UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 437 (LC)
Case Number: ACQ/422/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – former mill building occupied by various businesses – value – whether planning permission required to use bulk of accommodation as offices – held that it was – cost of essential repairs – whether 50 per cent vacancy rate should be adjusted to reflect impact of proposed CPO – held that it should – rental value – hope value - yield – disturbance – compensation determined at £2,045,043.95 – Land Compensation Act 1961, s9

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **THOMAS NEWALL LIMITED** **Claimant**

and

LANCASTER CITY COUNCIL **Acquiring Authority**

Re: St George's Works
St George's Quay
Lancaster
LA1 5QJ

Before: N J Rose FRICS

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 3 -7 October 2011

Barry Denyer Green instructed by Holdens solicitors of Lancaster for the claimant
Guy Roots QC and Alexander Booth instructed by Eversheds solicitors of Manchester for the acquiring authority.

The following cases are referred to in this decision:

Thomas Newall Ltd v Lancaster City Council [2010] RVR 223
Burdle v Secretary of State for the Environment [1972] 3 All ER 240
Church Commissioners v Secretary of State for the Environment [1996] 71 P & CR 73
Graysim Holdings Ltd v P & O Property Holdings Limited [1996] AC 329
Fraser v City of Frasersille [1917] AC 187
Birmingham Corporation v West Midland Baptist (Trust) Association Inc [1970] AC 874
Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565
Waters v Welsh Development Agency [2004] 1 WLR 1304
Transport for London v Spirerose Ltd [2009] 1 WLR 1797
Potter v Hillingdon London Borough Council [2010] UKUT 212
Minister of Transport v Pettitt [1969] 20 P & CR 344
M and B Precision Engineers Limited v London Borough of Ealing (1973) 225 EG 1190.
London County Council v Tobin [1957] 1 All ER 649.
Lesquende v Planning and Environment Committee of the State of Jersey [1998] 1 EGLR 137

The following cases were also cited:

Tiverton & North Devon Railway Co v Loosemore [1884] 9 App Cas 840
Snook v Somerset CC [2005] 1 EGLR 147
Johnston v Secretary of State for the Environment (1974) 28 P & CR 424
Lee Verhulst Investments v Harwood Trust [1973] QB 204
Hartley v MHLG [1970] 1 QB 413
Hughes v Secretary of State for Environment (2000) 80 P & CR 397
Panton v Secretary of State for Environment, Transport and Regions [1999] 1 PLR 92
Ullah v Leicester City Council [1996] 1 EGLR 244
Hughes v Doncaster Metropolitan Borough Council [1991] 1 AC 382
British Electricity Authority v Cardiff Corporation (1951) 158 EG 233
Harvey v Crawley DC [1957] 1 QB 485
Director of Buildings and Lands v Fung Shun Ironworks [1995] 2 AC 111
Lesquende v Planning and Environment Committee of the State of Jersey [1998] 1 EGLR 137
Transport for London (London Underground Limited) v Spirerose Limited [2009] UKHL 44
Horn v Sunderland Corporation [1941] KB 26
Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132
Cedar Rapids Manufacturing and Power Company v Lacoste & Others [1913] AC 569
Smith v Birmingham Corporation [1974] 29 P & CR 265
Minister of Transport v Pettitt [1969] 20 P & CR 344
Pearl Wallpaper Holdings Ltd v Cherwell District Council [1977] 2 EGLR 166
D B Thomas & Son Ltd v Greater London Council [1982] 1 EGLR 197
London County Council v Tobin [1959] 1 All ER 649
Inland Revenue Commissioners v Clay [1914] KB 466
Welford v EDF Energy Networks (LPN) plc [2006] 3 EGLR 165

DECISION

Introduction

1. This is a reference to determine the compensation payable by Lancaster City Council, the acquiring authority, to Thomas Newall Limited (TNL) for the freehold interest in a former mill known as St George's Works, St George's Quay, Lancaster, LA1 5QJ (the reference land) which was acquired by the acquiring authority in 2006.

2. Two references were made to the Tribunal. One (ACQ/422/2008) was to determine the compensation payable pursuant to a building agreement dated 16 February 2006 between the claimant, the acquiring authority and a company known as Luneside East Limited, which had been selected by the acquiring authority as developers of a large area including the reference land, known as Luneside East. The second reference (ACQ/338/2008) was to determine the compensation payable following a general vesting declaration made pursuant to the Lancaster City Council (Luneside East, Lancaster) Compulsory Purchase Order 2005 (the CPO). Following the conclusion of the hearing the parties agreed that the building agreement should be treated as covering the rights and obligations of the parties and the source of the Tribunal's jurisdiction; that the relevant date for valuation purposes was 1 August 2006 as provided in clause 15.3 of the building agreement and that reference ACQ/338/2008 was withdrawn.

3. On 12 January 2007 TNL served notice determining the building agreement on the grounds that certain "Purchase Conditions" had not been satisfied. The claimant is entitled to compensation under clause 15 of the building agreement, defined as follows:

> "any compensation which would be payable to TNL as a result of any acquisition pursuant to the CPO including but not limited to any payments under the Compulsory Purchase Act 1965, the Land Compensation Acts 1961 and 1963 [clearly a typographical error intended to read 1973] and the Planning and Compulsory Purchase Act 2004."

4. On 29 March 2010 the Tribunal (Her Honour Judge Alice Robinson and N J Rose FRICS) determined certain preliminary issues in the two references then extant as follows [2010] RVR 223:

"(a) For the purposes of section 16 of the Land Compensation Act 1961 it should not be assumed that planning permission would be granted for development of the claimant's land comprising retention, conversion, extension and change of use of the mill building to provide approximately 150 flats.

(b) For the purposes of section 14(3) of the Land Compensation Act 1961 there was a 40% chance that planning permission for the claimant's proposal would be granted 5 years after the valuation date.

(c) It could not reasonably have been expected at the valuation date that approval of reserved matters pursuant to the outline planning permission dated 6 November 2002 would be granted for the claimant's land comprising retention, conversion, extension and change of use of the mill building to provide approximately 150 flats."

5. At the subsequent hearing before me to determine the question of compensation Mr Barry Denyer Green of counsel appeared for TNL. He called one witness of fact, Mr Stephen Loxam, TNL's managing director, and three expert witnesses, Mr Mark Krassowski BA (Hons), BSc, MRICS (planning), Mr Ian Potts BA(Hons), FRICS, FBEng (building costs) and Mr Richard Asher FRICS (valuation). Mr Guy Roots QC and Mr Alexander Booth of counsel appeared for the acquiring authority and called expert evidence from Ms Samantha Ryan BA(Hons), MRTPI (planning), Mr John Ashall BSc, MRICS (building costs) and Mr Andrew Gerald Massie BSc (Hons), MRICS, IRRV, MCIArb (valuation).

Facts

6. From an agreed statement of facts and the evidence I find the following facts.

7. The reference land is situated approximately 0.75km to the north-west of the town centre of Lancaster, in an area known as Luneside East. It has a frontage of approximately 122 metres (400 feet) to the south side of St George's Quay, a local distributor road. The reference land lies directly to the west of the West Coast railway line (comprising railway embankment and viaduct) and the Carlisle railway bridge over the River Lune.

8. The site area of the reference land is approximately 0.7 hectares (1.73 acres). It is irregular in shape, more or less level in contour and at grade with St George's Quay. The claimant's freehold interest was subject to rights of way leading from St George's Quay between building 4 and building 5 and then across the parking area to the rear in a southerly direction and alongside unit 12. There was then a further right of way leading from this main right of way which crossed the main section of the reference land in an east west direction.

9. In addition to the freehold interest TNL claimed title to a strip of land to the west of building 4 (the IBS building). At the valuation date this matter remained unresolved.

Buildings 5 and 6

10. Buildings 5 and 6 were positioned along the northern boundary of the site, towards the north eastern corner of the reference land and adjacent to the pavement on the southern side of St George's Quay. They were constructed of solid stone walls in the 1840s and 1850s respectively. The accommodation was arranged on ground, first, second and third floors, after the original first floor was removed and the ground floor raised by approximately 3 feet above the road level. The ground floor was constructed from concrete. It had a ceiling height of approximately 4.85 metres (16 feet) to the underside of the beams above. In several of the ground floor units mezzanine level floors had been constructed internally. The upper floors were constructed from steel columns and beams with timber joists and timber floorboards, the majority of which had been screeded. The roof of building 5 consisted of a flat pitched decking system, surfaced with a butyl rubber membrane. The roof of building 6 was a multi-pitched, king post, solid timber truss structure, surfaced with slate tiles. Buildings 5 and 6 had two main pedestrian entrances accessing the building directly off St George's Quay. The building also had a further four pedestrian entrances accessed off St George's Quay and three pedestrian entrances off the parking area at the rear.

11. The building had three vehicle loading bays accessed directly off St George's Quay, with a further access via a set of double doors on the north-eastern corner. There were two fire protected stairwells serving all levels of the building, both situated at the rear (southern) wall. There were two other stairwells in the building, The one in the north - western corner of building 5 was fire protected and served the ground, first and second floors. The other was situated adjacent to the front (northern) wall near the midpoint of building 6 and linked the main pedestrian entrance with the first floor. A further fire protected stairwell was located on the northern side of building 6 and serviced the ground, first and second floors.

12. The building had shared toilet facilities on the ground, first and second floors only. There were two electric lattice gate goods lifts in the building, each adjacent to the stairwells on the rear wall. The building had a fire alarm system throughout with smoke detectors, manual call points and sounders with emergency lighting serving the primary escape routes. Approximately half of the building was serviced by a centrally monitored security system with a combination of magnetic door sensors and passive infrared movement sensors. The building was heated by an oil fired central boiler system, recirculating heated water through banks of perimeter heating pipes around the structural walls of the ground, first and second floors. A number of additional radiators were also provided to central areas. The ground floor comprised a variety of accommodation types including offices, studios, a trade counter, workshops, showroom and storage. The first floor generally comprised office and showroom accommodation, with some storage. The second floor comprised open plan offices, a gymnasium and artists' studios. The third floor comprised workshop and storage accommodation.

13. The net internal floor areas were as follows:-

	sq ft.
Ground floor	8,976
Mezzanine	3,241
First floor	9,239
Second floor	10,606
Third floor	10,743
	42,805

Building 4

14. Building 4 was situated along the northern boundary of the site, towards the north-western corner of the reference land, adjacent to the pavement on the southern side of St George's Quay. It was constructed in about the 1840s of solid stone walls with a flat decking roof. As with buildings 5 and 6 it was arranged on ground, first, second and third floors, after the original first floor was removed and the concrete ground floor raised by approximately 3 feet above the road level. The upper floors were constructed with steel columns and beams and with timber joists and screeded timber floorboards.

15. The building had a pedestrian entrance accessed off St George's Quay, and a pedestrian entrance directly into the stairwell and lift core off the vehicle archway to the east of the building. There was a vehicle entrance and loading bay accessed directly off St George's Quay. Access to the upper floors was provided by a 7 person electric lift within a perimeter stairwell.

16. Approximately half of the ground floor contained cellular office accommodation with mezzanine offices above.

17. The net internal floor areas were as follows:

	sq.ft.
Ground floor	3,982
First floor	3,993
Second floor	3,993
Third floor	5,165
	17,133

Building 12

18. Building 12 was situated to the rear of the site, some distance behind building 4 on an area of land extruding southwards. It was erected in about the 1950s. It was a single storey, steel framed industrial building, divided into two units with elevations comprising blockwork to approximately 15 feet and corrugated cement sheeting above. The building had a solid concrete floor. The roof cladding was a combination of corrugated cement sheets and translucent panels. The building had a roller shutter door on the northern elevation providing vehicular access to Unit 12. It also had twin wooden doors on the eastern elevation, providing vehicular access to Unit 12A.

19. Unit 12 had a toilet and kitchen with mezzanine offices above. Unit 12A contained an office and toilet with mezzanine storage above.

20. The net internal floor areas were as follows:-

			sq.ft
12	-	Ground floor	2,400
12	-	Mezzanine	160
12A	-	Ground floor	1,850
12A	-	Mezzanine	150
			4,560

Building 7

21. Building 7 was situated to the rear of building 6, towards the southern and eastern boundaries of the reference land. It was constructed at about the same time as building 6, with which it intercommunicated. It had solid stone walls, a solid concrete floor and a pitched timber frame roof with cement sheet cladding. There was a pedestrian door on the southern elevation.

22. The net internal floor area was 2,880 sq ft, all on the ground floor.

Building 1 – "red brick building"

23. Building 1 was constructed in about the 1870s. It was located behind building 6, towards the southern boundary of the reference land and was derelict.

Parking areas

24. There were two level, rectangular parking and yard areas to the rear of buildings 4 and 5. They were surfaced with a combination of materials including compacted aggregate, concrete and asphalt. The individual parking spaces were not formally marked out.

Tenants in occupation

25. At the valuation date, out of the total net internal area of 67,378 sq ft, 31,105 were occupied, all in buildings 5, 6 and 12. They included 916 sq ft in building 6 occupied by the claimant, and 4,973 sq ft in building 5 occupied by Westgate House, whose owner was a relative of Mr Loxam.

26. Very little formal lease documentation has been produced. Some units were occupied on informal agreements, others on formal leases which had expired, the tenants holding over. Most tenants were protected by the provisions of Part II of the Landlord and Tenant Act 1954. In general tenants were responsible for rates and internal repairs, and the claimant was responsible for repairs to the exterior and common parts. Some tenancy agreements entitled the landlord to demand a service charge for certain services including heating, water, electricity, security alarm, insurance and decoration of common areas.

The respective valuations

27. Mr Asher's expert report was dated 13 May 2011. It contained his valuations of the reference land at Appendix 7. The valuations were prepared on the assumption that the planning position was as follows. Buildings 5 and 6 were a single planning unit whose established use was B1 and B8, apart from the ground floor (which had consent for B1 use) and units 6BS and 6CS (which had consent for a gymnasium). There was no specific division between the use of buildings 5 and 6 for B1 and B8, although there would need to be a continuation of both uses within the building. Buildings 7, 4 and 12 were each separate planning units, with established uses as B1, B1 and B8 respectively.

28. The following rental values were adopted: upgraded office accommodation £7 per sq ft (£8 per sq ft for building 4, which was assumed to be refurbished to a higher standard); gymnasium £3.50 per sq.ft; industrial, workshop and storage space approximately £3 per sq.ft. Mr Asher assumed an ongoing vacancy rate equivalent to 15% of the estimated rental value and an ongoing deduction of 10% for letting fees in relation to the vacant space.

29. Mr Asher assumed that a purchaser of the reference land would have been a local businessman or investor, who would expect to retain an office in the building, from which he would carry out active day to day management in a similar way to that previously undertaken by the claimant. Allowance was made for the cost of repairs and upgrading necessary to bring the majority of the vacant areas up to a lettable standard. Mr Asher adopted the following capitalisation rates: buildings 5 and 6, 9%; building 4 (assumed let to a single tenant), 8.75%; buildings 7 and 12, 9.25%, and arrived at a capital value of £3,000,000.

30. Appendix 7 to Mr Asher's report also contained a second valuation, reflecting hope value. On this basis the capitalisation rates were reduced to 8.5% (buildings 5 and 6), 8.25% (building 4) and 8.75% (buildings 7 and 12), producing a capital value of £3,200,000.

31. Mr Asher prepared a rebuttal report dated 8 July 2011. Having considered the evidence produced by Mr Krassowski and Ms Ryan be assumed that buildings 5 and 6 should be regarded as a single planning unit, for which planning permission would not be required to convert most of the space to offices provided that a reasonable amount of floor space was devoted to B8. (Mr Asher subsequently explained that he had assumed that approximately 20% of the building would have to be retained as B8). Mr Asher further assumed that buildings 4, 7 and 12 were each single planning units, and that approximately 23% of building 4 could be used as storage/distribution and the remainder as offices.

32. Mr Asher considered that most of the vacant space in buildings 5 and 6 could have been converted to offices and that many of these areas would have required some refurbishment works to bring them up to the modest standard required by the market. His valuation assumed that, in the "no scheme world" this work would have been carried out prior to the valuation date, given the clear demand for low cost offices. It included an allowance for the cost of the necessary refurbishment based on figures provided by Mr Potts.

33. Mr Asher reduced the rental value of offices in building 4 from £8 to £7 per sq ft to reflect the mixed use of the property and he valued the ground floor storage at £3 per sq ft. He capitalised the resulting rental values at the same rates as he had adopted in his second valuation in Appendix 7, that is reflecting hope value. These assumptions were all incorporated in Mr Asher's revised valuation (Appendix 16), resulting in a capital value of £2,850,000.

34. Mr Asher prepared a second revised valuation (Appendix 17), reflecting Ms Ryan's view that each area of occupation within buildings 5 and 6 was a separate planning unit. On this basis planning permission would be required to change a number of the units to B1 offices. Mr Asher valued the vacant space as potential offices at between £6.50 and £7 per sq ft depending on location. He allowed 9 months for the necessary building works but no letting void or rent free period. He took into account the cost of the works which the planning experts had by then agreed would be required as a condition of obtaining planning consent. He did not reflect any section 106 requirement in respect of public transport costs, in view of the views of Mr Regan and Mr Krassowski on the subject. He valued the whole of building 4 as offices, and reverted to a rental value of £8 per sq ft to reflect the replacement of the existing lift shaft and entrance at the front of the building. Finally, he discounted the value by 10 per cent to reflect the limited risk in relation to obtaining planning permission, which the planning experts agreed would have been forthcoming. He adopted the same capitalisation rates as in Appendix 16, producing a value of £3,050,000.

35. In response to additional information of which he had by then become aware, Mr Asher produced a supplemental rebuttal report on 27 September 2011. This contained two further appendices, 20 and 21, showing values of £2,850,000 and £3,050,000 (assuming buildings 5 and 6 constituted a single planning unit and a series of planning units respectively). Mr Asher explained that he now relied on three valuations, depending on the planning scenario determined by the Tribunal, namely those in Appendices 7, 20 and 21.

36. Mr Massie's valuation was contained in his expert report dated 12 May 2011. He said that the most likely purchaser of the reference land would have been someone intending to let it out in parts as the claimant had done. In considering what he was prepared to pay the purchaser would have taken professional advice and considered a number of options ranging from, on the one hand, doing minimum works and letting to the type of occupier already at the property at a broadly similar level of rents to, on the other hand, doing sufficient works to change the quality of the accommodation to be able to offer office space at higher rents than those currently achievable. To represent the range of options which a potential purchaser might have considered. Mr Massie identified four "scenarios":

> Scenario 1 envisaged the continuation of uses similar to those existing on or before the valuation date allowing for some essential works. Two sub-options for building 4 were considered; scenario 1(a) envisaged doing minimum works to prevent further deterioration without making it suitable for letting for any use, and scenario 1(b) envisaged doing sufficient to enable it to be let for storage use. He also assumed that essential repair works would be undertaken to buildings 7 and 12.
>
> Scenario 2 was the same as (1) except that refurbishment of building 4 was considered for 'basic' office use.
>
> Scenario 3 was the same as (1) except that refurbishment of building 4 was considered for a good standard of offices.
>
> Scenario 4 envisaged that the whole of buildings 4, 5 and 6 would have been refurbished to a good standard of offices with 'active' uses on the ground floor, the remainder being demolished. Building 12 would have been repaired and building 7 demolished.

37. Mr Massie's appendix AGM 2 contained an appraisal of the potential for converting buildings 4, 5 and 6 into offices using the costs provided by Mr Ashall. This exercise made it so clear that such a conversion would not be viable that Mr Massie did not produce valuations specific to his scenarios 2, 3 or 4. Accordingly, Mr Massie's valuation was based upon his scenario 1. In that context 1 Mr Massie looked at two sub-options for building 4: scenario 1(a) assumed it would have been 'mothballed' and scenario 1(b) assumed that it would have been used for storage.

38. Mr Massie's valuation based upon his scenario 1 was set out in Appendix AGM 1 of his first report. He started with the building in its existing condition and with the tenants that existed on the valuation date. The valuation reflected a three year period. In the first year he assumed that the existing tenants would have been retained and essential works carried out. In the second year a proportion of the vacant accommodation would have been let and some rental increases achieved from existing tenants. In the third year the remaining vacant accommodation would have been let.

39. Having considered various lettings of other commercial properties Mr Massie concluded that as a mixed commercial property rental levels would have been achieved ranging from £1.50 per sq ft for storage in the upper parts of the building to £6.50 per sq ft for the best office suites, while office suites overlooking the railway line or with limited natural light would have commanded lower rental levels. He considered the following rental levels would apply:

Ground Floor	
Industrial and storage	£2.50 to £3.50 per sq ft
Offices	£4.50 to £5.00 per sq ft
First Floor	
Showroom	£3.50 per sq ft
Offices	£5.00 to £6.50 per sq ft
Second Floor	
Offices	£5.00 per sq ft
Storage	£2.00 per sq ft
Third Floor	
Storage	£1.50 per sq ft

40. From the resultant rents Mr Massie deducted 10 per cent for management costs in the first two years. Thereafter he allowed 7.5 per cent for management, 7.5 per cent for ongoing maintenance and a 10 per cent running void. The net income was capitalised at 9 per cent.

41. Mr Massie prepared an appraisal of building 4 for storage use, which showed that such a refurbishment would not have been financially viable. He therefore adopted the alternative option of 'mothballing' the building, applying to it a spot figure of £100,000. After deducting purchaser's costs this exercise produced a value of £1,203,772. He then deducted £560,920 for essential works and upgrading costs, including £50,000 for undertaking the works necessary to prevent further deterioration to building 4 over the next five years. This produced a value of £642,852, say £650,000.

The planning evidence

42. In his expert report dated 16 May 2011 Mr Krassowski said that, with the exception of the ground floor of buildings 5 and 6 which were granted permission for light industry in 1979, and second floor units 6BS and 6CS in building 6 which were granted permission for a gymnasium in 1997, none of the uses taking place on the reference land benefited from an express planning consent. Permission was granted for part of the third floor to be used as a gymnasium as part of the 1997 consent, but this part of the building was never occupied for the permitted purpose. Nevertheless, a variety of uses falling within Use Clause B1 (business) and B8 (storage and distribution) of the Use Clauses Order 1987 appeared to have taken place within the building as a whole since at least 1979/80 and continued up until the valuation date.

43. Mr Krassowski referred to the High Court judgment in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240, which set out three criteria to be considered when identifying the planning unit which should be considered when deciding whether there had been a material change of use. He said that it was extremely difficult to apply these criteria to buildings 5 and 6 for the following reasons. The delineation of many units changed over time as tenants increased or decreased the size of their occupations. In many cases a change of occupier had led to a change of the specific use, notwithstanding that the uses all stayed within the main B1/B8 use classes. The precise mix of uses within an individual unit often changed over time. TNL actively managed the building over time to meet the ever-changing requirements of its tenants and the units were let on short-term arrangements. He concluded that buildings 5 and 6 should be regarded as a single planning unit containing a composite B1/B8 use. If he was wrong, and the permitted light industrial and gymnasium uses gave rise to the creation of separate planning units, he still considered that the remainder of the building constituted a single planning unit.

44. Because they were both separate buildings with a more clearly defined history of occupation, Mr Krassowski considered that buildings 7 and 12 were separate planning units. Similarly building 4, because of its change of ownership and the fact that it had consistently been in single occupation since 1969, should be considered as a separate planning unit.

45. Mr Krassowski considered that the following table identified the lawful uses of various parts of the reference land, that is uses which had the benefit of planning permission or were immune from enforcement action:

Building	**Lawful use**
4	Mixed B1/B8
5/6	Mixed B1/B8 with ancillary D2
7	B1
12	B8

46. As far as buildings 4 and 5/6 were concerned Mr Krassowski considered that, provided their uses remained within either B1 or B8, and neither planning unit was in a single use, it was possible for parts of the planning unit to change between B1 and B8.

47. In her expert report dated 11 May 2011 Ms Ryan said that a comparison of the use of existing and proposed floorspace at the reference land derived from the claimant's Re-amended Statement of Case showed that very significant changes were contemplated, as follows:-

	Percentage of total floor area	
Use	**Existing**	**Proposed**
Office	30	83
Storage	26	6.5
Workshop	3	3
Retail Showroom	14	5
Gymnasium	9	0
Studio	14	0

48. The claimants' later suggestion indicated that, although there were no proposals to change the use of buildings 7 and 12, the whole of building 4 would change from a mixture of B1/B8 to offices.

49. Ms Ryan said that, if she had been consulted by a potential purchaser at the valuation date she would have advised as follows. TNL's proposal would have resulted in a material change in use of the reference land as a consequence of the significant increase in office floorspace within buildings 5 and 6 for which planning permission would have been required. Planning permission would have been required for a change of use of building 4 to offices. The lawful use of that building was not clear since it had been vacant for at least 3 years and it would not have been possible to demonstrate continuous use for the required period of 10 years in order to prevent enforcement action. Although planning permission would have been refused for TNL's proposal, it was likely that, in practice, it would have been possible to negotiate amendments to the development to make it acceptable to the local planning authority, enabling planning permission to be granted subject to the imposition of appropriate conditions and a contribution towards the cost of improving the local bus service.

50. The modifications to the proposal which would have been required in order to enable planning permission to be granted would have comprised: introduction of a food and drink use into the ground floor of building 6 with an associated sitting-out or public open space area to the rear; widening of the existing archway to create a vehicular access to the site; provision of a landscaped area for car, motorcycle and cycle parking to the south of the mill; demolition of buildings 1 and 7 to accommodate car parking, an attractive non-vehicular link to the south, and a sitting out area/public open space.

51. Ms Ryan considered that, in the event that planning permission was granted for such an amended scheme, conditions and obligations would have been required to secure the following: (i) ground remediation of the application site; (ii) transport and access, including a Green Travel Plan, cycle storage and contribution to sustainable public transport measures, and the promotion of a Traffic Regulation Order to prevent parking on the south side of St George's Quay; (iii) a landscaping scheme for the site; (iv) the laying out and maintenance of an area of public open space (or sitting out area) on land to the south of building 6A; (v) an asbestos survey and appropriate remediation strategy for the building; (vi) archaeological survey and recording of the mill and any buildings to be demolished on the site; (vii) a bat survey and appropriate mitigation measures to ensure that there would be no harm or disturbance to bat roosting sites; (viii) the creation of an attractive permeable route for pedestrians and cyclists through the site to land to the south; (ix) appropriate flood remediation measures for the site, most particularly to ensure a minimum finished floor level of all accommodation 200mm above finished ground level.

52. Finally, Ms Ryan would have advised that a planning application and a section 106 agreement would have taken 6 months to complete.

53. In his rebuttal report dated 8 July 2011 Mr Krassowski said that, if the Tribunal concluded that planning permission was required, the claimant's proposals could be amended such that they would be likely to obtain planning permission. That permission would contain the planning conditions and section 106 obligations suggested by Ms Ryan, except that there was no justification for a financial contribution towards a subsidised bus service.

Planning – conclusions

54. The main planning issue between the parties is whether the changes of use envisaged in Mr Asher's valuations would have involved a 'material change of use.' In order to decide whether a change of use involves a material change requiring planning permission, it is necessary first to identify the 'planning unit.' The considerations which are relevant when determining the planning unit were described by Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER in these terms:

> "What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.
>
> First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from the case of *G Percy Trentham Ltd v Gloucestershire County Council*, where Diplock LJ said:
>
> > 'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a 'material change in the use of any buildings or other land'? As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'
>
> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
>
> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.
>
> To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree."

55. In *Church Commissioners v Secretary of State for the Environment* the High Court [1996] 71P & CR 73 (R M K Gray QC) upheld the decision of the Secretary of State to the effect that each shop in the Metro Centre in Gateshead was a separate planning unit notwithstanding the landlord's control over the common parts.

56. Mr Denyer Green emphasised the prefatory words of Bridge J, that he was not propounding exhaustive tests to cover every situation, and his concluding guidance, that it must always be a question of fact and degree. He also relied on an observation concerning occupation by Lord

Nicholls in *Graysim Holdings Ltd v P & O Property Holdings Limited* [1996] AC 329 which concerned the statutory protection afforded to business tenants by Part II of the Landlord and Tenant Act 1954. Such protection applies to any tenancy where the demised property is, or includes, premises "which are occupied by the tenant and are so occupied for the purposes of a business carried on by him."

57. After considering a number of examples, Lord Nicholls said at page 336:

> "To look for a clear line between these instances would be to seek the non-existent. The difference between the two extremes is a difference of degree, not of kind. When a landowner permits another to use his property for business purposes, the question whether the landowner is sufficiently excluded, and the other is sufficiently present, for the latter to be regarded as the occupier in place of the former is a question of degree. It is, moreover, a question of fact in the sense that the answer depends upon the facts of the particular case. The circumstances of two cases are never identical, and seldom close enough to make comparisons of much value. The types of property, and the possible uses of property, vary so widely that there can be no hard and fast rules. The degree of presence and exclusion required to constitute occupation, and the acts needed to evince presence and exclusions, must always depend upon the nature of the premises, the use to which they are being put, and the rights enjoyed or exercised by the persons in question."

58. Mr Denyer Green submitted that the position relating to occupation under Part II of the Landlord and Tenant Act 1954 must be regarded as involving a higher test as against the landlord, because of the issue of security of tenure, which did not arise where the issue was the planning consequences of a change of use.

59. For the purposes of this decision I am not required to decide definitively whether buildings 5 and 6 constituted a single planning unit or a number of individual units. Rather, the question is what view would have been taken by a potential purchaser as to the need to obtain planning permission for the uses proposed by Mr Asher. I am satisfied that such a purchaser would have calculated what he could afford to pay on the assumption that such planning permission would be required. Mr Krassowski pointed to a number of factors which he thought suggested the existence of a single planning unit. I do not consider that, individually or collectively, they support that contention, for these reasons. Although Mr Krassowski suggested that the gymnasium use was ancillary to the main B1/B8 use, there was no evidence to suggest that the use of the gymnasium was specifically directed to other employees in buildings 5 and 6 and he conceded in cross-examination that the expression "ancillary" was " a bit misleading." Although Mr Krassowski emphasised that the areas occupied by individual companies expanded and contracted on occasions and suggested that it was possible to walk from floor to floor and from occupier to occupier without confronting a locked door, he accepted that the claimant could not take back any part of the area occupied by a particular tenant without that tenant's agreement. He also relied on the fact that buildings 5 and 6 contained common entrance and access ways and toilets. In my judgment, however, that fact is not material, given my clear conclusion on the evidence that various units were in the exclusive occupation of individual tenants. I accept Mr Roots's submission that the facts about the occupations and uses within buildings 5 and 6 are indistinguishable in principle from those in *Church Commissioners.* I am satisfied that a potential purchaser of the reference land would have been advised that buildings 5 and 6 contained a significant number of individual planning units.

60. It is agreed that units 12 and 4 each comprised a separate planning unit. Mr Krassowski considered that unit 7 also comprised a separate unit. Ms Ryan's view was that this was possibly the case, but it was more likely that unit 7 and an adjacent part of the ground floor of building 6 comprised a separate planning unit. In view of the conclusions I have reached as to the approach to be adopted to the valuation, to which I refer later in this decision, it is not necessary for me to reach a definitive conclusion as to the planning status of building 7.

61. It is agreed that no further planning permission was required for a use within the same use class of units 5GB (light industry – B1) and 6BS and 6CS (gymnasium). It is also agreed that, in each planning unit in buildings 5 and 6, a change of use between use classes B1 and B8 was permitted, subject to a limitation of 235 square metres. I would emphasise that this consideration applies only to accommodation with an established B1 or B8 use. In the case of the accommodation occupied by Westgate House and Cane of Kendal the evidence was not unequivocal, but pointed towards the existence of an existing retail use. A purchaser of the reference property would therefore, in my view, have made the assumption that planning permission would be needed to use those areas for office purposes.

62. Mr Krassowski's opinion was that building 4 had an established use for B1/B8 purposes. That opinion was based on information he had been given by Mr Loxam. Ms Ryan disagreed. She pointed to a historic occupancy schedule prepared by Mr Loxam which showed the building was sold by the claimant in 1969 and used for a mixture of offices, storage and trade counter; in 1988 it was then sold or let to a company which used it for a mixture of offices, storage, workshop and retail sales; that use continued until 1996, when it was sold to Independent Business Services (IBS) who used only the ground and first floor for offices, storage, workshop and retail sales. In 2002 IBS vacated the building and it was sold back to the claimant, who kept it vacant.

63. Ms Ryan observed that Mr Loxam's schedule provided only the most basic information relating to the use of building 4. Applying the tests in *Burdle*, it did not provide sufficient information to determine whether the building had a main purpose to which other uses were ancillary (the first test) or a composite use where no particular use dominated (the second test). Ms Ryan also observed that Mr Loxam could not be sure how the building was utilised, because his own witness statement acknowledged that he had not visited the upper floors after the sale in 1969. Finally, she noted that in 2001 IBS had made a planning application in which they described the existing use of the building as "warehouse/vacant."

64. In the course of cross-examination Mr Krassowski expressed the view that the person who prepared the 2001 planning application for IBS had made an error. He added, rather surprisingly, that the application form would have been completed differently if the author had known that it would be the subject of consideration in this Tribunal. In my judgment there is no satisfactory evidence to support Mr Krassowski's contentions on this issue. I find that building 4 was last used as a warehouse before its sale to the claimant in 2002 and, even if the use for that purpose had been established prior to that date, it had been abandoned by the valuation date. It follows that a purchaser of the reference property would have been advised that planning permission would be required for the office uses assumed by Mr Asher in his valuations at Appendices 20 and 21.

65. Finally I consider the section 106 contributions, if any, which would have been required to improve public transport accessibility to the reference land if planning permission were granted for

Mr Asher's proposed scheme. Ms Ryan relied on a letter from Mr Nigel Robinson, which suggested that the required subsidy would be £73,300 per annum for 5 years. The actual level of contribution over the 5 year term would have been calculated on a yearly basis using a formula linking the required level of subsidy to actual patronage. The acquiring authority's policy was to require a returnable bond of 50% of the contract price for the full 5 year period to protect the council from revenue and cost risks.

66. In a subsequent letter to Mr Krassowski, Mr Luke Regan pointed out that guidance on developer contributions was contained in ODPM Circular 05/2005, which set out five policy tests. It cross examination Ms Ryan accepted that Mr Robinson's advice was based on the assumption that planning permission would be required for the totality of the floorspace at the reference land. She agreed that if the necessary evidence was available to show that planning consent was only needed to change the use of parts of the property, a smaller figure would be negotiated. On the basis of the available evidence, taking account of the fact that the required bond would only be for 50% of the contract price and Mr Regan's view that it could be argued that the proposed development was not significant enough to require specific public transport improvements unless substantial third party contributions were available, I find that a prospective purchaser interested in converting much of the reference land to offices would have assumed that a contribution of up to £50,000 would be required towards the cost of public transport.

The consideration paid for the reference land under the building agreement and the cost of essential repairs

67. In Paras. 3.2.3 and 3.2.4 of his expert report dated 12 May 2011 Mr Massie summarised the building agreement dated 16 February 2006 in these terms:

> "The objective of the Building Agreement was to secure the development of the Subject Property in accordance LEL's overall proposals for Luneside East. The Building Agreement provided for the Claimant to undertake the refurbishment/redevelopment of the Subject Property (in a reconfigured form) for predominantly commercial uses to the satisfaction and requirements of the Council and LEL. The Claimant's development proposals were to be undertaken within the setting of a regenerated Luneside East area with the remainder of the development undertaken by LEL including initially the removal of the existing buildings and uses, decontamination and remediation, provision of infrastructure and public realm and critically the creation of the critical mass and environment that would have been necessary to attract occupiers to the area.
>
> The Building Agreement provided for the Council to acquire all the Claimant's interests in Luneside East, and in particular its freehold interest in the Subject Property, for which the Council was to pay the Claimant a consideration of £2.0m. The Council was then to transfer all of the land interests, including the Subject Property, to LEL. LEL was then to grant the Claimant a long leasehold interest in the part of the Subject Property that was to be retained in the LEL development (bearing in mind that the masterplan provided for part of the Subject Property to be demolished). The Claimant was then to pay LEL a premium of £2.0m for the grant of that lease with the monies to be used by LEL for the purposes of the infrastructure, public realm and other preparatory works in relation to the LEL development. LEL was to undertake certain works to the buildings that were to be the subject of the lease including reconfiguration and reconstruction, although the costs of those works were to be paid by the

Claimant. The Claimant was to be obliged to complete the refurbishment of the buildings in accordance with the LEL development masterplan and the requirements of the grant funding."

68. In his witness statement dated 13 May 2011 Mr Loxam referred to the fact that Mr Massie had valued the reference land for the purpose of the building agreement at £2m, and implied that that figure was inconsistent with Mr Massie's current valuation of £650,000.

69. Mr Massie replied in his rebuttal report dated 8 July 2011 as follows:

> "11.10 A valuation which properly accords with Rule 2 could only be thoroughly undertaken following the provision by Mr Loxam of the information concerning the occupation of the Subject Property which was initially provided in Annexes 10 and 15 of the Amended Statement of Case in December 2010 … and the opportunity to consider the condition of the Subject Property and the impact that this would have on the value.
>
> 11.11 My approach to the valuation, being on the investment basis, has always been consistent. The levels of ERV applied have varied with increasing knowledge of the Subject Property but have always been within a range of values, and the yields applied have been relatively consistent. The key variations have resulted from a more accurate assessment of the floor areas being possible once I had been able to inspect the Subject Property more thoroughly and then following the provision of the demise plans by Mr Loxam, the occupancy information provided by Mr Loxam which gave details of tenancies and passing rentals and the detailed investigations and considerations undertaken by Mr Ashall in relation to the condition of the Subject Property. For example Mr Ashall's advice in relation to Building 4 has led to the conclusion that even upgrading Building 4 to use as storage would not be financially viable whereas in the past I had assumed that the condition of Building 4 was such that it could have been viably reused for storage or workshop uses."

70. In the light of all the evidence I have reached the clear conclusion that Mr Loxam was right to suggest that Mr Massie's valuation of £650,000 is inconsistent with the consideration of £2m which he had agreed with TNL in late 2005/early 2006. The reasons for this conclusion are these.

71. Mr Massie referred in his rebuttal report to the limited nature of his inspection of the property. On 5 December 2005, however, he wrote to the claimant's then agent, Mr Paul Wilson, saying:

> "As you know I have valued the Mill at £2.0m – in its existing form, whilst I have gone into the valuation in more detail the valuation represents approximately £30 per sq ft."

By the time that e-mail was sent Mr Massie had carried out more than a limited inspection of the property. That is clear from a letter he wrote to Mr Tyson (who was assisting TNL at the time) on 16 November 2005, in which he said:

> "I am aware from our previous discussions that there is a substantial difference between our respective opinions of value of your client's interest. Following my lengthy inspection of the property I feel that my previous offer to you is fully justified."

72. Mr Massie said, and I accept, that at that time he had not carried out a measured survey of the buildings in order to calculate their net internal floor areas. On 1 February 2006 he provided the claimant with the detailed calculation behind the valuation referred to in his e-mail of 5 December 2005. It showed that Mr Massie had valued on the basis of floor areas totalling 71,505 sq ft. That area excluded what Mr Massie termed the rear building, presumably building12. In fact, the agreed net internal area excluding building 12 is 62,818sq ft. The true area was therefore 12.15% less than the area assumed by Mr Massie when he presented his valuation at £2m. That difference is certainly significant, but it does not of itself explain why his original valuation was, as he now suggests 200 per cent more than the true figure.

73. Mr Massie also relied on the absence of detailed information as to tenancies and passing rentals. By the time he produced his revised valuation of £650,000 he had received such information as was available about the tenancies subsisting at the valuation date. He referred to this information in his expert report dated 12 May 2011 as follows:

> "5.8.3 In relation to the occupation of the subject property, there was very little lease documentation and in the majority of instances it would appear that the arrangements were verbal only. In the absence of documentation there could be no certainty regarding the amounts of rents, the lengths of terms or the status of occupiers regarding security of tenure.
>
> 5.8.4 The uncertainty regarding the occupation of the subject property due to the lack of documentation would have been a significant disincentive to a potential purchaser as he would have been unable to confirm such fundamental matters as rent, lease, covenants and terms and security of tenure."

74. In arriving at his valuation of £650,000 Mr Massie assumed that the existing tenants would remain in occupation at the passing rents in the first year, and that essential works would then be undertaken, followed by the letting of the vacant space. He calculated that the net rental income received in year 1 would be £58,959. In year 2 he assumed that, where the passing rents were below the market level, they would be increased to that level and that some of the vacant space would be let and fully income producing. His estimate of net income in year 2 was £105,080. In year 3 he assumed that the entire building would be let at market rents, producing a net rental (after allowing for long term vacancies) of £110,637.

75. Thus, Mr Massie's valuation of £650,000 assumed that the short-fall below full rental value in the first two years would be £57,235 (£51,678 in year 1 and £5,557 in year 2). This figure is almost identical to the equivalent deduction of £59,814 made by Mr Massie when preparing his £2m valuation. That figure was based on the assumption that, in addition to the long-term vacancy rate, one quarter of the space was vacant and would be re-let within 12 months. As was the case with Mr Massie's £650,000 valuation, that figure was deducted from his estimated capital value assuming the building was fully let at market value. The information now available to Mr Massie as to the passing rentals has therefore not materially affected his valuation.

76. Mr Massie also referred to the fact that it was now clear that much lease documentation was missing, and this would have been a cause of significant concern to a potential purchaser. That deficiency in the quality of the investment was not known to Mr Massie when he prepared his valuation at £2m. The appropriate occasion on which to reflect it in the valuation is when selecting the appropriate yield, which takes into account all the attractions and disadvantages of the

investment. One would therefore expect the required yield to have been higher in Mr Massie's second valuation (producing a lower capital value), because he was by then aware of the lack of documentation. In fact, his original valuation adopted a yield of 9.25 per cent but he reduced it to 9 per cent when arriving at his valuation of £650,000, in full knowledge of the lack of documentation. I therefore reject Mr Massie's suggestion that the subsequent disclosure of the uncertain tenancy position provided any justification for the reduction in his valuation prepared in late 2005.

77. Mr Massie's third main justification for the discrepancy between the two valuations was that, as a result of advice obtained from Mr Ashall, he now realised that a substantial deduction should have been made to reflect the cost of works which were essential if the buildings were to become fully income producing.

78. Mr Ashall has been involved with Luneside East since 2004. He acted as cost consultant to the selected developer, Luneside East Ltd, and provided advice in connection with the developer's masterplan. He said that he had inspected buildings 4, 5 and 6 on 19 April 2006. In his expert report dated 12 May 2011 Mr Ashall included twenty photographs. He said this (para. 4.7):

> "I have included reference to photographs in this section of my report which are contained in Appendix JPA. To my knowledge all of these photographs were taken prior to the valuation date. I have included these photographs to illustrate the general visual impression of the condition of the reference land circa the valuation date, and to illustrate points in the written text of my report."

79. Mr Ashall identified the sources of these photographs as himself, Faulkner Brown architects, Bingham Davis structural engineers and Mr Massie's firm. In the course of cross-examination it became clear that Mr Ashall's knowledge of the photographs was far from complete. Asked the date of his photograph JPA 1.2 he replied that he was not sure, but he had been led to believe that it was prior to the valuation date. Asked whether photographs JPA 1.7 and 1.8 were in fact of building 4 rather than the main mill as stated, he replied that he could not be sure. His photograph JPA 1.9 showed the internal first floor of the main mill in an apparently uninhabitable state. When it was pointed out that Mr Loxam had said in his rebuttal statement dated 8 July 2011 that TNL had occupied the space until 10 November 2006, so that the photograph must have been taken after the valuation date, he replied that he could not accept that without checking. Mr Ashall's photograph JPA 1.10 showed the internal first floor of the main mill in a near derelict condition. His attention was drawn to a photograph of the first floor of building 6 taken in January 2005 and produced by Mr Potts, showing the same floor space in good condition. He was asked whether it was likely that there had been such a deterioration between January 2005 and the valuation date and replied that he would like to check the date of his photograph. Mr Denyer Green then drew Mr Ashall's attention to Mr Loxam's rebuttal, which stated that the accommodation shown on JPA 1.10 had been occupied by Ultimate Outdoors until 10 November 2006 and suggested that the photograph must have been taken after that date. Mr Ashall again replied that he would like to check the position.

80. Notwithstanding the observations in para. 4.7 of his expert report, in the course of cross-examination Mr Ashall said that he had not relied on the photographs that he had produced. He added that he had based his cost estimates on discussions with Mr Massie and his own observations on site.

81. Mr Ashall's estimate of the cost of essential works to maintain the current occupations and re-let the vacant space in buildings 5, 6, 7 and 12 was £435,920. In addition he assessed the cost of putting building 4 into a wind and watertight condition and arresting any further decline at £50,000, and the cost of demolishing buildings 1 and 1A at £75,000. When he prepared his valuation in late 2005 Mr Massie did not consider it necessary to make any deduction for these works. Instead, he assumed that building 4 could be let in its existing condition at full market value and he made an overall allowance of 5% per annum to reflect the ongoing costs of maintenance.

82. Unlike Mr Ashall Mr Massie is a valuer, not a quantity surveyor. He is, however, a very experienced surveyor and a partner in a firm which deals with all major aspects of property consultancy. By 16 November 2005 he had carried out a lengthy inspection of the reference land. In my judgment, if the state of the buildings at that time had been such as to warrant the level of expenditure on essential repairs suggested by Mr Ashall, Mr Massie would have appreciated the position and sought the necessary advice to enable him to make the appropriate allowance for the cost of the required works.

83. Mr Potts also gave evidence on building costs. He was a straightforward witness, but he was at a disadvantage in that he was not instructed until 31 March 2011, and his inspection was limited to the exterior of the property only on 5 April 2011, nearly 5 years after the valuation date. I am therefore unable to place any significant weight on his evidence, nor on that of Mr Ashall in the light of the vagueness of his recollection of the condition of the reference land at the valuation date.

84. Although para. 11.11 of Mr Massie's rebuttal was prepared on the basis that his valuation at £2m represented his opinion of value on the limited information then available, he also sought to justify the difference between that figure and his subsequent valuation at £650,000 on the grounds that the former was not really a valuation at all. He relied in this connection on his e-mail to Mr Wilson dated 5 December 2005. In that e-mail Mr Massie summarised the infrastructure costs which were anticipated to be incurred on the Luneside East development as a whole and which totalled £28.225m. He continued:

> " My estimate is that the section of the Mill proposed to be retained by Mr Loxam (Option 1) is approximately 45,000 sq ft – compared to a total development area of 325,000 sq ft. The section to be retained by Mr Loxam represents approx 14% of the total development.
>
> Based on 14% of the development then the contribution to infrastructure should be 14% x £28.225m = £3.95m say £4.0m.
>
> As you know I have valued the Mill at £2.0m – in its existing form, whilst I have gone into the valuation in more detail the valuation represents approximately £30 per sq ft.
>
> Hence the part of the Mill to be taken under Option 1 is 65,000 sq ft – 45,000 sq ft = 20,000 sq ft. The 20,000 sq ft to be taken valued then at £30 per sq ft = £600,000.
>
> The value of the section of the Mill then taken by LCC (£600k) is considerably below the amount that could be required as an infrastructure contribution (£4.0m). As you know we would be willing to compromise on a quid pro quo.
>
> Let me know if you need anything further for the moment."

85. In the course of cross-examination Mr Massie was asked whether he had taken the value of the reference land into account when considering what payment should be made under the building agreement. He replied "The number did not matter because it was an in and out transaction." That observation was a reference to Mr Massie's expressed willingness to compromise on a quid pro quo basis and to the fact that the building agreement provided for the claimant to receive a consideration of £2m for the reference property and to pay an identical lease premium to be used for infrastructure purposes.

86. I accept that, when he sent Mr Wilson the e-mail on 5 December 2005, Mr Massie's instructions were to agree identical figures for those two payments. It does not follow, however, that his statement in the e-mail that he had valued the mill at £2m was untrue. That valuation was being used by Mr Massie in an attempt to persuade Mr Wilson that a "quid pro quo" would be to the claimant's advantage. It showed that the cost of the infrastructure benefits was nearly seven times the value of the section of the mill which would be given up. The higher the cost of the benefits, and the lower the value of the building which would be lost, the more attractive to TNL would be a transaction where no money changed hands. It follows that, if Mr Massie's valuation had not represented his true opinion of value but was prepared for negotiating purposes, it is likely that he would have underestimated the value of the building to be surrendered by TNL rather than exaggerating it.

87. I find that Mr Massie's valuation of £2m represented his opinion of the value of the reference land in December 2005 on the information then available to him; that his subsequent valuation of £650,000 is inconsistent with that opinion and that a potential purchaser on the valuation date would have made no allowance for the cost of immediate essential repairs.

The building finish, level of occupation and passing rents to be assumed at the valuation date

88. When preparing his valuations Mr Asher made the following assumptions:

(a) that more floorspace in the buildings was occupied on the valuation date than was in fact the case.

(b) that the works necessary to achieve the rents included in his valuations had been undertaken and the units then let prior to the valuation date.

(c) that the rents achievable within the buildings would have been higher than the passing rents in the absence of the CPO:

89. Mr Denyer Green submitted that these assumptions were justified by section 9 of the Land Compensation Act 1961 which provides that:

> "No account shall be taken of any depreciation of the value of the relevant interest 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 possessing compulsory purchase powers."

90. Mr Roots accepted that an "indication" within the meaning of section 9 was given that the claimant's land would be compulsorily acquired; indeed, he conceded that a number of such indications might have been given. Consequently, if the evidence showed that there were fewer occupiers in the buildings on the valuation date than would have been the case in the absence of that indication, any resulting depreciation in value should be disregarded. He did not accept, however, that any vacant space was vacant because of the CPO. Mr Roots also accepted that if the evidence showed that rents would have been higher in the absence of the CPO, then the effect of section 9 would again be that any depreciation in value caused by the anticipated CPO should be disregarded. But, he said, where the market rental values suggested by Mr Asher exceeded the passing rents, there was no evidence to substantiate the higher figures.

91. As for the assumption that works had been carried out prior to the valuation date, Mr Roots submitted that this was contrary to fundamental valuation principle, namely that land must be valued under rule 2 in its existing state on the valuation date. Whilst it was permissible to take account of potentiality, it must not be assumed that such potentiality had been realised physically by changes to the land or buildings prior to the valuation date. In this regard he relied on *Fraser v City of Frasersille* [1917] AC 187 at p194. He also referred to paragraph 5 of the Tribunal's decision on the preliminary issue in the current reference which, citing *Birmingham Corporation v West Midland Baptist (Trust) Association Inc* [1970] AC874 at p899, stated that it was common ground that the physical condition of the reference land and its surroundings must be taken as at the valuation date.

92. I start with the extent of the occupation that must be assumed at the valuation date. Mr Asher said that it was inevitable that the announcement of a CPO, and the precursors to this, would have had an adverse effect on business occupation within the Luneside East area. A number of occupiers would have identified the uncertainty that existed. They would have sought to relocate as and when their occupational interests came to an end, rather than be faced with ongoing uncertainty and the drawn out effects of blight on their businesses. I accept that evidence.

93. In reaching that conclusion I have had regard in particular to a letter written to Mr Loxam on 16 February 2004 by Mr Julian Inman of the acquiring authority, described as the Project Manager for the Luneside East "Urban Village" project. Mr Inman said:

> "Further to my letter of 4 December I can now confirm that the City Council has secured the funding it needs to enable it to take this redevelopment project forward. A press release will be issued today.
>
> This will be a partnership project between the Council and the funding bodies i.e. English Partnerships, the NorthWest Development Agency and the Lancaster Regeneration Board (distributors for the European Regional Development Fund). The City Council will lead the project.
>
> The Council will wish to negotiate with you to acquire the whole of your freehold ownership interests at the site. The Council will instruct surveyors to act on its behalf once the tendering process to procure these services is completed. I expect surveyors to be instructed in the week beginning March 1st 2004 and I will advise you of this and the identity of the surveyor in due course.
>
> I am aware that businesses at Luneside East need as much certainty as possible regarding our plans. The Council will endeavour to acquire the whole site in as expeditious a manner as

possible. The successful implementation of this redevelopment project requires that **all** existing businesses remove from the site and **all** existing business operations at the site cease prior to the commencement of site works. For your information the Council at this point in time has programmed to commence site works early in 2005.

The Council will provide as much advice and support as possible to existing businesses at the site as it seeks to take this project forward. The Council can advise on the availability of alternative sites and premises and the availability of financial support, if any. Your contacts for this at the Council are …

I would be grateful if you could inform any leasehold or tenant business interests of the contents of this letter. Should you require any further information regarding progress of the redevelopment project please contact either David Lawson or myself as advised in my previous letter." (Original emphasis).

94. In his witness statement Mr Loxam said that as the acquiring authority's proposals for the comprehensive development of the area became clearer the claimant experienced severe problems in securing new tenants and keeping existing tenants. It was his duty to be honest with prospective tenants and explain the situation to them. Once he informed interested parties of the acquiring authority's redevelopment plans, the result was usually that the interest was not taken further.

95. In his response Mr Massie said that the claimant was pursuing its own predominantly residential development scheme for the reference land and the tenants would have been fully aware of this.

96. Mr Loxam said that, before the acquiring authority's involvement, TNL had been regenerating its property on a phased basis for business purposes without the assistance of public funding. However, as a result of encouragement from the acquiring authority TNL adapted to the authority's wishes for a mixed use development.

97. Having seen and heard Mr Loxam giving evidence I am satisfied that TNL would have had no plans for a predominantly residential development of the reference land had it not been for the acquiring authority's proposals for the comprehensive redevelopment of Luneside East. It follows that, to the extent that the vacancy rate which existed at the reference land at the valuation date exceeded what would have been expected in the absence of the acquiring authority's redevelopment proposals, the resulting depreciation in value should be left out of account. Mr Asher's valuation assumed that there would be a continuing long-term vacancy rate (or running void) of 15%, which is the same level as Mr Massie assumed in the valuation he prepared in late 2005. I conclude that a long-term occupancy rate of 85% is to be assumed when valuing the reference land pursuant to section 9. To the extent that less than 85% of the accommodation was occupied at the valuation date, the difference is to be left out of account.

98. I now turn to consider Mr Asher's assumption for valuation purposes that parts of the reference land had been upgraded and then let by the claimant prior to the valuation date. That assumption is based on Mr Loxam's assertion that there was a steadily growing demand for accommodation at the reference land, particularly for office space. Mr Loxam produced a list of enquiries which had been received from parties interested in renting space at his company's premises.

The list related to the period between 30 October 2003 and 22 August 2006. It referred to a total of 53 enquiries, of which 31 were for pure offices.

99. Mr Loxam referred in particular to an enquiry he had received from Lancaster and Morecombe Newspapers (LMN), who he said were interested in leasing building 4 for the purpose of centralising their offices which were situated in Morecombe and Lancaster and possibly other offices later. Mr Loxam met LMN's managing director (Mr Skelton) and toured the property with him on two occasions. Mr Loxam said that LMN required around 10,000 sq ft of office accommodation on a long lease but did not rule out taking further space. They were interested in taking the building in its current condition for fitting out to their specification subject to agreeing terms. Mr Loxam showed Mr Skelton a copy of Mr Inman's letter 4 December 2003 which stated that the acquiring authority would not have certainty of funding until the end of January 2004 and referred to the Council's Cabinet report of 25 November 2003 which stated that enabling works were not expected to be completed until August 2007. These timescales were not acceptable to LMN. They asked to be informed if the position should change. Both TNL and LMN were disappointed about the timescales and it was left that LMN would continue their search. Mr Loxam wrote to Mr Inman regarding this enquiry on 9 December 2003, but there was no response; nothing further came of the enquiry.

100. In his written closing, Mr Roots submitted that Mr Asher's assumption that works of improvement had been carried out prior to the valuation date flew in the face of a fundamental principle of valuation under rule 2, namely that the land must be valued in existing state 'rebus sic stantibus' at the valuation date. In addition it was inconsistent with Mr Asher's acceptance in cross examination of the contents of para. 6.1.7 of Mr Massie's report where that principle was set out.

101. In case it was submitted that section 9 would entitle the Tribunal to assume that refurbishment would have been undertaken prior to the valuation date, Mr Roots said that there would be two answers. Firstly, as a matter of law section 9 was concerned with depreciation of the "relevant interest", and there was nothing which displaced the normal rule that the land must be valued in its state and condition on the valuation date. Secondly, as a matter of fact, there was no evidence that the refurbishment works inherent in Mr Asher's valuations and costed by Mr Potts had actually been planned and would in fact have been carried out at an earlier date in the absence of an "indication". This list of works had simply been prepared for valuation purposes in the context of the claim for compensation. Mr Roots pointed out that, by virtue of the Land Compensation Act 1961, section 6 and schedule 1, there was to be left out of account any increase or decrease in the value of the reference land which, in the circumstances identified in the first column of Schedule 1, was attributable to the carrying out or the prospect of development mentioned in the second column of Schedule 1 (in so far as it would not have been likely to be carried out in the absence of the compulsory purchase). In Schedule 1, first column, the compulsory acquisition giving rise to these references fell within Case 1 and no other Case. There must then be disregarded the effect on the value of the land taken attributable to the development which had already occurred or the prospect of development occurring in future of any of the land included in the same CPO apart from the relevant land.

102. The Land Compensation Act 1961, section 9 required that there must be left out of account any diminution in value of the reference land which was attributable to the fact that an indication had been given that the land would be acquired compulsorily.

103. In addition to the statutory provisions, the House of Lords in *Waters v Welsh Development Agency* [2004] 1 WLR 1304 held that the "*Pointe Gourde* principle" still existed but had a much more limited role than was previously thought. In essence, it now applied in circumstances where there was a lacuna in section 6. (The *Pointe Gourde* principle is this: "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition" *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 at 572 per Lord MacDermott).

104. Mr Denyer Green accepted that, in applying rule (2), a valuer must start with a consideration of the actual state of occupation and condition on the valuation date. But the reasons why a property was in a particular state of occupancy and condition were relevant to what the valuer had to value. Accordingly the authorities relied on by the acquiring authority had only limited application where the reasons for a particular state of occupancy had to do with the actions of the acquiring authority, or the consequences of one or more of those actions. Mr Denyer Green agreed that, as a matter of general principle, the property must be valued in its existing state at the valuation date, as stated, for example, by Lord Buckmaster in the Privy Council decision in *Fraser v City of Fraserville.* However the decision and guidance in that case preceded the adoption of statutory rules for the assessment of compensation in the Acquisition of Land (Assessment of Compensation) Act 1919, and now found in the Land Compensation Act 1961, such as s9, and the "scheme" rules (*Pointe Gourde principle*) as more recently considered by the House of Lords in *Waters.*

105. In *Waters,* Lord Nicholls said (para. 61)

> "… what, then, is the purpose of [the *Pointe Gourde*] principle? Its purpose, in separating 'value to the owner' from 'value to the purchaser' is to forward Parliament's objective of providing dispossessed owners with a fair financial equivalent for their land. They are to receive fair compensation but not more than fair compensation. This is the overriding guiding principle when deciding the extent of a scheme."

106. Mr Denyer Green challenged the suggestion that the application of *Pointe Gourde* was limited to cases where there was a lacuna in section 6. He said that a possible application outside section 6 was recognised in *Waters* at para. 63, where Lord Nicholls said only that the application of the *Pointe Gourde* principle as a supplement to the section 6 code would usually be the position; he did not say the only position. Thus, in *Waters* Lord Nicholls said at para 54:

> "The courts … found themselves driven to conclude that the statutory code is not exhaustive and that the *Pointe Gourde* principle still applies. This conclusion is open to the criticism that in many instances this makes the statutory provisions otiose. This is so, but this is less repugnant as an interpretation of the Act than the alternatives."

107. Mr Denyer Green said that in *Transport for London v Spirerose Ltd* [2009] 1 WLR 1797 Lord Walker did not conclude that the *Pointe Gourde* principle no longer survived, only that the principle's vigour was now channelled and restrained by the complex statutory scheme in the Land Compensation Act 1961. In para 56 Lord Walker said:

> "I do not … intend to suggest that the *Pointe Gourde* principle has no part to play in this field, but its role is relatively limited. I agree with Lord Collins, when he says at para 128 that it is 'a principle of statutory interpretation, mainly designed and used to explain and amplify the expression 'value'. As Lord Walker implies in para 36, the principle is a factor to be

borne in mind when construing the compensation legislation with a view to achieving, so far as possible, a result consistent with its aim of fair compensation. That seems to me consistent with the principle and with most of the authorities, including all the decisions of this House and of the Privy Council, to which your Lordships were taken."

108. In *Spirerose* Lord Collins identified certain principles of valuation and said at paras 89 and 90:

> "First, the underlying principle is that fair compensation should be given to the owner claimant whose land has been compulsorily taken. The aim of compensation is to provide a fair financial equivalent for the land taken. The owner is entitled to be compensated fairly and fully for his loss, but the owner is not entitled to receive more than fair compensation: *Director of Buildings and Lands v Shun Fung Ironworks Limited* [1995] 2 AC 111, 125; *Waters v Welsh Development Agency* [2004] 1 WLR 1304, para. 4
>
> Second, the basis of compensation is the value to the owner, and not its value to the public authority."

109. Lord Collins observed at para 123 that:

> "Just as an increase in the value of the land due to the scheme must be left out of account, so also must any decrease: *Melwood Units Pty Limited v Comr of Main Roads* [1979] AC 426, 435 and *Director of Buildings and Lands v Shun Fung Ironworks Limited* [1995] 2 AC 111, 135."

He then concluded that the *Pointe Gourde* principle was in these terms at para 128:

> "In my opinion it is a principle of statutory interpretation, mainly designed and used to explain and amplify the expression 'value'. It is in this sense that it has sometimes been referred to as a common law principle … in *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 213-215 Lord Pearson reviewed the authorities and concluded, at p.214, that although the *Pointe Gourde* principle had been described as a 'common law principle', it could not be such a principle 'because compulsory acquisition and compensation for it are entirely creations of statute.' He went on, at pp.214-215: 'the *Pointe Gourde* principle in my opinion involves an interpretation of the word 'value' in those statutory provisions which require the compensation for compulsory acquisition to include the value of the lands taken. I am satisfied that this is the right approach and that there is nothing in Lord Nicolls' speech in *Waters* which is inconsistent with this view."

110. It was in the above context, said Mr Denyer Green, that the Tribunal observed in *Potter v Hillingdon London Borough Council* [2010] UKUT 212 at para 73 that:

> "We think that in future valuers and their advisers will need to adopt a more methodical approach, considering the potentially relevant statutory assumptions and applying them to the facts of the case and only moving on to consider whether some additional assumption is required under *Pointe Gourde* when those earlier steps have been taken."

111. Mr Denyer Green submitted that three steps followed from the above analysis. First, what was the cause of a situation that would mean that fair compensation would not be paid to the claimant? Second, did the statutory rules address that cause? Third, where no statutory rule applied, the *Pointe Gourde* principle, or a rule of statutory interpretation of like purpose, addressed that cause.

112. Mr Denyer Green said that the acquiring authority accepted the point of principle regarding section 9, if the evidence showed that the value would be lower due to a lower occupancy in the absence of an indication by the acquiring authority that the reference land would be acquired. It was illogical to accept that a lower occupancy rate (and value) could invoke section 9 but not a consequential and related state of condition tied to the occupancy. Section 9 made no such distinction, and the acquiring authority had pointed to no authority on that point.

114. If section 9 had no application, there would remain a clear loss of 'value' that should be disregarded by the application of the *Pointe Gourde* principle or a principle of statutory construction to the like effect.

115. There is no need for me to express a concluded view on this difficult legal point because I am not satisfied that the evidence is sufficient to establish this head of claim. Mr Asher assumed that certain existing tenants would have allowed the claimants to refurbish their premises and agreed to pay a rent which reflected such works. He also assumed that space which was vacant at the valuation date would have been similarly improved and re-let. The former assumption is purely speculative. In considering the latter assumption, it must be borne in mind that I have previously concluded that much of the accommodation which was vacant on the valuation date is to be assumed to have been occupied if the effects of the proposed compulsory acquisition are left out of account. It is reasonable to assume that, for the purpose of the statutory valuation, at least part of the vacant accommodation would still have been occupied by the previous tenants. Again, to assume that such accommodation would have been refurbished and let at an enhanced rent to the existing tenants is speculative. Mr Loxam said that his company's policy was to refurbish space as and when required by a particular tenant. There is no doubt some accommodation which would have fallen vacant in the absence of the CPO, but there is insufficient evidence to demonstrate that it would have been let to a tenant requiring refurbished office accommodation, or that any of the existing tenants would have had such a requirement. I am therefore unable to accept Mr Asher's valuation so far as it assumes that the reference land was in a different state from its actual condition at the valuation date.

116. Mr Asher's third assumption was that the rents payable for accommodation at the reference land would have been higher than the passing rents in the absence of the CPO. I consider this matter later.

Hope value

117. Mr Asher accepted the Tribunal's decision on the preliminary issue that there was a 40% chance of planning permission being granted for residential use after 5 years. However, he said, the property presented the opportunity for generating income immediately, with perhaps the prospect of residential planning permission or possible redevelopment for modern offices in the future, beyond the 5 year horizon. Mr Asher did not think that the prospective purchaser would have carried out a detailed calculation to quantify the additional potential value. He thought, however, that in the strong market that existed at the valuation date the purchaser would have reduced his required yield by one half of one per cent to reflect this possibility.

118. Mr Massie said that in his opinion the application of hope value would depend on the valuation approach which was adopted excluding such value. If the basic valuation assumed substantial

expenditure on converting much of the buildings to offices, he did not consider that the potential purchaser would also have had regard to the prospect of an alternative use in the future. If he did, his initial investment in refurbishing the building would be wasted. If, however, the property was to be kept largely in its existing use, with limited expenditure on repair and refurbishment (as in his scenario 1) than a purchaser might give consideration to hope value.

119. In order to assess the quantum of the potential value should such consent be granted, Mr Massie undertook what he termed a "high level" appraisal. He did not consider that it was appropriate to undertake a detailed appraisal, as a purchaser would have taken a broad view as to the potential profit rather than trying to calculate the exact figure. Further, any purchaser would have taken a cautious view in undertaking such as assessment.

120. Mr Massie prepared such an appraisal, based on the proposal put forward by TNL at the preliminary issue hearing. He adopted the gross development values put forward by TNL's then surveyors and included in TNL's initial Statement of Case as he considered that those figures were reasonable. However, he made an allowance for affordable housing which was not included in that assessment. He adopted the building costs set out in Mr Ashall's report because he felt that the costs in TNL's surveyors' appraisal were too low. Mr Massie's appraisal indicated that the proposed conversion would not be viable. Consequently a purchaser would not have been willing to pay hope value in relation to the chance of planning consent being granted in 5 years time.

121. Even if a small positive sum had been produced by the appraisal Mr Massie did not consider that a purchaser would have found it to be sufficiently attractive to justify the payment of an additional sum in excess of the existing value. Moreover, he thought that a purchaser would have been sceptical as to the viability of residential development in this location, having regard to the industrial nature of the surrounding area and the limited prospect of significant development coming forward in the foreseeable future to change the character of the area.

122. In his rebuttal report, Mr Asher prepared his own residual development appraisal, which differed from Mr Massie's in terms of the sale price of the affordable housing element and the construction costs. This produced a site value of £4,150,000 which exceeded his existing use valuation. He accepted, however, that a purchaser would have had to take a view as to when planning consent might be granted for residential use. Mr Asher reiterated his opinion that, in the buoyant market that existed at the valuation date, a purchaser would have made a small adjustment to the yield to reflect the possible increase in value for residential use.

123. In oral evidence in chief, Mr Massie said that he had made an error in his appraisal of the proposed residential conversion. He had allowed for interest for 18 months on the total construction costs, instead of half the costs to reflect the fact that such payments would be phased. The effect of correcting this error was to produce a positive site value of £621,784, but this was still less than the value for the existing use and so no question of hope value arose.

124. I have little doubt that, in the buoyant market which existed at the valuation date, investors would have taken a more optimistic approach to the future than they would in a more stable market. I also accept that a potential purchaser would probably not have prepared a detailed residual valuation based on residential development before deciding whether to pay an additional sum in the

hope that such development might at some time be permitted. Nevertheless, since the odds were against residential planning permission being granted within the next five years, in my view an investor would not have reflected the possibility of such planning permission in his bid unless it would have resulted in a development value which was considerably higher than the value of the property as a commercial investment. I am not persuaded on the evidence that a prospective purchaser would have concluded that such substantial additional value would be unlocked if residential planning permission were granted. Mr Asher also referred to the possibility of redevelopment as modern offices but, again, there was no reliable evidence to suggest that, if permitted, this would have resulted in a significantly higher value. Accordingly, there is in my view no reason to adjust the capitalisation rate to reflect hope value.

Value of freehold interest – overall conclusion

125. I consider firstly the valuations prepared by Mr Asher. Like Mr Potts, Mr Asher was a straightforward witness. However he suffered from a similar disadvantage – he did not inspect the interior of St George's Works until April 2011, nearly five years after the valuation date. By that time the roof of the existing building had been removed, resulting in significant water penetration and consequent deterioration and damage. Consequently – and it is no criticism of him – Mr Asher has had to rely greatly on Mr Loxam for a description of the accommodation at the relevant date. In that connection it is clear that the layout of buildings 5 and 6 – accounting for about two-thirds of the total floor area – was unusual. They in fact comprised four buildings – known as 5, 6A, 6B and 6C – which had been built at different dates and converted into a single unit by the creation of a single opening in each of the dividing walls. The whole was served by two cores at the rear and a number of entrances and loading bays at the front, with the ground floor being situated above street level and two further staircases leading up from the ground floor, one of which stopped at first floor level and the other at the second floor. As far as Mr Asher is concerned, the difficulties inherent in valuing the various units in such a complex building would have been aggravated by the absence of a physical inspection of the property.

126. Mr Asher has also been faced with a paucity of contemporaneous rental evidence. He valued the three upper floors of building No. 4 – each extending to some 4,000 sq ft – as offices but, with one exception (a building of 9,000 sq ft, including a storage/gym area of 2,500 sq ft) all the office comparables upon which he relied were significantly smaller than 4,000 sq ft and most related to much smaller units. The non office space at the reference land was occupied for a variety of purposes, and the rental evidence relating to those uses was even more limited than in the case of the offices.

127. Although Mr Asher has done his best to overcome these difficulties, I have come to the conclusion that the best starting point when valuing the reference land is the valuation of £2m which Mr Massie prepared in late 2005. (His calculation totalled £1,921,985, but he rounded it up). That valuation was produced some nine months before the valuation date, before the building had began to deteriorate. When he prepared the valuation Mr Massie was under some pressure to produce a realistic figure, since the acquiring authority wished to secure the withdrawal of TNL's objection prior to the forthcoming CPO inquiry. I therefore do not consider it appropriate to make a significant adjustment to the £2m valuation, subject to four qualifications. Firstly, the valuation assumed that one quarter of the space was vacant, in addition to the long-term vacancy rate of 15 per cent. I have concluded that that extraordinary vacancy rate should be disregarded. Secondly, it assumed that the floor areas of the buildings (excluding 12) totalled 71,505 sq ft, whereas the area which has been

agreed for the purpose of these proceedings is 12.15% less. Thirdly, it capitalised the rental value at 9.25%, but for the purposes of his scenario 1 valuation Mr Massie reduced that to 9%, the same rate as that adopted by Mr Asher for the bulk of the accommodation before his hope value adjustment. I find that the appropriate yield is 9 per cent. Finally, Mr Massie's £2m valuation included the sum of £150,000 for "other potential HOC [heads of claim], rear building etc". Other heads of claim do not fall to be included in a valuation of the freehold interest. As I have said, I assume that the term rear building referred to building 12. Excluding the mezzanines, the agreed area of building 12 is 4,250sq ft, which I will value at £3.50 per sq ft, the rate Mr Massie applied to the other ground floor unit, building 7. I will value the mezzanines at £1 per sq ft. This produces a total rental value for building 12 of £15,185. The effect of these four adjustments is to produce a value for the claimant's freehold interest of £1,771,000 (Appendix 1).

Disturbance

128. Compensation for certain disturbance items has been agreed in the sum of £85,312.95. There are in addition a number of disputed items of claim, which I shall consider in turn.

Statutory owners loss payment

129. This payment pursuant to s33A of the Land Compensation Act 1973 is based on 7.5% of the value of the freehold interest subject to a maximum of £75,000. Having determined the freehold value at more than £1,000,000, the statutory maximum figure applies.

Occupiers loss payment

130. This payment under s.33C of the Land Compensation Act 1973 is based on £25 per square metre (gross external area) occupied by TNL for the year immediately prior to the valuation date, subject to a maximum of £25,000.

131. The acquiring authority accepted that TNL occupied the following units on the first floor of building 6 as its management offices: 6 AFA - 6AFE and 6BFA. It contended, however, that there was no evidence which enabled it to accept that TNL had occupied unit 6BT on the third floor. That unit was shown on TNL's Re-amended Statement of Case as occupied for storage. Mr Loxam's evidence to the preliminary issues hearing showed this area to be occupied by TNL and associated businesses, which suggested that there were several occupiers. Mr Asher had produced a rates demand which identified the occupier as 'Opera Decorum', not TNL. In cross examination Mr Loxam had explained that unit 6BT had been occupied by other companies which were related to the claimant by sharing directors or shareholders. In practice it was used as storage by S Loxam and Co and R Gardner and Co Ltd, who carried on business as wholesalers of toys and stationery.

132. Mr Denyer Green submitted that the fact that Mr Loxam had accepted that 6BT was also occupied by other related companies did not disentitle TNL to the statutory compensation: s33C did not require exclusive occupation, merely that the claimant must have occupied the land. I accept Mr Denyer Green's submission on this issue. Mr Loxam was adamant that his company had occupied unit 6BT at the relevant time and I accept his evidence. I am also satisfied that the reference to

Opera Decorum on the rates demand – which was addressed to TNL – merely identified the unit by reference to a former occupier, who had vacated the premises in 1996. I determine the occupiers loss payment at £7,150 as claimed.

Loss of rent

133. Mr Asher prepared a claim for loss of rent prior to the valuation date in the sum of £114,588. There were two bases of calculation;

a. where an occupier was present in 2004 but subsequently vacated because of concerns about the scheme and was not replaced; and

b. units which continued in occupation after 2004, but where the rent was significantly below market rental value.

134. So far as (a) is concerned, I have found (para 97 above) that the exceptionally high vacancy rate at the valuation date was a consequence of the acquiring authority's letter of 16 February 2004 and should be left out of account when assessing compensation. TNL is thus entitled to the market rent from the units which fell vacant between 16 February 2004 and the valuation date. As for (b), I have concluded that I am unable to accept Mr Asher's estimated rental values and I have preferred those adopted by Mr Massie in his 2005 valuation.

135. It is, however, not possible to identify the rental value attributed to individual units in Mr Massie's 2005 valuation, which I have found provides the most reliable evidence of the freehold value. This is because the reference letters and numerals given to the units in that valuation do not accord with the unit numbers adopted by the valuers before me. Consequently, the claim for loss of rent has not been made out, with two exceptions. I have found that the rental value of building 12 was £3.50 per sq ft on the ground floor and £1 per sq ft on the mezzanine. Building 12 was divided into two units, both of which were let at rents below those levels. The loss of rent from these two units was therefore £9,967 (£2,233 + £7,734), calculated as follows:

Unit 12 – Quarry Fabrications

ERV	Ground floor 2,400 sq ft @ £3.50	=	£8,400	
	Mezzanine 160 sq ft @ £1.00	-	£ 160	
			£8,560	
	Less outgoings and voids – 25%		£2,140	
			£6,420 = £535 per month	
Monthly loss March 2004 to July 2006 = £535-458 = £77 x 29 =				**£2,233**

Unit 12A – Mecklen

ERV 1,850 sq ft @ £3.50	=	£6,475
Mezzanine 150 sq ft @ £1.00	=	£ 150
		£6,625
Less outgoings and voids – 25%		£1,656
		£4,969 = £414 per month

Monthly losses: March 2004 to June 2004 = £414 – 303 = £111 x 4 =	£ 444
July 2004 to September 2004 (vacant) = £414 x 3 =	£1,242
October 2004 to March 2005 = £414 – 255 = £159 x 6 =	£ 954
April 2005 to September 2005 (vacant) = £414 x 6 =	£2,484
October 2005 to July 2006 = £414 – 153 = £261 x 10 =	£2,610
Total loss of rent	**£7,734**

Management time

136. The sum of £21,281.00 is claimed for time spent in dealing with the consequences of the scheme underlying the acquisition of the reference land, excluding time spent on relocating TNL's offices. The figure is based on 327.4 hours spent by Mr Loxam in the period from 21 June 2006 (when he was notified that the CPO had been confirmed) to the date the matter was referred to the Tribunal. This time spent has been taken at £65 per hour.

137. Mr Asher said that, since the income derived from the reference land represented 99% of TNL's income, it was inevitable that the directors would have had to spend a considerable amount of their time dealing with the potential loss of that property.

138. Mr Roots referred to a number of previous cases in which management time had been considered by the Tribunal including *Minister of Transport v Pettitt* [1969] 20 P & CR 344 and *M and B Precision Engineers Limited v London Borough of Ealing* (1973) 225 EG 1190. He said that it was not possible to extract any clear and definitive principles from these cases. In the main they reflected the Tribunal's efforts to do the best it could to arrive at a fair award in the particular circumstances of each case. The fundamental point, however, was that there must be evidence not simply of time spent, but also of how that translated into something which could reasonably be regarded as loss. In the present case, although the acquiring authority did not dispute that the time claimed for had been spent, there was no evidence at all of any financial expenditure by the claimant on management time generally, and certainly no evidence that any overtime or other unusual amounts were paid. Although, in the light of the Court of Appeal decision in *Minister of Transport* v *Pettitt*, loss in this context was not necessarily confined to actual financial expenditure, it was likely to prove difficult to prove loss without showing how time spent by employees had manifested itself in some way in the company's accounts, either by actual expenditure or by clear evidence that expenditure had been saved. Furthermore, there was in the present case no evidence that the totality of time spent over the period in question was significantly more than the time the directors would have spent carrying out management tasks in the absence of the CPO.

139. In reply Mr Denyer Green submitted that, once the acquiring authority had accepted that "loss" need not be actual expenditure, and had not disputed that time was spent on events caused by the acquiring authority's proposed acquisition, the "loss" was such loss of time to the claimant. The claimant was a family company of which Mr Loxam was the active director. A company could only act through its directors or employees; if a director was doing something for the company, the company was doing that thing. Therefore the time claimed for was the time the company spent through its director on matters caused by the acquisition. If the claimant had been an individual who spent the undisputed time, previous decisions of the Tribunal showed that the individual would have been compensated as time was spent and therefore "lost". Where a family company acted through a director there was no difference in principle, and the decisions of the Tribunal showed that compensation could be awarded in such circumstances. The claimant had been reasonable and had not claimed for all time spent and was entitled to be properly compensated.

140. I accept in principle Mr Denyer Green's submissions on this issue. TNL's business consisted almost entirely of managing St George's Works, which had been sub-divided into many units and was clearly a management intensive investment. In my judgment, if Mr Loxam had not spent over 300 hours dealing with the consequences of the CPO, the profitability of TNL's investment would have been higher and it would be unjust to deprive it of compensation for the profit foregone in this way. Mr Asher said that the suggested hourly rate of £65 was significantly below the rates charged by all the claimant's professional advisers. He added that he believed it represented a fair rate "based on similar cases". I was not given any information about those cases and Mr Massie did not suggest an hourly rate. In what is necessarily a subjective judgment, I determine compensation for management time based on £55 per hour, namely £17,985.00.

Legal costs

141. TNL paid legal fees totalling £6,675.00 to Messrs Holdens for work "in association with the transfer of St George's Works pursuant to the building agreement." The acquiring authority resisted this item on the grounds that clause 2.9.1.1 of the building agreement made provision for TNL to be reimbursed its legal costs in connection with concluding the agreement up to a maximum of £43,000 but made no provision for legal costs in connection with the transfer of title under the agreement. It was implicit that each side was to pay its own. Mr Roots submitted that this item was not recoverable under the building agreement, nor under rule 6.

142. In reply Mr Denyer Green pointed out that compensation under the building agreement was to be assessed in accordance with the ordinary rules of compensation; professional fees were compensatable if caused by the acquisition, reasonably incurred and not too remote: see *London County Council v Tobin* [1957] 1 All ER 649. It was irrelevant that the agreement was otherwise silent on professional fees. The acquiring authority did not say that the fees were not reasonably incurred, or too remote, only that the Agreement did not provide for legal costs in connection with the transfer of title. Those fees were plainly and reasonably incurred in relation to title matters, caused by the acquisition and not too remote. In any event legal costs of a transfer would be payable if the acquisition were compulsory under section 23 of the Compulsory Purchase Act 1965, and for the purposes of assessing compensation under the Building Agreement one was required to make just that assumption.

143. I accept Mr Denyer Green's submissions on this issue and award compensation for legal costs in the sum of £6,675.00.

Other professional fees

144. The following items of professional fees have been agreed:

Taxation advice regarding reinvestment of compensation moneys	£2,300.00
Accountants fees for providing summary of relocation costs	£ 500.00
Legal advice following receipt of acquiring authority's letter dated 25 January 2007 and in connection with preparing provisional claim	£3,000.00
	£5,800.00

The following fees incurred in connection with the claim are disputed:

Harrison, Willis and Moore (HWM) - valuers	£5,000.00
Jones Lang LaSalle – valuers	£2,500.00
A I Cherry – forensic accountant	£20,801.00
I L Tyson – property consultant	£20,000.00
	£48,301.00

145. The acquiring authority accepted that it had asked Mr Loxam to submit a full claim for compensation, rather than the unexplained invoices which had originally been sent on an ad hoc basis. Mr Roots submitted, however, that the need to assemble a complete claim did not justify fees of the magnitude claimed.

146. The acquiring authority recognised that HWM were responsible for the rule 2 valuation on the residential redevelopment basis and the existing use valuation in the original claim. Although an assertion had been made that this work contributed to the way in which the claim was eventually pursued at the Tribunal, this had not been properly explained.

147. The Jones Lang LaSalle fee related to advice sought and given as to whether TNL was in a position to ransom the land to the rear. It was thus a discrete item of work not forming part of the original formulation of the claim by HWM nor forming part of the basis on which Mr Asher supported his valuation in the Tribunal. Mr Roots submitted that it did not follow from the mere fact that advice was sought on a point raised by Mr Loxam which turned out not to be sound that it was reasonable to include the professional cost of such advice as part of the reasonable costs of preparing the claim.

148. With regard to the cost of the report in relation to the disturbance claim by A I Cherry, the acquiring authority pointed out that this report was not now relied upon and consequently contended that it was not reasonable to include it in the claim. Although Mr Asher claimed that these fees should be included because the work was of considerable benefit to other members of the professional team in formulating the claim as submitted, the nature and extent of the benefit had not been explained. Moreover, if one examined the headings of the disturbance claim as formulated by

Mr Asher, it was not at all clear what role there would have been for a forensic accountant. There was simply no justification for including AI Cherry's fees.

149. With regard to Mr Tyson's fees Mr Roots pointed out that, although Mr Asher asserted that Mr Tyson has been of considerable assistance to the directors, there had been no further explanation of Mr Tyson's role. In his evidence to the preliminary issues hearing Mr Loxam had described Mr Tyson as "managing agent and project coordinator for TNL's part as stakeholder in the development of Luneside East." In his statement for the subsequent hearing Mr Loxam described Mr Tyson as a non-executive director who was only paid when an invoice is submitted. It was not at all clear from the evidence whether Mr Tyson was being employed as a director or as a professional adviser. No information had been provided about his professional qualifications or expertise. There was no proper information as to what he did in relation to the preparation of the claim prior to the reference, but it was known that the original valuation on the basis of conversion of the building to 150 flats had been prepared by HWM. Although the payment to Mr Tyson was described as for preparation and advancing the claim, Mr Loxam said that Mr Tyson became involved due to his knowledge of building conversion work and to prepare plans as well as manage negotiations. Mr Loxam also said that Mr Tyson attended every meeting and every discussion including being involved with the reinvestment properties.

150. Mr Roots submitted that there was no adequate explanation to support a claim for £20,000, especially when TNL had professional advice of valuers and accountants available, the fees for whom it was also claiming. The evidence did not justify including this item as directly connected with preparation of the claim, nor was the amount reasonable. Recognising that TNL was in principle entitled to something in respect of professional fees before the commencement of the reference, but faced with inadequate explanation of the actual fees claimed, Mr Roots suggested that the HWM fees (together with the accountants fees of £500, already accepted) be treated as a proxy for the amount of fees which would have been reasonable, the other fees claimed being rejected.

151. Mr Denyer Green's submissions on this issue were as follows. So far as A I Cherry's fees for advising on the disturbance claim were concerned, the test was whether these costs were caused by the acquisition, reasonably incurred at the time, and not too remote. The acquiring authority had asked for a full claim. The claimant needed accountancy advice and the fact that ultimately it put its case in the reference on a different basis was irrelevant. For essentially the same reasons the fees paid for advice on valuation to HWM and to Jones Lang LaSalle on possible ransom value should be compensated in full.

152. As to the latter, there was a difference between seeking advice on a point which was simply an unreasonable point whatever the answer might be, and seeking advice on a point that might or might not be included in a claim. It was not unreasonable to consider whether a claim might include a ransom element in relation to access to the rear of the reference land. This item was reasonably incurred at the time. Mr Denyer Green relied on the same legal principles to support his submission that the fees paid to Mr Tyson were reasonable.

153. With the exception of those relating to Mr Tyson's fees, I accept Mr Denyer Green's submissions on this issue. In arguing that much or all of the work done by HWM, AI Cherry and Jones Lang LaSalle was not used in TNL's case as presented to the Tribunal, the acquiring authority have, in my judgment, confused reasonable pre-reference costs with the costs of the reference itself.

TNL is entitled to the former, whether or not it is subsequently awarded the latter. I am not persuaded that any of these fees were unreasonably incurred, nor that they were not caused by the acquisition, nor that they were too remote. This conclusion does not apply in the case of Mr Tyson's fees, however and, for the reasons advanced by Mr Roots, I disallow that item. Accordingly I determine the disputed professional fees in the sum of £28,301.00. The total compensation for disturbance is therefore £230,390.95, as follows:

Agreed items	£85,312.95
Statutory owners loss payment	£75,000.00
Occupiers loss payment	£ 7,150.00
Loss of rent	£ 9,967.00
Management time	£ 17,985.00
Legal costs	£ 6,675.00
Other professional fees	£ 28,301.00
	£ 230,390.95

Interest

154. Mr Roots submitted that, since it had now been agreed that the reference was being pursued under the building agreement, the entitlement to interest derived from the terms of that agreement and, if any compensation was payable, it would be necessary for the Tribunal to include interest in its award from 1 August 2006. Interest would be payable upon any compensation awarded by the Tribunal which exceeded the amount previously paid (£2 million). The appropriate interest rate was that provided for from time to time by section 32 of the Land Compensation Act 1961.

155. In reply Mr Denyer Green submitted that the decision of the Privy Council in *Lesquende v Planning and Environment Committee of the State of Jersey* [1998] 1 EGLR 137 showed that reference costs were capable of being rule 6 costs, and therefore demonstrated the breadth of the items closely associated with a reference that were compensatable. Interest reflected loss of the use of money, and was a true loss. In the alternative, as the remaining reference was one by consent, the claimant relied on section 49 of the Arbitration Act 1996 as applied by para 30 of the Upper Tribunal (Lands Chamber) Rules 2010, and sought the exercise of the Tribunal's discretion at a reasonable rate from the valuation date until the outstanding sums were paid. There were two possibilities. First, a reasonable rate would be not less than the Judgment Rate as applied from time to time on judgment debts as awarded by the civil courts. Second, as the building agreement provided that the Standard Commercial Conditions applied to the sale of the property, the rate reserved under the Standard Commercial Property Conditions (2nd Ed), condition 1.1.1(e) as the contract rate being the Law Society's interest from time to time. This was based on 4% above Barclays Bank Rate. The acquiring authority had accepted the principle of entitlement, but the rate it suggested would result in no interest being paid on unpaid compensation since 31 March 2009, and that was unacceptable to TNL.

156. I accept Mr Roots's submissions on this issue. The building agreement provides that TNL are entitled to any compensation that would be payable as a result of any acquisition under the CPO.

Such compensation would attract interest at the statutory rate and I am not persuaded that there is any good reason to depart from that basis.

Result

159. The total compensation payable by the acquiring authority to TNL is £2,001,390.95 as follows:

Value of freehold interest	£1,771,000.00
Disturbance	£ 230,390.95
	£2,001,390.95

160. In addition TNL is entitled to such interest as would have been payable under section 32 of the Land Compensation Act 1961. A letter concerning costs accompanies this decision, which will become final once the question of costs has been determined.

Dated 15 December 2011

N J Rose FRICS

Addendum following reopened hearing

161. Following the Tribunal's interim decision of 15 December 2011, TNL made an application under Rule 54 of the Upper Tribunal (Lands Chamber) Rules 2010 that the Tribunal should set aside part of its decision, namely that relating to TNL's loss of rent claim. The acquiring authority then made an application under Rule 53 that the Tribunal should correct its decision insofar as it related to the floor areas used in arriving at the freehold value.

162. I did not accept that either application fell within the Rules relied upon. Nevertheless, since the decision had not become final, on 8 February 2012 the parties were informed that, in the light of the submissions made in support of the applications, I considered it would be in the interests of justice if I received further expert evidence from Mr Asher and Mr Massie, limited to the implications on (a) the value of the freehold interest and (b) the loss of rent of my finding that Mr Massie's 2005 valuation was the best evidence of value. That further evidence was presented at a hearing on 18 May 2012, at which Mr Denyer Green appeared for TNL and Mr Roots QC appeared for the

acquiring authority. I set out below a summary of the parties' contentions, together with my conclusions on the two issues.

Freehold value

163. In his expert report Mr Massie said that the conclusion in para 72 of the interim decision – that the rear building which had been excluded from his 2005 valuation was building 12 – was incorrect; the total area of 71,505sq ft adopted in that valuation included building 12. Although TNL initially denied this, at the reopened hearing Mr Asher accepted Mr Massie's evidence on the point.

164. Mr Massie's approach to the valuation of the freehold was as follows. He made a floor area adjustment of 6.75% instead of the 12.15% appearing in paragraph 127 and Appendix 1 to the interim decision. The revised adjustment equalled the percentage reduction in floor space, from the total which Mr Massie had used in his 2005 valuation (71,505sq ft), to the area available to let which he and Mr Asher had used in their evidence at the first valuation hearing (66,679sq ft). His floor area adjustment came to 16,150sq ft compared to the deduction made in Appendix 1 of 29,069sq ft, and resulted in a total rental value of £223,105. Since that figure included the rental value of building 12 Mr Massie omitted the addition of £15,185 which the Tribunal had made for that building in Appendix 1. The effect of these two adjustments was to reduce the freehold value from £1,771,000 to £1,752,000.

165. Mr Asher suggested that the Tribunal's valuation should be adjusted in this way. The 2005 valuation had assumed a floor area of 3,500 sq ft for the ground floor unit, building 12, whereas the true area of that unit was now agreed to be 4,560 sq ft, including a mezzanine of 310sq ft. He therefore reduced the total 2005 area of 71,505sq ft by 3,500sq ft., producing a revised area, excluding building 12, of 68,005sq ft. The ERV of that reduced area in the 2005 valuation was £227,005 (£239,255 minus £12,250 for building 12). Since the agreed floor area – excluding building 12 – of 62,818 sq ft was 7.63% less than 68,005sq ft, the ERV of £227,005 should be reduced by a similar percentage. This produced an adjusted ERV – excluding building 12 – of £209,690. To that figure he added £15,185, being the ERV of building 12 adopted by the Tribunal in its interim decision, resulting in a total ERV of £224,875.

166. Mr Asher capitalised this ERV at 9% and deducted a total of 25% for running void, management and insurance, all as in the interim decision, producing a figure of £1,873,960. He made a further deduction of £101,894 for purchaser's costs and arrived at a capital value of £1,772,066, which he rounded down to £1,772,000.

167. The total rental value adopted in the interim decision was calculated by deducting a single percentage from the combined rental value of a large number of units which had been adopted by Mr Massie in 2005. Mr Asher used the same approach when valuing units in buildings 4, 5 and 6, but he sought to depart from it in the case of building 12. There is in my view no justification for singling out building 12 for special treatment in this way. As for the size of the floor area adjustment, the valuers agreed at the main hearing that the proportion of the agreed net internal area which attracted a rental value was 66,679sq ft. I see no reason not to adhere to that agreement. I therefore accept Mr Massie's deduction of 6.75% from the ERV of £239,255 in the 2005 valuation. I also accept Mr Massie's evidence that building 1 was derelict and of no value and that the method of calculating

purchaser's costs used by Mr Asher is inconsistent with the general market convention and, indeed, with the approach Mr Asher himself adopted at the previous hearing. I find that the value of the freehold interest is £1,752,000.

Loss of rent

168. In his further supplemental report dated 20 April 2012 Mr Asher analysed the schedule of unit identifiers and floor areas which had been agreed for the purposes of the reference and compared those used by Mr Massie in his 2005 valuation. He produced a schedule and annotated floor plans showing the correlation between the two sets of reference numbers and the rental values per square foot adopted in the 2005 valuation. Mr Massie accepted that Mr Asher's calculations were broadly accurate and the acquiring authority did not suggest that loss of rent was not claimable in principle for any of the units in the reference land.

169. In his report Mr Asher divided his claim for loss of rent into three categories. At the hearing he accepted that there were in fact four. Firstly, those cases where the tenants had vacated early as a consequence of the CPO and not been replaced. Secondly, those where a rental shortfall resulted from TNL's inability to increase the rent to market value as a consequence of the CPO. Thirdly, the space occupied by Sunterra (units 5S and 5SA), who vacated for reasons unconnected with the CPO, but which could not be re-let because of the CPO. Finally, one unit let post-February 2004 at a depressed rent because of the CPO (Ultimate Outdoors).

170. Mr Asher pointed out that in the interim decision I had made a deduction from the total rental income of 5% for management and an additional 5% for maintenance and insurance. He accepted that any loss of rent calculation should reflect those deductions. He did not agree that an additional deduction should be made for voids. The interim decision found that there would have been a continuing long-term vacancy rate of 15% across the reference land as a whole. The amounts claimed were all for rents that were lost from the 85% of the areas that would have been occupied but for the February 2004 letter. Consequently, any further deduction would be double-counting. Mr Asher did not, however, seek to challenge the Tribunal's assessment of loss of rent from units 12 and 12A, which did incorporate a void allowance.

171. Mr Asher said that different considerations applied to the claim in respect of the premises formerly occupied by Sunterra. He accepted that Sunterra had vacated the premises for reasons unconnected with the CPO and it would therefore have been necessary to re-market the unit in any event. Bearing in mind that it had been fitted out as reasonable quality offices, he allowed a three month letting void before calculating the rent lost for a period of seven months terminating on the date of acquisition. Mr Asher's total claim for loss of rent (excluding units 12 and 12A) was £90,916.

172. In those cases where an occupier was present in 2004 but subsequently vacated (category (a)), Mr Massie accepted that the units were vacant for the whole period shown in Mr Asher's lists, that the areas of those units had been reasonably accurately calculated and that the rental value per sq ft of each unit adopted by Mr Asher had been correctly derived from the 2005 valuation. He did not accept, however, that this element of the claim could simply be quantified, as Mr Asher had done, by adding up the calculated amount of rent of each unit, for this reason. In reaching its conclusions in

para 134 in relation to loss of rent in cases where an occupier was present in 2004 but subsequently vacated because of concerns about the scheme and was not replaced, Mr Massie said that the Tribunal had cross referenced to para 97. Reading the two paragraphs together it was clear that the reference to the "exceptionally high vacancy rate" in para 134 meant a vacancy rate greater than 15%. It followed that, in calculating loss of rent in such cases, allowance must be made for 15% vacancy. The Tribunal appeared to have made a 15% allowance for vacancies in para 135 (where the Tribunal set out its conclusions in relation to buildings 12 and 12A). A similar allowance should be made in relation to all the other vacant accommodation within category (a).

173. Mr Massie said that different considerations applied to cases in category (b), that is units which continued in occupation after 2004, but where the rent was significantly below market value. He did not dispute the arithmetic of Mr Asher's calculations. He pointed out, however, that in contrast to category (a) the Tribunal had made no finding that, in the absence of the CPO, rents paid by existing occupiers could and would have been increased to the calculated ERV over the period in question. This was consistent with the evidence and submissions at the original hearing and was not an error. There was no justification for making an alteration to the decision in this respect.

174. Mr Massie also pointed out that Mr Asher's calculations valued the mezzanines at the same level as the main space, in contrast to the approach adopted in para 135 of the interim decision. They also failed to allow for the 15% vacancy rate which had been allowed in that paragraph. Mr Massie did not refer in his report to the marketing period which it would be reasonable to allow before the Sunterra unit could have become rent producing. In oral evidence in chief, however, he said that Mr Asher's three month period seemed "rather quick".

175. On the assumption that the Tribunal was minded in principle to allow TNL's application, Mr Massie considered that the amended amount of compensation for loss of rent should be £24,700. This related to units 5GB and 5GB-M, 6CGB and CGB-M, 5S and 5SA, 6AGA and 6AGA-M, 6BGB, 6ATB, 6CGA and 6CGA-M and 6BGA, all of which fell within category (a).

176. I deal firstly with Mr Massie's suggestion that there was no evidence to justify a claim for loss of rent for units in category (b). I do not agree. In his evidence at the main hearing Mr Loxam said, and I accept, that he had done his best at a difficult time to retain and attract tenants, keeping rents as low as necessary in order to do so (witness statement para 3.16). I am satisfied that, in the absence of any CPO proposals, TNL would have taken steps to increase rents paid for the occupied units to market level whenever it was reasonable to do so. A summary of tenancies was produced during Mr Asher's re-examination (trial bundle D, page 123). This stated, in respect of units 5GA and 5F, that "As with all tenants the agreement was subject to a three year renewal with six months notice of termination by either party." The accuracy of that statement was not challenged. Accordingly, I consider it reasonable to award compensation for all units within category (b) on the basis that the rent payable would have increased to market value six months after the date of Mr Inman's letter of 16 February 2004 to Mr Loxam – that is by 16 August 2004. In doing so, I have not overlooked the possibility that, in the absence of the background of compulsory acquisition, the full rental value might have been achieved at an earlier date, or that some tenants might have vacated early.

177. At the close of Mr Massie's evidence I confirmed that in the interim decision I had indeed calculated the loss of rent from units 12 and 12A on the basis that 15% should be deducted from

ERV to reflect voids. I added, however, that having heard Mr Asher's evidence I found it difficult to see why Mr Asher was wrong to suggest that this was double counting given that, apart from the units for which loss of rent was being claimed, more than 15% of the accommodation had been vacant on the valuation date. Mr Massie replied, very fairly, that he could not explain what was wrong with Mr Asher's approach, although he felt that it was an extremely difficult matter to think through. I find that the 15% deduction for voids does represent double counting and should not be made when assessing compensation for loss of rent.

178. Turning to the claims for loss of rent from mezzanines, in each case Mr Asher valued these at the same rate as the main space in the relevant unit. He suggested that to do otherwise would mean that the main space was undervalued. I do not agree. Mr Massie said that, when he prepared his 2005 valuation, he was aware that some units included a mezzanine area, but he did not specifically add any rent for the mezzanines. I accept that evidence. Mr Massie suggested that, for the purpose of assessing the loss of rent, the mezzanines should be valued at one seventh of the main space rate and I am satisfied that that approach does not undervalue any of the accommodation within the units in question. I will therefore value all mezzanines at one seventh the main space rate.

179. Finally, I accept Mr Massie's opinion that the three months letting period which Mr Asher allowed when assessing the loss of rent from the Sunterra unit is too conservative. Notwithstanding the strong market conditions at the time, I find that there would have been a period of 4½ months before any new tenant would have started paying rent.

180. My calculations of the loss of rent suffered by TNL appear on Appendix 2. Mr Asher accepted in cross examination that the market rental value of all the main space occupied by Water Sculptures was £3.25 per sq ft, and not partly £3.25 and partly £3.50 as shown in his calculation. I have adjusted the amount due in respect of that unit accordingly. The total compensation for loss of rent taken from Appendix 2 is £62,653. This is in addition to the unchallenged figure of £9,967 previously awarded for units 12 and 12A.

Result

181. The effect of these conclusions is to increase the total compensation payable to TNL to £2,045,043.95, calculated as follows:

Compensation awarded in interim decision	£2,001,390.95
Deduct reduction in freehold value (£1,771,000 minus £1,752,000)	£ 19,000.00
	£1,982,390.95
Add additional compensation for loss of rent	£ 62,653.00
	£2,045,043.95

182. I confirm that this decision will take effect when the question of costs has been determined.

Dated 25 June 2012

Costs Addendum

183. I have received written submissions on costs.

184. On 25 March 2009 the acquiring authority made an unconditional offer to pay to the claimant the aggregate of (1) £2m compensation, (2) reasonable professional fees in respect of the preparation and negotiation of the claim prior to the reference (pre-reference costs), (3) costs of the reference up to the date of the offer, and (4) interest on that portion of the sums in (2) which had not been paid previously.

185. The total compensation awarded - £2,045,043.95 – included pre-reference costs of £34,101 – being the aggregate of £5,800 professional fees agreed and £28,301 determined in respect of disputed items. In order to compare the acquiring authority's offer of £2m with the Tribunal's award, it is thus necessary to deduct the pre-reference costs of £34,101 from the total award, producing a figure of £2,010,942.90. The claimant has therefore beaten the acquiring authority's offer by £10,942.90.

186. The claimant submitted that it should have the costs of the reference under the general rule, because the acquiring authority's offer did not exceed the award. If the costs of the preliminary issues hearing were dealt with separately, the claimant asked to be awarded the costs of that hearing, or alternatively a just proportion of such costs having regard to its success in one of the three issues, or alternatively that there should be no order as to costs.

187. The claimant said that it had succeeded in relation to preliminary issue (b), in that the Tribunal determined that there was a percentage hope of planning permission, that such permission would not be refused because of access and transport difficulties or considerations, and that such permission would be granted subject to the conditions and planning obligations that were identified in the decision.

188. The claimant submitted that all the matters in issue determined by the Tribunal in relation to preliminary issue (b) concerned practically all the planning issues that also had to be addressed by the Tribunal in relation to preliminary issues (a) and (c). The expert evidence, the issues that each expert addressed and their respective conclusions covered, largely, the same ground in relation to each of the three preliminary issues, notwithstanding that the respective experts had to draw conclusions specific to each preliminary issue. It was most unlikely that the hearing of the preliminary issues had been extended by reason only that the Tribunal also had to determine preliminary issues (a) and (c). It was necessary for the claimant to seek a determination by the Tribunal in relation to issue (b), and it was reasonable to incur the costs accordingly. The claimant succeeded in preliminary issue (b), and the acquiring authority should therefore pay the claimant's costs of the preliminary issues. Although the Tribunal did not ultimately find that an additional sum reflecting hope value would be payable, it was reasonable for the claimant to have advanced its case in relation to the preliminary issue on which it did succeed.

189. The acquiring authority submitted (i) that it should receive its costs from the date on which it was directed that the preliminary issues be determined (including the costs of the pre-trial review on 7 November 2008) up to and including the date on which the acquiring authority's amended reply to the claimant's re-amended statement of case was served and (ii) the claimant should pay 75% of the acquiring authority's costs incurred before and after the dates mentioned in (i). The proportion of 75% was intended to reflect in a broad brush manner the following principal factors:

(1) the fact that the acquiring authority was substantially successful even though the award was marginally above the offer.

(2) the fact that the Tribunal rejected Mr Ashall's evidence on refurbishment costs.

(3) the fact that the claimant succeeded to some extent on certain of the disturbance items.

(4) the fact that costs were unreasonably incurred by reason of the inadequacy of the claimant's amended statement of case dated 3 September 2010; changes in the clamaint's schedule of existing uses of the reference land; the inadequacy of the information in the expert report of Mr Potts; the claimant's delay in accepting the acquiring authority's suggestion that a single valuation date be agreed and reference ACQ/388/2008 be withdrawn until after the hearing had taken place and submissions had been made on the issue; the claimant's repeated failure to comply with the prescribed timetable for evidence and/or submissions; and the claimant's unreasonable response to the acquiring authority's application to amend the Tribunal's decision in relation to the value of the land.

190. The acquiring authority accepted that the matter was outside the scope of section 4 of the Land Compensation Act 1961 because the award was higher than the offer. Nevertheless, it could not reasonably be overlooked as a starting point that the award was a mere 0.55% above the offer, and was by a large margin lower than the sums claimed either originally (land value £6.35m), or when the claim was revised following determination of the preliminary issues (land value £3.75m). It was clear from the decision of the Court of Appeal in *Purfleet Farms Ltd v Secretary of State for the Environment, Transport and the Regions* [2003] 02 EG 105 that the Tribunal must consider whether the exaggeration of the claim had led to costs which were not reasonable for the claimant to incur or whether it had been the pursuit of issues which it was not reasonable for the claimant to pursue that had led to the exaggeration of the claim. The acquiring authority submitted that, in these circumstances, it would be inappropriate to determine the question of costs simply on an overall basis. Rather, it was necessary to have regard to the various issues which had been considered by the Tribunal in the course of the reference.

191. On the preliminary issues the acquiring authority had succeeded on all issues of substance. The costs incurred on the preliminary issues were in relation to a claim for £6.35m assuming planning permission as contended by the claimant. If that basis of claim had been found to be correct, it would have been unnecessary to assess the existing use value and the disturbance claim. If the claimant had not advanced the contention that planning permission was to be assumed, it was unlikely that the parties would have requested, and the Tribunal would have directed, that the planning issues be heard as preliminary issues involving a 7 day hearing with several experts of different disciplines.

192. Whilst it was understandable that the Tribunal should have reserved its decision on costs until it was able to judge what value was to be attached to the hope value element of the claim, it could now be observed that when the claimant revised its case, only £250,000 (subsequently reduced to £200,000) was attached to hope value. If the claimant had originally attached £250,000 rather than £1.14m to hope value, it was unlikely that the parties would have requested, and the Tribunal would have directed that the planning issues be heard as preliminary issues. The Tribunal had subsequently decided that a potential purchaser would not have attached any substantial value to the "hope" in addition to the existing use value. The acquiring authority had therefore been wholly successful in relation to the effect on value of the potential for development. It should therefore be awarded all its costs in relation to the preliminary issues and for the consequent revision to the pleadings after the Tribunal's decision.

193. The acquiring authority said that although, following the preliminary issues decision, the claimant claimed that the land should be valued at £3m based on its existing use, this was not an existing use value. That was because the claimant had made assumptions as to the uses to which various parts of the premises could be put without any regard to the question whether planning permission would have been required for such uses. This necessitated further evidence at the second hearing. The Tribunal's decision in relation to these planning issues was wholly in favour of the acquiring authority's contentions and the acquiring authority submitted that this should be reflected in the costs order.

194. On valuation issues, the acquiring authority pointed out that the eventual outcome, while higher than Mr Massie's valuation, was substantially lower than Mr Asher's valuation. In its re-amended statement of case the claimant had contended that parts of the building should be valued on the assumption that refurbishment works had been carried out and that much of the floor space had been let as offices. It was therefore necessary to adduce evidence as to the extent of the works needed to refurbish the buildings to the standard appropriate to the use assumed by Mr Asher. It subsequently became clear that the costs of refurbishment included in the claimant's re-amended statement of case had not been based on advice from a quantity surveyor and Mr Potts was instructed subsequently to support the figures in the re-amended statement of case. The explanation in Mr Potts's report as to how he had arrived at his figures was so inadequate that the acquiring authority had to utilise the procedure in the Tribunal's practice directions to pose supplementary questions.

195. On disturbance, the acquiring authority submitted that its position, namely to admit the principle but to ask for proper explanation of the amounts claimed, was entirely reasonable. The Tribunal had found in favour of the claimant (in whole or part) in relation to loss of rent, management time, legal fees and other professional fees. The total amount awarded in respect of the disputed items was £125,581. Apart from loss of rent, these items were dealt with largely as a matter of submission involving relatively little time and cost. The acquiring authority recognised that in determining costs the Tribunal should take account of the fact that the claimant was largely successful on these items, but at the same time should take account of the fact that the costs incurred on these items formed a relatively small proportion of the total costs. Although the claimant was to a certain extent successful with regard to loss of rent, the amount awarded was a consequence of the Tribunal's decision in relation to the rental value of the various parts of the premises. The dispute as to loss of rent in the context of the disturbance claim did not add significantly to the length or costs of the hearing.

196. Generally, the acquiring authority submitted that the claimant's conduct throughout the course of the proceedings had in many respects been unreasonable and had added unnecessarily to the costs incurred by the acquiring authority. In contrast, the acquiring authority had acted reasonably and proportionally at all times, endeavouring to balance appropriately the need to respond to the claimant's case while minimising costs having regard to its position as guardian of the public purse.

197. I deal firstly with the acquiring authority's submission that a starting point when considering costs is the fact that the sum determined was only marginally higher than the acquiring authority's offer. I do not accept that submission. The starting point is that the claimant has beaten the sealed offer. In para [29] of *Purfleet Farms* Potter LJ summarised the legal position as follows:

> "it is my view that the proper approach of the tribunal for the costs of a successful claimant (ie 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 any given 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 (eg abandoned issues, unnecessary adjournments, or failure to comply with 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 the 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."

198. In para [37] of Potter LJ observed that

> "if the amount of the exaggerated claim is based on the valuation, opinion and evidence of the claimant's expert witness, it will rarely be appropriate to make an adverse costs order against the successful claimant. Valuation is an inexact science."

The amount of compensation claimed in this reference was well in excess of the amount determined. It was based on the opinions of a number of expert witnesses whose evidence, to varying extents, was not accepted by the Tribunal. Moreover, I consider that some of the criticisms of the claimant's conduct of the reference which have been made by the acquiring authority are justified, albeit to a relatively minor extent. Nevertheless I do not consider that these matters, taken together, constitute a sufficient reason to deprive the claimant of any of its costs, given the scope that exists for reasonable disagreements between experts on planning and valuation matters and also the conduct of Mr Massie in failing to mention in his expert report that he had previously valued the reference land at some three times the figure he was putting to the Tribunal.

199. In my judgment, looked at in the round, the acquiring authority has not demonstrated that the claimant incurred costs unreasonably on the preliminary issues, the further planning issues, the valuation issues or disturbance, or that it pursued issues which it was not reasonable to pursue. There is in my view no special reason to depart from the general rule in this case. Accordingly, the acquiring authority must pay the claimant's costs of the reference, such costs to be assessed in default of agreement by the Registrar of the Lands Chamber on the standard basis.

200. I would add that this addendum has been seen in draft by Her Honour Judge Robinson, who presided over the preliminary issues hearing and who has expressed agreement with this addendum so far as it relates to that hearing.

Dated 4 September 2012

N J Rose FRICS

APPENDIX 1

ST GEORGE'S WORKS, ST GEORGE'S QUAY,
LANCASTER, LA1 5QJ
VALUATION BY THE UPPER TRIBUNAL (LANDS CHAMBER)

Floor	Ref	sqft	ERV	£ pa	£ pa	£ pa
3F	A	1,458	1.50	2,187		
	1 & 2	1,948	1.50	2,922		
	B	1,948	1.50	2,922		
	3 & 4	2,411	1.50	3,617		
	5	4,080	1.50	6,120		
	C	1,356	1.50	2,034		
	D	4,037	1.50	6,056		
Sub Total		**17,238**			25,857	
2F	6	3,357	2.25	7,553		
	7	4,413	4.00	17,652		
	8	4,080	7.00	28,560		
	E	4,263	2.00	8,526		
Sub Total		**16,113**			62,291	
FF	F	3,358	5.50	18,469		
	G	2,002	5.50	11,011		
	12	2,411	5.50	13,261		
	13	4,080	5.50	22,440		
	H	4,263	2.50	10,658		
Sub Total		**16,114**			75,838	
GF	1	5,784	3.25	18,798		
	J	2,002	3.75	7,508		
	K	2,411	4.00	9,644		
	L	4,080	3.50	14,280		
	M	4,263	3.00	12,789		
Sub Total		**18,540**			63,019	
GF Unit		3,500	3.50	12,250	12,250	
		71,505				239,255
Deduct floor area adjustment – 12.15%						29,069
						210,186
Add ERV building 12						15,185
						225,371
Y P in perpetuity @ 9%						11.11
						2,503,872
Less						
Running void 15%		375,064				
Management 5%		125,021				
Maintenance and insurance 5%		125,021			625,106	
						1,878,766
Less purchaser's costs – 5.75%						108,030
						£1,770,736
					say	**£1,771,000**

APPENDIX 2

ST GEORGE'S WORKS, ST GEORGE'S QUAY,
LANCASTER, LA1 5QJ
DETERMINATION BY THE UPPER TRIBUNAL (LANDS CHAMBER)
OF LOSS OF RENT COMPENSATION FOLLOWING REOPENED HEARING

(a) Tenants vacating due to CPO and not replaced

Cane of Kendal (Lease 1) – 5GB and 5GB-M

Vacated December 2005

Loss of rent:

ERV 5GB	1,486sq ft @	£3.50	=	£5,201 per annum
5GB-M	1,520sq ft @	£1.00	=	1,520
				£6,721 per annum

7 months equates to **£3,921**

Cane of Kendal (Lease 2) – 6CGB and 6CGB-M

Vacated September 2005

Loss of rent:

ERV 6CGB	915sq ft @	£4.00	=	£3,660
6CGB-M	180sq ft @	£1.14	=	205
			=	£3,865 per annum

10 months equates to **£3,222**

A M Support – 6AGA, 6AGA-M and 6BGB

Vacated December 2005

Loss of rent:

ERV 6AGA	215sq ft @	£3.25	=	£ 699
6AGA-M	200sq ft @	£0.93	=	186
6BGB	75sq ft @	£3.75	=	281
				£1,166 per annum

7 months equates to **£680**

Davies – 6ATB

Vacated September 2004

Loss of rent:

ERV	527sq ft @	£1.50	=	£790

22 months equates to **£1,448**

Graeme Casson – 6BGA, 6CGA and 6CGA-M

Vacated October 2005

Loss of rent:

ERV 6BGA	171sq ft @	£3.75	=	£ 641
6CGA	732sq ft @	£4.00	=	2,928
6CGA-M	201sq ft @	£1.14	=	230
				£3,799 per annum

9 months equates to **£2,850**

(b) Units suffering from inability to raise passing rents to market levels due to shadow of CPO - 6 months notice of termination required before increase obtained

Westgate House – 5GA and 5F

ERV 5GA	1,637sq ft @	£3.50	=	£ 5,730
5F	3,336sq ft @	£5.50	=	18,348
				£24,078
Less passing rent				£16,000
Shortfall				£ 8,078 per annum

23 months equates to **£15,483**

Water Sculptures -6AGB, 6AGB-M, 6AGC and 7D

Loss of rent:

ERV 6AGB	2,066sq ft @	£3.25	=	£6,715
6AGB-M	968sq ft @	£0.93	=	£ 900
6AGC	527sq ft @	£3.25	=	£1,713
7D	2,880sq ft @	£3.25	=	£9,360
				£18,688 per annum
Less passing rent				£10,500
Shortfall				£ 8,188

23 months equates to **£15,694**

Cane of Kendal (Lease 1) – 5GB and 5GB-M

Vacated December 2005

Loss of rent:

ERV 5GB	1,486sq ft @	£3.50	=	£5,201
5GB-M	1,520sq ft @	£1.00	=	£1,520
				£6,721 per annum
Less passing rent				£6,250
Shortfall				£471 per annum

16 months equates to **£628**

Cane of Kendal (Lease 2) – 6CGB and 6CGB-M

Vacated September 2005

Loss of rent:

ERV 6CGB	915sq ft @	£4.00	=	£3,660
6CGB-M	180sq ft @	£1.14	=	205
				£3,865
Less passing rent				£2,000
Shortfall				£1,865 per annum

13 months equates to **£2,020**

Alans Removals – Units ST

Loss of rent:

ERV	3,820sq ft @	£1.50	=	£5,730
Less passing rent				£5,200
Shortfall				£ 530 per annum

23 months equates to **£1,016**

Cox – 6CTB

Loss of rent:

ERV	1,031sq ft @	£1.50	=	£1,547 per annum
Less passing rent			=	700
Shortfall				£ 847 per annum

23 months equates to **£1,623**

(c) Tenant vacating for reasons unconnected with CPO

Sunterra 5S and 5SA

Vacated December 2005. Therefore suffered 10 months vacancy.

Assume 4½ months required before rent producing

Loss of rent:

ERV	3,568sq ft @	£7.00	=	£24,976 per annum

5½ months equates to **£11,447**

(d) Unit let post February 2004 at sub-market rental level due to shadow of CPO

Ultimate Outdoors – 6CF

Let February 2005

Loss of rent:

ERV	2,025sq ft @	£5.50	=	£11,138
Less passing rent			=	4,750
Shortfall				£ 6,388 per annum

18 months equates to **£9,582**

LOSS OF RENT – SUMMARY

(a) Tenants vacating due to CPO and not replaced

Cane of Kendal (Lease 1)	=	£3,921	
Cane of Kendal (Lease 2)	=	£3,222	
A M Support	=	£ 680	
Davies	=	£1,448	
Graeme Casson	=	£2,850	£12,121

(b) TNL unable to increase passing rents to ERV due to CPO

Westgate House		£15,483	
Water Sculptures	£15,694		
Cane of Kendal (Lease 1)		£ 628	
Cane of Kendal (Lease 2)		£ 2,020	
Alans Removals		£ 1,016	
Cox		£ 1,623	£36,464

(c) Tenant vacating for reasons unconnected with CPO

Sunterra	£11,447

(d) Unit let post February 2004 at sub-market rent due to CPO

Ultimate Outdoors	£ 9,582
	£69,614
Less management, maintenance and insurance 10%	£ 6,961
Total loss of rent (excluding units 12 and 12A)	**£62,653**