HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 44

on appeal from:[2008]EWCA Civ 1230

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Transport for London (London Underground Limited) (Appellants) *v* Spirerose Limited (in administration) (Respondents)

Appellate Committee
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury
Lord Collins of Mapesbury

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LORD SCOTT OF FOSCOTE

My Lords,

1. The issue for decision in this appeal relates to the basis on which compensation for compulsory purchase should be assessed in a case where the land in question has an unrealised potential for development but where the success of an application for the requisite planning permission is, although probable, not a certainty. More particularly, the issue is whether, in such a case, compensation should be assessed on the basis that planning permission for the development *would* be granted, or whether the amount that such an assessment would produce should be discounted to reflect the lack of certainty. I have had the advantage of reading in advance the opinions of my noble and learned friends Lord Walker of Gestingthorpe and Lord Collins of Mapesbury and agree with their conclusion that the assessment of compensation should take into account that lack of certainty and that, accordingly, this appeal should be allowed. I want, however, to add just a few words of my own and for that purpose gratefully adopt the recital of the relevant facts to be found in paragraphs 67 to 72 of Lord Collins' opinion.

2. Compulsory purchase is a creature of statute and the compensation to be paid to the expropriated owner is likewise provided for by statute. The current statute is the Land Compensation Act 1961, which consolidated earlier legislation. Rule (2) of section 5 re-enacts the principle set out in section 2 of the Acquisition of Land (Assessment of Compensation) Act 1919, but that had been established earlier by judicial decisions interpreting and applying provisions in the Land Clauses Consolidation Act 1845, that compensation was to be assessed on the basis of the value of the land to its expropriated owner,

not on the basis of its value to the acquiring authority. Rule (2) says that

> "The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise."

3. It is obvious that once land has been made the subject of a compulsory purchase order and notice to treat has been served by the acquiring authority, the value of the land to the seller in the open market cannot be ascertained by an actual sale. The market value becomes a matter of valuation and for that purpose a hypothetical open market has to be assumed and the attributes of the land for the purposes of the hypothetical sale in that market become important. The 1961 Act provides both for certain matters relating to the land to be assumed and for other matters to be disregarded. Section 6 of the Act provides for certain disregards (see para 77 of Lord Collins' opinion), none of which, fortunately, is relevant in the present case, and section 9 requires any depreciation in the value of the land caused by the acquiring authority's compulsory purchase plans to be disregarded.

4. Bearing in mind the importance of development potential in the assessment of market value, it is not surprising that sections 14 to 16 of the Act provide for certain assumptions about planning permission to be made. None of these is relevant in the present case. One of the statutory assumptions, namely, an assumption that planning permission for the land in accordance with a certificate issued under section 17 of the Act would have been granted, might have been relevant but, in the event, was not (see paras 83 to 85 of Lord Collins' opinion which explains why not).

5. Nonetheless section 14(3) of the Act expressly keeps open for the expropriated owner the right to have included in his compensation the value to be attributed to any development potential the land may have. His compensation does not have to be confined to the existing use value of the land.

6. The Tribunal found in the present case that there was a probability that planning permission for a valuable re-development of the land in question would have been granted. But they awarded

compensation on the basis of a valuation of the land not on the footing that the permission would probably have been granted but on the footing that it *would* have been granted. They attributed a value of £608,000 to the land on that latter footing but a value of only £400,000 on the footing that "permission is not as a matter of law to be assumed and only hope value is to be taken into account". The Court of Appeal affirmed the Tribunal's decision and the issue for your Lordships is whether the Tribunal was justified in law in treating a probability as a certainty.

7. The proposition that if an application for planning permission would probably have succeeded it should, for statutory compensation purposes, be assumed that planning permission would have been granted, cannot be derived from statute. That assumption is not one of the statutory assumptions to be found in the 1961 Act. If a section 17 certificate had been obtained the assumption would have been required by section 15(5) of the Act but that had not happened. Moreover the extra-statutory assumption of a certainty of planning permission appears inconsistent with Rule (2) of section 5. It could not be supposed that the sale of a property, in respect of which it could be concluded that a grant of planning permission would probably succeed, would produce as high a price in the open market as a sale of the property with the benefit of an actual grant of the planning permission. The open market can be expected to attribute a premium to certainty or, conversely, to apply a discount to reflect a lack of certainty. The difference between the Tribunal's £608,000 on a certainty basis but £400,000 on a hope basis recognised that market reality. So why did the Tribunal apply an extra-statutory assumption in awarding compensation of £608,000 and why did the Court of Appeal confirm the Tribunal's decision?

8. It may be that part of the thinking was based on the jurisprudence relating to the burden of proof in civil cases. The party on whom lies the burden of proving a relevant fact can succeed in discharging that burden on the so-called "balance of probabilities". If the existence of the fact is more probable than not, the burden of proof is satisfied. But this is to do with proof of historic fact. It has nothing to do with valuation. A search for the market value of land at a particular date must take account of the attributes of the land at that date. Absent statutory intervention there is no warrant for adding attributes that the land does not possess nor, for that matter, for subtracting attributes that the land does possess. The land in the present case had a promising potential for the grant of planning permission but it did not have the benefit of an actual grant of planning permission. To transform a

probability of planning permission into a certainty of planning permission on the footing that the civil standard of proof, the balance of probabilities, has been satisfied misunderstands, in my respectful opinion, the nature of the valuation exercise that Rule (2) of section 5 requires.

9. Another suggested source of the proposition that a grant of planning permission should be assumed is the so-called *Pointe Gourde* principle (see *Pointe Gourde Quarrying and Transport Co. Ltd v Sub-Intendent of Crown Lands* [1947] AC 565). The *Pointe Gourde* case has been analysed by Lord Walker (paras 10, 18 and 19 of his opinion) and by Lord Collins (paras 118 to 127 of his opinion). I am in respectful agreement with the opinion expressed by each of them that the principle is one of statutory interpretation (Lord Walker at para 11**,** Lord Collins at para 127) relating to the "value to the seller" concept underlying the assessment of compensation. In *Waters v Welsh Development Agency* [2004] 1 WLR 1304 I expressed my own view of the *Pointe Gourde* principle but my view did not attract support from my colleagues. I find myself, however, in complete agreement with what Lord Walker and Lord Collins have said about *Pointe Gourde* in their respective opinions in the present appeal. I agree that the principle provides no warrant for a valuation of the land with which this case is concerned on the basis that a grant of planning permission was a certainty. I would, therefore, for the reasons given by my noble and learned friends allow the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

10. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Collins of Mapesbury. Lord Collins deals clearly and comprehensively with all the issues in this appeal. I am in full and respectful agreement with his reasoning, and having studied his draft opinion I have been doubtful whether it would serve any useful purpose to publish the opinion which I had already prepared. But concurrent opinions have their supporters as well as detractors (Dr F A Mann, The Single Speech (1991) 107 LQR 519; James Lee, A Defence of Concurring Speeches [2009] PL 305) and it may be worthwhile to make some observations on the *Pointe Gourde* principle.

The statutory background and the Pointe Gourde *principle*

11. In this appeal there has been a good deal of debate about what the *Pointe Gourde* principle is, and whether it is relevant to the determination of the appeal (see *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565). In my opinion it is an imprecise principle, in the nature of a rebuttable presumption, adopted by the court in the interpretation of statutes concerned with compensation for the compulsory acquisition of land. It can be stated at several different levels of generality (see for instance *Waters v Welsh Development Agency* [2004] 1 WLR 1304 paras 42 (Lord Nicholls of Birkenhead) and 146 (Lord Brown of Eaton-under-Heywood, citing the Law Commission's Report No 286). It is only if the principle is stated at a fairly high level of generality (that the court approaches the statute expecting Parliament to intend compensation to be assessed on a "no-scheme" basis) that it has much to do with the determination of this appeal.

12. The principle is essentially concerned with statutory construction. It is not (unlike the *Barras* principle: see *Barras v Aberdeen Sea Trawling & Fishing Co. Ltd* [1933] AC 402 and Bennion, Statutory Interpretation, 5th ed. pp 599-604) concerned with the meaning of a particular word or phrase which has appeared in a succession of statutes dealing with the same subject-matter, but with the general attitude and expectation with which the court should approach a statute dealing with compensation for the compulsory acquisition of land. It is interesting to note that Bennion mentions *Pointe Gourde* once only (at p 442) as an illustration of the following observation:

> "When an area of law is of long standing, and is made up of enactments some with a long history, finding the legal meaning may be especially difficult to ascertain. Here certain special interpretative conventions may have grown up.
>
> *Example* 150.1 Such conventions have arisen in the compulsory purchase of land. One of these is known as the 'no-scheme rule' or '*Pointe Gourde* rule'. As stated by Lord MacDermott:
>
> 'It is well settled that compensation for a compulsory acquisition of land cannot include an increase in value

which is entirely due to the scheme underlying the acquisition.'

This rule may operate to influence the legal meaning of a relevant enactment."

13. The law of compensation for compulsory acquisition of land has a long history, having its origins about two centuries ago in the construction of canals, railways and other infrastructure of the industrial revolution. Other fields of law that Bennion may have had in mind include patents, bankruptcy, rating and income tax. Until well into the 20th century Acts of Parliament were expressed in much plainer language than they are today, and in all the fields which I have instanced successive generations of judges have interpreted and developed the meaning of simple undefined statutory expressions. In this way a judge-made body of doctrine came into existence. But as over the years statute law has changed both in its substance and in its style of drafting, it is sometimes difficult to discern whether Parliament intended to carry forward, or modify, or supplant the freight of judicial exposition of earlier statutes (for an unusual example, in the field of compulsory purchase, of Parliament expressly carrying forward judicial doctrine, see the observations of Lord Hoffmann on injurious affection under section 10 of the Compulsory Purchase Act 1965 in *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1, 6-7; there are also some interesting observations at pp295-296 about 'the opinions of individual [Victorian] judges on questions of economic and social policy.')

14. The history of compensation for compulsory purchase of land is fully explained in the opinions of Lord Nicholls of Birkenhead, Lord Scott of Foscote and Lord Brown of Eaton-under-Heywood in *Waters*. It is not therefore necessary to repeat it at length, but it may be helpful to identify the most important milestones. The first is the Land Clauses Consolidation Act 1845, which set out standard provisions, the form of which had been developed over two or more generations in private or local Acts enabling land to be compulsorily acquired for the construction of canals, railways and similar works. Section 63 of the 1845 Act used the simple expression "value" as the statutory measure of compensation for land taken.

15. Judicial exposition of this simple expression (in an age which tended to set a higher value on private property rights than on communal needs) favoured the landowner by building in a premium

because the purchase was compulsory, and reinforced this by what Scott LJ (in *Horn v Sunderland Corporation* [1941] 2 KB 26, 40) referred to as

> "the old sympathetic hypothesis of the unwilling seller and the willing buyer which underlay judicial interpretation of the Act of 1845."

Scott LJ was in a position to speak with authority as he had chaired a committee which reviewed the law and led to the Acquisition of Land (Assessment of Compensation) Act 1919. The main purpose of that Act was, as he said,

> "to mitigate the evil of excessive compensation which had grown up out of the theory [of the unwilling seller and willing buyer], evolved by the Courts…"

The 1919 Act achieved this purpose by six rules, set out in section 2. These now appear in almost exactly the same language in section 5 of the Land Compensation Act 1961.

16. Judicial interpretation was not however wholly predisposed in favour of landowners. Indeed the most important element of judicial exposition, during the half-century before the 1919 Act, was the development of the principle which Lord Nicholls (in *Waters,* paras 18-19) explained as follows:

> "When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to *increase* the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power. For the same reason there should also be disregarded the 'special want' of an acquiring authority for a particular site which arises from the authority having been authorised to acquire it.
>
> This approach is encapsulated in the time-hallowed pithy, if imprecise, phrase that value in this context means value

to the owner, not value to the purchaser. In *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, 42, the graveyards case, Cockburn CJ said:

> 'When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it.'"

17. The graveyards case was an unusually clear example since (although there was then no general planning control) the Bishop of London was unlikely to grant permission for corpses to be exhumed and reinterred elsewhere, in the absence of some pressing public need. The graveyards were therefore of no commercial value to the rector in whom they were vested. But questions arose in less extreme cases as to the "special adaptability" of land for some public purpose (such as the construction of a reservoir). Here the court took a more nuanced approach, as appears from the decision of the Court of Appeal in *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16. The judgments of Vaughan Williams LJ and Fletcher Moulton LJ are not easily reconciled. The former recognised (at p28) that the possibility (or probability) of special use could be recognised in the valuation, but not the "realised probability." The latter (at p35) was more restrictive:

> "The scheme which authorises the new reservoir only entitles the owner of the land to receive as compensation the value of the land unenhanced by that scheme, and, unless its situation and peculiarities create a market for it as a reservoir site for which other possible bidders exist, I do not think that the single possible purchaser that has obtained parliamentary powers can be made to pay a price based on special suitability merely by reason of the fact that it was easy to foresee that the situation of the land would lead to compulsory powers being some day obtained to purchase it."

18. Fletcher Moulton LJ's approach received legislative affirmation, as Lord Nicholls put it (in *Waters* at para 28) in rule 3 of section 2 of

the 1919 Act which was (apart from a transitional proviso) in the following terms:

> "The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority."

This provision was re-enacted, in almost the same terms, as rule 3 of section 5 of the 1961 Act. Vaughan Williams LJ's distinction between a possibility and a realised possibility was echoed by the Privy Council, as Lord Collins notes, in *Gajapatiraju v Revenue Divisional Officer, Vizagapatan* [1939] AC 302, 313.

19. *Pointe Gourde* was a decision of the Judicial Committee of the Privy Council on an appeal from Trinidad and Tobago. In 1941 the British Government made an agreement with the United States Government for the latter to construct a naval base in Trinidad, and the appellant company's land, the most important feature of which was a limestone quarry, was compulsorily acquired for the use of quarried stone in building the naval base. The applicable statute was the Land Acquisition Ordinance 1941, section 11(2) of which was in terms very similar to those of rule of section 2 of the 1919 Act. The tribunal assessed compensation at $101,000, including $15,000 on account of an expected increase in profits because of the special needs of the construction work. The Privy Council held that section 11(2) did not apply so as to disallow the $15,000 award, but reached the same conclusion on the more general ground that it was well settled that compensation should not include an increase in value entirely due to the scheme underlying the compulsory acquisition. Lord MacDermott quoted from the judgment of Eve J (approved by the Court of Appeal) in a case antedating the 1919 Act, *South Eastern Railway Company v LCC* [1915] 2 Ch 252, 258:

> "Increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded."

This quotation was arguably rather out of context, since the *South Eastern Railway* case involved the acquiring authority trying to reduce

the amount of compensation on the ground of betterment (through opening up a Strand frontage) of other land in the same ownership.

20. Quite apart from its subsequent history, I find *Pointe Gourde* itself a rather surprising decision. Section 2(3) of the 1919 Act, mirrored by section 11(2) of the Trinidad Ordinance, was evidently intended to give express statutory confirmation to the "special adaptability" rule discussed in cases like *Lucas*. It would not, I think, have been stretching its language unduly to treat it as covering the expected increase in profits from the quarry. Instead the Privy Council seems to have taken the view that the extra profits were outside the express statutory provision, but were nevertheless within the general "value to owner" principle, illustrated by the 19th century cases such as the graveyards case and embodied in the Trinidad equivalent of rule 2 of section 2 of the 1919 Act. By focusing on a hypothetical sale by a willing vendor without any identification of the hypothetical purchaser, the "value to owner" principle transports the court into a "no-scheme" world. That is the view that Lord Nicholls took, with the agreement of the majority, in *Waters*, para 42:

> "It is important to keep in mind that, despite its late arrival on the scene, the expression 'the *Pointe Gourde* principle' is not a reference to a principle separate and distinct from the 'value to the owner' principle. It is no more than the name given to one aspect of the long established 'value to the owner' principle."

Lord Pearson made some illuminating remarks to the same effect in *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 213-215, some of which are quoted by Lord Collins.

21. As it happens, the Privy Council's advice to His Majesty in *Pointe Gourde* was given shortly before the passing of the Town and Country Planning Act 1947, which introduced unprecedented statutory control of the use and physical development of land in England and Wales. It was a very important milestone in the history of compensation for the compulsory purchase of land. Parliament was faced with a momentous choice, whether to compensate landowners for no more than the value of their land in its current use and state of physical development (as enhanced by any actual permission or general development rights under the 1947 Act) or to extend compensation to the "hope value" of obtaining permission for development in the future. Parliament took the former view, treating future development rights as

public property. (That notion was not wholly novel in this country, as demonstrated by Lloyd George's increment value duty introduced by the Finance (1909-10) Act 1910; the intricacies of that long-defunct tax explain why, surprisingly, it was the Revenue that was arguing – unsuccessfully – for a *lower* value in *IRC v Clay* [1914] 3 KB 466; *Clay* was not a compulsory purchase case at all but was cited by the respondent's counsel in *Pointe Gourde* and described by him as having "disturbed the waters".)

22. Apart from some limited relaxation in 1954, the stern principle introduced by the 1947 Act held the field until the Town and Country Planning Act 1959. Until the coming into force of the 1959 Act the law was still (I venture to say) reasonably straightforward, at any rate by comparison with what was to come: the *Pointe Gourde* decision meant that the "value to owner" principle was to be found not only in the explicit provisions of rule 5 of section 2 of the 1919 Act but also in the less explicit provisions, as judicially expounded, of section 2(2); and the general "current use" rule in the 1947 Act, although stern, was at least simple. That simplicity was swept away by Part I of the 1959 Act. The stark simplicity of the 1845 Act and the relative simplicity of the 1919 Act were replaced by provisions displaying the least attractive features of statutory draftsmanship in the second half of the twentieth century. In *Camrose v Basingstoke Corporation* [1966] 1 WLR 1100, 1110 Russell LJ said of section 6 of the 1961 Act:

> "The drafting of this section appears to me calculated to postpone as long as possible comprehension of its purport."

Similarly in *Davy v Leeds Corporation* 1964 3 AER 390, 394 Harman LJ referred to these provisions as "a Slough of Despond."

23. The general shape of the changes made by Part I of the 1959 Act is however reasonably clear. Sections 2 to 4 contained a series of statutory assumptions as to the grant of planning permission in respect of land being compulsorily acquired, and (in section 5) provisions as to the issue by the local planning authority of a certificate of appropriate alternative development, the contents of which were material to some of the statutory assumptions. Section 9 of the 1959 Act provided for various planning matters (most relating to development of other land in the same scheme) to be disregarded. These provisions of the 1959 Act are now found, subject to some amendments, in the Land Compensation Act 1961 sections 14 to 16 (statutory assumptions),

section 17 (certificate of appropriate alternative development) and section 6 and First Schedule (statutory disregards).

24. The background set out above (which is more fully discussed in *Waters*, both in the speeches in the House already mentioned and in the admirable judgment of Carnwath LJ in the Court of Appeal, [2003] 4 All ER 384) explains the general nature of the problems of construction presented by the 1961 Act. It is a consolidating Act which, as it must, follows closely the wording of the enactments which it is consolidating. So it brings together into a single statute, which your Lordships have to construe as a whole, the simple, unvarnished language of the 1919 Act and the complexities of the 1959 Act which caused so much grief to Russell LJ in *Camrose* and Harman LJ in *Davy*. As the majority of this House decided in *Waters*, the *Pointe Gourde* principle has survived not only the 1919 Act but also the 1959 Act. But now that those statutes are consolidated in the 1961 Act (as from time to time amended, principally to reflect changes in planning law) it must be recognised, in my opinion, that the principle's vigour is now channelled and restrained by a much more complex statutory scheme.

25. There is to my mind a parallel with the travails with the interpretation of taxing statutes that courts endured during the years between *Ramsay* in 1981 and *MacNiven* in 2001. For a time the courts lost sight of the truth that the *Ramsay* principle is a principle of statutory construction, and that taxing statutes are not a different species of enactment subject to different rules of construction. The principal authorities, well known to tax practitioners, are *WT Ramsay Ltd v IRC* [1982] AC 300, *Furniss v Dawson* [1984] AC 474, *IRC v McGuckian* [1997] 1 WLR 991 (especially Lord Browne-Wilkinson at p 998, Lord Steyn at pp 999-1000 and Lord Cooke at p 1005) and *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 (especially Lord Nicholls at paras 1-8 and Lord Hoffmann at paras 28-32). To these I would add a short passage, less well known in this country, from the dissenting judgment of Kirby J in *Commissioner of Taxation v Ryan* (2000) 201 CLR 109, 146,

> "It is hubris on the part of specialised lawyers to consider that 'their Act' is special and distinct from general movements in statutory construction which have been such a marked feature of our legal system in recent decades. The Act in question here is not different in this respect. It should be construed, like any other federal statute, to give effect to the ascertained purpose of the Parliament."

26. Lord Nicholls' review in *Waters* of the history makes only a passing reference (in paras 47 and 48) to the 1947 Act and the 1959 Act. He refers to them in the context, highly relevant in *Waters*, of the increasingly complex and far-reaching schemes of development brought in by the 1947 Act, the New Towns Act 1946 and later statutes concerned with comprehensive urban regeneration. In paras 49-54 he summarises section 6 of and the First Schedule to, the 1961 Act, but only for the purpose of deciding whether there are gaps (he referred to a "gaping lacuna") in the statutory code requiring to be filled by *Pointe Gourde*. Although entitled to the greatest possible respect, this part of his opinion cannot, I think, be regarded as essential to the House's decision in *Waters*.

The issue and the facts

27. The issue in this appeal can be stated quite shortly: it being common ground that the land acquired would (but for the proposed scheme) have had a reasonable prospect of obtaining planning permission for commercial and residential redevelopment, should that prospect be treated as a certainty (though not falling within any of the statutory assumptions) or should it be reflected merely in hope value? (The issues as stated in the bound volume are more discursive, and are not agreed, but my version gives the gist of the issue.)

28. The essential facts can also be stated quite shortly. The detailed findings of the Lands Tribunal are carefully set out in paras 3 to 23 of its written decision, but the essentials are that the respondent owned a single storey printing works (with basement) in Holywell Lane, South Shoreditch. The site was required for the extension of the London Underground between Dalston and Whitechapel. Notice under the Transport and Works Act 1992 was given in 1993. The London Underground (East London Line Extension) Order was confirmed in 1997. Notice to treat was given to the respondent on 24 August 2001 and possession was taken on 3 December 2001, which is the statutory valuation date.

29. The Tribunal's findings as to the prospect of permission for redevelopment (and also its conclusion as to the law, the central point in this appeal) are set out in paras 88 and 89 of the decision:

> "Our conclusion, therefore, is that at the valuation date there was a reasonable prospect of planning permission being obtained for the development (the Calfordseaden scheme) and that, in accordance with our views on the issue of law, planning permission should be assumed for the purposes of valuation. We would add that, at the relevant date for a section 17 certificate, the autumn of 1993, there is no evidence to suggest any likelihood of planning permission for mixed-use development and it can reasonably be inferred that a certificate for such a use would not have been given.
>
> We need also to consider the prospects of obtaining planning permission for the purposes of valuation based on hope value. Our own assessment is that the prospects of obtaining planning permission at the valuation date would have been good. In order to assess hope value, however, what is relevant is not our view of the prospects but the view that prospective purchasers of the site would have taken as to the prospects. In the event we find nothing in the evidence before us to suggest that the view of the market at the valuation date would have been different from the conclusion that we have reached in this respect."

The reference to the Calfordseaden scheme is to a four-storey (with basement) mixed-use building designed by architects of that name. The reference to a section 17 certificate is to a certificate of appropriate alternative development. The respondent made an abortive attempt to obtain such a certificate, but it would have been of no practical utility since it would have related to a date over eight years before the valuation date. In terms of figures, the difference between the two approaches is between £608,000 and £400,000 (para 135 (a) and (c) of the Lands Tribunal's decision).

Are there gaps for Pointe Gourde *to fill in this case*?

30. In para 50 of his opinion in *Waters* Lord Nicholls drew attention to Part III of the First Schedule to the 1961 Act, added by amendment in 1980. He drew attention to para 11, which provides,

> "Paragraph 10 of this Schedule shall have effect in relation to any increase or diminution in value to be left out of

> account by virtue of any rule of law relating to the assessment of compensation in respect of compulsory acquisition as it has effect in relation to any increase or diminution in value to be left out of account by virtue of section 6 of this Act."

I agree that this can only be explained as a reference to the *Pointe Gourde* principle in some shape or form. It does not necessarily mean that what is to be read into the statutory code under that principle has not been attenuated as that code has become more complex.

31. Lord Nicholls then stated in para 51:

> "The first and most obvious oddity of this enactment is that it makes no provision regarding value attributable to the prospect of development of the subject land itself. It is frankly impossible to believe that Parliament intended that enhancement of value attributable to the prospect of development of associated land should be disregarded but not enhancement in value attributable to the prospect of development of the subject land itself. The statutory assumptions regarding planning permissions in respect of the subject land, set out in sections 14 to 16, do not provide an adequate explanation for this difference in treatment. Planning permission is one thing, the prospect of development is another."

He went on to refer to *Camrose.*

32. This closely-reasoned passage calls for careful study. Plainly Lord Nicholls had not overlooked that section 15(1) provides for it to be assumed that the land taken has planning permission for the proposed development (where such permission is not actually in existence at the valuation date). The last two sentences of the paragraph show that. But if planning permission is to be assumed (say, for residential development of 70-plus acres of agricultural land on the edge of a conurbation, as in *Wilson v Liverpool Corporation* [1971] 1 WLR 302) why should it be incredible that Parliament did not intend the compensation to reflect the increase in value due to that assumed planning permission? If that was not its intention Parliament would be snatching back with one hand what it had just given with the other. The assumption of planning permission for residential development may not enable a landowner to obtain the full development value

eventually realised, both because of delay and because a developer would expect to make a good profit for itself. That is the difference between what Vaughan Williams LJ called "the probability" and "the realised probability" in *Lucas* at p28. But to have to accept some discount on the full development value is very different from a total disregard under section 6 and the First Schedule.

33. Lord Nicholls' reference to *Camrose* may provide the explanation. If (to take an extreme and indeed absurd example) planning permission for residential development were assumed for 1,000 acres of high-altitude moorland in Cumbria, the open-market value of the land could be expected to reflect the market's scepticism as to whether the development would ever be carried out and prove profitable. That is the point, in much less extreme circumstances, of the *Camrose* case. Disregarding (under section 6 and the First Schedule, case 4) what Lord Denning MR called the "artificial inflation" of Basingstoke under the Town Development Act 1952, and the extra infrastructure needed for that expansion, the 233 outlying acres (part of the total 550 acres acquired from the Berry family trustees) were unlikely to be developed for many years. Therefore, although there was an assumed planning permission, it was in the circumstances discounted to no more than "hope value"—hope not of planning permission (which was assumed), but of the permission being acted on (see [1966] 1 WLR 1100, 1106).

34. In *Camrose* Lord Denning MR also stated that *Pointe Gourde* had been approved by this House in *Davy v Leeds Corporation* [1965] 1 WLR 445. That seems debatable. Only Viscount Dilhorne (with whom Lord Cohen agreed) referred to *Pointe Gourde*, and what Viscount Dilhorne said was that it had been given statutory expression by section 9(2) of the 1959 Act (now section 6 of, and the First Schedule to, the 1961 Act, which was not in force at the time of the relevant events in *Davy*). No member of the Appellate Committee in *Davy* said that *Pointe Gourde* operated otherwise than through its statutory expression. Russell LJ (in *Camrose*) described *Davy* as an application of the *Pointe Gourde* principle. I would prefer to describe it as a correct application of the statutory code embodying that principle.

35. In his opinion in *Waters* (para 53) Lord Nicholls also found a "gaping lacuna" in the statutory code illustrated by *Wilson v Liverpool Corporation*. The Corporation wished to acquire and develop 391 acres as a housing estate. It managed to acquire 305 acres by

agreement. The prospect of development of the 305 acres was disregarded, and the relevant 74 acres which were compulsorily acquired were valued at a discount on the price fetched by a "dead-ripe" comparable (£6,700 per acre discounted to about £4,700 per acre). This result was arrived at by treating the *Pointe Gourde* principle as still informing the assumption to be made in an unusual situation. The situation was unusual since of the seven different cases found in the First Schedule to the 1961 Act as from time to time amended, only the first is expressed in terms of authority for compulsory acquisition; the other six all refer to types of planning designation for large-scale development. I would regard *Wilson v Liverpool Corporation* as a marginal case which Parliament may not have foreseen (rather than as a gaping lacuna). It is of no direct relevance to the facts of this appeal, which are much simpler than either *Wilson* or *Waters*.

36. There is a lacuna in this case only if your Lordships conclude that the underlying aim of fair compensation—compensation neither obviously in excess, nor obviously falling short, of what the respondent would have received in a no-scheme world—is not met by applying the terms of the 1961 Act, as amended, in their natural meaning. If your Lordships conclude that the natural meaning would produce an unfair result, some other construction may be called for. But that would be a matter of applying recognised, purposive principles of statutory construction, not invoking some judge-made rule which operates outside recognised principles of statutory construction.

37. The scheme, in this case, is the extension of the London Underground from Dalston to Whitechapel. It is not suggested that the carrying out of that scheme increases or depresses the value of the respondent's land in any particular way, except so far as it has taken away the respondent's prospect of obtaining planning permission for mixed-use redevelopment, since no planning authority was going to authorise redevelopment on a site marked for compulsory purchase, as the respondent's land has been since 1993. The respondent is therefore entitled to compensation for the loss of a chance, assessed as at the valuation date (3 December 2001), of obtaining planning permission in a "non-scheme world" sometime between 1993 and 2001. Unless it falls within one of the statutory assumptions in section 6 of and the First Schedule to the 1961 Act, that chance is to be assessed as "hope value", a concept with which valuers, and the Lands Tribunal, are very familiar.

38. It is common ground that the case does not fall within any of the statutory assumptions. Yet the Lands Tribunal and the Court of Appeal, with vast experience of this field of the law, came to the conclusion that planning permission should be assumed, even though none of the statutory assumptions applied. The effect of their reasoning (taken to extremes) is that if there is at the valuation date a 51% chance of planning permission being granted, that should be treated as a 100% certainty. It on the other hand there is a 49% chance, it is either to be treated as no chance at all, or (as the Court of Appeal seemed to favour) left as it is, as a 49% chance. Neither solution seems satisfactory.

39. In reaching this conclusion the Lands Tribunal relied mainly on the decision of the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 and *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020. But it seems reasonably clear that each of those cases started from a finding by the fact-finding tribunal that in the absence of the proposed scheme involving compulsory purchase, planning permission *would* have been granted (not might have been, or would have been expected on the balance of probability to be, granted). They do not therefore assist in the process of elevating a good chance into an assumed certainty.

40. In the judgment of the Court of Appeal delivered by Carnwath LJ, the Court (para 61) was rightly less impressed by the significance of *Melwood* and *Jelson*. Instead it saw itself as having to cope with an anomaly (para 65):

> "As has been seen, the claimant was unable to take advantage of the statutory assumptions because of an anomaly in the provisions fixing the date of consideration. As far as possible, we should interpret the no-scheme rule so as to remedy the anomaly rather than extend it. Further, reflecting the same point, it is plainly desirable that there should be consistency in the assessment of compensation for compulsory acquisition of land in materially similar cases, whether or not the statutory assumptions apply."

41. I sympathise with the Court of Appeal's aim but I respectfully think that it went too far. It assumed that a case in which the owner was unable to take advantage of any statutory assumption (whether under section 16 of the 1961 Act, or under a certificate of appropriate alternative development issued under section 17) was an anomaly to be

remedied in the interests of fairness. But Parliament has enacted a statutory code of some complexity demonstrating that it does not regard all these cases as "materially similar." For the Court to try to correct the code in accordance with its perception of what is fair would amount to judicial legislation. It would upset the balance of the code which Parliament must be supposed to have considered carefully. It would (for instance) render much of section 16 redundant.

42. The Court of Appeal quoted at length from the decision of this House in *Gregg v Scott* [2005] 2 AC 176. In that case the House was asked, in effect, to extend the ambit of "loss of a chance" in tort cases from the issue of quantification of damage to the issue of liability (and in particular, causation of damage, which is an essential of liability in tort). The House was divided on that controversial issue. I am doubtful whether the law of compensation for compulsory acquisition of land will be greatly enriched by reference to the jurisprudence on "loss of a chance" in tort. "Hope value" is, as I have observed, a well-understood concept which has served for generations. The introduction of the tort cases may have been influenced by the fact that Stuart-Smith LJ, who presided and gave the leading judgment in *Porter v Secretary of State for Transport* [1996] 3 AER 693, had also presided and given the leading judgment in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602. I have no doubt, however, that *Porter* was rightly decided.

43. The conclusion which Carnwath LJ drew from *Gregg v Scott* was (para 58):

> "These passages are helpful in making clear that the law offers neither a single solution nor total logical coherence as to the standard of proof for establishing hypothetical events, and that policy considerations are an important factor."

This paragraph refers to a sentence in the opinion of Lord Hoffmann (para 83) emphasised by Carnwath LJ,

> "This apparently arbitrary distinction obviously rests on grounds of policy."

44. I respectfully question whether the distinction is arbitrary. Decisions taken by the free choice of the claimant (as in *McWilliams v Sir William Arrol & Co.* [1962] 1 WLR 295) or by the defendant (as personified by the responsible doctor, as in *Bolitho v City and Hackney Health Authority* [1998] AC 232) go to liability and are therefore (even though hypothetical) decided on the balance of probability. As Baroness Hale said in *Gregg v Scott* (para 194, quoting Tony Weir, Tort Law (2002) p75):

> "The idea that recovery should be proportional to the cogency of the proof of causation is utterly unacceptable."

Questions of quantification of damage, on the other hand, may involve quantifying chances, either future or hypothetical, especially when the outcome would depend (or would have depended) on action taken by a third party either as a matter of free choice (as in *Allied Maples*) or in the exercise of a responsible judgment (as in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563). The decision of a local planning authority is comparable to that of a judge trying an action for damages; the decision is not arbitrary, but neither is it predictable with certainty.

45. For these reasons (which are, I believe, consonant with those of Lord Collins) I would allow the appeal and award compensation of £400,000.

LORD MANCE

46. I have had the benefit of reading in draft the speech of my noble and learned friend Lord Collins of Mapesbury. I agree with his reasoning and conclusions and with the further illumination of the area in the speech of my noble and learned friend, Lord Walker of Gestingthorpe, which I have also seen in draft. I therefore agree that the appeal should be allowed.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

47. I have had the benefit of reading in draft the admirable opinions of my noble and learned friends, Lord Walker of Gestingthorpe and Lord Collins of Mapesbury, and I agree with them that this appeal must be allowed.

48. It has always been common ground that the compensation in this case is to be assessed by reference to the amount which the land to be compulsorily acquired "if sold in the open market … might be expected to realise" as at the date on which possession of the land was taken (or, if earlier, the date of assessment) – see rule (2) of section 5, and subsection (3) of section 5A, of the Land Compensation Act 1961. It has also always been common ground that, while there are certain statutorily required counter-factual adjustments which may have to be made in particular cases to the open market valuation of land which is being compulsorily acquired, in sections 14 to 22 of the 1961 Act, none of them apply here.

49. The Lands Tribunal in this case concluded that, as at the relevant valuation date, although planning permission for development of the land for mixed use had not been applied for or granted, it would have been regarded in the market as likely, but by no means certain, to be granted. In these circumstances, it would seem to follow that the valuation should have been carried out on a "hope value" basis – i.e. by assessing the price which would be obtained for the land bearing in mind (a) its value in the market in the light of its current state of physical development and its currently permitted use, and (b) any added value which would be attributed in the market to the prospect of obtaining planning permission for any physical redevelopment and/or change of use – in this case mixed development.

50. Both the Lands Tribunal and the Court of Appeal nonetheless held that the land should be valued on the basis that it actually had planning permission for residential development. This is a very surprising result, at least on the face of it, for three reasons. First, if a statute directs that property is to be valued on an open market basis as at a certain date, one would not expect any counter-factual assumptions to be made other than those which are inherent in the valuation exercise

(such as the assumption that the property has been on the market and is the subject of a sale agreement on the valuation date) or those which are directed by the statute. To put the point another way, the courts below appear to have inserted a judge-made assumption into a statutory formula, which seems to be complete and self-contained.

51. Secondly, the assumption made in the present case appears to bypass, indeed to render redundant, many of the specific assumptions as to assumed planning permission contained in sections 16 and 17 of the 1961 Act. Thus, in summary terms, subsections (2) and (3) of section 16 state that it should be assumed that land has planning permission for a particular use if two conditions are satisfied, namely (a) that it is allocated for that use in a development plan, and (b) that the use is one "for which permission might reasonably have been expected to be granted". If the decision under appeal is correct, then that is a pointless, indeed almost absurd, provision: whenever permission for a change of use "might reasonably have been expected to be granted", one must, if the courts below are correct, apparently assume that it has been granted.

52. Thirdly, the decision appears to "transgress", as Scott LJ put it in *Horn v Sunderland Corporation* [1942] 2 KB 26, 49, "the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss", save, I should add, where the legislation otherwise provides. (In my view, another principle relied on by the appellant acquiring authority, the presumption of reality as described by Megaw LJ in *Trocette Property Co Ltd v Greater London Council* (1974) 28 P&CR 408, amounts to much the same thing as the principle of equivalence.)

53. The reasoning which underlay the decisions of the Lands Tribunal and of the Court of Appeal had a number of strands, but, on analysis, I do not consider that, even taken together, they really begin to undermine the force of these three simple points.

54. The Lands Tribunal primarily relied on the so-called *Pointe Gourde* principle, which, in summary amounts to this, that the level of compensation for compulsory acquisition of land cannot be increased or decreased by a change in the value of the land which is entirely attributable to the scheme underlying the acquisition. It is hard to see how that principle can assist the respondent land owner in the present case.

55. The only way the *Pointe Gourde* principle could be relied on, as a matter of logic, appears to me to be on the basis that, if the scheme in question had not been in existence, then at some time before the valuation date, the respondent land owner would have applied for, and, on the balance of probabilities, obtained permission for mixed development. I do not consider that that would be a legitimate invocation of the *Pointe Gourde* principle, which is concerned with the effect of the scheme on the value of the owner's interest, not with the characterisation of that interest – see the remarks of Lord Cross of Chelsea in *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 253, approving a dictum of Russell LJ in *Minister of Transport v Pettitt* (1968) 67 LGR 449, 462. It may amount to the same point put another way, but, when assessing compensation, it is, at least generally, inappropriate to invoke the principle for the purpose of speculating what might have happened - see per Lord Brown of Eaton-under-Heywood in *Waters v Welsh Development Authority* [2004] I WLR 1304, para 148, disapproving what was said by Lord Denning MR in *Myers v Milton Keynes Development Corporation* [1974] 1 WLR 696, 704.

56. Quite apart from this, I do not consider that it is right to invoke the *Pointe Gourde* principle, or any other principle developed by the courts, for the purpose of adding a wholly new assumption to the statutory assumptions which have been laid down by the legislature – see per Lord Pearson in *Shaw-Fox* [1973] AC 202, 214-5. All the more so if that assumption is effectively inconsistent with one or more of the express statutory assumptions. I do not thereby intend to suggest 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 in para 127 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 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.

57. In any event, even if it was legitimate to invoke the *Pointe Gourde* principle in this connection, it seems to me that the result arrived at by the Lands Tribunal and the Court of Appeal would be contrary to the fundamental purpose of the principle. Assuming the scheme would have prevented the land owner obtaining planning permission for mixed use, then what the land owner was deprived of by

the existence of the scheme was, according to the Lands Tribunal, not the certainty of getting such permission, but a good prospect of getting it. By awarding compensation on the basis that such permission would be certain to be, or had been, obtained, the courts below were therefore enabling the land owner to be better off than he would have been in the "no scheme world". That appears to me to be contrary to, rather than consistent with, the principle.

58. While not eschewing the basic reasoning of the Lands Tribunal, the Court of Appeal relied on three further grounds for concluding that planning permission for residential development should be assumed to have been granted. "First and foremost", the unfairness of the land owner in this case being unable to take advantage of a certificate under section 17(4)(b) of the 1961 Act – [2008] EWCA Civ 1230, para 65. Such a certificate would, if granted in respect of residential development of the land, have enabled the respondent to compensation on the basis that planning permission for such development had been granted, and therefore on the basis fixed by the Lands Tribunal. For my part, I would prefer to treat as an open question the issue whether it is right that such a certificate should be based on the situation as at the date of the notice to treat (whether deemed or actual). That was the effect of the decision in *Jelson v Minister of Housing and Local Government* [1970] 1 QB 243, but it may be appropriate for your Lordships to reconsider the issue one day (not least because of the subsequent decision of this House in *Birmingham Corporation v West Midland Baptist (Trust) Association Inc* [1970] AC 874). The issue has not been considered in this House, as it was conceded in *Fletcher Estates Ltd v Secretary of State* [2000] 2 AC 307 that *Jelson* [1970] 1 QB 243 was rightly decided.

59. However, assuming that *Jelson* [1970] 1 QB 243 was rightly decided (as it may very well have been), I cannot accept the Court of Appeal's view that it helps justify their decision in this case. As Lord Denning MR said in *Jelson* [1970] 1 QB 243, 250, there are anomalies whichever date was chosen under section 17(4)(b), and therefore anomaly, and hence unfairness, are very suspect grounds for justifying the addition of a non-statutory assumption to the valuation assessment. In any event, it is by no means clear to me that there is a particularly striking anomaly: it makes some sense to select the date of the making of the compulsory purchase order as being the relevant date for the purposes of section 17(4)(b), as that is the date on which the owner's ability to seek and obtain planning permission becomes fettered.

60. Even if that is wrong, I would certainly reject the argument that, because it is unfair to the owner that he cannot obtain a section 17(4) certificate from the planning authority by reference to the position as at the valuation date, the court can effectively arrogate to itself an extra-statutory power to grant what amounts to such a certificate to the owner, especially in the light of the factors mentioned in paras 49 to 51 above.

61. The second point made by the Court of Appeal was that it would render the valuation exercise simpler and less controversial, if one assumed that planning permission had been actually granted, as opposed to embarking on a "hope value" exercise – [2008] EWCA Civ 1230, para 66. First, that is scarcely a principled reason for the Court's conclusion, let alone a good enough reason for effectively adding a further assumption to the statutory assumptions. Secondly, it is not a persuasive reason: "hope value" valuations, i.e. valuations based on the assessment the market would make of the prospect of an event occurring, and the quantification which it would accord to that prospect, especially the grant of planning permission, are very familiar to any experienced surveyor or property lawyer. Thirdly, it is an unconvincing reason, because a "hope value" valuation would, even on the Court of Appeal's reasoning, be required where the prospect of obtaining planning permission was less than 50%.

62. Indeed, this last point highlights a logical incoherence in the Court of Appeal's approach: if the prospect is 51%, then it is effectively increased to 100%, whereas if it is 49%, it remains at 49%. I accept that this incoherence might be said to be reflected in section 16(2) and (3) of the 1961 Act, but, even assuming that that is right, it is one thing for the legislature to enact a one-sided statutory assumption to benefit those whose land is compulsorily acquired; it is quite another for the courts to add such an assumption when none is to be found in the legislation.

63. Thirdly, the Court of Appeal suggested that its approach "reflects the common assumption and practice of tribunals, courts, practitioners and valuers" – [2008] EWCA Civ 1230, para 66. I am far from convinced that this is correct; and, even if it is, it cannot justify an erroneous interpretation of the 1961 Act. The Court of Appeal's observation lies a little unhappily with the observation of the Lands Tribunal in para 24 of its decision in this case, where it said that "this important issue in the law of compensation does not appear to have arisen previously in such starkly defined terms". Your Lordships were

also taken to an earlier decision of the Lands Tribunal, *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140, where, at para 95, the President, Mr George Bartlett QC (who also sat on this case) seems to have reached the opposite conclusion, albeit in somewhat different circumstances.

64. Accordingly, for the reasons given by Lord Walker and Lord Collins, with which I entirely agree, supplemented by these reasons of my own, I would allow this appeal.

LORD COLLINS OF MAPESBURY

My Lords,

The background

65. From the earliest days of the law of compensation for compulsory acquisition the value of the land taken has included what was described in 1867 as "not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied" (*R v Brown* (1867) LR 2 QB 630, 631). The Town and Country Planning Act 1947 introduced wide-ranging controls on development, but it was only after the Town and Country Planning Acts 1953 and 1954 that owners of land were fully able to realise the development value of their land if they could get planning permission. Since then development value has been an important element in the assessment of compensation, because the value of land in the open market may depend on what planning permission exists or could be obtained for development on the land. The Land Compensation Act 1961 contains complex provisions (first enacted in the Town and Country Planning Act 1959) designed to deal, at least in part, with the assumptions about planning permission to be made in the valuation process.

66. The issue on this appeal can be stated shortly: where land is compulsorily acquired, and the Lands Tribunal ("the Tribunal"), in assessing compensation, finds on the balance of probability that but for the compulsory acquisition (in what has been called since the 1970s, in the jargon of compulsory acquisition compensation claims, "the no-

scheme world") planning permission would have been granted by the valuation date, should the Tribunal (a) treat that hypothetical permission as a certainty, to be assessed at its full value (in this case on what is known as the "residual valuation") or (b) award "hope value," that is, a percentage of the full value, discounted for the chance that permission would not have been granted?

67. Transport for London ("TfL") appeals against the order of the Court of Appeal (Carnwath, Thomas and Etherton LJJ, in a judgment of the court) dated November 13, 2008 by which the Court of Appeal dismissed the appeal of TfL against a decision of the Tribunal (the President and Mr P.R. Francis FRICS) determining the compensation payable to the respondent, Spirerose Ltd ("Spirerose") for the compulsory acquisition of its land.

68. The land required by London Underground Ltd ("LUL", to which TfL is the statutory successor) for construction of the East London Line Extension included land in the London Borough of Hackney belonging to Spirerose. The land comprised a small building used as a printing works. In 1993 notice of LUL's application for the making of an Order for the purpose of carrying out the scheme was published, and in 1997 the Secretary of State for Transport made the London Underground (East London Line Extension) Order 1997.

69. On November 24, 2003 Spirerose made (or was treated as having made) an application to the local planning authority for a certificate of appropriate alternative development under section 17 of the Land Compensation Act 1961. The development specified by the application was the redevelopment of the land by the demolition of the existing building and the erection of a four storey building and basement with both offices and residential flats. If a valid certificate had been obtained, it would have been assumed (by virtue of provisions in the 1961 Act to which I shall revert) for valuation purposes that planning permission would have been obtained for the development.

70. The local planning authority resolved to grant a certificate to the effect that permission for the development would have been granted, but on the erroneous basis that the relevant date for consideration of planning policies and circumstances in determining the section 17 application was the date of valuation of Spirerose's claim for compensation, December 3, 2001, rather than the date of the notice of the application for the making of the Order which had been published

in the autumn of 1993. Taking the wrong date made a decisive difference. In the 1990s the London Borough of Hackney Unitary Development Plan sought to restrict residential development so as to preserve the area as a location for local business and industry, and so also to preserve employment opportunities. But by the time LUL served notice of entry in August 2001 and took possession of the land in December 2001, following the Government's new national planning policies, the local planning authority was adopting a more flexible attitude towards proposals for mixed use development where the characteristics of the land were considered to make that an appropriate form of development.

71. Consequently the valuation had to be conducted without the benefit of a section 17 certificate. The case for Spirerose before the Tribunal was that, but for the scheme underlying the compulsory acquisition, planning permission would have been granted for mixed use redevelopment of the land, and consequently the land should be valued on the basis of an assumed permission to this effect. TfL's case was that planning permission would not have been granted for the mixed use redevelopment of the land; but that, in any event, the land could not be valued on the basis of a planning assumption unless one or more of the statutory assumptions applied, which they did not, and the prospect of such permission being granted could only be reflected in hope value.

72. The figures on these alternative cases were found by the Tribunal to be these. First, the value on the basis that planning permission was not to be assumed, and only "hope value" was to be taken into account, was £400,000. Johnson, Davies and Shapiro, *Modern Methods of Valuation of Land, Houses and Buildings*, 9th ed (2000) explain hope value in these terms (at pp 279–280):

> "A valuation to determine hope value is often impossible other than by adopting an instinctive approach, particularly in the stages when the hope of permission is remote; it can only be a guesstimate of the money a speculator would be prepared to pay. As the hope crystallises into reasonable certainty of a permission at some stage, a valuation can be attempted based on the potential development value deferred for the anticipated period until permission will be forthcoming, but with some end deduction to reflect the lack of certainty. Indeed, since most developers will buy only when permission is certain

> (preferring an option to buy or a contract conditional on the grant of permission before certainty has been reached) any sale in the period of uncertainty will probably require a significant discount on what might otherwise appear to be the full hope value."

73. The second figure was £608,000 on the basis that planning permission was to be assumed. This figure was reached on the basis of a "residual valuation," because the evidence of comparable transactions was inadequate. The residual basis is this: the value is the surplus after the purchaser has met out of the proceeds from the sale or value of the finished development the costs of construction, costs of purchase and sale, the cost of finance, and an allowance for profits required to carry out the project: Johnson, Davies and Shapiro, op cit at p 165. The third figure was the existing use value, which was £227, 500.

Land Compensation Act 1961 ("the 1961 Act")

74. The 1961 Act consolidated earlier legislation relating to the assessment of compensation for compulsory acquisition of interests in land. The only provisions which are directly relevant to the proceedings and this appeal are Rule (2) of section 5, and sections 9, 14(3), 15(5), 17, and 22(2)(a), but Spirerose's case is that other provisions support its appeal, and it is therefore necessary to set out the effect of other sections of the 1961 Act.

75. Sections 5 to 16 contain provisions determining the amount of compensation.

Section 5, Rule (2)

76. Section 5 lays down rules for the assessment of compensation. Rule (2) is: "The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise." This is in the same terms as the Acquisition of Land (Assessment of Compensation) Act 1919, section 2, Rule (2).

77. For more than 100 years it had been accepted that the relevant date for valuation was the date of the notice to treat. But inflation made that an unjust and shocking rule. The law now is that valuation under this Rule is made as of the date when possession is taken by the acquiring authority, or, if earlier, the date of assessment: *Birmingham Corp v West Midland Baptist (Trust) Association Inc* [1970] AC 874, a decision on Rule (5) of section 2 of the 1919 Act, relating to the cost of reinstatement, applied to Rule (2) of the 1961 Act in *Washington Development Corp v Bamlings (Washington)* (1984) 52 P & CR 267 (CA), and confirmed by the 1961 Act, section 5A(3), inserted by the Planning and Compulsory Purchase Act 2004, section 103.

Section 6

78. The broad effect of section 6 and Schedule 1 (which are notoriously complex and obscure) is to make provision for disregarding the increase or diminution in the value of the land acquired attributable to development, or the prospect of development, of land other than the land acquired in a range of specified circumstances "as would not have been likely to be carried out" if the acquiring authority had not acquired or proposed to acquire the land: see *Camrose (Viscount) v Basingstoke Corp* [1966] 1 WLR 1100, at 1107, per Lord Denning MR; *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 1304, at [49], per Lord Nicholls of Birkenhead.

Section 9

79. Section 9, as amended by the Town and Country Planning Act 1968, section 108, and Sched. 11, provides:

> "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."

Sections 14 to 16

80. Sections 14 to 16 provide for assumptions as to planning permission that are to be made in ascertaining the value of the land acquired: section 14(1). These are supplemented in Part III of the Act by provisions dealing with certificates of appropriate alternative development, in particular section 17. None of the assumptions is itself directly applicable to the hypothetical planning permission at issue on this appeal.

81. The assumptions fall into the following categories. The first is development in accordance with the proposals of the acquiring authority, if there is no existing permission for such development: section 15(1). In such cases it is assumed that planning permission would be granted in respect of the relevant land, such as would permit development in accordance with the proposals of the acquiring authority. In the present case that means that an assumption would have to be made that permission would be granted for the new railway. That permission does not add to the value of the land.

82. The second category is development included in paragraphs 1 and 2 of Schedule 3 to the Town and Country Planning Act 1990: section 15(3). This is of very limited application and now refers mainly to the rebuilding of war-damaged property.

83. The third category is development in accordance with the current development plan: section 16. Section 16(1)-(4) provides for assumptions of planning permission in accordance with provisions in statutory development plans, i.e. where sites are defined or allocated for certain development in a plan or are subject to comprehensive development or part of an "action area" in a plan.

84. The fourth assumption is under section 15(5) in accordance with a certificate issued under section 17. Under section 17 the owner or the acquiring authority may obtain a determination, through the planning system, of the classes of development which "would be appropriate for the land in question if it were not proposed to be acquired by any authority possessing compulsory purchase powers…" (section 17(3)). The local planning authority may issue such a certificate or may issue a certificate stating that planning permission would not have been granted for any development save for the proposals of the acquiring authority. There is a procedure under section 18 for an appeal to the Secretary of State by the owner or the acquiring authority.

85. The combined effect of section 17 and section 15(5) is that, where a certificate is issued under section 17, it is to be assumed that any planning permission which, according to the certificate, "would have been granted" (as amended by the Local Government, Planning and Land Act 1980, section 193 and Sched 33, para 5, replacing the words "might reasonably have been expected to be granted") in respect of the acquired land, would be so granted. Once the planning authority comes to the conclusion that permission would more likely than not have been granted, that finding would be equivalent to a certainty because of the statutory assumption in section 15(5): *Porter v Secretary of State* [1996] 3 All ER 693 at 704**.**

86. I have already mentioned the abortive attempt by Spirerose in these proceedings to obtain a certificate. The relevant date for the determination was the date in the autumn of 1993 when statutory notice was first published of the making of the London Underground (East London Line Extension) Order under the Transport and Works Act 1992: section 22(2)(a) of the 1961 Act; *Jelson v Minister of Housing and Local Government* [1970] 1 QB 243; *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [1999] QB 1144, affd [2000] 2 AC 307, 314 (where the appeal on this point was not pursued).

87. Section 14(3) ensures that the owner is not precluded by these provisions from arguing that planning permission would have been granted for a development on the land:

> "Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed ..."

Principles of valuation

88. Because so much of the argument before the Tribunal, the Court of Appeal, and this House, turned on the application of what is known as the *Pointe Gourde* principle, to which I shall have to revert, it would be convenient if I were at this point to quote its classic formulation: "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 656, 572, per Lord MacDermott (PC). There is a valuable survey of the principle, its antecedents and its subsequent use in Law Commission, *Towards a Compulsory Purchase Code: (I) Compensation*, Cm 6071 (2003), App D, prepared when Carnwath J was Chairman of the Law Commission.

89. Some elementary principles of the law of compensation for compulsory acquisition provide a starting point. 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, at 125 (PC); *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 1304 at [4].

90. Second, the basis of compensation is the value to the owner, and not its value to the public authority. In the first edition of Cripps (later Lord Parmoor), *Principles of the Law of Compensation*, 1881 it was said (at 144):

> "The basis on which all compensation for lands required or taken should be assessed, is their value to the owner, and not their value when taken to the promoters. The question is not, what the persons who take the land will gain by taking it; but what the person from whom it is taken will lose, by having it taken from him."

91. The classic example mentioned by Cripps is *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, 42 where Cockburn CJ said that it was intended that the landowner should be compensated to the extent of his loss and "his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it."

92. Third, and directly in point on this appeal, one plainly relevant element in the value to the owner is the prospect of exploiting the property. I have already mentioned *R v Brown* (1867) LR 2 QB 630, in which Cockburn CJ (at 631) said that the jury assessing compensation

under the 1845 Act had to consider "the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market."

93. As Cripps, *Principles of the Law of Compensation*, put it in the first edition, 1881, p.153:

> "The present value of lands is enhanced by the probability of their more profitable use, and the assessment of compensation should be made on the potential, as well as on the actual value of lands to the owner. When lands used for agriculture are suitable for building purposes, this is necessarily an important element in their value, and a matter for which the owner should be compensated. …"

94. The same point was made more elaborately, when the Privy Council said (through Lord Romer) in *Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302, 313:

> "[T]he land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined … but also by reference to the uses to which it is reasonably capable of being put in the future … No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land. It is plain that, in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon … [I]t is the possibilities of the land and not its realized possibilities that must be taken into consideration.
>
> But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the

> possibility of being used for building purposes, the arbitrator … would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the possibility that the land might never be so required or might not be so required for a considerable time."

95. I emphasise that the reference is to "possibilities of the land and not its realized possibilities", and that a deduction would have to be made to take account of the fact that the land might not be required for building or might not be required for a considerable time. This is a powerful confirmation of a principled approach to valuation. There is no reason why the same principles should not apply when the modern law of town planning is factored in. It is elementary that the price which the land in question might reasonably be expected to fetch on the open market at the valuation date would be expected to reflect whatever development potential the land has: *Mon Tresor & Mon Desert Ltd v Ministry of Housing and Lands* [2008] UKPC 31, [2008] 3 EGLR 13, at [27], per Lord Brown of Eaton-under-Heywood.

The present case

96. It is common ground that none of the statutory assumptions in the 1961 Act relating to planning permission applied. For convenience I repeat what I consider to be the crucial provisions in the 1961 Act.

97. By Rule (2) of section 5 "The value of land shall …be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise." By section 9, no account is to be taken of any depreciation of the value of the land which is attributable to the fact that an indication has been given that the relevant land is to be acquired by an authority possessing compulsory purchase powers. Section 14(3) provides that it is not to be assumed that planning permission would necessarily be refused for any development which is not development for which the granting of planning permission is to be assumed under the 1961 Act. This underlines the point that, whether or not the case can be brought within any of the specific provisions, it is open to a claimant to seek to persuade the Tribunal that the value of the site would have been enhanced by a permission, or the prospect of a permission, for some valuable development.

98. The Tribunal concluded, on the balance of probability, that planning permission would have been granted for the specified redevelopment of the land but for the scheme of acquisition and that the permission would have existed at the valuation date. The Tribunal expressed the finding of fact in various ways. It said: "there was a reasonable prospect of planning permission being obtained for the development" ([88]); "the prospects of obtaining planning permission at the valuation date would have been good" ([89]); "there was a strong likelihood that the … scheme as proposed would have gained consent if an application had been made at the valuation date" ([133]); "a good chance of getting permission for the scheme that has been the subject of the residual valuation …" ([134]) and the conclusion was expressed "on the basis that planning permission for a mixed use development would have been granted at the valuation date, which we find on the facts to be the case" ([135(a)]). These formulations are different ways of putting the same point, namely that, on the balance of probability, permission for mixed-use development would have been granted as at the valuation date. There is no basis for any suggestion that the Tribunal found that permission would certainly have been granted.

99. In the light of this finding of fact, it seems to me to be plain on the basis of the statutory provisions and of authority going back more than 100 years, which is entirely in accordance with commercial common sense, that (a) the value of the land is the open market value; (b) any depression in the price which the land might be expected to fetch which is caused by the scheme is to be disregarded; (c) the valuation must take into account the potential of the land, including its potential for development; and (d) the development potential must be valued in the normal way, by discounting for future uncertainties. If that is right, it provides a clear answer to the question on this appeal, namely that the valuation on the "hope value" basis is the appropriate one.

100. Why, then, did the Tribunal and the Court of Appeal come to a different conclusion?

The Tribunal

101. The Tribunal decided that the land should be valued on the assumption that permission would actually have been obtained. The essence of the decision was that the 1961 Act makes provision for compensation to be assessed in certain circumstances on the

assumption that planning permission has been granted, and that even though those statutory assumptions did not in terms apply, authorities in the Court of Appeal and the Privy Council established that the Tribunal could apply them by analogy.

102. The Tribunal considered, first, that the *Pointe Gourde* principle could be applied as an adjunct to the statutory provisions relating to assumed planning permissions, with the result that for valuation purposes it could be assumed that planning permission would be granted even if the statutory assumptions did not apply. Second, it thought that that conclusion was supported by the decision of the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 (PC) and of the Court of Appeal in *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020, each of which (according to the Tribunal) proceeded on the basis of assumed planning permission; and *Porter v Secretary of State for Transport* [1996] 3 All ER 693, which proceeded on the basis of a percentage chance of obtaining planning permission, was distinguishable because it was a case of a claim under the Compulsory Purchase Act 1965, section 7, for severance and/or injurious affection of the retained land. Third, the Tribunal took the view that *Jelson Ltd v Blaby District Council* was binding authority for the proposition that section 9 of the 1961 Act had the result that planning permission should be assumed. To restrict compensation to a value based on hope value alone where the evidence showed that permission would have been granted would not be fair compensation.

The Court of Appeal

103. The reasoning of the Court of Appeal dismissing an appeal from the decision of the Tribunal was as follows. First, the resolution of the issue depended on the correct application of the *Pointe Gourde* rule. Second, the Tribunal was right to find that *Porter v Secretary of State for Transport* [1996] 3 All ER 693 did not assist. Third, the law did not offer a single solution to the standard of proof for establishing hypothetical events and policy considerations were an important factor. Fourth, the Tribunal's approach was supported by *Melwood Units Pty Ltd v Commissioner of Main Roads* and *Jelson Ltd v Blaby District Council*, although the Court of Appeal accepted that there was no reasoned binding authority on the issue. The Court of Appeal concluded:

> "65…. First and foremost, the 1961 Act is intended to provide a statutory code, in which … there is apparent a legislative intention to assimilate the various versions of the rule. It is accepted that, where the statutory assumptions apply, probability of a permission is converted into full value for valuation purposes. … [T]he claimant was unable to take advantage of the statutory assumptions because of an anomaly in the provisions fixing the date of consideration. As far as possible, we would interpret the no-scheme rule so as to remedy the anomaly rather than extend it. Further, reflecting the same point, it is plainly desirable that there should be consistency in the assessment of compensation for compulsory acquisition of land in materially similar cases, whether or not the statutory assumptions apply.
>
> 66. The statutory policy reflects the common assumption and practice of tribunals, courts, practitioners and valuers. That policy and practice has obvious merit in simplifying the task of valuation for the purpose of assessing compensation. In doing so, it reduces the likelihood of disputes and litigation, it promotes compromise, and will save costs both in and out of court.
>
> 67. In our view there is no anomaly in giving a hope value in cases where there would have been a possibility, but less than a probability, of planning permission. It is one thing, in the interests of consistency and simplicity, to assume the grant of planning permission when it would probably have been granted. It is quite a different thing to deprive the land owner of any hope value when such value would have been reflected in the market even though planning permission was improbable. To exclude such value would be contrary to the fundamental principles of assessment of compensation under the 1961 Act.
>
> 68. In our view, the policy considerations in favour of the tribunal's conclusion are powerful. For the reasons we have given, there is no authority or other good reason for not giving effect to them …."

104. In substance what the Court of Appeal did was to apply the *Pointe Gourde* principle to fill what it perceived to be an anomaly or gap in the legislation caused (at least in this case) by the fact that the

critical date for the section 17 application by virtue of section 22(2)(a) was the date in the autumn of 1993 when statutory notice was first published of the making of the London Underground (East London Line Extension) Order. As I have said, at that time there would have been little prospect of obtaining planning permission for a mixed use development.

The authorities relied on by the Tribunal

Jelson Ltd v Blaby District Council

105. Jelson Ltd owned land on the route of a proposed ring road round Leicester. Land on either side of the road was shown in the development plan as allocated primarily for residential purposes. Jelson (and Wimpeys) built large housing estates adjoining the proposed ring road. In 1962, because of the construction of the M1, the ring road project was abandoned. After planning permission to build houses on the site of the former proposed ring road was refused, the Council was forced to acquire the strip of land that had been reserved for it pursuant to a purchase notice. Jelson sought a section 17 certificate for residential development. On appeal the Minister issued a "nil certificate" (i.e. a certificate under section 17(4)(b) that permission would not have been granted for development other than the development for which the land was compulsorily acquired). He did so on the basis that the correct time at which to consider whether planning permission might reasonably have been expected to be granted was the date of the deemed notice to treat. At that time housing estates had been built on either side of the proposed road. Although it was a fair assumption that but for the ring road proposal the strip of land in question would have been included in the housing estates, at the section 17 determination date planning permission would not have been obtained for residential housing on the strip. It was held by the Court of Appeal in *Jelson Ltd v Minister of Housing and Local Government* [1970] 1 QB 243 that the Minister's approach to the time at which the determination was to be made was right as a result of the combined effect of sections 17(4) and 22(2) of the 1961 Act.

106. *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020 was an appeal from the Tribunal on the claim for compensation for the deemed compulsory purchase of land following the purchase notice. There were three agreed alternative valuations between the parties on the amount of compensation. The first was on the assumption that any decrease in

value due to the effect of the road scheme was to be ignored and consequently that the land would have been developed as part of the neighbouring estate, which gave a figure of £60,000. The second was on the assumption that planning permission could reasonably have been expected to be granted for a 31 unit residential development, which gave a loss of £26,350. The third was an assumption that at the date of valuation there was no prospect of planning permission being granted for residential development but that there was some "hope value", which gave a figure of £6,700. The second basis was rejected by the Tribunal, on the ground that planning permission for that layout could not have been reasonably expected, or indeed expected at all: (1974) 28 P & CR 450, at 459. The Tribunal found for the first method because the valuation exercise was to be approached on the basis that there had been no road scheme and said (quoted at [1977] 1 WLR at 1025): "… if the *Pointe Gourde* principle does not require a diminution in value entirely due to the scheme underlying the acquisition to be left out of account, section 9 of the Act of 1961 provides the analogous principle … in rather wider terms than the *Pointe Gourde* principle is usually expressed."

107. The decision was upheld by the Court of Appeal: [1977] 1 WLR 1020. Lord Denning MR, with whom Stephenson and Waller LJJ agreed, said (at 1027): "The position is, to my mind, that there is a depreciation here which is covered both by the *Pointe Gourde* principle and by section 9 of the Land Compensation Act 1961." In *Fletcher Estates Ltd v Secretary of State* [2000] 2 AC 307 this House left open the "wider issues" raised by *Jelson Ltd v Blaby District Council*, namely whether the 1961 Act required the question whether planning permission would have been granted for any classes of alternative development to be determined by reference to events which might or might not have happened in the past if the proposal had not come into existence: [2000] 2 AC at 325, per Lord Hope of Craighead.

108. In the present case the Tribunal considered that since none of the statutory assumptions as to planning permission could have applied on the facts of *Jelson Ltd v Blaby District Council* so as to give rise to an assumption of permission for residential development, it is necessarily implicit in the conclusion of the Court of Appeal that, applying *Pointe Gourde*, it was appropriate to assume the grant of such planning permission.

109. I do not agree. The point was not discussed or considered, and the parties proceeded on the basis that planning permission would have

been granted at the relevant date had there been no road scheme. The existing houses were built facing the proposed ring road. Jelson made the application in accordance with a layout previously agreed with the county planning officer and an official of the acquiring authority, but the application was refused because of objections of the residents in the housing estates who said that their houses were built with the advantage of facing on to the ring road, The evidence was that, but for the road scheme and the building of the housing estates, permission would actually have been obtained for the building of housing estates including the strip. This decision did not justify the conclusion by the Tribunal that it was authority for the proposition that the grant of planning permission is to be assumed once it is shown that it would probably have been granted.

Melwood Units Pty Ltd v Commissioner of Main Roads

110. Nor is *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 (PC) such an authority. A developer had acquired 37 acres of land in Brisbane. Two areas of the land, totalling 4 acres, were subject to an expressway proposal which would have the effect of severing the land, leaving 25 acres to the north and about 7 acres to the south. The developer sought planning permission for development of the 37 acres as a drive-in shopping centre and parking space, but the application was treated as an application for planning permission for the 25 acres only, and permission was granted on that basis. The land for the expressway was compulsorily acquired. The developer claimed compensation for the value of the acquired 4 acres and for loss due to the severance of the 7 acres to the south.

111. The Land Appeal Court in Queensland awarded compensation on the basis that the land acquired and the land to the south never had any potential as part of a shopping centre. The Full Court of the Supreme Court of Queensland declined to answer questions in the case stated by the Land Appeal Court. The Privy Council held that the proceedings should be remitted to the Land Appeal Court. The principal issue was whether the *Pointe Gourde* principle as a whole could apply to a decrease in value caused by the scheme. The conclusion was (at 435):

> "… it is a part of the common law deriving as a matter of principle from the nature of compensation for… compulsory acquisition, that neither relevantly attributable

> appreciation nor depreciation in value is to be regarded in the assessment of land compensation."

112. It is plain from the decision that the evidence was that permission would have been granted. The Privy Council accepted "as findings of fact … that but for the expressway project and its impact on the 37 acres an application to develop the whole area for a drive-in shopping centre with ancillary parking area would have been granted by the registration board, including the resumed land and south land" (at 433) and said that "it is established that, without the expressway project, .. planning permission would have been given for the whole 37 acres" (at 434).

113. The questions in the case stated included a question whether the Land Appeal Court should have assessed compensation on the basis that, but for the compulsory acquisition, planning permission "would or would probably have been granted" for the whole of the 37 acres, and the Privy Council answered "yes" to that question: [1979] AC at 438. But the Privy Council said (ibid.) that the answers by themselves "may not serve any very useful purpose" and adopted the developer's formulation of the questions. The developer's formulation was that the assessment should proceed on the basis that there was no expressway proposal and that "planning permission would have been obtainable" for the whole site. The Privy Council concluded that the developer's formulation was not substantially different from its own answers, and was prepared to adopt it: at 439.

114. Consequently, neither *Jelson Ltd v Blaby District Council* nor *Melwood Units Pty Ltd v Commissioner of Main Roads* proceeds on the basis that once a landowner has shown on the balance of probabilities that permission would have been granted, it will be assumed that it would have been obtained. There was no persuasive, still less binding, authority to that effect.

Porter v Secretary of State for Transport

115. It is therefore not necessary to discuss at length *Porter v Secretary of State for Transport* [1996] 3 All ER 693, which the Tribunal and the Court of Appeal were at pains to distinguish. In that decision land had been acquired for a road. The plaintiff was granted on appeal under section 18 of the 1961 Act a certificate of appropriate

alternative development in respect of the land acquired, namely that the land acquired would have been suitable for residential development. Among the questions for the Court of Appeal was whether the section 18 determination was res judicata or gave rise to an issue estoppel so as to bind the Tribunal in determining compensation for diminution in the value of land retained by the plaintiff under the Compulsory Purchase Act 1965, section 7. By a majority (Peter Gibson LJ dissenting on this point) it was held that the section 18 determination did not have that effect because (among other reasons) the question in the section 18 determination and the question in the 1965 Act proceedings were different.

116. What the Tribunal had to assess was the diminution in value, if any, of the retained land. Stuart-Smith LJ (with whom Peter Gibson and Thorpe LJJ agreed) said (([1996] 3 All ER 693 at 704):

> "Where a court or tribunal has to decide what would have happened in a hypothetical situation which does not exist, it usually has to approach the matter on the basis of assessing what were the chances or prospect of it happening. The chance may be almost a certainty at one end to a mere speculative hope at the other. The value will depend on how good this chance is. Where, however, the court or tribunal has to decide what in fact has happened as an historical fact, it does so on balance of probability; and once it decides that it is more probable than not, then the fact is found and is established as a certainty. This distinction is well illustrated by *Davies v Taylor* [1972] 3 All ER 836, [1974] AC 207 and *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 4 All ER 907, [1995] 1 WLR 1602.
>
> It would be unnecessary for the Secretary of State to evaluate the chance of the eastern route being the preferred alternative route in the event that the actual route was not chosen, provided it was more than 50%; but the Lands Tribunal would be concerned in assessing value to evaluate the chances of this happening more precisely."

117. The acquired land was valued on the basis that, in the absence of the road scheme, a road would have been built on a different alignment, and that in those circumstances the land would have been suitable for residential development. The land fell to be valued as at a time before

section 14(5)-(7), added by the Planning and Compensation Act 1991, came into effect. Those provisions exclude a claim on that basis by imposing the assumption that no road would be built to meet the same need as the scheme road.

118. The decision is consistent with the view which I take of the approach to the prospect of planning permission where there is no statutory assumption. But this was a case on that part of section 7 of the 1965 Act which deals with damage caused by diminution in value of the retained land. I do not consider that it is helpful in the valuation exercise under Rule (2) of section 5 to approach the question of compensation through the loss of chance approach in cases of damages for negligence such as *Davies v Taylor* [1974] AC 207 and *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602.

The Court of Appeal and the Pointe Gourde principle

119. As I have said, what the Court of Appeal did in this case was to use the *Pointe Gourde* principle to remedy what it perceived to be an anomaly. The anomaly was said to be that section 22 fixed the time by which the section 17 criterion was to be applied, and that bore no necessary relation to the planning position at the valuation date (the date of entry); and it was said to have the surprising effect that the planning determination had to be made by reference to circumstances in the autumn of 1993, eight years before the date of entry. Spirerose was therefore unable to take advantage of the statutory assumptions because of that anomaly in fixing the date of consideration: [28], [65], [71].

120. Can the reasoning of the Court of Appeal be justified? The answer to that question depends on (a) the juridical basis of the principle; and (b) whether its application in *Waters v Welsh Development Authority* [2004] UKHL 19, [2004] 1 WLR 1304 can support the conclusion of the Court of Appeal.

121. In *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 656 (PC) land in Trinidad was compulsorily acquired by the Crown so that it could be leased as a naval base to the United States. The land had a limestone quarry. The owner claimed that the value of the land should reflect the special need of the United States of the stone for the building of the naval base. The

Privy Council accepted that the claim could not be rejected because of the then equivalent in Trinidad of what is now Rule (3) of section 5 of the Land Compensation Act 1961 ("The special suitability or adaptability of the land for any purpose shall not be taken into account …"). That was because it referred to a purpose to which the land itself could be applied, and not to the use of the products of the land elsewhere. But the claim to take account of the special value of the quarry was rejected because (at 572): "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." Consequently the land had to be valued without taking account of the special needs of the United States.

122. The principal authority relied on was *South Eastern Railway Co v London County Council* [1915] 2 Ch 252. This involved a valuation by an arbitrator under the Land Clauses Consolidation Act 1845. Eve J, whose judgment was upheld by the Court of Appeal, said that the matter resolved itself into an enquiry as to the mode in which the amount to be paid as purchase money was to be ascertained. In answering that enquiry, increase in value consequent on the execution of the undertaking for or in connection with which the purchase was made must be disregarded: at 258.

123. The first case in this House to refer to *Pointe Gourde* was *Davy v Leeds Corporation* [1965] 1 WLR 445, where Viscount Dilhorne (at 453**)** said that what is now section 6(1) of the 1961 Act had given statutory expression to the principle. Section 9 also gives effect to the principle. The position would be the same without such an express provision. 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 Ltd v Commissioner of Main Roads* [1979] AC 426, at 435 (PC); and *Director of Buildings and Lands v Shun Fung Ironworks Limited* [1995] 2 AC 111, at 136 (PC).

124. In *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202 this House, by a majority, refused to extend the principle so as to apply it not only to the ascertainment of the value of land or an interest in land, but also to the ascertainment of the nature and extent of the interest to be valued in a case where the scheme had brought about an alteration of the interest itself (in that case by giving freeholders the right to terminate agricultural tenancies). On one reading of the speeches there was a significant extension of the principle in *Waters v Welsh Development Authority* [2004] UKHL 19, [2004] 1 WLR 1304, in

which Lord Nicholls of Birkenhead said: “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 alternative” ([54]).

125. A proposal to build a barrage across the mouth of Cardiff Bay was opposed by the Countryside Council for Wales and the Royal Society for the Protection of Birds because the proposals would involve an unacceptable loss of nationally important bird habitats. The European Commission claimed that the new barrage would be incompatible with the United Kingdom's obligations under EC Council Directives regarding the conservation of wild birds and their habitats. Therefore in order that the scheme could go ahead it was proposed to provide a bird reserve on the Gwent Levels to compensate for the loss of the Cardiff Bay habitat. In 1997 the Land Authority for Wales used its statutory powers to acquire the site compulsorily as part of this bird reserve. The owners claimed that they were entitled to compensation based on the increased value their land was said to have possessed because of its important role as part of the compensatory wetlands provision required by the Cardiff Bay barrage project.

126. It was held that the proposed acquisition of the reserve was an integral part of the barrage project and that the enhanced value attributable solely to the use to which the land would be put under the scheme was to be disregarded. The *Pointe Gourde* principle could be applied by analogy as a supplement to the statutory code in section 6: [63(4)]. Lord Scott of Foscote agreed with the result, but thought (at [115]) that it could be achieved either (a) by applying Rule (3) of section 5 to disregard “special suitability or adaptability of the land for any purpose … if that purpose is a purpose to which it could be applied only in pursuance of statutory powers” etc; or (b) by applying the traditional “value to the owner” principle. But I doubt whether there is a very significant difference between Lord Scott’s view on the second point and the ratio of the majority.

127. What is the juridical basis of the *Pointe Gourde* principle? Lord Nicholls of Birkenhead said in *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 1304, at [42] that the principle is no more than the name given to one aspect of the long established “value to the owner” principle.

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: see e.g. *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307, 315, per Lord Hope of Craighead; *Waters v Welsh Development Agency* at [142] per Lord Brown of Eaton-under-Heywood. In *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202 at 213 to 215 Lord Pearson reviewed the authorities and concluded 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" (at 214). He went on: **"**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" (at 214-215). I am satisfied that this the right approach and that there is nothing in Lord Nicholls' speech in *Waters* which is inconsistent with this view.

129. It follows that there is no basis in authority or in principle for the conclusion that it is open to the court in effect to establish an assumption that planning permission would be obtained, by analogy with the specific statutory rules which create the assumption. I have already endeavoured to show that the authorities relied on by the Tribunal do not provide such a basis. *Waters v Welsh Development Agency* is an example of an extended interpretation of the concept of value in the context of determining the extent of a scheme in order to give effect to a Parliamentary intention to provide dispossessed owners with a fair financial equivalent: see at [61]. The underlying basis of the decision in *Waters* is that the extent of the scheme to be ignored for the purposes of valuation is not limited by the express provisions of section 6 and schedule 1. It does not go further, and does not support the conclusion of the Court of Appeal.

130. Nor do I understand how the Court of Appeal could have concluded, given its decision on the approach to the consequences of a finding on the balance of probabilities, that where there would have been a possibility, but less than a probability, of planning permission, the land owner should have the benefit of hope value. That conclusion seems to me to undermine the principal conclusion that a finding of probability leads not to hope value but to valuation on an assumption that planning permission would certainly have been obtained.

131. I accept TfL's fundamental point that it is not the role of the court to re-write legislation by adding additional assumptions of planning permission. As Lord Denning MR said in *Jelson v Minister of Housing and Local Government* [1970] 1 QB 243, 250, whichever date was taken there would be anomalies: "So much so that I think we must go simply by the construction of the statute." There is a difference between legitimate purposive construction and impermissible judicial legislation. The 1961 Act has dealt with the present case by providing not only for the section 17 procedure, but also by providing in section 14(3) that, even if the statutory assumptions do not apply, nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused. That enables development value to be taken into account. In my opinion for the court to depart from the normal method of valuation of land which has potential development value by adding an assumption that planning permission will be obtained by analogy with those provisions which do provide for assumptions is not a permissible exercise of statutory construction.

132. I am not persuaded in any event that there is any real anomaly. It is true that the fact that the section 17 determination date was a date in 1993 would have made a proper determination under that section valueless to Spirerose, because in 1993 there would have been little prospect of obtaining planning permission for a mixed use development. It is also true that if the section 17 determination date had been in 2001, then planning permission would have been assumed, and Spirerose would have had the advantage of the full development value. But the anomaly, if that is what it can be called, arises only on the facts of this case. Developments in planning policy may make the earlier date as at which the section 17 determination is to be made more favourable than the valuation date. In addition, there is much to be said for the submission on behalf of TfL that the date of publication of the notice of the making of the compulsory order is a rational choice by the legislature, because that is the date on which the prospect of obtaining valuable development rights is taken from the owner.

133. For those reasons, and also those of my noble and learned friend Lord Walker of Gestingthorpe, whose opinion I have had the privilege of reading in draft, I would allow the appeal.