issues are:

> "(2) In assessing compensation for the compulsory purchase of the land taken, should the compensation be a sum equivalent to the open market value of the land in its existing state on the valuation date as contended by the Acquiring Authority or should it be assessed with the severance and injurious affection claim on a 'before-and-after' basis (ie the difference at the valuation date between (a) the value of the whole of the Claimants' property (as defined in the Amended Statement of Case) including the land taken in its existing state on the basis that in the absence of CTRL planning permission would have been granted on the valuation date for the construction of 20 industrial units of the type for which planning permission was granted on 12 April 1995 and (b) the value of that land on the basis that planning permission would be granted for a lesser number of units apportioned as between the land taken and the remaining land within the wider site) as contended by the Claimants?
>
> (3) In assessing compensation for injurious affection and/or severance, should the compensation be a sum equivalent to the diminution in the open market value of the Claimants' retained land at the valuation date caused by the taking of the land acquired as contended by the Acquiring Authority or should it be assessed with the value of the land taken on a 'before-and-after' basis (ie as above) as contended by the Claimants?"

The remaining point of dispute between the parties following these amendments is whether, as a matter of law, the Claimants are wrong to use the 'before and after' valuation method when assessing compensation for the value of the Reference Land and for severance and injurious affection to the retained land.

57. Mr Roots argued that although the before and after method was often used by valuers as a shorthand way of calculating both of these elements of compensation it was not consistent with the law. He referred to *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153 and *Hoveringham Gravels Ltd v Chiltern District Council* (1977) 35 P&CR 295 in support of his contention that the measure of compensation for severance and injurious affection is the diminution in the value of the retained land and that it must be assessed separately from the compensation for the value of the land taken. Different considerations and assumptions

applied in each instance and the before and after method did not allow a clear and separate identification of the component parts.

58. Mr Pickles submitted that it did not follow that because the legislation made specific presumptions for the assessment of compensation for the land taken and for severance and injurious affection to the retained land that the before and after method could not be used. Mr Roots had not said how specifically these presumptions impacted upon the use of the method. Mr Pickles asked the Tribunal to confirm the theoretical availability of the before and after method although he was not asking it to make a choice at the preliminary hearing about whether its use was appropriate in this reference.

59. The facts of *Hoveringham* are unusual. In 1970 Chiltern District Council proposed to acquire the entirety of a piece of land for use as a public open space. The claimant (appellant) obtained a section 17 certificate under the Land Compensation Act 1961 in June 1970 for residential development. The council's proposal was not pursued but instead the entity of land was effectively divided into two; the front land being required by the county council for road widening and the back land no longer being adequate in terms of area and access to support an independent residential development. Planning permission to develop the whole area was refused in June 1972 which resulted in the appellant serving a purchase notice requiring the respondent district council to buy the whole area. The purchase notice was referred to the Secretary of State who confirmed it subject to a modification that the county council should purchase the front land and the district council should purchase the back land. In 1974 the appellant made separate and successful applications for section 17 certificates in respect of the front land and the back land without prejudice to its reliance upon the original 1970 section 17 certificate covering the whole site, the value of which it apportioned between the front and the back land. The Tribunal rejected this approach and instead held that the 1970 certificate, though still extant at the date of the hearing, had become irrelevant in the changed circumstances and that the front and back land must each be valued separately without regard to what the position would have been had the scheme envisaged when the 1970 certificate was issued come to fruition. The Court of Appeal upheld this decision. Roskill LJ, giving the judgment of the court, said at 302:

> "…when one is dealing with a deemed planning permission we think it is impossible logically to hold that the valuation of the back land, in relation to which a later specific section 17 certificate has been issued, must be determined by reference to and only to a previous section 17 certificate issued in relation to the whole area and a different proposed compulsory acquisition…
>
> …In the result, we reject this part of the appellants' submissions – that is, that the whole area should be valued and the resultant valuation apportioned between the front land and the back land in proportion to their respective acreages – and we reach the same conclusions as did the Lands Tribunal as to the inapplicability of the June 15, 1970 certificate.
>
> We confess that we have reached this conclusion with some regret and we share the view of the lands Tribunal that this is a very difficult case…"

60. We distinguish the facts of *Hoveringham* from those of the present reference where, although part only of a larger landholding is being acquired, the parties have agreed that the whole is assumed to have a single planning permission which is the same as that actually granted in 1995 and which includes the land taken. There is no alternative subsequent planning permission in respect of the part taken and the part retained.

61. The before and after valuation method is often used in practice. Indeed we note that the Acquiring Authority's own expert valuer, Mr Owen, states in his report that:

> "6.8 My preferred approach to the valuation would be to carry out a 'before and after approach', in which the claimants' entire holding is valued at the valuation date with, and then without the land acquired. This has the benefit of also encompassing any loss in the value of retained lands arising from severance or injurious affection…"

The method has the advantage that it assesses the true loss of the claimant and thereby satisfies the principle of equivalence whilst being easy to understand and use. It avoids the problem, which can arise if the land taken and the retained land are valued separately, of having to compensate for the loss of marriage value in the two plots of land.

62. The Law Commission favours the before and after valuation method. In its Consultation Paper No.165 Towards a Compulsory Purchase Code: (1) Compensation, published in 2002, it said:

> "'*Before and After' valuation*
>
> 5.15 In principle, it seems, the reduction in value of the retained land should be assessed separately from the value of the land taken. However, in practice a 'before and after method' is sometimes used. This involves comparing the overall value of the complete holding before the taking, with the value of what remains thereafter. In some cases it may be thought to produce a fairer result, which better accords to the principle of equivalence."

In Proposal 5 of that report, headed "Injury to Retained Land", the Law Commission recommended:

> "(4) If the claimant so requires, the amount due under this Proposal is to be assessed by calculating the difference at the valuation date between (a) the market value of the subject land and the retained land taken together (disregarding any diminution due to the relevant project) and (b) the market value of the retained land on its own (taking account of any effect on that value of the relevant project)"

In its Final Report No. 286 the Law Commission, following consultation, said:

> "'*Before and after*'
>
> 3.30 There was wide support for our proposal to provide specifically for the 'before and after' approach, which some suggested was standard practice already. There was, however, a strong body of opinion that this method should not depend, as we

proposed, on the election of the claimant, since it may often be the fairest and most convenient method of valuation, regardless of the subjective views of the claimant. We are inclined to agree. Our amended proposal would leave it as a matter for agreement between the parties, or determination by the Tribunal."

Its amended proposal was stated as Rule 4(2):

> "If, in either case, the parties agree or the Tribunal determines:
>
> (a) …
>
> (b) compensation due under this Rule [injury to retained land] and Rule 3 [market value] may be assessed together, that is, by calculating the difference at the valuation date between:
>
> (i) the value of the subject land and the retained land, taken together, as they were immediately before the acquisition; and
>
> (ii) the value of the retained land, on its own, as it was immediately thereafter."

63. We are not satisfied that the before and after valuation method should not be used as a matter of law. It will always produce a valuation that includes the value of the land taken and any severance/injurious affection even if they are not identified separately in the valuation process. The separate valuation of the land taken and severance/injurious affection to the retained land will often produce the same result, as was the case in *ADP & E Farmers v Department of Transport* [1988] 1 EGLR 209 where the Member, C R Mallett FRICS, noted at 216C that "In the result the method adopted was of little consequence…" A 'shorthand' approach to a correct result is not one that we would necessarily discourage but it would have to show, on the evidence, that it produced a valuation that satisfied the statutory requirements. We think that this question is best considered at a substantive hearing.

64. We conclude that the Claimants may proceed to a substantive hearing on their reference as determined above. The parties are now invited to make representations on costs, and a letter on this accompanies this decision, which will become final when the question of costs has been determined.

Dated 21 July 2009

His Honour Judge Nicholas Huskinson

AJ Trott FRICS

Addendum on Costs

65. We have considered the representations on costs made by the parties in the letter from the Acquiring Authority's solicitor dated 20th August 2009 and the letter from the Claimants' solicitors dated 5th August 2009. The Acquiring Authority submits that the costs of the preliminary issues should be reserved to be dealt with as part of the final determination of the reference. The Claimants submit that there should be at this stage an order for costs in favour of the Claimants in respect of the costs of and incidental to the decision upon the preliminary issues and that the Tribunal should order an interim payment and should order that the costs should be subject to a detailed assessment in the Supreme Court Costs Office if not agreed.

66. We have had regard to the Interim Practice Direction and Guidance of the Lands Tribunal dated May 2009 and to the decision in *Purfleet Farms Ltd v Secretary of State for Transport* [2002] EWCA Civ 1430.

67. Although the Tribunal's decision on the preliminary issues was in favour of the Claimants on the principal point, it is not correct to say that the Claimants succeeded upon the entirety of the matters raised in the preliminary issues, see the concession recorded by us in paragraph 55 of our Decision.

68. As was made clear in our decision, all matters of causation remoteness and reasonableness remain to be decided in the future upon the evidence. We have in mind the limited circumstances in which a claimant for compensation for land compulsorily acquired will be deprived of his costs of the reference. However we also have in mind the matters set out in paragraph 23 of the Interim Practice Direction and Guidance and in paragraph 43 of the judgements in *Purfleet*, where Chadwick LJ states:

> "Where the Tribunal makes an award of compensation which is well below the amount claimed, it is appropriate for it to consider, in the context of an award of costs, both whether the fact that the claim was exaggerated has led the claimant to incur costs which (given a more realistic evaluation of his claim) he would not have incurred and whether the explanation for the difference between the award and the amount claimed is that issues were pursued on which the claimed had no real chance of success."

69. We have not overlooked the fact that the trial of the preliminary issues was sought by the Acquiring Authority and that the Claimants resisted there being such a hearing. However we consider that the Acquiring Authority should not be deprived of the opportunity of arguing, if they see fit to do so at the end of the reference once causation remoteness and reasonableness have been considered, that the Claimants have pursued head(s) of claim which, in the light of the evidence eventually called, it was unreasonable to pursue. The Acquiring Authority should not be deprived at this stage of the ability to raise an argument as to whether the Claimants should be entitled to their costs (or anyway all of their costs) incurred on a preliminary issue in establishing a right in law to pursue a claim if, on the evidence eventually called, such a claim ultimately turns out to have been one that it was unreasonable to pursue.

70. Accordingly we order that the question of the costs relating to the preliminary issues is reserved until the final determination of this reference.

Dated 14 September 2009

His Honour Judge Nicholas Huskinson

A J Trott FRICS