UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2014] UKUT 0116 (LC)
UTLC Case Number: ACQ/274/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Compulsory purchase of 1.1 acre waste transfer site –planning assumptions – valuation – disturbance - extinguishment of business – pre-possession "shadow period" losses – management time – re-investment costs – Land Compensation Act 1961 section 5 rules (2) and (6), sections 14(3) and 16(3) and section 10A – compensation determined at £2,580,747

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **(1) DAVID MOSCHE HALPERN** **Claimants**
(2) PATRICK WILLIAM GLADWELL
(3) CLEARUN LIMITED
(4) DOMINION MOSAIC & TILE COMPANY LIMITED

and

GREATER LONDON AUTHORITY **Acquiring Authority**

re: Clearun Wharf, 151 Marshgate Lane, Stratford, London E15 2DT

Before: HH David Mole QC (sitting as a Deputy Judge of the Upper Tribunal) & Paul Francis FRICS

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
9-11, 14-18, 21-22 October and 25 November 2013

Barry Denyer Green and *Daniel Robinson*, instructed by S J Berwin, solicitors of London EC4, for the claimants
James Pereira and *Alexander Booth*, instructed by Squire Sanders LLP, solicitors of Leeds, for the acquiring authority

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The following cases are referred to in this decision:
Urban Edge Group Ltd v London Underground Ltd [2009] UKUT 103(LC)
Abbey Investments Ltd v London Development Agency [2010] UKUT 325 (LC)
Harvey v Crawley Development Corporation [1957] 1 QB 485
Horn v Sunderland Corporation [1941] 2 KB 26
Director of Buildings and Lands v Shun Fung Ironworks [1995] 2AC 111
Lindon Print Ltd v West Midlands County Council (1987) 283 EGLR 70
Loring v Davis (1886) 32ChD 625
Pointe Gourde Quarrying and Transport Ltd v Sub-Intendent of Crown Lands [1947] AC 565
RMC (UK) Ltd v London Borough of Greenwich [2005] ACQ/3/2003 (LT)
Waters v Welsh Development Agency [2004] UKHL 19

DECISION

Introduction

1. This is a consolidated reference relating to the compulsory acquisition by London Development Agency (now Greater London Authority and referred to hereafter as the acquiring authority) of a 1.1 acre waste transfer site (WTS) at Clearun Wharf, 151 Marshgate Lane, Stratford, London E15 2DT (the reference land) under The London Development Agency (Lower Lea Valley, Olympic and Legacy) Compulsory Purchase Order 2005 (the CPO). The CPO was made on 16 November 2005 and, following a public inquiry, was confirmed by the Secretary of State on 18 December 2006. A General Vesting Declaration was made on 14 May 2007 and the land vested in the acquiring authority on 2 July 2007, which is the valuation date for the purposes of this reference.

2. The initial reference (ACQ/274/2010) was made by the acquiring authority on 8 January 2010 and related to the question of compensation to be paid to the first and second claimants for the value of the land under section 5, rule (2) of the Land Compensation Act 1961 (the 1961 Act). On the same date, the acquiring authority made a further reference (ACQ/280/2010) whereby the claimant was Clearun Limited (Clearun), the company which operated the WTS. This related to the issue of compensation for disturbance under rule (6) due to the alleged extinguishment of the Clearun business together with other miscellaneous heads of claim. An application for them to be consolidated was accepted and subsequently ordered by the Tribunal. On 28 June 2013 a further reference (ACQ/88/2013) was made by the fourth claimant, Dominion Mosaic and Tile Company Limited (Dominion), which dealt with a technicality regarding the first claimant's interests and, following an application, that reference was also consolidated with the above by an order dated 24 September 2013.

3. As at the commencement of the hearing, the claimants' claim for the value of the reference land under rule (2) was predicated upon three alternative bases: Firstly, that the reference land had a value of £6,000,000 pursuant to section 16(3) of the 1961 Act on the assumption that planning permission for a scheme comprising a mixed use development in accordance with their planning expert's "Notional Scheme 2" would have been granted by the valuation date. Secondly, pursuant to section 14(3) of the 1961 Act, the said value discounted by 20% (£4.8 million) on the assumption that no such permission existed at the valuation date, but that it could be expected to be granted within 18 months thereof. Thirdly, that if the Tribunal determines that there was no short to medium term prospect of planning permission being obtained, a value of £2.7 million representing the existing use value enhanced by a sum to reflect the long term "hope" of such a permission being forthcoming. The acquiring authority's case was that planning permission was not to be assumed under section 16(3), and that having regard to both the existing use value, and development prospects under section 14(3) (whereby it was agreed that planning consent for a mixed use development could have been expected to be obtained within 18 months of the valuation date), the rule (2) value was £1,850,000.

4. In terms of disturbance, the claimants' forensic accounting expert assessed compensation for the extinguishment of Clearun's business in the sum of £1,482,549 to which should be added £282,133 (revised to £401,000 immediately prior to the hearing) relating to pre-possession losses incurred by the business. The acquiring authority's case was that the evidence did not support the conclusion that the business was extinguished, and compensation under that head should therefore be nil. However, if it were to be established that the business was extinguished to some degree, it was contended that no more than 50% of it was extinguished and, on the basis of their accountancy expert's evidence, compensation should be no more than £83,990. In the event that the Tribunal were to find that the business had been totally extinguished, and that there was no failure to mitigate (which the acquiring authority say there was due to a failure to dispose of what was left of the business in a timely fashion), the acquiring authority said the compensation properly payable in respect of the value of the business was £238,721. As to pre-possession losses, these were valued by the acquiring authority at £97,313

5. The acquiring authority contended that the claim for £80,000 relating to Mr Halpern's management time expended in progressing the claim was unproven.

6. Mr Halpern also sought reinvestment costs in the sum of £2,250,000 pursuant to section 10A of the 1961 Act, but the acquiring authority disputed that such were payable and that element of the claim was withdrawn on the fifth day of the hearing.

7. The principle of the claimants' claim for pre-reference costs was accepted by the acquiring authority, and was subsequently agreed at £57,000, as was the entitlement to a Basic Loss Payment in the sum of £75,000.

8. Mr Barry Denyer-Green and Mr Daniel Robinson of counsel appeared for the claimants and called Mr David Mosche Halpern as a witness of fact, together with the following expert witnesses: Mr Ben Kelway (Planning), Mr Neal Matthews (Valuation), Mr Jeffrey Nedas (Forensic Accountancy - disturbance) and Mr Andrew Murdoch (Transport). The second claimant, Mr Patrick William Gladwell, did not appear and was not represented.

9. Mr James Pereira and Mr Alexander Booth of counsel appeared for the acquiring authority and called the following witnesses of fact: Mr Roger Tuffley (Crossrail Safeguarding Manager), Mr David Clarke (Consultant to GLA), Mr Ralph Luck (Director of Property for the Olympic Delivery Authority), Mr Geoffrey Spiller (evidence relating to the Carpenters' land) and Mr John Burton (Director of Development, Westfield). A witness statement was also received from Mr James Fergusson (Crossrail Engineering Consultant) but he was not called. Expert evidence was provided by Mr Sean Bashforth (Planning), Mr Colin Smith (Valuation), Mr Gordon Hodgen (Forensic Accountancy – disturbance) and Mr Mike Axon (Transport).

Facts

10. The experts helpfully produced statements of agreed facts and issues in dispute from which, together with the evidence and the assistance received from counsels' comprehensive skeleton arguments, closing submissions and replies, which were all received by 7 January 2014, and our accompanied inspection of the former site of the reference land and surrounding area on 26 November 2013, we find the following facts.

11. The reference land was included within the CPO as Plot 477 and until the valuation date was operated as a licensed waste management station (WTS) by Clearun Ltd. It comprised a site of approximately 4,460 sq m (1.1 acre) with open yard areas together with buildings that totalled 9,731 sq ft (905 sq m) and included a large warehouse/recycling shed and an office. The site was located within the London Borough of Newham on the north-western side of the northern end of Marshgate Lane, Stratford E15, about 80 metres from its junction with Carpenters Road. The site was approximately triangular in shape, having Marshgate Lane forming its south-eastern boundary and the confluence of the River Lea, Waterworks River and City Mill River providing its western and northern boundaries. A line of high-voltage overhead power lines ran directly to the west of the site between pylons that were located to the north-east and south-west across the three rivers respectively. At the valuation date, the reference land and adjacent land was subject to Crossrail Safeguarding, but the acquiring authority declared that for the purposes of this reference, that fact shall be disregarded only as to the subject site.

12. Prior to the compulsory acquisition, the wider surrounding area in general was occupied by low grade industrial and warehouse uses, railway lines and sidings and vacant or disused plots. The land immediately to the west of the reference land, across the River Lea, was occupied by Carpenters Business Park which principally comprised modern, steel portal frame buildings, and the land on the opposite side of Marshgate Lane was occupied by the fourth claimant, Dominion Mosaic and Tile Company (the Dominion site), as a tile warehouse, showroom and parking. The area to the south of the reference land (known as Thornton Fields) comprised open space and operational railway sidings beyond which was the elevated Great Eastern Railway Line. This was carried by a bridge over the southern section Marshgate Lane which formed a crescent or loop and contained further industrial and commercial buildings and occupations. The link between the north and south sections of the Marshgate Lane loop was known as Pudding Mill Lane, which contained Pudding Mill Lane DLR station, and once rejoining Marshgate Lane, led into the south-western section of Stratford High Street. The junction with the High Street was over 960 metres from the reference land and Stratford Regional Station was close to the junction.

13. Stratford International Station, which was completed in 2006 and became operational in November 2009 lies approximately 1km to the north of the reference land and is incorporated within Stratford City, the substantial commercial and shopping centre development undertaken by Westfield Plc and which itself opened in 2009. Immediately to the north of Stratford City was a residential area known as the Clay Lane Estate. Hackney Wick DLR station was within 912 metres walking distance of the reference land via Marshgate Lane and Carpenters Road,

and the nearest bus stop to the north east corner of the reference land (service 276) was 120 metres walking distance.

14. Factual evidence relating to the parties and their relationships together with other germane background details were comprehensively set out in the first claimant's witness statements and his evidence before us. To prevent unnecessary repetition here, we refer to them below where relevant under the heading "The Evidence of the First Claimant, Mr David Mosche Halpern".

Issues

15. The issues that remained to be determined by us can be summarised as follows:

16. *The Value of the Freehold Interest in the Reference Land (Rule (2))*

1. Whether the reference land was "allocated" under section 16(3) of the 1961 Act, with the consequence that, if it was, it is to be assumed that planning permission would have been granted, at the valuation date, for residential use, being a use within a range of uses identified in the relevant policy, or

2. Whether the reference land should, instead, be valued on the basis of the hope or expectation of planning permission being granted, preserved under section 14(3) of the Act. (It is common ground between the claimants and the acquiring authority that permission might be expected to be granted by 18 months after the valuation date for a mixed use, predominately residential, development.)

3. Whether the hoped for permission would have been granted earlier than 18 months after the valuation date, and if so what, if any difference, would that make to the value.

4. What density of residential development, in terms of habitable rooms per acre (hrha) would be anticipated to receive planning permission.

5. When, after the grant of planning permission, a reasonable purchaser would expect development in accordance with it to be viable.

6. The existing use value (EUV) of the reference land

Disturbance Issues (Rule(6))

1. Whether the business of the third claimant, Clearun Ltd, was extinguished, either fully or partially; and if so the value that should be placed upon that business at the valuation date.

2. Pre-possession losses

3. First claimant's management time

17. Mr David Halpern, the first claimant, was the first witness and set the scene for his various claims and those of the other claimants. He was the main and often the only witness to give evidence about a number of important matters relating to the various claims for business loss. So far as the value of the land taken is concerned he had less to say (although his evidence was interesting and important on several points) and the argument on land value was developed by the expert witnesses. For that reason it seems to us sensible, after dealing with Mr Halpern's evidence, to first consider the issues relating to the claim for disturbance and business loss and then to turn to the issues arising over the valuation of the land taken.

The evidence of the First Claimant

18. **Mr David Mosche Halpern** began his evidence by explaining the historical background to his interests in land in Marshgate Lane. Dominion Mosaic and Tile Company Limited ('Dominion') (the fourth claimant and the company of which he was sole director) had for many years owned a site at 44 Marshgate Lane (the Dominion site) and this had originally included what became the reference land. In 1987 the London Borough of Newham ('LBN') bought a strip of land to connect Marshgate Lane with Carpenters Road. This effectively divided the site into two separate parcels. The Dominion site remained in the hands of Dominion (and does to this day) but the severed section became 105 Marshgate Lane and on 10 February 1988 that area was sold by Dominion to Mr Patrick Gladwell, the second claimant, who moved Clearun Ltd, his waste management and skip hire business, onto it. That is the reference land.

19. Mr Halpern said that as time went by he came to appreciate that there was significant development potential in the land and he gave a short account of his discussions with Mr Gladwell about the possibility of buying back all or part of his interest in it. He also explained the discussions that had been held with LBN and the applications that were made in respect of residential development of the Dominion site and by Clearun Ltd. He explained why he came to the view that the Thornton Fields site, the Dominion site and the reference land had a very special value. He also thought that Clearun Ltd was a valuable asset, would continue to be a successful operation and would be a good investment. He said that he had been talking with Mr Gladwell for some time about the Clearun business and that Mr Gladwell had indicated that as he was suffering from ill health and stress he would welcome somebody who would assist him with his responsibilities, and who would enable him to release some capital from the business.

20. Those discussions culminated in an option agreement (the 2006 Agreement), signed on the 7th June 2006, and made between David Halpern and Patrick and Mary Gladwell. By this contract Mr Halpern was to pay £1.7 million for the reference land (clause 3) and £1,050,000 for 50% of the issued shares of Clearun Ltd (clause 4). Clause 2 said that Mr Halpern had the right to exercise the option until 5:00pm on 22 June 2006, although that appears to have been varied by a written note at the bottom of the first page of the contract which required him to exercise his option by "the end of June 06". The sale and purchase of the property and shares was to be completed six months from the date of exercising the option and time was said to be of the essence. Clause 10 provided for the total consideration of £2.75 million to be paid by three instalments: the first £950,000 to be paid within a month of exercising the option, the second £900,000 to be paid within two months and the remaining £900,000 on completion. Mr

Halpern exercised his option at the end of June 2006. He paid £1 million in October 2006, £500,000 in January 2007 and a further £ 1.25 million on 21 June 2007. However the latter sum was not paid to Mr Gladwell but held by Mr Greenwood, his solicitor.

21. Mr Halpern said that this option had been attractive to Mr Gladwell, firstly because he could carry on his waste transfer operation whilst Mr Halpern would see to the business side of the affairs, and secondly because it meant that he would receive a substantial payment at an early stage, rather than have to go through the process of extended negotiations with the acquiring authority in connection with the compulsory purchase order. It was put to Mr Halpern that the £1.7 million agreed between him and Mr Gladwell was good evidence of the value of the land. Mr Halpern did not agree. He conceded that both he and Mr Gladwell were prudent businessman who knew about buying and selling land in the locality at the time and understood the planning context. He acknowledged that Mr Gladwell had been independently advised about the value of the reference land, Jones Lang LaSalle having valued it at £1.87 million in early 2007. To finance the purchase of the land, Mr Halpern had approached the First Bank of Israel, which was the bank he uses for general business and securing mortgages. They instructed AtisReal to carry out a valuation for commercial mortgage purposes. The valuation was dated October 2006 and was undertaken on a RICS Red Book basis and on the assumption that the Olympics were not taking place. The valuation was for £1.8 million but Mr Halpern said he did not believe that hope value had been taken into account, despite what was said in the valuation itself. He agreed that he had refused to disclose this valuation until ordered to do so by the Tribunal, as he had not considered it to be necessary. The valuation had been made nine months prior to the vesting date and he said that in his experience bank valuations are generally cautious and below market value. His opinion was that the valuation was simply wrong.

22. Mr Halpern confirmed that he gave evidence as an objector to the CPO inquiry. He did so in respect of the Dominion site, but not the reference land or Clearun. Clearun made a separate objection on the basis that the business was likely to be extinguished if the CPO was confirmed. He understood that the prospect that the CPO would be confirmed was very good. It was put to him that he exercised the option in the full knowledge that it was highly likely that the CPO would be confirmed, the position of Clearun would be very difficult and it would be unlikely that an alternative site for the business would be found. He responded that there was still 12 months to go before the land would be required; it would not be easy but the LDA had said they would find somewhere and, with the right money, he was confident a place could be found. He acknowledged that he had never run or invested in a waste company and thus had no experience of such a business. If the CPO had not been made he said he would still have completed the acquisition of the freehold of the property and 50% of the shares in Clearun. He would have sought planning permission to develop the property and would have intended to relocate Clearun's business when the time came to redevelop. In the meantime Clearun would have continued to operate from the reference land. However, he agreed that was not what he expected to happen.

23. Mr Halpern said that the acquisition of the property became 'frustrated' (although not in the technical legal sense). This was partly due to the compulsory purchase order and the difficulty in finding alternative premises for Clearun. He also said that Mr Gladwell had not fulfilled some of his obligations requiring the production of accounts, tax returns and other

information. As it transpired, neither the land nor the shares were transferred to Mr Halpern at that stage and he and Mr and Mrs Gladwell entered into another contract on 6 February 2008. This contract, briefly summarised, recorded that the London Development Agency had vested the reference land in themselves under the CPO and the parties were therefore unable to complete the transfer of it. Instead Mr Gladwell assigned his rights to compensation for the land and for disturbance to Mr Halpern. In addition the remaining 50% of the shares would also be sold to Mr Halpern. The total price for 100% of the shares would now be £850,000. This new contract meant that Mr Halpern had overpaid by £200,000 and that sum was returned to him.

24. Examination of Clearun's accounts shows that there was about £700,000 in the company's account when Mr Halpern acquired it. Making proper allowance for various debts of the company brought that sum down to something like £650,000. That meant, as Mr Halpern acknowledged in cross-examination, that instead of Mr Gladwell getting £1.050 million for half the shares in the company, he got about £200,000 for all the shares in the company. Mr Halpern initially said that because Mr Gladwell 'received a lower price for the shares' there was an oral 'gentleman's agreement' that, if he were to receive compensation over and above the price that Mr Halpern paid to Mr Gladwell, the two of them "would come to an arrangement regarding payment of an additional amount." In cross-examination Mr Halpern said, on reflection, he did not think that was the reason. It was because by then the business was of very little value – much of its value having been "destroyed" by the CPO. Mr Gladwell wanted to close the matter so Mr Halpern agreed to pay him £850,000 with an agreement for overage if more money than that were paid in compensation. Mr Gladwell was not well. He was feeling very elderly and said that he could not take it any longer and that is why the agreement was "remade." It was put to Mr Halpern in cross-examination that the reason that Mr Gladwell did not get his money was because Mr Halpern had realised that he had overvalued the company under the option agreement. Mr Halpern denied that. It was also put to him that he never had any intention of running Clearun as a going concern; his only purpose was to use it as a vehicle for claiming disturbance compensation. This Mr Halpern also denied, maintaining that he proposed to run the company in partnership with Mr Gladwell.

25. Whilst the shares were duly transferred on 6 February 2008, the reference land was not. It was submitted on behalf of Mr Halpern that he has an equitable interest in the freehold of the reference land by virtue of the option Agreement of 7 June 2006 and this entitles him to claim compensation for the value of the land. Insofar as Mr Gladwell still had a compensatable interest in the freehold, he had agreed to assign his compensation claim to Mr Halpern by virtue of the February 2008 contract. As for the disturbance claim, it was submitted that Mr Halpern is entitled to maintain it as the owner of 100% of the shares in Clearun or alternatively because the right to claim for disturbance was also expressly assigned in the 2008 Agreement. There is also a dispute as to whether Mr Halpern had an equitable interest in 50% of the shares of Clearun at the valuation date.

26. Mr Halpern explained in some detail the efforts that were made to relocate Clearun and the negotiations that took place over various suggested sites. It is unnecessary to set these out at any length as the acquiring authority does not now maintain that Clearun failed to take reasonable steps to relocate or mitigate its loss on those grounds.

27. As for the total extinguishment of Clearun Ltd's business, Mr Halpern said that as the company was unable to relocate by the valuation date, it had no choice but to arrange to sell its assets by auction and its goodwill to selected parties, in order to mitigate its losses. The auction took place on 27 June 2007 at the reference land. A copy of the schedule of sales prepared by the auctioneers, Malcolm Harrison Auctions Ltd, was exhibited. This showed that a substantial number of skips, some vehicles and a variety of equipment were sold for a price of £165,053.70p.

28. The sale of the goodwill, as Mr Halpern described it, is said to have taken place on 14 May 2008 (although the precise date is not clear from the copy of the agreement before the Tribunal). The sale was to 0S Hire Ltd, trading as Olympic Skips and the price was £75,000. Thus, he said, the Clearun business was extinguished.

29. Although the sale agreement was made in May 2008, the 'transfer date', which is the date from which the purchaser takes the business "as a going concern", is said to be 9 July 2007. Mr Halpern said he believed £25,000 had been received by the solicitor in 2007 and held as a deposit. He thought that there was a payment of £50,000 by the solicitor to Clearun on 28 May 2008. He was cross examined about the Chaps Receipt details, which shows a payment from the solicitor to Clearun of £75,000 on 28 May, but responded by pointing out that was a payment made by the solicitor and he may have received money earlier. Completion was on that day but it was backdated to the valuation date on the solicitor's advice.

30. In a letter dated 16th July 2007 Mr Gladwell wrote to five potential buyers to ask for offers. He said:

> "We have sold by auction the bulk of our equipment and machinery but in order to service our loyal customers we have kept back a small amount of equipment until we find a suitable company to look after them. We are now offering for sale our client base along with the remaining stock.
>
> Our turnover until July 2005 was circa £1.6 million, and in July 2006 was in excess of £2 million. We anticipate that if the customers continue to be served at the least half the turnover will be secured. We now wish to sell the goodwill including transfer of the telephone lines as soon as possible."

The letter invited offers to be forwarded to Mr Huggins, Mr Gladwell's solicitor, by 'close of business July 18 2007'. This gave the potential offerors less than a day to assess the offer and make up their minds.

31. The terms of the May 2008 agreement, drawn up by a solicitor, are of interest. The vendor was Clearun Limited. Mr Gladwell was noted to be "the guarantor". Clause 2 said

> "SALE AND PURCHASE OF THE ASSETS

for the consideration the Vendor will sell … and the Purchaser will buy with effect from the transfer date the Business as a going concern and comprising all of the following assets:

2.1 the Goodwill and the full benefit (so far as the Vendor can assign the same) of the Contracts and all the licences held by the Vendors in relation to the Assets

2.2 the Work in Progress

2.3 all books and records (except accounting records) ….

2.4 vehicles and plant."

32. Schedule 1 listed the vehicles and plant, including four skip lorries and approximately 60 skips.

33. In clause 6.1 it was recorded that:

"THE PARTIES AGREE that the Business is transferred as a going concern as from Completion …"

34. Clause 8 set out undertakings, amongst other things, that neither the vendors nor guarantor would engage in a competing business for three years nor solicit former customers.

35. Mr Halpern said that he regarded the sale as no more than the disposal of the remaining goodwill and equipment of Clearun. The company itself effectively ceased to exist at the valuation date, in his view. He did not think it traded after that date. He accepted that if the business had been extinguished in July 2007 it could not be sold as a going concern in May 2008, however the words "as a going concern" was simply wording put in by the solicitor. The sale was no more than an attempt to mitigate the loss. He acknowledged that he was not involved in that deal in 2007 at all. He did not think the details of the contract were important: his only concern was to get the £75,000 in order to mitigate the losses.

36. Mr Halpern was asked about the lorry P 421 NNM which was photographed working in the London congestion charge zone in 2008 and was wearing the Clearun name and telephone numbers. This was not one of the vehicles that had been sold at auction. The photographs showed it removing a skip from outside House of Fraser off Oxford Street. Enquiries of that company suggested that payment was made to OS hire Ltd for work done by 18 March. Mr Clarke gave evidence that a lorry in Clearun livery was in the congestion charge zone on a number of dates in late 2007 and early 2008. Clearun was shown as the registered keeper of the lorry until 11 March 2008. Penalty charges were issued and sent to Clearun's registered address and two of them were paid in February 2008. Mr Halpern replied that obviously somebody was using a Clearun lorry in late 2007 and 2008 but that did not mean it was Clearun; he could not say who it might have been.

37. In his evidence in chief Mr Halpern made a claim for his management time. This was said to be in respect of his time in his capacity as the equitable owner of the freehold of the reference land from June 2006, and also working as Clearun Ltd's agent before that date. On that basis he claimed the sum of £80,000, being 1000 hours at the rate of £80 an hour. In cross-examination he agreed that he had not been acting as Clearun's agent before June 2006. He had misquoted himself, he said. It was just a mistake. As for the element of management time spent in connection with the reference land, he said he was investing in a compensation claim so he had to incur some costs. He had been involved in writing letters from a date that he could not remember but he acknowledged that he had no specific evidence of the work he had done as equitable owner of the freehold.

38. Having heard Mr Halpern, we have concluded that, occasionally, he would yield to the temptation to make assertions for which he could have no first-hand evidence and there did seem to be a tendency for the strict historical accuracy of his recollection to become a little clouded by an understandable concern for the prospects of his claim. We have therefore been inclined to look for independent support for his evidence before putting more weight on it than would be fair.

Disturbance - The Law

39. The disputes between the parties were about the application of the law to the facts; there was no serious disagreement about what the basic principles of the applicable law were. We therefore summarise them very briefly. The long recognised principle of law is "that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may be properly regarded as the subject of compensation for disturbance provided, first, that it is not too remote and secondly, that it is the natural and reasonable consequence of the dispossession of the owner." (Per Romer LJ in *Harvey v Crawley Development Corporation* [1957] 1 QB 485 at 494.) Such a dispossessed owner is entitled "to be put so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed upon him in the public interest, but on the other hand no greater." (per Scott in LJ *Horn v Sunderland Corporation* [1941] 2 KB 26 at page 42. (The principles were more recently reiterated in the case of *Director of Buildings and Lands v Shun Fung Ironworks* [1995] 2AC 111.) Both occupation and ownership are crucial to a successful claim under this principle. Section 5, Rule (6) of the Land Compensation Act 1965 left the right to disturbance compensation that had been created by judicial authority unaffected by Rule (2).

40. In the Land Compensation Act 1973, section 37, Parliament came to the aid of persons displaced from land who did not have a legal interest in it. That provides:

"37 (1) where a person is displaced from any land in consequence of-

(a) the acquisition of the land by an authority possessing compulsory purchase powers ...

he shall, subject to the provisions of this section, be entitled to receive a payment (hereafter referred to as a "disturbance payment") from ... the acquiring authority.

(2) a person shall not be entitled to a disturbance payment -

(a) in any case, unless he is in lawful possession of the land from which he is displaced;

(b) in a case within subsection (1)(a) above, unless either-

(i) he has no interest in the land for the acquisition or extinguishment of which he is ... entitled to compensation under any other enactment."

The amount of the disturbance payment is defined by section 38 as follows:

"38 (1) the amount of a disturbance payment shall be equal to -

(a) the reasonable expenses of the person entitled to the payment in removing from the land from which he is displaced; and

(b) if he was carrying on a trade or business on that land, the loss he will sustain by reason of the disturbance of that trade or business consequent upon his having to quit the land.

(2) in estimating the loss of any person for the purposes of subsection (1)(b) above, regard shall be had to the period for which the land occupied by him may reasonably have been expected to be available for the purposes of his trade or business and to the availability of other land suitable for that purpose."

41. The claimant is under a duty to act reasonably to reduce or mitigate his loss. The standard of reasonableness is not to be set too high and it is for the acquiring authority to prove that a claimant has failed to mitigate his loss. (See *Lindon Print Ltd v West Midlands County Council* (1987) 283 EGLR 70.) The availability or non-availability of alternative accommodation for a business is likely to be a very relevant matter in deciding whether the action taken by the business owner was reasonable. Losses resulting from a reasonable forced sale of equipment may well be another example of compensatable losses. Loss of profit or goodwill may also form an important head of claim either where the business has to be extinguished completely or where there is a partial or temporary loss. In principle, of course, the returns produced by successful efforts to mitigate the loss, such as the proceeds from sales of equipment or a sale of the goodwill of a business, should be set-off against the loss of profit.

42. Those general principles are undisputed, but there is an important distinction between what is claimable in principle and what can be proved on the evidence in any particular case. In every case the claimant has to prove on the balance of probabilities that he has suffered the losses in respect of which he is claiming. The Tribunal can only reach a conclusion in his favour on the basis of credible and admissible evidence.

Disturbance - The Issues

Ownership of shares

43. Before turning to the specific disturbance claims upon which a determination is required, it is necessary for us to first say something in connection with the parties' arguments relating to equitable ownership of the shares in Clearun.

44. The claim for disturbance is made by Clearun Ltd. It was emphasised in closing on behalf of the claimants that Clearun Ltd, the third claimant, is a separate legal personality and the identity of its shareholders has no bearing on the loss suffered by the company. However, it was argued, the identity of the owner of the shares had a bearing on Clearun's chances of remaining in occupation of the land until it was required for redevelopment and the rent it would have to pay. If Mr Halpern was a 50% owner of Clearun Ltd, it was inconceivable, it was said, that he would have evicted Clearun or done anything that damaged or extinguished its business. Secondly, the sale of the shares in the company might have a bearing on the valuation of the total extinguishment claim. It was argued that Mr Halpern was the equitable owner of 50% of the shares in Clearun at the valuation date because the option to buy the shares was exercised before the valuation date and from that moment half the shares were held on trust for Mr Halpern. Reference was made to *Loring v Davis* (1886) 32ChD 625, per Chitty J at page 630 et seq, and particularly at page 624 where he said:

> "If a man makes a transfer, there being no previous contract whatever, and executes a transfer to another of shares or stock, on the face of the transfer it is a sale, and if the intended transferee pays the purchase-money upon the transfers, and takes the transfer into his own possession and keeps it, has not the transferee by thus accepting the transfer of the shares, as between himself and the transferor become the equitable owner of the shares, and that not withstanding that the transferee does not execute the transfer?"

45. It was submitted that the equitable interest passed when the contract was executed and not when the full purchase price was paid. The option was exercised on 22 June 2006 and what happened thereafter can be disregarded; the parties were entitled to vary the terms, which is what they did.

46. The acquiring authority argued that Mr Halpern had not acquired a beneficial interest in Clearun limited by the valuation date. He had not adhered to the terms of the 2006 agreement and the payments he had made were not in accordance with it. The 2006 agreement was never completed by Mr Halpern. There was no evidence of any variation in its terms. It was observed that the instance given by Chitty J in *Loring v Davis* postulated that the purchase money on the transfers had been paid.

Consideration and conclusion on share ownership

47. It seems to us that this issue is of limited relevance. It makes little difference to the claim itself. There is no suggestion that Clearun Ltd is not entitled to claim for its business loss. Mr Halpern appears, now, to own 100% of the shares in Clearun and thus compensation awarded to Clearun could eventually profit Mr Halpern. The only relevance is the degree of control that Mr Halpern was in a position to exercise at the valuation date, and the way that exercise of control might have a bearing on the value of the company. It seems to us that, in practical terms and as a matter of fact, at the valuation date Mr Halpern was in a position, regardless of his strict legal rights, to influence decisions made by and about the company. Nonetheless that does not persuade us that Clearun's occupation of the land would have been secure or unburdened. Mr Halpern's attitude to his agreements with Mr Gladwell and his answers to some of the questions in cross-examination about whether he would have contemplated charging Clearun a substantial rent, leave us in no doubt that Mr Halpern would have taken a strictly commercial attitude and that the welfare of Clearun would not have been his primary concern.

48. We do not believe that it is necessary to decide whether Mr Halpern was or was not legally an equitable owner of the shares and we do not do so. Suffice it to say that it seems to us that there is force in the argument that Chitty J's words in *Loring v Davis* are distinguishable on the facts from the current case and we are inclined to agree with the acquiring authority that there is no evidence that there had been any variation of the contract upon which it would be prepared to rely.

Business losses – total or partial extinguishment

49. It is strongly contended on behalf of the claimants that the business of Clearun was totally extinguished. A substantial proportion of Clearun's equipment was auctioned on 27 June 2007, raising £160,053 (£145,748 nett). It is said that "a little while later, but still in 2007" there was an agreement to sell the remaining assets, described as the 'rump' of the business, to OS hire Ltd. This was recorded in the May 2008 agreement. The consideration was £75,000. This, it is submitted, effectively disposed of the business of Clearun. Clearun had been operating profitably and had reasonable prospects of continuing to do so, at least until Mr Halpern required the land for development. Mr Nedas had put a value on the business (£1,482,549) and, subject to taking account of the auction proceeds and the £75,000, that was the measure of disturbance compensation due. The only real issue was whether the acquiring authority had discharged the burden of proving that Clearun had failed to act reasonably in attempting to mitigate its losses. Attention was drawn to Mr Gladwell's health difficulties, about which Mr Halpern gave evidence. (We also recall the e-mail from Adrian Huggins dated 27th June 2007 which spoke of Mr Gladwell's robust health until about a year ago followed by a catalogue of illnesses, which Mr Gladwell put down to the stress of the CPO.) That is something that might have a bearing on the reasonableness of the efforts at mitigation.

50. The acquiring authority submitted that the business of Clearun Ltd was clearly not extinguished. Mr Gladwell was the man who could have given evidence on this issue but no evidence was forthcoming from him. Mr Halpern gave evidence but it was very unclear on what basis he did so since he had no active role in Clearun Ltd until he became a director in 2008 and before that he had no involvement with that or any other waste business. Mr Nedas simply relied

upon what he was told by Mr Halpern and could add nothing factual. By contrast the 2008 sale agreement expressly refers to the business of Clearun Ltd being sold as "a going concern". There was little evidence of sensible efforts to mitigate the loss by an effective sale of the business. The acquiring authority pointed to the surprising and inadequate letters sent out on 16 July 2007, two weeks after the authority took possession of the land.

51. In closing, the acquiring authority confirmed that its position on the duty to mitigate was that Mr Gladwell should have taken steps to bring about the timely sale of the business of Clearun once the possibility of a move to Thames Wharf had disappeared in March 2007. The steps he did take were too little and too late. The acquiring authority did not maintain that there was a failure to take reasonable steps to mitigate loss prior to the confirmation of the CPO.

52. The acquiring authority drew attention to the evidence of a waste removal lorry, of which Clearun was the registered owner, making several trips into central London between the date of extinction in July 2007 and the sale to OS hire in May 2008. Several congestion charge penalty notices were issued to Clearun Ltd and some of them were paid. It was submitted that somebody was making money from this although it was impossible to say who.

Consideration and conclusion – total or partial extinguishment

53. We accept that there is a danger of putting too much emphasis on whether there was a total or partial "extinguishment" of the business. A total extinguishment may occur where a business cannot be relocated or sold as a going concern and loss of goodwill and future profits will be permanent and total. Such a loss is compensatable. However, it may often be the case, where a business is displaced, that it will be a sound mitigation strategy for the claimant business owner to identify a core business, which can be sold as a going concern together with its contacts and goodwill and an adequate supply of plant and equipment. The remaining plant and equipment can be disposed of separately. That may be a sound way of mitigating the claimant's loss. Whether it is described as a total or partial extinguishment is of little concern as long as it is clear what has actually happened. Of course, in such a case, the sale of the core business as a going concern is intended to recoup some of the value of goodwill and future profits. Indeed it may recoup all of that value. A claimant cannot simultaneously sell a business as a going concern, which implies a price reflecting future value, and claim compensation for a total loss of future profits. But in such a case, providing the evidence is clear that there was still a loss, there is no reason why a claimant should not recover compensation to reflect the loss the business has suffered through having to sell the core business off as a going concern, rather than being able to make its own profits in the future.

54. In this case the evidence put forward by the claimants has all been directed to establishing that there was a total extinguishment of Clearun's business at the valuation date and Mr Nedas's valuation evidence was based on that proposition.

55. We are satisfied that there was not a total extinguishment of the business, finding on the evidence that a significant core of Clearun's business was sold "as a going concern" to OS Hire.

That is what the contract of May 2008 said was being sold. We do not accept Mr Halpern's evidence that this was no more than a meaningless flourish by the lawyers. The sale included "the goodwill and the full benefit (so far as the vendors can assign the same) of the contracts and all licences held by the vendor". It included work in progress and the business telephone number. It included vehicles and plant. The contract was also consistent with the letters sent out on behalf of Clearun Ltd by Mr Gladwell on 16 July 2007. The letter said:

> "We have sold by auction the bulk of our equipment and machinery but in order to service our loyal customers we have kept back a small amount of equipment until we find a suitable company to look after them."

And then:

> "Our turnover until July 2005 was circa £1.6 million, and in July 2006 was in excess of £2 million. We anticipate that if the customers continue to be served at least half the turnover will be secured. We now wish to sell the goodwill including transfer of the telephone lines as soon as possible."

We read that as a clear indication that Clearun Ltd was continuing to service their loyal customers until they found another company to take them over. That is why the company had kept back "a small amount of equipment." "Them" plainly refers to the "loyal customers" who were being serviced in the interim.

56. Therefore, an element of the concern was, indeed, still going. The business had not been extinguished at the valuation date. That may be part of the explanation for the sighting of a Clearun lorry removing waste in the West End on 3 March 2008 and for the congestion charge penalty notices, issued to Clearun Ltd, some of which were paid. No doubt the loyal customers were continuing to pay someone to have their rubbish removed, although no such payments can be identified in the accounts of Clearun. Perhaps Mr Gladwell could have explained. Mr Halpern could not. Neither could Mr Nedas, who appeared to suggest that what was said in the letter was a lie, a suggestion which did not impress us.

57. The timing of the sale to OS Hire is also confusing. The written contract of May 2008 says that "the transfer date" from which the sale has effect is 9 July 2007, the valuation date. But this can only be a notional date since Mr Gladwell's letters of invitation went out a week after the valuation date on 16 July 2007. It is a peculiarity of those letters that they required an answer on 18 July, giving potential buyers little more than 24 hours to make a sensible offer. It is not obvious what purpose such a short opportunity to consider the offer can possibly have had, even if Mr Gladwell had suddenly decided time was pressing, unless it was to prevent Clearun being embarrassed by offers, or other offers, for its business. Mr Halpern thought that there had been a preliminary agreement between Clearun and OS Hire in August 2007 although he had no direct knowledge or evidence of that. It certainly appears that payments towards the £75,000 price were made to a solicitor in the autumn. There is no explanation why there was no formal agreement or final payment until May 2008.

58. The acquiring authority submitted that the circumstances exposed a significant lack of clarity in the financial arrangements of Clearun and OS Hire. We agree. There is, indeed, a troubling lack of clarity in the financial and business arrangements of Clearun up to and following the valuation date. The business was not totally extinguished at the valuation date and, for an uncertain period and to an uncertain extent it must have continued. If it continued, the presumption is that some money was made by it, of which there is no trace. We are left with the clear impression that we do not have the whole picture and that it would be unwise to put much weight on the sum of £75,000 as a simple market sale of the 'rump' of the business. Mr Halpern gave unreliable evidence on these matters and Mr Gladwell has not been available to enlighten us further. Given that uncertainty, we are not satisfied on the evidence that disturbance to the business should be measured simply by valuing loss of profits on the total extinguishment basis, less the proceeds of the auction and the sale to OS Hire.

59. On what basis, then, can the Tribunal act? Mr Hodgen undertook an alternative valuation of the Clearun business in which he made the assumption, relying upon the assertion in Mr Gladwell's marketing letters, that half the turnover might be retained and that the compulsory acquisition was responsible for the partial extinguishment of 50% of the business. On that basis he calculated compensation for the loss of Clearun's business as being £83,990. However, the acquiring authority pointed out that this valuation had been undertaken purely to assist the Tribunal and they were not positively advancing it; any such valuation having to assume that (a) adequate efforts had been made to mitigate the loss and (b) that Clearun would be able to continue occupying premises for at least 10 years. Both of those assumptions were contested by the acquiring authority.

60. On behalf of the claimants in closing some reliance was placed on that valuation as an alternative position. It was asserted that at least 50% of the business was extinguished for which compensation was due. On the other hand, this exercise was fairly described by the claimants as "entirely arbitrary" and "an extremely unsound basis for the Tribunal to decide that only 50% of the business was extinguished."

61. Another view might be that the May 2008 sale was the work of a tired and ill seller anxious to dispose of the business even if it was at a substantial undervalue and was thus reasonable mitigation in the circumstances. We have considered that possibility, but do not think the evidence justifies such a conclusion. The apparent efforts to sell the business were very late and limited, to say the least, and no satisfactory explanation, supported by adequate evidence, has been put forward. We have set out our reasons for not being satisfied that the business was totally extinguished. So far as what was happening with the business of Clearun in 2007 and 2008 can be fathomed, it is consistent with a coherent and determined, but undeclared, strategy to maximise the remaining value of the business. For those reasons and the reasons identified by both the acquiring authority and the claimants we are not satisfied that we have any sound basis for deciding that 50% or any other percentage of the business was extinguished.

62. In those circumstances it is not necessary for us to set out in these reasons an analysis of the extinguishment valuations of Mr Nedas on the one side and Mr Hodgen on the other. Suffice it to say that we followed them both with interest and thought there was force in the criticisms

levelled at Mr Nedas's valuation. Had it been necessary to do so, we would have preferred the valuation of Mr Hodgen.

Pre-possession losses

63. **Mr Jeffrey Nedas** said he calculated Clearun's pre-possession loss by assessing what the company's profit would have been for the year ended 31 July 2007 but for the CPO. He then compared that estimated profit with the loss that actually occurred, the difference, he contended, being the loss caused by the CPO. **Mr Gordon Hodgen**'s approach was that pre-acquisition losses should be solely based on those increased costs or lost profits that can be directly attributed to the acquisition, on the grounds that Mr Nedas's methodology assumed that the whole of the difference between the estimated profit and the actual loss was caused by the CPO.

64. In the business extinguishment valuation (BEV) included as an appendix to his first expert witness report, Mr Nedas calculated losses under this head in the sum of £431,383 being the loss of profits based upon his assessment of the maintainable gross profit before tax and the actual operating profit before tax achieved "in the year ended 31 July 2007" assuming turnover of £2.0 million and a gross profit percentage of 29%, and subject to a number of adjustments. In the report itself, he made an adjustment to allow for a higher notional rental liability (an increase from £80,000 to £120,000pa), and the figure became £391,383. In his rebuttal of Mr Hodgen's first report, Mr Nedas said he did not agree either with his approach or his figures and set out a detailed explanation of his views as to why the estimated gross profit percentage was fair, and why Mr Hodgen's analysis of the rubbish disposal expenses and the redundancy costs was incorrect. However, acknowledging that the notional rental liability should have been even higher (at £155,000 pa) he did make a further adjustment to produce a figure of £356,383.

65. In his third report, dated 25 July 2013, Mr Nedas said that the notional rental figure had now been agreed at £120,000 pa and his figure was therefore further revised to £391,383. However, on 16 October 2013, the day before he was due to appear before the Tribunal, Mr Nedas produced a letter and a revised valuation, calculating these losses at £401,000 based upon 11 months trading figures, having acknowledged the fact that Clearun ceased to operate on 7 July 2007. He pointed out that that had been recognised in the valuation set out as in Appendix C to the agreed statement of facts and issues dated 27 September 2013, but made other adjustments including revision of the gross profit percentage to 27.47% based on an increased turnover of £2.2 million. The valuation was set out at his revised Appendix C thus:

	£	£
Estimated Turnover for Y/E 31 July 2007		2,200,000
11/12 thereof		2,017,000
Gross profit @ 27.47 % (see below)		554,000
<u>Less</u>		
Administration expenses [agreed]	230,000	

Depreciation [agreed]	60,000	
	290,000	
11/12 thereof		(266,000)
Estimated profit before tax		288,000
Actual loss per 2007 accounts		(113,000)
Pre-possession loss		401,000

Gross profit percentage:

Gross profit per Clearun's 2007 Accounts		459,754
Less		
Wages	293,796	
Additional redundancy related costs		
(£122,941 - £113,569 inc in wages)	(9,372)	
		(284,424)
		175,330
Rubbish disposal expenses per accounts	1,009,270	
At 37.1% of turnover	(667,656)	
Therefore, additional rubbish disposal expenses		341,614
Less landfill tax adjustment		(22,589)
Adjusted gross profit		494,355
Gross profit % on turnover of £1,799,612		27.47%

66. Mr Nedas said that, in making his further adjustments, he had agreed with Mr Hodgen that he should not have included the rent in his earlier valuations as no payment was made during the "shadow period". He also acknowledged that he should not have added back a proportionate part of what he considered to be non-commercial wages, such sums having been paid during the shadow period and would have been paid in the no-scheme world. He further made allowance for additional landfill tax. Mr Nedas went on to say that during the 2006 financial year, Clearun's turnover was £2.026 million which represented growth of 28% over 2005. It also grew by 11.22% during the quarter ended 31 October 2006. Turnover fell from 2006 onwards. In his view, based upon these factors, turnover in a full year to 31 July 2007 could have been expected to be £2.2 million hence his increase from the £2 million previously used – to then be adjusted by 11/12 as set out in his revised valuation.

67. As to losses "caused solely by the CPO", Mr Nedas said that on the basis of Mr Hodgen's methodology, there were two specific issues and no others. Firstly, additional rubbish disposal costs (which Mr Nedas calculated at £341,614 and Mr Hodgen said they were no more than

£52,439) and secondly redundancy and staff related costs at £122,941 which were arithmetically agreed, although Mr Hodgen and counsel queried part of this sum, concluding that only £48,935 was payable. However, he said Mr Hodgen's approach made no allowance for loss of gross profit on lost turnover [although, in fact, it did, in his assessment of loss of profits of £27,499 – see para 71 below]. In Mr Nedas's view, the whole of the difference between an anticipated profit of £288,000 and an actual loss of £113,000 (£401,000) was caused by the CPO as there were no other factors that could said to be responsible.

68. In connection with the rubbish disposal costs, Mr Nedas said that a "common sense" check of Clearun's 2007 accounts proved these to be unusually high in comparison with previous years. He said Mr Hodgen had arbitrarily chosen to only account for invoices from 16 June 2007, amounting to £52,438.94 whereas Clearun had been taking steps to clear the site for a much longer period. In reality, the clearance costs for 2007 were over £1 million (56% of turnover), whereas the average for the previous three accounting years was 37.1%. Allowing for the increase in Landfill Tax rates from 1 April 2007, Mr Nedas calculated the extra rubbish disposal costs entirely attributable to the CPO to be £341,614. He did not agree with the suggestion that because Clearun had allowed "vast volumes" of waste to build up over many years and had not made any provision in each year's accounts for the disposal of same, the whole of the extra costs incurred in completely clearing the site should not be compensatable.

69. It was accepted in submissions that Clearun had historically made no provision in its accounts for terminal site clearance liabilities, but to introduce such an allowance in the final years trading for the purposes of assessing compensation would result in an unacceptable change to the accounting policies used from year to year. In any event, if Clearun had made such an allowance during the period it had been trading, it would have been immaterial (about £18,000 per year). It was a fact that the only reason for the substantial increase in disposal costs was the need, caused solely by the CPO, to vacate the site. The acquiring authority submitted that, if Mr Nedas's additional costs were to be awarded, it would mean the claimants were getting away scot free with costs that they would, at some stage, have had to incur. It was pointed out that the question of a change to accounting policies had not been raised during the hearing, or put to the witnesses. The suggestion, it was submitted, was akin to a company making no allowance in its accounts for tax liability and then saying the business should be valued on the basis that it never had to pay dues to HMRC.

70. On the question of redundancy costs, Mr Nedas produced a table setting out how his figure was made up. Payments in lieu of notice, NIC on those and redundancy payments amounting to £122,941 would not, he said, have been incurred if the business had continued to operate. In his letter of 16 October 2013, Mr Nedas said that this figure had been agreed with Mr Hodgen, Mr Hodgen said that he did not disagree with Mr Nedas's arithmetic, but was not sure whether payments in lieu of notice were really recoverable in addition to statutory redundancy payments as, surely, there had been enough time prior to the date of acquisition for the requisite notice to be given. However, this was a matter for submissions, and he said in re-examination that he did not consider the payments claimed to be inappropriate. In submissions, it was stated that whilst it was accepted that £48,935 was payable as a matter of principle (despite the fact that there was a question over whether the payment to Mr Davidson was

applicable as he had emigrated to Spain), there was no evidence produced that any of the employees were contractually entitled to the additional payments in lieu.

71. In his first report, Mr Hodgen valued pre-possession losses in the sum of £128,873 inclusive of rubbish disposal costs which he calculated at £52,439 from 13 June 2007 to the valuation date. In his second report, in the light of further information that had been made available by the claimants, the pre-possession costs were revised to £202,879. That figure was made up as to £122,941 redundancy and payments in lieu, £52,439 for additional rubbish clearance and £27,499 loss of gross profit from sales for the period 17 June to 2 July 2007. This loss of profits was based upon his Schedule 3a (Bundle 12 p.6307) which showed the actual and expected gross profit in 2007. However, it was submitted that as there was no evidence from the claimant to justify entitlement to any of the additional rubbish costs, or £53,127 of 'notification pay' in connection with the redundancy costs, the compensation payable should be reduced to £97,313. Mr Hodgen accepted in cross-examination that in making adjustments in his Schedule 3a, the year on which he relied was 2007 which was the year in which compulsory acquisition took place, and there were therefore a number of uncertainties – including how much of the rubbish disposal expenses were attributable to the CPO.

72. Mr Hodgen said that there were a number of reasons why he did not agree with Mr Nedas's methodology. His claim for £391,383 (revised to £401,000) assumed that all losses incurred (including his assessment of loss of profits) were caused by the compulsory acquisition, but no attempt had been made to identify all the individual components of the ultimate loss figure being claimed. Further, Mr Nedas's calculation of the operating profit of £288,000 was based upon his forecast of 2008 turnover, not 2007. That figure, Mr Hodgen said, was £58,000 higher than the earnings before interest and tax that Mr Nedas had himself previously calculated for 2007.

73. It was submitted for the claimants that Mr Nedas's approach should be preferred in that his estimate of turnover and calculations of profit percentage took into account the uncertainties caused by the CPO whereas Mr Hodgen's did not.

Conclusions – pre-possession losses

74. It seems to us that there are merits in both sides' arguments, but in general terms, as we said in connection with the evidence relating to extinguishment, we prefer Mr Hodgen's approach. We accept that Mr Nedas's methodology, by which all losses based upon his, in our view, overstated expected profitability against an actual loss for 2007, are due to the CPO is not supported by evidence. Mr Nedas's revised appendix C, provided with his letter of 16 October 2013 is somewhat confusing, as also is Mr Hodgen's appendix 3a referred to above.

75. We consider that the most appropriate way forward is to deal with the two specific items in dispute, redundancy and rubbish disposal costs,, and then "take a view" as to what other profits were lost. Firstly, we accept the claimants' evidence on redundancy costs. There is no

dispute that some £122,941 was paid, and the argument that pay in lieu of notice (and NIC costs thereon) had to be paid also because the claimants were trying to relocate up until the last minute seems reasonable. The acquiring authority's argument in closing that the relevant employees' contracts were not produced was, in our view, a red herring. The fact is that the payments were made.

76. As to the rubbish disposal costs, it is clear from the evidence that they were very significantly higher than in previous years as a percentage of turnover and this can only have been due to the need to completely clear the site. Nevertheless, we accept the argument advanced by the acquiring authority in closing that allowance should be made for that the fact that the claimants had historically made no provision against a growing terminal liability that would eventually accrue. This meant that the additional clearance costs were very much more than they would have been, and the principal of equivalence would be exceeded if the whole amount were allowed. It is quite right that the "vast mountain" of waste would eventually have to be removed, and if the full claim was allowed, the acquiring authority would be paying compensation for something that was not entirely caused by the CPO. However, looking at Mr Hodgen's assessment, that does seem to us to be totally arbitrary and somewhat unfair. To take only the invoices from early June to the valuation date and to ignore the fact, as confirmed by the claimants, that they had been taking steps to clear the site from much earlier on, cannot in our view be right.

77. In reality, the additional clearance costs accounted for 19% of turnover in the 2007 financial year and, doing the best that we can, taking into account what we have said above, we think that 50% of this difference would be fair compensation – amounting to £170,807.

78. Turning to compensation for loss of profits, preferring as we do, Mr Hodgen's methodology, he allows losses for the period 17 June to 2 July 2007 in the sum of £27,499, but gives no reason why these dates are used. Nevertheless, whilst we think this sum is inadequately justified, it is a figure which the acquiring authority is prepared to pay, and we accept it. Mr Nedas has produced, as we have said, no evidence to support his conclusion that his additional losses were caused by the CPO and we therefore reject them. Compensation for disturbance is, therefore, determined at a total of £321,247.

Management time – discussion and conclusion

79. Mr Halpern claimed management time calculated in the total sum of £80,000, being 1000 hours at £80 per hour. However, in closing it was accepted on behalf of the claimant is that in the absence of any documentation showing payments being made to Mr Halpern for his services, neither he nor Clearun can sustain a claim for management time. Nonetheless it is submitted that the Tribunal has sufficient material before it for it to "arrive at a robust view as to the amount that would be fair and just." It is said that this would be in accordance with the usual practice of the Tribunal in such matters. In reply the acquiring authority said that whatever time Mr Halpern spent on the claim was caused by his own actions in acquiring land with a view to making the claim for compensation and not by the CPO.

80. Where a claimant seeks compensation for the personal time that he has spent dealing with a compulsory acquisition he must prove that ingredient of his claim just as he must prove any other element. This is one of several aspects of the claim for which the only evidence is that of Mr Halpern himself. The Tribunal needs some tangible evidence of the time that was worked and some justification of the value that is put on it. It cannot simply assume that because the claimant had an interest in the land it must also be assumed that he had performed chargeable work for which he is entitled to be compensated. In this case there is no evidence upon which we can conclude that Mr Halpern is entitled to £80,000 compensation for his personal time, or to justify arriving at any other sum.

The Rule (2) Valuation

81. Prior to setting out and drawing our conclusions upon the evidence, the law and the policies relating to the planning issues against which any consideration of value must apply, we deal firstly, and shortly, with an issue that arose in connection with the safeguarding by Crossrail of a corridor of land that included the reference land.

Safeguarding

82. The factual position in relation to the safeguarding was set out in the evidence of Mr Tuffley, Safeguarding Manager with Crossrail. He explained that the safeguarding was to protect the proposed railway lines to a proposed Crossrail 2 depot at Thornton Fields. It covered a broad corridor of land that included the totality of the reference land and, amongst others, the Dominion site. It would have been necessary to divert Marshgate Lane to the West across the reference land in order to accommodate a viaduct and embankments carrying those lines. The safeguarding would have left a strip of land on the Western side of the reference land to which any development would have had to be confined. He referred to a letter dated 5 March 2003 to the London Borough of Newham that recorded the position. This safeguarding designation was, of course, overtaken by the Olympic CPO but if, on the valuation date, the CPO was to be taken as having been cancelled, his recommendation to the LBN would still have been to refuse planning permission. He did not agree, in cross examination, that the safeguarding would have been modified to permit development of a larger portion of the reference land or the land surrounding it. He thought it would have been necessary to preserve the safeguarding in its entirety. Mr Kelway suggested in his evidence in chief that this safeguarding would have been under review at the valuation date and probably lifted a year after that, although he agreed in cross examination that this was by no means certain.

83. It was agreed between the parties that the safeguarding should be disregarded so far as it related to the reference land itself because of section 9 of the Land Compensation Act 1961. Section 9 reads:

> "no account shall be taken of any depreciation of the value of the reference land which is attributable to the fact that (whether by way of allocation or other particulars contained in

> the current development plan, or by any other means) an indication has been given that the relevant land is, or is likely, to be acquired by an authority assessing compulsory purchase powers."

84. A difference of opinion arose between the parties about whether the safeguarding of the land to the north and south of the reference land should also be ignored insofar as it caused any depreciation in the value of the reference land. It was argued on behalf of the claimants that it was unreal to contemplate for valuation purposes that embankments might be constructed on the land to the north and south of the reference land in order to carry a railway line, whose purpose would be completely defeated if the reference land formed an unbridgeable gap in middle of it. The tribunal should ignore the whole of the safeguarding.

85. The acquiring authority argued that the words of section 9 should be given their full natural meaning, which is that the disregard applies only to depreciation of the value of the reference land attributable to an indication that the relevant land (not the other land) is likely to be acquired. However the only real valuation point was whether it should be contemplated that the Dominion site might have a mixed-use development on it or only an embankment. That was insignificant compared with the issues relating to the likelihood that the Carpenters Lands and Stratford City were likely to come forward.

86. In our judgement the acquiring authority is right on the strict interpretation of section 9; the disregard of a depreciation in value of the reference land goes only so far as attributable to an indication that the relevant land is likely to be acquired by CPO, not so far as attributable to an indication that other land is likely to be acquired. However, the claimant is right to say that it makes little sense to try and contemplate a world in which there might be a railway line to the north and to the south but a gap at the relevant land in the middle. In the tribunal's view the result would be that would-be purchasers, understanding the purpose of the safeguarding, disregarding any safeguarding on the relevant land but noting that it continued to exist on the rest of the corridor, would take a pragmatic and commonsense view and conclude that the safeguarding to the north and the south was unlikely to form much of an impediment to ultimate development. Therefore, in the circumstances, it is hard to contemplate that there would be any significant depreciation of the relevant land that was due to the safeguarding of the other land and it is not a factor upon which we place any weight.

Planning

87. Three witnesses gave evidence of fact about the prospects for development in the area in a no-scheme world, meaning a no Olympics world.

88. **Mr Geoffrey Spiller** gave evidence about his involvement in proposals to develop the area of land to the north of the reference land owned by the Worshipful Company of Carpenters. Until 2009 he was Managing Partner in Glenny LLP, chartered surveyors and property consultants. Throughout the 1990s he had been actively involved in the Stratford property market and became aware that 19.57 acres of land owned by the Carpenters was to come onto

the market. He described the land and the area within which it was located, and said that he introduced the IO Group to the opportunities it presented. He described how schemes were prepared and discussed with LBN and the IO group became the Carpenters' Preferred Purchaser. Just before a formal application was put in, LBN produced a new draft planning framework document "Newham's Arc of Opportunity", which sought to achieve a more comprehensive regeneration of an area totalling 28 acres. It was proposed that there would be a substantial residential element in this development. IO joined with Barrett Homes and together with LBN worked up a master plan. New schemes had to be devised after LBN announced that to achieve planning permission for such an important regeneration project it would be necessary to employ a "trophy architect". It became clear that LBN's insistence on a section of the site being developed for B1 office development after an initial phase of housing development was likely to become an impediment to development. The view of the market was that there was no demand for office development on the scale proposed at the subject site, nor would there be in the foreseeable future. A DTZ research report concluded that it was unlikely that there would be demand for large scale offices on the site until the proposed development around Stratford station had been completed successfully and let. The Worshipful Company of Carpenters had evidently become frustrated at the delay in finalising the planning application and agreeing the final contract. They called a meeting with IO in October 2003 and told them that they were selling the site to the LDA.

89. Mr Spiller agreed with the view that there would have been no demand for large-scale offices on the Carpenters' land until development round Stratford station had been completed. LBN's position did not change and therefore, in the absence of the Olympics, he saw no prospect of development on the Carpenters land in the foreseeable future.

90. **Mr John Burton** is a Director of Development with Westfield Shoppingtowns Ltd. He had been with Westfield since October 1994 where his title was "Director Stratford City". He gave evidence about the background to Westfield's involvement in the development of Stratford City and commented on the likely involvement of Westfield with that development in the absence of the 2012 Olympics. He explained that Westfield is one of the largest retail property groups in the world with worldwide interests, particularly in large retail developments. In 2005 and 2006 Westfield was also investing in west London at White City. That development was not opened until 2008. In the absence of the Olympics, he said, White City would have been Westfield's priority. He was cross examined as whether he had been involved in any other schemes in this country that were supported by a CPO , and he instanced a proposed development at Guildford. This had come to nothing, he said, because Westfield sold its interest due to doubt about its viability. He pointed out that it was wrong to assume, simply because land had been compulsorily purchased, that it meant that viability did not need to be considered. If the development turned out not to be viable Westfield might sell its land, even at a loss.

91. He explained how Westfield came to be involved with potential development at Stratford city in 2004, acting as part of a consortium. At that time the prospects of the development going ahead were not high. He listed a number of particular challenges. The presence of power lines running across part of the Stratford City site was a problem. He explained that these were not a physical impediment to the shopping centre but they were an aesthetic obstacle to making an exciting new place. There were difficulties with road access. He did not mean difficulties in

a planning sense, but some of the land to build new roads on still had to be acquired. He agreed that it could have been done by compulsory purchase order if that had been set in train. There was a need to require various rights over and under land owned by Network Rail in order to provide services for development on the site. He said that whereas, in principle, one might not have expected any particular difficulty, his experience with Network Rail had been that nothing was ever easy despite the best intentions being expressed. He was asked in cross-examination to consider the points that they raised and concluded that it seemed to him that together they had a huge potential for difficulty. He also foresaw difficulties with the procurement of infrastructure and utilities to service the overall site and said he had considered the possibility of utility "bundling" but failed to reach any agreement with utility providers. In answer to the proposition that the nature of the problem here was no different in principle to problems elsewhere, he said the magnitude of the task was significant. Scale was important: on smaller scale developments it was much easier to quantify the cost. At the scale of Stratford City the risks were much greater. Even with the Olympic CPO the task was of immense complexity. There were substantial upfront costs necessary to install infrastructure and deal with section 106 obligations. The costs had been estimated at £125 million but Westfield thought they might prove closer to double that.

92. As a result there was a serious concern about the financial viability of the project. Westfield had acquired a 25% interest initially. The matters listed meant that Westfield was not convinced that there was a viable scheme there. Historically there had been a poor trading record in Stratford and rental levels had been at a low level. It was felt that the risk had been underplayed and Westfield doubted its ability to bring retailers into the development. In 2004 Westfield's view was that there was not yet a viable scheme. They put the smallest possible value in the scheme in their 2004 accounts - Mr Burton thought it was about £5 million.

93. Against that background in a ' non-Olympic world" he suspected that the scheme would only just be starting in 2013. Without a contribution for Stratford City infrastructure, the funding gap, perhaps as much as £500 - 600 million, would be too great. The residential and the office development on other zones and on the railway land had to be brought forward at the same time as the retail development. This meant the majority of the infrastructure, not simply the infrastructure for the shopping centre, had to be brought forward immediately. He was of the opinion that the development would have been extremely uncertain without the Olympics. It was clear prior to the Olympic announcement that there were difficulties in raising and funding any such development through the markets. He did not accept, in cross-examination, that if the Olympic bid had been unsuccessful he was saying it would simply go onto the 'back burner; he thought that the development would have been worked up anyway, but the likelihood of it coming forward in short order was remote.

94. **Mr Ralph Luck**, now the Real Estate Director for King's College, said that he was formerly the Director of Property for the Olympic Delivery Authority (the ODA), responsible for all property transactions undertaken by the authority and the delivery of the Olympic village for its legacy use. He continued to be retained by the ODA as a consultant. The ODA was the statutory body responsible for creating the infrastructure and facilities for the Olympic and Paralympic games in 2012. He had considerable experience in development and regeneration projects, particularly in London. From September 2005 he took part in all the negotiations with

Westfield, Stratford City Developments Ltd, the LDA, Network Rail and the Secretary of State for Transport in order to bring about the Olympic facilities and the development of Stratford city. Mr Luck described the Stratford Rail Lands, pointing out that the land had only two access points and had been used to stockpile the arisings from the construction of the Channel Tunnel rail link works, substantially increasing the level of the land. He drew attention to the planning history and in particular the outline planning permission granted by the London Borough of Newham on 17 February 2005 for a comprehensive mixed-use development scheme of the rail lands. The scheme involved a number of highway proposals including the creation of five new access points of which four were approved. Agreement on the fifth could not be reached until the Olympic Park planning consent on 28 September 2007. Mr Luck then summarised the somewhat involved process for making and confirming the Olympic and Legacy CPO 2005 (the CPO) and the Powerlines CPO. He dealt with the efforts that were made following the confirmation of the orders to find a development partner for Westfield that would secure the necessary finance. Lend Lease was selected as a development partner but by early 2008 it became clear that it would not be able to raise enough money on sufficiently attractive terms due to the collapse of the financial debt and equity markets. Further negotiations followed and the need for agreement became urgent as the time for beginning the works rapidly approached. Arrangements were put in place on 16 July 2008. Zone 1 of the land was transferred to Stratford City Development Ltd (SCDL) which was obliged to deliver the shopping and leisure centre and certain other infrastructure relating to the wider regeneration. The ODA provided £232.6 million grant funding and the SCDL funded £150 million. The agreements covered the large number of transfers of land and rights necessary to bring about the development. Mr Luck said that in order to agree the various agreements he had, on behalf of the ODA, to see and understand SCDL's financial viability appraisals. As a result he can say that viability was marginal and, in his experience, less than most developers would accept, even after the substantial funding provided by the ODA. He was clear that the Zone 1 development was not viable without that funding contribution.

95. Mr Luck identified the impediments to the delivery of Stratford City in the absence of the Olympics and the CPO. Five new vehicular accesses and another major pedestrian access were needed. The necessary land needed to be acquired and in the absence of the CPO there would have been long and difficult negotiations with several parties possibly seeking to extract ransom value for their land. Zone 5, which it was planned to develop for residential purposes, was crossed by two main overhead electricity cables and pylons. The relocation of such lines was very expensive. Because of the potential adverse effects on residential values SCDL would not have started development until the removal of the pylons had been resolved. In the absence of the Olympics, National Grid did not regard the Stratford City proposals as of national significance and would not have relocated the lines. Mr Luck said that the installation of utilities was a major undertaking which involved negotiations with a number of landowners, including Network Rail. Without the CPO he was confident that negotiations would have been long and tortuous, particularly in relation to Network Rail which had originally sought to extract a ransom payment for vehicular and utility service access. Even with the CPO it was difficult and time-consuming to agree terms with Network Rail, which originally objected to the making of the CPO. The objection was finally withdrawn and in 2008 a complex Rights Agreement provided for the provision of the necessary rights and for the assessment of compensation. Only in the summer of 2012 was it possible to agree compensation with Network Rail.

96. Mr Luck expressed his view that without the CPO the Rights Agreement and compensation would still not been agreed and the Stratford City scheme could not have commenced. The coming of the Olympics was a major catalyst on a large number of fronts. There were a very considerable number of planning issues and he was sure that it would have taken LBN a considerable time to resolve them in the absence of the Olympics. After setting out other problems concerning the cost of acquisition and the nature of the development consortium and the difficulty of getting people to talk to each other constructively, Mr Luck turned to the amount of funding provided. He pointed out that this had come forward at a time when commercial funding was becoming very scarce. He listed the public funds that were being put forward in support of various elements. The total amount of public funds that went towards elements of the development that would have been necessary for Stratford City amounted to approximately £2 billion. In the absence of the Olympics the scheme would have had to be undertaken in phases. He concluded that there was ample evidence that, in the absence of the Olympics and the CPO, the scheme would not have commenced for some years: certainly not before the valuation date and indeed, he added, probably not for several years after it. Without the scheme, given the circumstances of the site and the number of interested parties he could not be certain when, or even if, the difficulties would be satisfactorily resolved. He thought that the various parties would be tempted to play a long game, to the detriment of bringing any scheme forward.

97. Asked to imagine and consider the situation where the Olympics and CPO and the funding were cancelled, Mr Luck replied that in such a situation, with the funding gone, the ODA would have had to be disbanded and planning put back in the hands of the four boroughs. Westfield would be left with no certainty whatsoever and a number of the agreements that have been reached would simply fall apart. He instanced the length of time that his negotiations with Network Rail had taken: they had claimed £30-£35 million and it took until the summer of 2012 to agree £3 million. He thought the situation would have taken years to resolve and he doubted if development would have started even by now.

98. In cross-examination, Mr Luck did not agree that the difficulties were being exaggerated and were, in effect, no different from those normally experienced. He said that the parties had quite different aspirations and aims. The scale was much greater and he did not see how the funding could have been resolved in the usual way. He could not say how much of the £232 million was solely due to the Olympics, but the problem was that in a non-Olympic world Stratford City had not progressed sufficiently far for important details, the position of services for example, to be known. He did not agree that in the absence of the Olympics it would not have been necessary to underground the power lines. That depended upon the development. Residential development was sensitive so it was necessary to pay to either put the lines underground or leave large areas undeveloped. Nor did he agree that the undergrounding could have been funded in any event. Although he acknowledged that it was an economic decision, he had not yet come across a situation where it had been economic to underground power lines. He was taken through several of the points he had made in his evidence but was unshaken on his conclusion that, bearing in mind the circumstances, he doubted that the development of Stratford City would have happened for a long time. He pointed out that the development of King's Cross had taken some 15 years.

The planning experts' evidence

99. There was a very great deal of planning evidence about the development of policies over many years supporting redevelopment for mixed-use purposes on and around the Stratford rail lands. It is unnecessary to set it all out in great detail because, happily, the planning witnesses were able to agree that a mixed-use planning permission on the reference land could reasonably have been expected by 18 months from the valuation date. Much of the policy background was the subject of a helpful agreed statement of facts. The important issues that remain seem to us to come down to the question of timing, whether permission could be expected significantly earlier than 18 months after the valuation date, and to the amount or density of residential development that could be expected on the site.

100. The question of timing depends, firstly upon the issue was to whether or not planning permission is to be assumed under section 16(3), which we deal with separately below. Timing is then important for the assessment of land value which depends, to a degree, upon the view that a purchaser of the land on the valuation date would take about the length of time he would have to wait before redevelopment of the reference land would become a viable proposition. To that end, the circumstances in which new residential development would be likely to find itself are relevant.

101. The amount of redevelopment on the reference land, particularly residential development, that might be expected to achieve planning permission, is central to the valuation of the land.

102. In his evidence in chief, **Mr Ben Kelway**, for the claimants, said that he thought that a development with a larger mass had been conditionally accepted on the Carpenters site.

103. He drew attention to the London Plan (2004) which, at policy 2A.1, identified as criteria to be used by the Mayor in assessing planning applications "optimising" the use of previously developed land, "using a design led approach to optimise the potential of sites" and ensuring the development occurred in locations "accessible by public transport, walking and cycling". The Opportunity Areas identified on the map included '16 The Lower Lea Valley' and '20 Stratford.' They were described as areas "with potential for significant increases in density" at paragraph 2.8. Policy 4B.3, "maximising the potential of sites" spoke of achieving the "highest possible intensity of use compatible with local context". Boroughs should adopt the density ranges in Table 4B.1, "Density location and parking matrix (habitable rooms and dwellings per hectare)". This table related ranges of density to locations an accessibility index and various settings. Paragraph 4.47 said that appropriate density ranges were related to location, setting in terms of existing building form and massing, and the index of public transport accessibility (PTAL). "Urban" locations were "dense development with a mix of different uses and buildings of 3 to 4 stories, such as town centres along main arterial routes and substantial parts of London" while "suburban" was "lower density development, predominantly residential, of 2 to 3 stories as in some parts of the London and much of outer London".

104. The Mayor of London's "London Plan Density Matrix Review" June 2006 recorded as a "Key Finding" that 67% of schemes granted permission in 2004/05 were at densities above their recommended band. It recommended a "simplified" density matrix which left the ranges within the central, urban and suburban settings essentially the same. Mr Kelway referred to a table at paragraph 5.13 of his second rebuttal report. This showed a number of approved developments in Stratford and the lower Lea Valley around the valuation date and expressed as a percentage the degree to which their approved density was above the London Plan range. He noted that considering Notional Development 2 on the reference land as having a PTAL of 2, anticipating an increase to 4, (a range of 300 to 450 habitable rooms per hectare (hrh)) at 592 hrh that development would be 31.6% above the London Plan range. He said that would be far from exceptional and the table illustrated his point about the flexibility with which the density ranges were treated. Mr Kelway set that out in the context of the need for housing in Newham. He agreed that the starting point for density calculation was the net area of the site but in the case of the reference land the site was surrounded by rivers and that immediate context should be taken into account. In re-examination he observed that paragraphs 4.76 and 4.77 of the Newham UDP (2004) said that it was important to make the best use of available land albeit not at the expense of residential amenity and design quality. Density would be only one of the considerations to be taken into account and for some sites the setting or location might allow for design approaches at higher densities, while still meeting other criteria. That might apply to Major Opportunity Zones (MOZs) or sites with waterside locations, as well as sites with good transport links. He drew attention to the Newham residential planning guidelines at page 4. It gave the site some breathing space.

105. Mr Kelway made his point in relation to the assumption of planning permission under section 16(3), and we have recorded that in that section of this decision.

106. The policies for urban regeneration and in particular MOZ1, the Stratford Rail Lands Land Use Proposals, were considered in detail by both planning witnesses. Mr Pereira asked Mr Kelway about paragraph 2.133 and 2.136 which referred to the isolated Clays Lane Estate, and the need for residential uses to decrease its isolation. His view was that the development of the reference land would be part of overall regeneration and as part of the redevelopment of Stratford City it would reduce the isolation of that estate. Clearly the reference land could not do that on its own. He acknowledged that to take that reasoning to its logical conclusion would mean that any development within MOZ1 could be said to assist in reducing the isolation of that estate, in which case it is difficult to see what point there was in expressly imposing that qualification on residential development.

107. Mr Kelway was cross examined in some detail about his reliance upon the PTAL calculation and his interpretation of the GLA matrix. He said that the matrix was only a starting point. He would regard the reference land as a central/urban site with reasonable access. His attention was drawn to the document ‘Stratford - A 2020 vision: Rail Lands Framework Plan SPG’ and the passages (referred to above) about Thornton fields dealing with access, the need for high quality design, and that residential development should fall within the range of 150-200 habitable rooms per hectare. Mr Kelway did not accept that advice so far as it related to density. So far as road access was concerned, it was not as bad as all that and would be improved. He advanced various statements by planning officers as indicating support for higher

density which were examined together with permissions on other sites. The matter was summed up when Mr Pereira put to Mr Kelway that some exceptional quality was identified in the cases that had been looked at that was said to justify a higher density. Mr Kelway replied that arguments in favour of granting planning permission should always be judged on the totality of the benefits, not just single issues.

108. Mr Kelway was of the opinion that the Stratford City scheme would still have proceeded in a no scheme world and would have begun to transform the rail lands by the valuation date. He was challenged in cross-examination on this. Reference was made to the Secretary of State's decision dated 21st September 2012 allowing the appeal in the case of the section 18 appeal regarding the Rooff Goods Depot on Carpenters Road. Both parties referred to passages in the Inspector's report. Mr Kelway conceded that if there were no CPO to assemble the site and no funding for Stratford City, then that scheme would probably not be viable at the valuation date. However that scheme might be reasonably anticipated in the longer term on a phased basis although he could not say when it might have started. He accepted that in that world, the undergrounding of the power lines would fall away, while emphasising that it was not a requirement for permission on the reference land.

109. In his evidence in chief Mr Kelway said that he thought that a development with a larger mass had been conditionally accepted on the Carpenters site. He was asked about the timing of development on the Carpenters land and the difficulties of access that faced that development. A CPO would probably have been needed for the road and possibly for site assembly as well. The strategy appeared to have been to devise an implementable first phase, although there did not appear to be anything tangible to show how it would be done.

110. There were many questions about the notional development schemes, their scale and the densities that had been assumed. The relationship with the power lines was explored as a particular potential constraint although one, Mr Kelway said, that should not be exaggerated. He gave an example of a very modern development close to the Excel Centre and next to the DLR which was close to power lines. (This development was viewed on our site visit.) The setting of the notional development schemes, both when surrounded by other new developments and when isolated amid the then circumstances of Marshgate Lane were considered at some length.

111. **Mr Sean Bashforth**, a director of Quod, gave planning evidence for the acquiring authority. He said that he had been a planning consultant for various developers at Stratford City since 2002 and had visited the reference land and the surrounding area many times in the course of 2002 and 2003. He described Carpenters Road at that time as being industrial, dusty and with lots of lorries. In places derelict cars covered the pavements. Marshgate Lane had a better appearance because of the more modern industrial units along it but it was still busy with heavy traffic, being a popular route up to the motorway network. He did not regard it as a very pleasant environment. He explained why other areas that had been discussed in the evidence, such as Fish Island, had a different and much more pleasant feel.

112. He gave evidence of the progress of plans for Stratford City, the timing of the planning permission and the progress of reserved matters, and the difficulties that development faced. He referred to the view expressed in his report that, in the absence of the Olympics, significant parts of the Stratford City development would not have started until well after the valuation date. He said that a new primary school would not have started until the end of 2012, a secondary school in 2015 and much of the residential development and offices would not start on site until 2013 or 2014. On reflection even those dates were perhaps optimistic. He explained the importance of proper access to the development of the Carpenters' land and Marshgate Lane. He thought it was unrealistic to expect the level of access that was necessary without the development of Stratford City which would enable it. In his view it would have been difficult to bring the Carpenters Land forward incrementally in an effort to avoid access difficulties; the policies really contemplated comprehensive redevelopment. In the absence of new access created by the development of Stratford City and the Carpenters' land, a development on the reference land would have been much more isolated, with consequences for its PTAL assessment.

113. Mr Bashforth had set out a full account of the relevant policies and had explained why, in his view, the reference land could not be said to be "allocated" within the meaning of section 16 (3) of the LCA 1961. This was a point upon which he was cross examined but adhered to his view. He also explained why, in his opinion, any development on the reference land was likely to be at a substantially lower number of habitable rooms per hectare than contemplated by Mr Kelway. He did not accept that a valid method of approaching the scale and layout of development on the reference land was that it should be design led. The policies made it plain that one should start with a PTAL calculation, and some time was spent in examining the nuances of the various policies on that topic. These, also, were matters upon which he was cross-examined at some length, particularly with regard to the notional designs put forward for development on the reference land. He agreed that a reasonable amount of amenity space could probably be provided on the site, but he was concerned about its quality and whether it would be acceptable to the planning authority. His main concern was that much of it would be at rooftop level and would be next to power lines. He acknowledged that it might be possible to re-arrange the scheme, although it would not necessarily be capable of staying within the same building envelope and that would probably result in a lesser number of habitable rooms.

114. Mr Bashforth was cross examined about the timing and deliverability of development on the reference land. He also spoke to the importance of access and the significance of the Carpenters land and the southern part of the Stratford City development to that. He agreed that permission might reasonably be expected for development on the reference land within 18 months from the valuation date and gave his reasons. However he emphasised in relation to the reference land and development at Stratford City and the Carpenters land that it was one thing to get permission and quite another to deliver the development. He said that he was aware of 5 or 6 town centre schemes that were acceptable in planning terms but had never come to fruition.

Consideration and Conclusion

115. We found the evidence of Mr Burton, Mr Spiller and Mr Luck compelling. Those gentlemen were able to speak from direct experience of involvement at high-level in the

circumstances they described and the evidence they gave was detailed and authoritative. We find that, at the valuation date, whether on the cancellation assumption or in a no-scheme world, the vision of Stratford City and the comprehensive redevelopment of the area that it would bring would still have been many years away.

116. In our opinion a prospective developer of the reference land would have been entitled to be more optimistic about the number of habitable rooms that it could accommodate than Mr Bashforth was prepared to admit. The evidence does suggest that the planning authority has been prepared to be more generous in the densities it allows than strict application of the planning matrix and PTAL might suggest. PTAL is but one factor, and in this case we found it rather a marginal one. It was clear from the evidence of Mr Axon and Mr Murdoch that the calculation could change quite significantly if the measurements were taken from a different part of the site - a difference of not very many metres. We think that it is likely that a developer who had studied the development of the policies and the way that they had been applied by the planning authorities would reasonably start with a proposal that looked at densities at the sort of level advanced by Mr Kelway. However, we also think that there is force in Mr Bashforth's criticisms of the notional development schemes on the reference land. Of course it would be possible to redesign the development satisfactorily but in our opinion it would be difficult to do so while retaining the same number of flats or habitable rooms. A prospective developer would accept a reduction in order to achieve a satisfactory design without incurring undue delay. How much that reduction would be can only be a broad judgement but we conclude that, dealing with issue 4, the sort of figure would be of the order of 450 habitable rooms per hectare.

117. The planning evidence is also important to a judgement about the amount of delay that a developer would have to contemplate before his permitted development became viable (issue 5). We accept the distinction drawn by Mr Bashforth about the important difference between obtaining planning permission and being able to fund the building of it. We do not see that development on the reference land could have a realistic prospect of viability until the wider development of Stratford City and the Carpenters land to the north was likely to happen in the reasonably near future. We have considerable doubt that the sort of development proposed on the reference land would be viable if it faced an indefinite period as a standalone residential development in the comparatively unwelcoming circumstances of Marshgate Lane at the valuation date.

The value of the freehold interest in the reference land

Issues 1, 2 and 3: Whether planning permission at the Valuation Date should be Assumed under Section 16(3) LCA1961, or whether, in accordance with section 14(3) there was a realistic hope that planning consent would be forthcoming within 18 months of the valuation date, or even earlier.

118. Mr Halpern, standing in the shoes of Mr Gladwell, the second claimant, is claiming compensation for the value of the freehold interest in the reference land, assessed pursuant to Rule 2 of the 1961 Act. The claimant argues that planning permission is to be assumed to have been granted in respect of the reference land, pursuant to section 16(3) of the Land

Compensation Act 1961, and that such an assumption makes the land more valuable. Assuming planning permission for mixed-use development, as described by the claimant's planning witness, and development without undue delay, the claim would be for £6 million.

119. The acquiring authority argues that the land should be valued on the basis of hope value, preserved under section 14(3) of the LCA 1961, and that it would be unrealistic to expect planning permission until 18 months after the valuation date. On the agreed basis that permission might be expected for development on the reference land within 18 months from the valuation date, the claimant contends for a value of £4.8 million. The acquiring authority challenges the claimant's valuations on two main grounds. Firstly a purchaser of the reference land in the no scheme world would recognise the existing use value of the site and would anticipate such a degree of delay before any development on the site would be viable that he would value it on the basis of its existing use value with a small addition to reflect long-term hope value. Secondly the mixed-use development that is assumed by the claimant's planning witness is unrealistic: as a consequence of both the planning policies and the constraints of the site it would be unreasonable to anticipate a development with such a high density. Mr Kelway assumes about 600 habitable rooms per hectare whereas Mr Bashforth suggests somewhere between 300 and 450 hrh.

120. Whether the valuation should be under section 16(3) or section 14(3) is an issue of law and fact that must be determined. However, before turning to that sub-issue, it should be noted that it is common ground that the planning policy framework for the reference land and other land in the locality was supportive of redevelopment for mixed uses in the interests of regeneration. It is also common ground that the mere assumption of a grant of planning permission either at the valuation date, or within 18 months, need not necessarily confer any additional market value above existing use value. The real issue is whether the assumed grant of planning permission under section 16(3) or hope value under section 14(3) would have enhanced the market value of the reference land above its value for its existing use.

The Law

121. Section 14 of the act deals with the specific assumptions mentioned in sections 15 and 16 of the act. It says, so far as relevant:

> "(1) For the purpose of assessing compensation in respect of any compulsory acquisition, such one or more of the assumptions mentioned in sections 15 and 16 of this Act as are applicable to the relevant land or any part thereof shall be made in ascertaining the value of the relevant interest.
>
> (2) ….
>
> (3 Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed;"

122. It is agreed between the parties that subsections 16 (1) and (2) do not apply

123. Section 16, so far as relevant, reads:

> “(3) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a range of two or more uses specified in the plan in relation to the whole of that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which -
>
> > (a) is development for the purposes of a use of the relevant land or that part thereof, being a use falling within that range of uses, and
> >
> > (b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be.
>
> (7) Any reference in this section to development for which planning permission might reasonably have been expected to be granted is a reference to development for which planning permission might reasonably have been expected to be granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.”

124. Whereas section 16(2) says that where the relevant land is allocated "primarily for a use specified in the plan" it shall be assumed that permission would be granted for that use, section 16(3) refers to an allocation "primarily for a range of two or more uses" in which case the assumption is that permission would be granted for a use within that range. As we set out below, policy UR14 of the development plan refers to ‘seeking development’ for "primarily employment-generated land uses" and then goes on to set out what is included in that phrase. It is the claimant's case that policy UR14 amounts to an allocation "primarily for a range of two or more uses" and that range includes residential use. Therefore, it is argued, there is an assumption created by section 16(3) that there is, effectively, permission on the valuation date for residential development. The acquiring authority argues that the authorities show that the words of UR14 cannot amount to an allocation. Therefore the issue for the Tribunal is whether the relevant land forms part of an area *allocated* in the current development plan.

125. In the case of *Urban Edge Group Ltd v London Underground Ltd* [2009] UKUT 103(LC) the President of the Lands Chamber, George Bartlett QC, considered the application of section 16 in the context of a UDP. After a detailed and careful analysis of the changing statutory provisions the Tribunal rejected the contention that section 16 only had application to development plans prepared under the 1947 and 1962 Acts and concluded that it applied equally to a UDP. That is common ground for the purposes of this case. The difficult issue is to decide whether, in the words of section 16(3), the relevant land consists of or forms part of an area shown in the current development plan as an area allocated primarily for a range of two or more

uses specified in the plan in relation to the whole of that area. In *Urban Edge* the Tribunal said that this task:

> "falls, self-evidently, to be determined by examining how the relevant land is shown on the proposals map and relating this to the policies and other provisions of the plan. This is, as will be seen, a much harder task than it would usually have been in relation to first generation development plans, which, in accordance with the provisions of section 5 in the 1947 Act, used to show areas allocated for housing or other use is and to define the sites of new roads etc, leaving the rest as white (unallocated) land or Green Belt."

The Tribunal noted that second or third generation development plans did not define sites or allocate areas of land in this way.

126. In the *Urban Edge* case the Tribunal had to consider a policy that the council would "seek to protect and enhance the mixed employment and special land-use character of the South Shoreditch Inset Area". There would be a "presumption of approval in principle to proposals for industrial (B2) development" in the South Shoreditch Defined Employment Area.(The SSDEA) In paragraph 30 of that decision the Tribunal expressed difficulty in accepting the contention that the whole of the SSDEA was allocated for employment purposes within the meaning of section 16. The Tribunal continued:

> "the SSDEA is a very large expanse of densely developed urban land (it is over 100 acres in extent) containing roads and buildings of many sorts in a great range of uses, industrial, residential, commercial, retail, leisure etc - and a principal policy is that its mixed employment and special land-use character should be maintained rather than that it should be put to a particular use or particular uses. Moreover, to the extent that the UDP does provide for industrial development of land in the SSDEA, the policies dealing with this part are qualified: "favourable consideration" will be given to employment generating development… but subject to particular provisos."

127. The Tribunal contrasted the policies that provided safeguarding for particular uses on particular sites and concluded that the whole of the SSDEA, although an area in within which employment uses would be favoured, could not be said to be an area allocated primarily for such uses. (The Tribunal in that case was considering section 16(2).)

128. A similar task was undertaken by the Tribunal (Her Honour Judge Alice Robinson and Paul Francis FRICS) in the case of *Abbey Investments Ltd v London Development Agency* [2010] UKUT 325 (LC). That case also concerned the LB Newham UDP and the London Plan. At issue was whether planning permission was to be assumed pursuant to section 16(3). However the relevant land formed part of the site known as ‘m7’ in the UDP. It was shown separately on the proposals map and was not part of a MOZ. There was no specific policy underpinning the ‘m’ sites. The proposal was for "mixed development including B1, live/work and residential." A permission of that nature had been granted in 2001. The Tribunal found (at paragraph 19) that m7 allocated land for the purposes of section 16(3) :

"It proposes development of a specified area for specified uses. Whilst most of the 'm' sites are relatively small, proposal m7 happens to be one of the larger ones. It does straddle a number of roads and pre-existing development blocks and does not specify more precisely the specific location or quantum of development. However this is perhaps understandable given that the proposal is intended to perform a regeneration function rather than to provide a specific quantum of floor space or residential units in order to meet a strategic target. We do not consider that an "allocation" must necessarily be confined to a site such as a pre-existing development block, it may relate to an "area" which includes or amalgamates a number of existing features and development. The 'm' sites can be contrasted with the MOZ areas which are much larger and, for example, the EMP4 sites which are also larger and are the subject of a policy which seeks to control development rather than propose development."

129. In paragraph 20 the Tribunal explained why it did not consider it necessary for a proposal to specify a quantum of development as opposed to a particular use. After noting that, before section 16 was an issue, others had described the order lands as being "allocated", the Tribunal went on (in paragraph 21) to say that the situation was very different from that in *Urban Edge* and that:

"the policies which are applied to the SSDEA sought to control development which might come forward, rather than specifying that the land should be put to a particular use or uses. By contrast, m7 is a proposal that the land should be developed for particular uses, not a development control or criteria-based policy."

The Tribunal continued (paragraph 22):

"Finally, we do not consider that the UDP envisages that the 'm' sites would necessarily be the subject of development frameworks that would identify in more detail how much development of what type would go where on the site. There is no policy in the UDP requiring a detailed development brief or framework to be prepared to guide development of the 'm' proposal sites as opposed to the MOZ areas"

The Policies

130. Mr Kelway's evidence was that section 16(3) of the 1961 Act applied to the reference site because it was allocated in the then current development plan by MOZ1 and UR14, which actively promoted mixed-use development and identified a specific range of uses, including commercial and residential uses.

131. Mr Bashforth was of the contrary view. He said that the policy was not an allocation but merely identified the area as being suitable for employment generating uses.

132. The statutory development plan at the valuation date consisted of the London Borough of Newham Urban Development Plan which was adopted in June 2001 and the London Plan adopted in February 2004. Following the decision to award the 2012 Olympic Games to

London, the London plan was updated with a series of Early Alterations but the relevance of these is more questionable, given the need to ignore the value affect of the "scheme".

133. The Newham UDP incorporated several policies for urban regeneration. Policy UR1 designated a list of sites of strategic significance called Major Opportunity Zones. (‘MOZ’). The reference land was shown on the proposals map as lying within MOZ1 the "Stratford Rail Lands". Paragraph 2.55 explained that "given the size of these sites -- ranging from 8 ha (20 acres) to over 40 ha (100 acres) - the policies below set out only broad parameters for development to address. To assist understanding of the possibilities and constraints that exist within each site the Council will prepare Urban Framework Plans (UFPs) and issue them as Supplementary Planning Guidance.”

134. The detailed description of the Major Opportunity Zones opens, in paragraph 2.57, with the declaration that due to the size and prominent position of the sites designated as MOZs "it is not possible to be prescriptive about rigid land-use proposals. The Council is seeking to provide sufficient flexibility in order to encourage imaginative proposals that can respond to rapidly changing local, regional and international circumstances."

135. The relevant land was on the western edge of MOZ1. Paragraph 2.122 recorded that MOZ1 consisted of the Stratford Rail Lands, Thornton Fields, Chobham Farm, land in the ownership of the Worshipful Company of Carpenters and land in various ownerships bounded by Waterworks River, Carpenters Road and the A11. It had an area of approximately 156.3 ha (386 acres) of which the developable area comprised about 100 ha (247 acres). There were several paragraphs considering different aspects of this large area. It was said that a draft Urban Framework Plan ‘had been prepared’ to ensure the comprehensive planning of the area and Newham Council had approved its use for development control purposes. Paragraph 2.136 set out the wide range of uses that the Council would support. This range was then reflected, but not exactly reproduced, in policy UR14 which declared:

> “THE COUNCIL WILL SEEK DEVELOPMENT OF THE STRATFORD RAIL LANDS PRIMARILY FOR EMPLOYMENT-GENERATING LAND USES. THE RANGE OF USES WILL INCLUDE:
>
> A) USE CLASSES B1 ... AND B-2 ...
>
> B) LEISURE USES;
>
> C) TOURISM-RELATED USES, INCLUDING HOTELS;
>
> D) RESIDENTIAL USES WHICH SERVE TO REDUCE THE ISOLATION OF THE CLAYS ESTATE; AND
>
> E) A MAJOR RETAIL AND MIXED DEVELOPMENT (INCLUDING RESIDENTIAL, LEISURE AND TOURISM-RELATED USES) INCORPORATING AND INTEGRATED TRANSPORT INTERCHANGE SERVING STRATFORD'S INTERNATIONAL AND REGIONAL RAILWAY STATIONS, AND BUS STATION. THE DEVELOPMENT MUST BE UNIFIED WITH THE EXISTING TOWN CENTRE

TO ENHANCE THE RANGE OF FACILITIES AVAILABLE, AND SO THAT IT DOES NOT AFFECT THE OVERALL VITALITY AND VIABILITY OF STRATFORD OR CENTRES IN ADJACENT BOROUGHS."

136. Policy UR15 announced that the council would prepare an Urban Framework Plan before proposals for individual parcels would be considered.

137. Supplementary planning guidance was published in accordance with that policy, the most relevant document for this site being 'Stratford - A 2020 Vision', published in May 2004 as providing 'a tool for guiding development and outlining a vision for the area. It sets out the borough's aspirations, establishes guiding principles and identifies ways in which the regeneration potential might be maximised. The relevant land lay at the western tip of the Thornton Fields area in that document, section 8 at page 33 (B3801). Under 'Development Principles' it was said that the whole site was suitable for mixed use development consisting of residential and commercial uses. It continued "for development to proceed access to the site will need to be improved with the most suitable access point likely to be via Marshgate Gate (sic) in the north". Under Transportation it was said that "road access to the site is currently poor and it may be necessary to improve access arrangements from Marshgate Lane in the north. At present there is no public transport serving the site with the nearest bus services being located on Carpenters Road." It continued "any development of the site should be of high quality and should reflect the site's waterside location. Given the relatively isolated nature of the site any residential development should fall within the range of 150-200 habitable rooms per hectare."

Consideration

138. The issue is whether the reference land is "allocated" by the proposals map and the relevant policies. It may be useful to start by noting that the verb "allocate" includes the meanings to place, to locate, to apportion and that its root comes from "locus", the Latin word for a place. This is consistent with the distinction that appears to underlie the approach derived from the cases of *Urban Edge* and *Abbey Investments* between a policy that proposes specific development for a specific place and a policy that seeks to control or guide development or encourage particular uses within a broad area rather than propose it. It is not easy to say on which side of the line a particular policy falls. It must always depend upon the wording of the particular policies and study of the proposals map. The size of the area covered by the policy may be an indication against allocation. That is not because size in itself is a determinative factor - it is perfectly possible for a very large area to be allocated to a very specific use such as an airport - but because it is likely that the bigger the area is, the less inclined the policymaker may be to be prescriptive about what uses go in what places. Another indication against allocation may be where the policy contemplates that the disposition of uses on particular sites within the broad area will depend upon some further analysis or plan.

139. With those factors in mind our conclusion is that the reference land was not "allocated" for the purposes of section 16(3). The MOZ covers a very wide area, 100 ha of developable

land, which includes very different opportunities and constraints and had a very wide range of uses on it. As Mr Bashforth pointed out, many areas within MOZ1 were either not suitable for development at all or certainly not for 'employment-generating' uses, unless that phrase is given a breadth of meaning that would include almost everything. MOZ1 included operational railway land and train stations, rivers, roads, schools, and protected green spaces. It is not surprising that the language of Policy UR14 is not prescriptive: the council will 'seek' development of the whole area 'primarily' for 'employment-generating' uses. "Employment - generating" describes what is potentially an enormously wide class of use. It is not entirely clear whether the policy means that the whole range of uses set out in UR14 as included are seen to be "employment-generating"; many of them obviously are, and all of them may be. It is, however, tolerably clear that not all the specified range of uses could be expected across the whole MOZ; the residential uses must "serve to reduce the isolation of the Clay Lane estate" and the major retail and mixed development is centred on Stratford City and railway stations. It is, therefore, not surprising that policy UR15 says that "before proposals for individual parcels will be considered" there is to be an Urban Framework Plan. It seems to us hardly consistent with an allocation on a specific site within the MOZ that the development plan says there has to be a framework plan before the specific site can be considered.

140. We do not overlook the Rooff inquiry inspector's statement that UR14 'allocates' land (in her report, para 278), but in our judgement it gives little support for the proposition that the UDP allocates land in the sense section 16 uses the word. On the contrary, the inspector emphasises the very general nature of the policies and that the best that can be said for the Carpenters land is that it falls within the policy that applies to the whole area of MOZ1, namely that the council "will seek" primarily employment-generating uses within the specified range of other uses. It is also right to note that there are a number of places where the UDP, MOZ and UR policies are spoken of by officers of LB Newham as if they "allocated" land. Phrases such as "within the broad land-use allocation, the proposed development is therefore acceptable" occur in several officers' reports relating to development in MOZs. We put little weight on such phrases in that context, agreeing with Mr Bashforth that it is highly unlikely those officers had section 16 in mind.

The 'Statutory Disregard' under s.6 LCA1961 and the Pointe Gourde principle.

141. The statutory disregard is set out in section 6 and Schedule 1 of the LCA 1961. Section 6 reads:

> "6 (1) ….. no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if—
>
> (a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of that land;

FIRST SCHEDULE

Part I

Description of Development

Case	Development
1. Where the acquisition is for purposes involving development of any of the land authorised to be acquired.	Development of any of the land authorised to be acquired, other than the relevant land, being development for any of the purposes for which any part of the first-mentioned land (including any part of the relevant land) is to be acquired.

The way these statutory provisions are set out in the act does not contribute very positively to their understanding. However in our view the basic valuation exercise is a simple one. Has the relevant land been acquired for purposes that involve development of any of the other land included in the same compulsory purchase order? If so, disregard any increase or reduction in value of the relevant land that is due to carrying out development of any of the other land in the CPO for any of its purposes, or is due to the prospect of it, except where that development would have been likely to be carried out even without compulsory acquisition or the prospect of it.

142. This is a statutory exercise. Both its nature and purpose are easily comprehensible in principle, even though its application to the facts may not be easy. It is quite distinct from the *Pointe Gourde* principle developed by the courts. (*Pointe Gourde Quarrying and Transport Ltd v Sub-Intendent of Crown Lands* [1947] AC 565). The *Pointe Gourde* principle requires that any increase or decrease in the value of the subject land that is wholly attributable to the underlying scheme be left out of account. That principle and the statutory disregards in section 6 and schedule 1 share the purpose of ensuring a dispossessed owner receives fair compensation but not more than fair compensation. However they do not necessarily have the same effect. The statutory provisions are confined to any of the other land 'authorised to be acquired'. The *Pointe Gourde* principle contemplates that the underlying scheme may well include much more land than is involved in a particular compulsory purchase order. (See for example *RMC (UK) Ltd v London Borough of Greenwich* (2005) ACQ/3/2003 (LT). In such a situation the *Pointe Gourde* principle may be regarded as a supplement to the section 6 code and should be applied by analogy with its provisions. (See *Waters v Welsh Development Agency* [2004] UKHL 19, per Lord Nicholls at paragraph 63.) The tribunal has very much in mind the view expressed by the House of Lords in *Waters* that the *Pointe Gourde* principle had come to be applied too widely and should be restricted in its application (see Lord Nicholls at paragraph 56 and Lord Brown at paragraph 148).

143. In the parties' closing submissions and replies a dispute appeared to arise about the definition of the scheme and the application of the disregards. The claimant argued that the scheme should not be defined as including any development or prospects of development that

would be likely to occur anyway in the absence of proposals to acquire compulsorily. The acquiring authority argue that first the scheme must be defined and then disregards applied in respect of development that would be likely to occur anyway, so far as appropriate. We understand that this debate stems mostly from the different views of the parties about the prospects for Stratford City and the Carpenters land. We are not sure that there is really an issue of law between the parties on this point.

144. We are clear that the nature of the exercise is to start with the statutory code and to apply section 6. We then apply the *Pointe Gourde* principle as a supplement and consider whether any further adjustment to the value of the subject land due to an increase or decrease wholly attributable to the underlying scheme should be made. However we apply that principle by analogy with the statutory code and we give proper weight to the words 'wholly attributable' (our emphasis added). If the relevant land can be said to have added value because of the prospect of a particular development included in the underlying scheme, but which would have been likely to be carried out anyway sufficiently soon to affect the value of the relevant land, then that added value would not be 'wholly attributable' to the scheme and should not be disregarded. The application of those principles to the facts of this case is a matter of the Tribunal's judgement.

The Basis of Valuation - Conclusion

145. We proceed, therefore, on the basis that no assumption as to the grant of planning permission is to be made by virtue of section 16(3). But, on the other hand in accordance with section 14(3), neither is there any assumption as a result of any of the provisions of the act that planning permission would necessarily be refused for development not actually assumed. The parties agree that planning permission for a mixed-use development including a substantial residential element would have been likely to be granted within 18 months of the valuation date. On the basis of the facts that are set out above we do not think that permission would have been granted any earlier. There were plainly a number of issues to do with the assumed circumstances of the relevant land, the appropriate form of development upon it, and progress on important nearby areas that would probably have taken 18 months to resolve with the planning authority.

146. Planning permission is one thing. When it is commercially viable to implement it is another. Concerning the longer term, as we have said above, we found the evidence of Mr Spiller, Mr Burton and Mr Luck persuasive. We find that in a world without the Olympics there would have been the prospect of an eventual major development at Stratford City with Westfield at its heart and, once that was becoming established, there would have been sufficient demand to support development on the Carpenters' Land. However, without the spur of the Olympics and its CPO, that development would have been long delayed. We do not accept the claimants' suggestion that Mr Spiller, Mr Burton and Mr Luck were exaggerating the various impediments. We think that it is quite possible that the developments would only have been starting to get underway by 2012 or 2013. Of course it is true that the major redevelopment of a large area has to start somewhere, but we do not think that any sensible developer or potential investor, aware of the comparatively peripheral position and access difficulties of the reference

land, would have thought that it was a good idea to start there. The predominantly residential development of the reference land would have been unlikely to make financial sense until, at the very least, it was clear that Stratford City was in the process of realisation and that the Carpenters Land and the highway improvements that would bring were committed for the near future.

147. We therefore conclude that a prospective purchaser of the reference land would have recognised that it had potential development value, but would have thought that it would probably be some seven years or so before that hope could be realised. In the meantime the reference land was valuable as a waste transfer station. In our view the most realistic way to value it in a world without the Olympics is to take its existing use value and add a percentage to reflect the relatively long-term hope value.

Existing Use and Hope Value

148. It follows from these conclusions that to establish this value, it is not necessary for us to consider here the extensive evidence relating to the development value of the land that was produced and spoken to by Mr Matthews and Mr Smith. It is the existing use value that is relevant, and the percentage addition that a purchaser would consider appropriate to reflect the prospect of the development for which we have concluded planning consent would be obtained becoming viable.

149. Nevertheless, we do, of course, appreciate that a developer or investor might go through the exercise of calculating the present day (valuation date) value of the expectation that he could receive, in seven or eight years time, the full development value of the land. Using the relevant tables, the present day value of £1 in 7 years at, say, 6% is 0.6650. On the basis of Mr Matthews' valuation in which he calculates its development value at the valuation date at £4.8 million on the assumption that planning consent would be obtained within 18 months that would produce £3,192,000. However, that exercise assumes that such development value is guaranteed, which of course it is not. In our judgement, he would make a very substantial discount from that sum to reflect the not inconsiderable risks underlying such an assumption.

150. The greatest risk, apart from the prospect of general volatility in the market, the possibility of recession and the fact that in the no-Olympics world there were several local authorities involved, would be the very real possibility, in our view, of the Stratford City scheme being delayed or even shelved. We think that, bearing in mind the need to crystal-ball gaze for such a long period of time, the prospective purchaser would discount the present day value of the potential "best case scenario" by at least 40% and possibly more. Therefore, at 60% of the potential value on Mr Matthews' basis it becomes £1.915 million – say £2,000,000. We are, of course, mindful of the acquiring authority's arguments against Mr Matthews' opinion of development value, and we "park" this valuation scenario in the back of our minds whilst considering the evidence on existing use value (EUV).

151. In his first valuation, **Mr Matthews** adopted £2.50 psf on the reference land, giving a rental value of £120,000 pa to which he applied a yield of 6.8% resulting in an EUV of £1.76 million. To this he added 5% for the development prospects giving a value of £1.85 million. In support of that opinion, he said that he had considered a number of valuation bases as there was limited evidence of directly comparable open market transactions of open storage sites and depots with large ancillary yards in north and east London at the time. He referred to a number of open storage sites including Phoenix Wharf, Edmonton, N18 where in 2005 he had acted for the landlord in the letting of 47,500 sq ft secure open storage and 3,000 sq ft offices to be used as a car pound. He said the lease stated that the rent for the open storage area was assessed at £2.11 psf. He was also aware of a further letting in 2003 at that location of land to be occupied as a bus depot at £2.04 psf, and the rent there was reviewed in 2008 to £2.40 psf. Although no date was given, Mr Matthews said that a third area at Phoenix Wharf was let by him at £2.85 psf.

152. Further comparables including Leeside Works, Tottenham N17 (bus depot), an ancillary yard at Parcelforce, Stephenson Street E16, land at Hackney Wick (bus parking), Stability Works Waterden Road E15 (bus depot) and Edison Road Enfield (builder's yard) produced rentals in the range £2.02 to £2.70 psf for lettings within the period 2004 – 2008, but none of these had planning permission for waste transfer use. In that regard, Mr Matthews said that the Upper Tribunal (Lands Chamber) (PR Francis FRICS) in *Prittam and Kuldeep Kaur Singh v London Development Agency* (ACQ/291/2008) relating to a 3.76 acre site occupied as a bus garage and yard at Stability Works, Waterden Road, E15, had concluded that the rental value for secure, concreted and well drained open storage land in the area was £2.20 psf in April 2007, and taking the capitalisation rate applied in that case, such sites were worth £1.41 million per acre. Applying that to the reference land gave a value of £1.55 million for storage land. However, in the knowledge that demand for waste transfer sites was strong, and from a thorough analysis of his schedule of comparable evidence he said, at paragraph 13.23: "I derive the existing use valuation (reflecting the waste transfer premium) as being in the order of £1.76 million…" That equated to a rental value of £2.50 psf at a yield of 6.8%. The addition of 5% he then added was to reflect "long-term development prospects" which, in cross-examination, he said assumed planning permission being obtained within 10 to 20 years.

153. In his second report, (in rebuttal of Mr Smith's evidence), Mr Matthews revised his valuation to £2.7 million based upon a rental value of £3.25 psf (£155,727 pa) and a yield of 5.75%. This was due to his having considered additional evidence relating to the waste transfer site at 28 Marshgate Lane (itself the subject of a reference to this Tribunal), Randall Works, Epping and the McGraths site at 54-58 River Road, Barking. He said that his revised figure did not specifically include any enhancement for development hope value as to do so would be inappropriate where an adjustment had already been made (for the value of the waste transfer permission).

154. Firstly, in connection with 28 Marshgate Lane, Mr Matthews said (starting at paragraph 5.8 of his first rebuttal report):

> "5.8 My further research of the 28 Marshgate Lane transaction, a 2003 letting to Brewsters Waste Management, used as evidence by AtisReal in their 2006 valuation,

suggests they have concluded incorrectly. Whilst I have not had sight of the lease (although requested) I believe the broad terms set out in the AtisReal valuation to be correct – a 25 year term at £104,000 per year initial rent from 2003. Why a £270,000 premium was, I understand, paid by the ingoing tenant to the landlord is not clear. Whether the premium was in payment of works undertaken by the landlord or a sum to financially secure the site I cannot say but the tenant must have perceived it as having some value or they would not have agreed to pay it. What is most unclear is what the area of the demise was in 2003. The AtisReal valuer states the area was 0.9 acre (which Colin Smith has adopted) and the CPO Schedule and plan shows plot 517 (which I assume was the leasehold element of Brewster's occupied estate) as being 0.67 acre…..

> 5.9 Taking the site area as being 0.9 acre (as per the AtisReal report) the 2003 £104,000 annual rent equates to £115,555 per acre (£2.65 psf) and at 0.67 acre (as per the CPO Schedule) equates to £155,224 per acre (£3.56 psf). As Brewster owned adjoining parcels of land it may be that AtisReal assumed the entire occupied site to be the let area (0.244 acre + 0.67 acre = 0.9 acre) – whereas Brewsters owned the freehold of the adjoining site – which I presume is the site referred to by Colin Smith in Knobs Hill Road. This leads me to conclude that the demised area…is likely to be 0.67 acre…

Mr Matthews went on to say that all rental indicators show industrial rents increased from 2003 to 2007 and, from information provided within Mr Smith's firm's (CBRE) Rent and Yield Monitor, said it was appropriate to apply a 3.4% pa increase for that period giving an increase by the first quinquennial review of 14.3% . He continued:

> "5.10 … Applying this increase to the 2003 annual rent of £155,224 per acre (£3.56 psf) equates to £177,421 pa (£4.07 psf). The [reference] property was 1.1 acres which suggests an annual rent of £195,163. Applying the agreed 6.5% capitalisation rate to this produces a capital value (ignoring the contentious and unclear £250,000 *(sic)* premium payment) of £3.0 million for a 1.1 acre site with waste use in Marshgate Lane. This does not, of course, include any amount for development value nor development hope value."

155. Mr Matthews went on to say that whilst the above had indicated a rental value in 2007 of around £4.00 psf, the headline rents achieved in the Randall Works letting in July 2008 at £2.52 psf and the 80 River Road, Barking letting to OS Hire in July 2006 at about £2.30 psf suggest that a headline rental of £4.00 psf "may be bullish". But, with the reference land being some 7 miles closer to central London he said he was of the view that a rental value of about £3.50 psf would be appropriate. However, due to the admitted lack of actual comparable information, he said he should remain cautious, and therefore arrived at a final figure of £3.25 psf. Adopting Mr Smith's 6.5% capitalisation rate (he had originally used 6.8%), Mr Matthews said the resultant capital value became £2.4 million. However, he adjusted the yield further to 5.75% to reflect CBRE's published research figures for secondary industrial estates, thus concluding that the value should, in fact, be £2.7 million. In arriving at this revised figure, he pointed out that Mr Smith agreed with his analysis of the 28 Marshgate Lane transaction, and that it was possibly the most important comparable in that it was the only truly nearby site with waste transfer permission. As to Randall Works in Epping, Mr Matthews referred to this as an off-market transaction where a private landlord negotiated a rent review on a 30,962 sq ft waste transfer site, including buildings, in 2008 at £2.52 psf. It was in a rural location further from London and "the accommodation appeared basic". Thus a significant upwards adjustment was required.

156. The 80 River Road letting to OS Hire appeared, Mr Matthews said, to have been concluded before planning consent for a WTS was obtained in which case the rental figure agreed might not have reflected a premium for waste transfer use.

157. 54-58 River Road, Barking was an off-market acquisition by McGrath Bros (Environmental) Ltd in June 2006 of a 10.26 acre site at £18.25 million. It had planning consent for waste transfer use. That price equates to £1.78 million per acre, but allowing 10% for quantum, this would give a value for a site the size of the reference land in Barking of some £2 million per acre. Allowing for the fact that the reference land is better located for central London, this transaction, in his view, further supported his conclusions.

158. He ended by saying that he had used his extensive experience as an industrial property agent to adjust the comparable evidence to reflect all the relevant differences in characteristics, location and demand.

159. In cross-examination, Mr Matthews accepted that he had no previous experience of valuing waste transfer sites. He accepted that Mr Gladwell, who had been professionally advised in respect of the sale to Mr Halpern at £1.7 million, and who also had personal knowledge of the 28 Marshgate Lane and Knobs Hill Road sites, had not been called to give evidence and that both he and Mr Halpern were prudent businessmen. Whilst he acknowledged that the transaction in 2007 had been at arms length, and that there was no evidence that the CPO had affected the price, he pointed out that the sale meant that Mr Gladwell, who was ageing and ill, would not have to endure the hassle of dealing with the CPO. This may have affected the figure that was achieved, but he agreed that if there had been any question over whether or not it was a sale at market value, Mr Gladwell could have been asked to provide witness evidence.

160. Mr Matthews accepted that the AtisReal valuation was relevant, and should be given some weight, but it was tempered by the inaccuracies that he had highlighted. However, he did agree that, for the purposes for which it was undertaken, it should include development value if it existed.

161. As to the uplift of 5% that he had applied in his first valuation to reflect development value, he said that this was based upon the development prospects coming to fruition in "ten to twenty years". However, in respect of his second valuation he said that, where he had already allowed a significant premium specifically for a special use, it would not be appropriate to add a further uplift for the prospect of long term redevelopment.

162. Regarding his revised valuation, Mr Matthews accepted that the agreed Schedule of transactions (at page 6777F) indicated that his new figure of £3.25 psf was higher than all of the waste transfer site comparables referred to, and that the closest one was 24 River Road where the £3.00 psf was an asking price. He also agreed that the adjustments he had included in his second report had not been set out in his first one, and that it was the 28 Marshgate Lane evidence that was the principal reason for the increase in rental value.

163. Challenged on his view the £2.00 psf rental that OS Hire agreed to in 2007 occupation of 80 River Road was for a bare storage site without planning consent for waste transfer use, he said that he did not know whether it might have reflected the expectation of obtaining permission (which they in fact achieved in July 2007).

164. Regarding the McGrath site at 54-58 River Road, Barking, it was accepted that the market for a 10 acre site would be very different, and that it included extensive wharfage although there was some question in his mind over whether that would attract a higher value.

165. In connection with his revisions to the yield, Mr Matthews did not accept the argument that it was not appropriate to reduce the yield and increase the rental value in this instance. His only reason for making the alteration to yield was the figures in the CBRE report for secondary industrial which, he thought, was appropriate

166. In submissions, it was suggested that Mr Matthews' revised valuation should be approached with considerable caution. Not only had he admitted that he had had no previous experience of valuing waste transfer sites, but it was also clear that the figure of £2.7 million contended for was very much a lone voice within a wealth of valuation opinion. He had abandoned the figure sought in his first report (one that had been agreed by his senior colleague Mr Fisher) in favour of one that was significantly out of step with so much other evidence. Indeed, in his first witness statement, Mr Halpern had said that a purchaser could be expected to have to pay "at least £1.75 million" for an existing waste transfer site.

167. **Mr Smith** said he had been involved with a large number of the Olympic CPO sites, many of them being similar in user to the reference land, and all had been agreed at existing use value. He said his primary approach had been to rely upon what he described as the compelling evidence available from the AtisReal valuation in 2006, and the actual sale of the land to Mr Halpern in 2007. He quoted various relevant sections of the AtisReal report from which, he said, it was abundantly clear that the question of development potential had been considered. In particular, the paragraph that read:

> "In arriving at our valuation we have had regard to the following characteristics of the property - the potential for redevelopment ass per the designation under the 2002 Planning Framework, prior to the 2012 London Olympic Plan."

That appeared, he said, to put the position beyond doubt; the valuation report is at full market value and reflects hope value to the extent that such value exists.

168. There were, however, a number of factors not mentioned in the AtisReal report which, he said needed to be taken into account, and of which the valuer had presumably been unaware. One of these was the Crossrail 2 Safeguarding, the existence of which would impact upon hope value. There was also the fact that Atisreal's valuer had appeared to rely upon erroneous information relating to 28 Marshgate Lane. As a result, Mr Smith made some adjustments and, also considering the evidence relating to the OS Hire letting in River Road, Barking in 2007,

and the McGrath acquisition of 54-58 River Road, concluded that the value of the reference land including a 10% uplift for hope value was £1,354,000.

169. In his second report, the rebuttal of Mr Matthews' first report, Mr Smith referred to the fact that Mr Matthews had been, to a large extent, relying upon rental comparables of open storage sites and, referring to the *Singh v London Development Agency* case had said he adopted a rental value of £2.20 psf (giving £1.55 million for the reference land) and adjusted this upwards by 13.5% to reach his pre-hope value figure of £1.76 million (based upon a rental value of £120,000 pa). Mr Smith said he did not disagree with this approach, when a direct comparison is made between open storage and waste transfer sites. He also agreed that it was appropriate to apply a further uplift to reflect the long-term hope value.

170. In the light of some further evidence, relating to his own negotiation of the part waste transfer and part skip hire site at the rear of 28 Marshgate Lane, which equated to £1.355 million per acre, Mr Smith said he had revised his valuation to £2.00 psf (£95,832), capitalised it at 6.5% and added his previously adopted 10% for hope value to produce £1,692,307 – say £1.7 million. However, he said that as this was very close to Mr Matthews' first valuation, he was prepared to accept that figure (£1.85 million). As to the yield, Mr Smith said in cross-examination that the range for industrial sites such as this at the valuation date was 6.5 to 8.0% (and he had settled a number of cases at the higher figure) so his adoption of 6.5% was being as generous to the claimant as he felt able.

171. In his second rebuttal report, Mr Smith explained the background to Brewster's Waste Management taking a lease at 28 Marshgate Lane, and said that it was a forced acquisition due to them being dispossessed from their previous site in connection with the CPO elating to the redevelopment of Arsenal FC's former ground at Highbury. The rent they agreed to pay, which was very much out of kilter with the general level of rents for such sites reflected that urgency. An indication of this, he said, was the fact that a tenant's only break clause was inserted in the lease exercisable at the fifth anniversary at the date of the first rent review. The ability to exercise such a break at that time would give them the opportunity to negotiate a lower rent (it being an upwards only rent review) on the basis that if Econometric (the landlord) did not agree, they risked being left with a vacant site. Such a process was not unusual, he said, in circumstances where a lessee agrees to a long term (25 years) at a very high initial rent.

172. There was also, Mr Smith said, the fact that Econometric obtained planning consent for a new tipping hall, and other site works, which they undertook at what he believed to be an overall cost of some £427,000.

173. Mr Smith went on to say that in his opinion the McGrath site at 54-58 River Road referred to by Mr Matthews was a strong comparable, subject some adjustments to reflect the value of the wharfage and the fact that it was a scheme world transaction where the operator would be benefitting from the waste arisings generated by the Olympic scheme. Far from there needing to be a downwards adjustment to reflect the fact that it was such a large site, the rarity of very large waste transfer sites would, if anything, make it more valuable.

Conclusions on value

174. As to existing use value, we are satisfied that there is overwhelming evidence to support a conclusion that, at the valuation date, the existing use value was very much closer to the figure promulgated by Mr Matthews in his first report (£1.85 million) and accepted by Mr Smith.

175. Firstly, the land was acquired by the first claimant under an option which he exercised in June 2006 for the sum of £1.7 million. The Tribunal is fortunate, as the acquiring authority submitted, to have contemporaneous evidence relating to a sale of the actual land very close to the valuation date. It was a sale in the real world, by a vendor who had been professionally advised in respect of value (by Jones Lang LaSalle) and who had recent experience of selling other land in the vicinity. There can be no question, in our view, that Mr Gladwell was aware that the land may have held some long-term planning potential, as he had himself submitted an application for residential development in 2004. It was confirmed in evidence that there was no overage agreement entered into between Mr Halpern and Mr Gladwell as a condition of the sale, any such agreement that there may have been being in connection with the sale of shares in Clearun Ltd.

176. It was submitted for the claimants that when the land was acquired by Mr Halpern, it had not been exposed to the open market and that it must be seen as linked to the acquisition of the shares in Clearun. Also, it was conducted at a time when the compulsory acquisition was very much a live issue and that may have tainted the price. Further, Mr Halpern knew that Mr Gladwell was elderly, in poor health and "just wanted to get out". Thus it was the claimant's case that he bought at an undervalue, and that little weight should be given to that evidence.

177. As we mentioned earlier in this decision, we have no evidence from Mr Gladwell which might shed some light on his views of the price achieved, his state of mind or his alleged illness and we are also conscious of the fact that he was professionally advised by a respected firm that was well aware of the CPO situation. If there had been any risk that he was not achieving market value, either his appointed valuers or his solicitor would surely have insisted on a formal overage provision being entered into the contract. As to any suggestion that, with the price having been agreed in 2005, there may have been some upward movement in values in the interim, we accept the acquiring authority's submission that it was at all times open to Mr Gladwell, or for that matter, Mr Halpern, to renegotiate the price at any time up until the date the option was exercised – that being less than 12 months before the valuation date. Accordingly, we attach significant weight to this evidence.

178. Secondly, the AtisReal valuation report, carried out on the instructions of Mr Halpern's proposed mortgagees, First International Bank of Israel, in October 2006. This was an open market valuation carried out in accordance with the requirements of the RICS Red Book – described by Mr Smith as the "Gold Standard" in terms of valuation practice. The valuation, a copy of which was produced in evidence, it having only been disclosed by Mr Halpern following an Order from the Tribunal, adopted the approach that was accepted by Mr Matthews as to all intents and purposes being the same as a rule (2) valuation under the Compensation Code. It

was stated that the valuation took into account the special assumption that the 2012 Olympics were not taking place, and that it was therefore an assessment in the no-scheme world. It is clear from several locations within the text of the report that the question of no-scheme world development potential had been taken into account and it was stated that "the value of the asset would, in part, be underpinned by the ability to form part of the comprehensive development in the area known as Thornton Fields…".

179. It was submitted for the claimants, and set out in Mr Matthews' first rebuttal report, that the AtisReal valuation was incorrect because the land area of one of the comparables (28 Marshgate Lane, the only one nearby) relied upon by its valuer had been miscalculated. Due to that misunderstanding the area of land was valued at £2.64 psf whereas it was actually £3.56 psf if the correct area of 0.67 acre was used. This appeared to be a critical element in Mr Matthews' re-assessment of the value of the reference land at £2.7 million set out in his second report. For the acquiring authority, it was submitted that there were a number of factors relating to the 28 Marshgate Lane leasehold transaction that made it an unreliable comparable in any event. It was pointed out that the new lessee was a cash-rich purchaser who was desperate to find a suitable waste transfer site as he was also being dispossessed by a different CPO; that he paid a very substantial premium and that there were unresolved questions that brought any analysis of that transaction into question.

180. For the claimants, it was submitted that, as opposed to what the acquiring authority suggested would be the result if the £270,000 sum paid by Brewsters to Econometric was in fact a premium, the answer would be precisely the opposite. If it was, it made the £104,000 rental value an undervalue rather than an overvalue, which could justify an even higher rental value per sq ft to reflect its true rental value.

181. We agree that little if any weight can be applied to 28 Marshgate Lane. It is, in fact, at the time of writing this decision, the subject of a reference to this Tribunal and there are a number of valuation issues peculiar to that site which (not least the effect that an alleged premium paid by the ingoing tenant at the commencement of its lease in 2003 might have on rental value) make it potentially unreliable. It would be inappropriate to place any reliance upon an analysis of that transaction until such time as those issues have been resolved. Having said that, we are mindful of, and agree with, the submission made by the acquiring authority, that Mr Matthews' analysis of that transaction shows the comparable to be so significantly out of line with all the other evidence as to make it of little assistance in this case. Ignoring the premium issue, the rent of £104,000 pa agreed in 2003 equated to £3.56 psf for the 0.67 acre site, and this was far in excess of anything that had been achieved anywhere else within the vicinity.

182. Whilst it would appear that there may have been some misunderstanding of the area of land at 28 Marshgate Lane in the AtisReal valuation, and that if the correct area had been adopted, this may have led to the valuer adopting a slightly higher figure, we are satisfied in the round that the valuation of £1,800,000 (which was stated to have included consideration of development potential but did not quantify the amount, if any, of hope value attributed to it), is supported by the general tenor of the evidence overall and falls into line with it. The question has to be asked: having considered a number of other comparables (as we have), would the

Atisreal valuer have reached the same conclusion as to 28 Marshgate Lane's usefulness in the overall scheme of things.

183. Thirdly, the advice provided to Mr Gladwell by Jones Lang LaSalle (JLL). This was in the sum of £1.87 million (£1.7 million per acre) and we were guided to contemporaneous correspondence. Although it is clear that, in some earlier advice (in 2004 and 2005), JLL referred to higher values it was evident that, in regard to the later letter, that advice was to be used as a starting point for negotiations. Mr Norman of JLL later made it clear in that letter that to justify those figures, evidence of actual transactions would be needed. The acquiring authority pointed out that there was no evidence actually produced to support those figures. In the following 12 months, JLL advised Mr Gladwell of its views that the reference land was worth £1.7 million per acre. Although we are unable to attach significant weight to these submissions in the light of there being little documentary evidence relating to JLL's advice, it does support the range of values that were clearly being considered at the time.

184. As to the rest of the comparables, we agree with the acquiring authority's submission that the transactions at 80 River Road, Barking are good evidence of the parameters for waste transfer sites (July 2007 at £2.00 psf and May 2009 at £2.25 psf). We do not accept Mr Matthews' suggestion that the £2.00 psf that OS Hire paid in July 2007 reflected an open storage site. The planning application for waste transfer use was made in September 2006, and obtained in July 2007. We also note that Mr Matthews said he was acting for the landlord and would as letting agent have been fully aware of the fact that the application had been made, and that a positive result could be expected due to the prevalence of waste transfer uses in the area. We do not think that, if he thought at the time that there was an additional premium for such use, he would have advised his client to accept a rent that did not reflect it. However, we do accept the argument that the reference land is much closer to central London, and that it would not be unreasonable to expect the rental value in Marshgate Lane to be more than it was in Barking, some 7 miles further out. Although Mr Matthews accepted in cross-examination that he had no specific evidence to support that contention, it stands to reason, in our view, that the considerable savings that an operator would expect to achieve in terms of transport and fuel costs would result in an increased bid for such a proximate site.

185. We are satisfied that the evidence that was before us, when considered in the round, supports a rental value of the reference land of £2.50 psf at the valuation date. This is some 50p psf above the £2.00 at River Road, which we think adequately reflects a premium to cover the reference land's closer proximity to the City. We were not persuaded by Mr Matthews' arguments in support of the significantly reduced yield he adopted in his revised valuation, particularly in the light of the wealth of other evidence before us. However, we adopt Mr Smith's figure of 6.5% rather than Mr Matthews' initial yield of 6.8%.

186. Turning to the allowance for long term development potential – anticipated to reflect the expectation of achieving planning consent for a predominantly residential development after no less than 10 years and possibly considerably longer, Mr Matthews adopted 5% in his first report. Mr Smith thought a 10% allowance was appropriate on the same basis. In our conclusions above, we have found that a development would become viable within about 7 years, and this

therefore, in our view, warrants a higher figure. In our judgement a prospective purchaser would consider an uplift of 15% to be appropriate. The resultant valuation becomes:

Rental value at £2.50 psf (49,030 sq ft) £122,575	say	£120,000pa
Years Purchase in Perpetuity @ 6.5%		15.385
		£1,846,200
	Say	£1,850,000
Add 15% for development potential		£ 277,500
		£2,127,500

187. This conclusion is, in our view, further supported by the alternative approach that a developer might take (as described in paragraph 150 above).

188. The value of the reference land net of the addition for development hope value equates to just under £1.7 million per acre, and in our view that figure is also particularly well supported by the open market freehold sale of 54-58 River Road, Barking, the much larger site with wharfage, at £1.78 million per acre in June 2006. Mr Smith was correct, we think, to point out that there is some not insignificant value in the wharfage and that there should be no adjustment for size as the very large plots come onto the market extremely rarely. It is however noted that both valuers accept there should also be a discount to reflect the Olympic effect. Nos. 72-76 River Road, that was also referred to in the Schedule, and a transaction upon which both valuers rely, was a sale at £1.76 million per acre in 2006. Both of these were waste transfer sites.

189. Having decided the issues above, we determine compensation as follows:

Value of the reference land at 2 July 2007	£2,127,500
Disturbance	£ 321,247
Pre-reference costs	£ 57,000
Statutory Basic Loss Payment	£ 75,000
	£2,580,747

190. This decision will become final when the question of costs is determined, and not before. The accompanying letter sets out the procedure for making submissions in writing.

DATED: 18 March 2014

HH David Mole QC

P R Francis FRICS

ADDENDUM ON COSTS

191. Submissions on costs have now been received from the parties. They were due to be filed and served by 5pm 1 April 2014. Those from the acquiring authority were filed on 31 March 2014 (although, in the absence of any agreement regarding exchange, were not served upon the claimants until 4 April 2014). The claimants filed and served, on 11 April 2014, their submissions about the appropriate costs order that they thought the Tribunal should make and, at the same time, responded to the authority's submissions. However, by an application of the same date, the claimants sought under rule 53, or alternatively rule 54, of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, an order setting aside parts of the decision dated 18 March 2014 and to receive and/or hear new evidence regarding a number of disputed issues at a re-opened hearing. In consequence of that application, they also sought an extension of time by which submissions on costs should be made (despite having filed them in any event) until 14 days after the later of the date by which the Tribunal makes a decision on the application or, if allowed, the re-making of the decision.

192. The acquiring authority filed a response and an objection to the claimants' first application on 22 April 2014. At the same time, the acquiring authority made an application to file further costs submissions responding to the issues raised in the claimants costs submissions on the grounds that by failing to lodge their submissions in accordance with the Tribunal's direction, they had accordingly secured for themselves the opportunity to respond to the acquiring

authority's position, whilst at the same time depriving the authority of the equivalent right of response.

193. The application to set aside parts of the decision and to receive/hear further evidence, was refused by an order of the Tribunal dated 7 May 2014. That order also granted permission for the acquiring authority's response.

194. Relevant to the costs submissions, summarised briefly in the following two paragraphs and considered thereafter in detail, is the fact that the acquiring authority made an unconditional offer in the sum of £3,000,000 on 24 May 2011. Following the substantive hearing, and after the delivery of the parties' closing submissions (but not the replies), the acquiring authority withdrew the offer by letter to the claimants dated 19 December 2013. As will be seen from paragraph 189 above, the Tribunal determined compensation in the sum of £2,580,747.

195. The claimants' principal argument was that they should not have to pay any of the acquiring authority's costs from 24 April 2011, or alternatively, from that date to 31 December 2013. Further, and in any event, whatever order the Tribunal makes in consequence of the parties' submissions, the authority should not have its costs (as claimed) in respect of two particular issues: the extinguishment of Clearun's business and the existing use value (EUV) of the land.

196. The acquiring authority's submissions were promulgated on three different bases. Firstly, that the claimants should pay the whole of the authority's costs from the date of the notice of reference – 8 January 2010 - because no claim that satisfied section 4(1)(a) and (2) of the 1961 Act had been submitted between the date of the acquisition and the date that the notice of references were made by the authority in respect of the first three claimants. Secondly, and in any event, the claimants should pay the authority's costs of the references from 24 May 2011 to 19 December 2013 (the period during which the sealed offer was open, was not accepted and was not exceeded by the Tribunal's determination). Thirdly, to the extent that they are not covered by any costs order made under the first two bases, the claimants should pay the authority's costs of the particular issues referred to by the claimants. The authority also pointed out that their costs applications were without prejudice to any costs orders that have already been made on interim applications in the course of the references.

Should the claimants pay all of the acquiring authority's costs in the reference?

197. According to the acquiring authority, despite numerous and repeated attempts to extract details of the claims, including from long before the references were made (as set out in Mr Clarke's evidence), none that satisfied sections 4(1)(b) or (2) of the 1961 Act was ever submitted. This lack of information was, indeed, the principal reason for the authority making the references. Under s.4(1)(b) therefore, the Tribunal should order costs to be paid by the claimants unless there are special reasons not to do so. The policy behind that provision was to enable the acquiring authority to make what it considered to be an appropriate offer before it had incurred any, or any significant, costs (see *Spirerose Ltd v TfL* [2008] RVR 12 at para 36).

In these references the authority was unable to make a sealed offer until well after the first two references were made (with the third reference only being made by the fourth claimant and consolidated with the other two, shortly before the hearing). Even then, due to the lack of a fully particularised claim, it had not been possible to gauge accurately what was an appropriate offer to make. Hence the authority concluding after the hearing that the offer that had been made was much too high, and thus withdrawing it.

198. The claimants, having set out the Upper Tribunal's jurisdiction on costs as contained within s.29 of the Tribunals, Courts and Enforcement Act 2007, together with the relevant paragraph (12) of the Lands Chamber's Practice Directions, rely principally, in their argument that they should not be directed to pay any of the acquiring authority's costs in the reference, on the particular rules that apply by virtue of section 4(1) of the 1961 Act which prevails over s.29. Section 4 of the 1961 Act reads:

> "(1) Where either –
>
> (a) the acquiring authority have made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Upper Tribunal to that claimant does not exceed the sum offered; or
>
> (b) the Upper Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by him, containing the particulars mentioned in subsection (2) of this section;
>
> The Upper Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Upper Tribunal, the notice should have been delivered."

199. The claimants submitted that guidance on what special reasons might be is to be found in the Court of Appeal judgment in *Purfleet Farms Ltd v Secretary of State for the Environment, Transport and the Regions* [2003] 1 EGLR 9 where Potter LJ said, at paragraph 29:

> "Leaving Aside the impact or influence (if any) of the CPR upon awards of costs in the Lands Tribunal, it is my view that the proper approach of the Tribunal for the costs of a successful claimant (i.e. a claimant who is awarded more than the amount of an unconditional offer by the respondent) should be that he is entitled to his costs incurred in the proceedings in the absence of some 'special reason' to the contrary. Whether such special reason exists in the case is a matter for the judgment of the Lands Tribunal. Plainly, it may exist where wasted or unnecessary costs have been incurred for procedural reasons as a result of the conduct of the claimant (e.g. abandoned issues, unnecessary adjournments, or failure to comply with the directions of the Tribunal). However, so far as the nature and substance of the case advanced by the claimant is concerned, special reasons should be regarded as established only where the Tribunal considers that an item of costs incurred, or an issue raised, was such that it could not, on any sensible basis, be regarded as part of the reasonable and necessary expenses of determining the amount of the disputed compensation. This would apply not only to a claim advanced without any

statutory basis but to other examples of manifestly unreasonable conduct that may give rise to unnecessary expense in the course of the proceedings. It means, in my view, that, following a hearing of a compensation reference in the Lands Tribunal in which the claimant has been successful, a special reason for departing from the usual order for costs should be found to exist only in circumstances where the Tribunal can readily identify a situation in which the claimant's conduct of, or in relation to, the proceedings has led to an obvious and substantial escalation in the costs over and above those costs that it was reasonable for the claimant to incur in vindication of his right to compensation."

200. The acquiring authority, in its response to the claimants' submissions said that it had no issue with those principles as set out.

201. The claimants submitted that, as to the alleged failure to submit a particularised claim in accordance with s.4(1)(b) and 4(2), that the words of s.4(1) make clear that s.4(1)(a) and (b) are put in the alternative and separated by the word "or". The two paragraphs provide for the case where (1) an offer is made and (2) where an offer cannot be made in time because of the lack of a notice of claim. As the authority made an offer on 24 May 2011, it could not have been in a position for which 4(1)(b) makes provision, and the claimants should not therefore be held liable for costs by reason of an alleged failure to provide a notice of claim. The Authority was able to, and did, make an offer before the vast bulk of the legal costs were incurred.

202. In response to this point, the acquiring authority said that the inclusion of the word "or" did not make sections 4(1)(a) and (b) mutually exclusive. Either or both can be relied upon. In any event, they said, even if they were mutually exclusive the claimants' position appears contradictory because they seek to rely on the sealed offer to deny the operation of s.4(1)(b) while at the same time arguing that the sealed offer is to be treated as having no effect for the purposes of s.4(1)(a) – see paragraph 206 below. The claimants cannot have it both ways.

203. As to the Clearun reference, the claimants pointed out that the BDO Stoy Hayward Business Extinguishment Valuation Report was served on the authority in early 2009. This was acknowledged by the authority to be the case, however, as accepted in cross-examination by Mr Nedas, the business was valued on the basis that it would continue in perpetuity whereas Mr Halpern had informed the authority that it was intended to make a rule (2) claim for development value which would, of course, have foreshortened the businesses' tenure. Thus, in the absence of a rule (2) claim, the authority said it was was unable to know whether the BDO report constituted a proper basis for the *overall* compensation claim.

204. The claimants suggested that, in relation to the rule (2) claim, a claim was "believed" to have been submitted by Jones Lang LaSalle, this appearing to have been acknowledged in an email from Colin Smith (the authority's valuer) dated 14 April 2009. That email, the authority said, does not acknowledge that any such claim had been made. It set out the authority's understanding of the first claimant's position at the time, recording that Mr Halpern had indicated that "an additional sum is to be claimed for the value of the land" and concluded by asking "when is it intended that a full and final claim will be made?"

205. The claimants went on to submit that any liability to pay costs by virtue of s.4(1)(b) does not arise where there are special reasons to show otherwise. In relation to ACQ/274/2010 and ACQ/280/2010 the references were made by the acquiring authority only two and a half years after the vesting date, this alone constituting a special reason why the normal rule in s.4(1)(b) should not apply. The claimants were not in a position to formulate any claim before then because of a lack of information regarding local land sales. The authority disputed this, and said there had been ample time.

Should the claimants pay the acquiring authority's costs from 24 May 2011, or from then up to and including 19 December 2013?

206. It was submitted by the claimants that where an acquiring authority makes an unconditional offer to settle, and that offer is withdrawn, the authority cannot claim the benefit granted by that offer – see *Foster v Mayor etc of Sheffield* (1895) 72 LT 549, a Court of Appeal decision (thus binding on the Tribunal) concerning the Lands Consolidation Act 1845. In that case, Rigby LJ said at p551:

> "It [the offer] was withdrawn by direction … When withdrawn it was as though it had never been made and the corporation could not confirm it and make it a binding offer for the purposes of s.34 of the Lands Clauses Consolidation Act 1945."

207. As the unconditional offer was withdrawn, it is no longer extant and any automatic consequences that might otherwise arise under s.4(1)(a) cannot take effect. The authority has lost the benefit of that offer, and thus this is a special reason why the normal rules apply and the claimants are entitled to their costs.

208. It was argued that if, contrary to these submissions, it were to be held that the unconditional offer did provide the authority with protection during the period of its existence, the claimants should be given, say, 21 days after the offer was made to enable them to take advice and consider acceptance (see *Chapter Group PLC v LRT* [2006] RVR 242 at para 13). In any event, the authority should not be entitled to its costs after the offer was withdrawn.

209. In respect of these arguments the acquiring authority took particular issue. The requirements of s.4(1)(a) are clearly met as the determination did not exceed the value of the offer. The proposition that the decision in *Foster* means that once a sealed offer is withdrawn it is to be treated as if it never existed is remarkable. That would mean that the sealed offer would be irrelevant to the Tribunal's direction on costs and that it would be unlawful to have regard to it. It was submitted that the report on that case showed clearly that no such thing was decided Firstly, that case related to section 34 of the Lands Clauses Consolidation Act 1845, and not to s.4 of the 1961 Act. It is not therefore binding since it concerns different legislation. Secondly, the Court of Appeal held unanimously that the offer had not been duly authorised before its withdrawal, thus treating an offer that has never been duly made as never having made at all makes sense.

210. Further, that case was in relation to an arbitration and the offer was withdrawn on the day the arbitrator took up his appointment, and before the start of the proceedings. The claimants had acquiesced in the withdrawal of the offer and, under section 34 there was no discretion to award costs based upon 'special reasons'. The facts of that case were, therefore, so different as to make it of no application in this matter.

211. It was submitted that it would be remarkable if the authority was unable to recover its costs where (a) it had made a sealed offer considerably in excess of the Tribunal's eventual determination, (b) which had been available for acceptance for well over two and a half years and (c) was only withdrawn after the proceedings had closed and final submissions had been made. Further, or alternatively, if the sealed offer was held not to engage the Tribunal's obligation to award the authority its costs, it amounts to a 'special reason'. The sealed offer represents a special reason for the purposes of the legislation.

212. As to the claimants' reference to *Chapter Group* the authority said that, again, that should not be considered to apply as it was a case where the sealed offer had been accepted.

213. In summary, the claimants said that in the light of their detailed submissions on these issues they should have their costs on the ground that the unconditional offer was withdrawn, and no special reason exists for excluding the normal rule that the claimants should have their costs. In the alternative, they should have their costs up to, say, 21 days after 24 May 2011, and after 20 December 2013 on the ground, per *Foster* that the unconditional offer did not protect the acquiring authority save between those two dates. Otherwise, they said "the claimants concede that the AA is entitled to its reasonable costs" between those dates.

Should the acquiring authority have its costs in relation to specific issues?

214. The claimants submitted that, whatever costs award is made in consequence of the foregoing, the authority should not have its costs associated with the extinguishment of the business or the rule (2) EUV valuation. No "special reason" exists for concluding that the expenses of pursuing the extinguishment valuation were not, on any sensible basis, part of the reasonable expenses for determining the compensation due. As to the EUV, whilst it was accepted that Mr Smith for the acquiring authority came to accept Mr Matthews' initial figure of £1.85 million, the Tribunal in fact determined the figure at some £277,500 more.

215. The acquiring authority said that the decision in *Purfleet*, referred to by the claimants as guidance on the question of special reasons cannot and should not be regarded as exhaustive in that regard. On business disturbance, the claimants had advanced a case which maintained that the Clearun business had been wholly extinguished, and sought some £1.4 million on that basis. The Tribunal accepted the acquiring authority's evidence on whether extinguishment had taken place, and thus determined that no compensation was due under this head. Further, it was submitted that the Tribunal made a number of references to its concerns that it had not been properly informed by the claimant in connection with this aspect of the claim. In those

circumstances, the claimants' conduct should be regarded as so unreasonable as to justify the authority being awarded its costs on that issue.

216. The same goes for the rule (2) aspect of the claim. The Tribunal recorded that it had heard "overwhelming evidence" to support the authority's valuation approach, as opposed to that of Mr Matthews.

Discretion

217. The claimants submitted that that, in exercising its discretion as allowed under the rules, there were some matters that should be taken into account. The acquiring authority was initially only offering the claimants £1 million per acre for the land (a total of £1.05 million) and it was not until December 2012 that Mr Smith in his rebuttal report agreed Mr Matthews EUV figure of £1.85 million. The initial low offer was the principal reason why a suitable relocation site could not be found, and had the offer amounted to £1.85 million there was every likelihood that relocation could have taken place, and these proceedings might have been unnecessary.

218. The acquiring authority dismissed this argument because it comprised unsubstantiated assertions as to possible reasons why relocation did not take place, whereas relocation was not even a live issue at the hearing since the authority had accepted that there were no alternative sites to relocate to. Indeed, the claimants' statement of case gave the reasons for non relocation as the unavailability of sites, rather than the lack of suitable funding.

Conclusions

219. The simple fact is that the sealed offer of 24 May 2011 was not exceeded by the Tribunal's determination. The requirements of s.4(1)(a) were therefore met. We are somewhat mystified as to why the claimants purport to rely on *Purfleet* and paragraph 29 in particular, which related to whether or not the claimant should have all his costs where he had been successful in beating a sealed offer. In this case the offer was not beaten and the claimant lost. The issue is, therefore, whether they should be obliged to pay all, any or some of the authority's costs. The only means by which the claimants might be able to avoid paying all, any, or some of the acquiring authority's costs is if the Tribunal thinks there are special reasons why it would not be proper to do so.

220. We are not persuaded by the claimants' arguments as to why they should not have to pay any of the authority's costs, and disagree with their understanding of the interrelation between sections s.4(1)(a) and (b), preferring the authority's interpretation. As the acquiring authority said, it would be remarkable if it was unable to recover its costs where it had made a sealed offer which was well in excess of the Tribunal's determination and had been open for acceptance for some two and a half years. It had only been withdrawn some time after the hearing had ended, and closing submissions had been made. In our judgment the claimants had more than enough time to consider the offer (which, despite what the claimants said, we do not think was

made too early) and we agree, for the reasons set out by the authority, that *Foster* cannot possibly have any application in this case. It would be ridiculous if the existence of such an offer, properly made, had to be treated as though it had never existed if, for some entirely justified reason, it had been withdrawn. If that were right, it would mean that the existence of a sealed offer would have to be deemed irrelevant to the Tribunal's discretion on costs, in that it would be unlawful to have regard to it.

221. In our view, in the light of these submissions, the claimants should pay the acquiring authority's costs from 24 May 2011, the date the sealed offer was made (we agree that *Chapter Group* does not apply), to 19 December 2013, the date it was withdrawn. Whilst the acquiring authority's reasons for withdrawing the offer seem to us to be sound, we do not however think it would be right for the claimants to have to pay their costs after that date. In our view the authority's protection on costs exists up until the offer was withdrawn, but thereafter the fact that it was is considered to be a "special reason" to deprive them of their costs from that date.

222. As to the question of the two particular issues, we accept entirely the acquiring authority's rebuttal of the claimants' submissions. We also find the claimants' submissions in respect of discretion unsustainable.

223. We therefore determine that the claimants shall pay the acquiring authority's costs in the reference between 24 May 2011 and 19 December 2013. The claimants shall have their costs prior to 24 May 2011, and for the period after 19 December 2013 there shall be no order as to costs. Costs to be on the standard basis and, if not agreed, to be the subject of a Detailed Assessment by the Registrar.

DATED 15 May 2014

HH David Mole QC

P R Francis FRICS