**UPPER TRIBUNAL (LANDS CHAMBER)**

**UT Neutral citation number: [2016] UKUT 415 (LC)**
**UTLC Case Numbers: ACQ/452/2009**
**ACQ/454/2009**
**ACQ/460/2009**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***COMPENSATION – compulsory purchase – fish and chip shop – expert evidence following interim decision on facts – grossly exaggerated claim – substantial concessions in claimants' closing submissions – open market value of freehold interest – no compensation for loss of profits in absence of reliable evidence – disturbance and other rule (6) losses – compensation determined at £238,865***

**IN THE MATTER OF FIVE NOTICES OF REFERENCE**

| | | |
|---|---|---|
| **BETWEEN** | **(1) THARIQ MAHMOOD MOHAMMED**<br>**(2) SAJIT PERVAIS MOHAMMED**<br>**(3) KISHWAR MOHAMMED**<br>**(4) SHABREEN ZAHIRE MOHAMMED**<br>**(5) MASRIQ BAL MOHAMMED** | **Claimants** |
| | **and** | |
| | **NEWCASTLE CITY COUNCIL** | **Acquiring Authority** |

**Re: 15 Waterloo Street,**
**1 and 1A Sunderland Street,**
**Newcastle-upon-Tyne**
**Tyne & Wear**
**NE1 4DE**

**Before: A J Trott FRICS**
**Sitting at: Sunderland County Court, 44 John Street, Sunderland SR1 3LA**
**on 18-22, 25, 27-29 April and 4-5 May 2016**

*Matthew Horton QC*, instructed by C J Thompson, Solicitor, for the Claimants
*Vincent Fraser QC*, instructed by the Legal Services Department, Newcastle City Council, for the Acquiring Authority.

The following cases are referred to in this decision:

*W Clibbett v Avon County Council* [1976] 1 EGLR 171
*Tragett v Surrey Heath Borough Council* [1976] 1 EGLR 175
*Lancaster City Council v Thomas Newall Limited* [2013] EWCA Civ 802
*Cedars Rapids Manufacturing and Power Company v Lacoste* [1914] AC 569
*In re Lucas and the Chesterfield Gas and Water Board* [1909] 1 KB 16
*Horn v Sunderland Corporation* [1941] 2 KB 26
*West Midlands Baptist Association v Birmingham Corporation* [1970] AC 874
*Phoenix Assurance Co v Spooner* [1905] KB 753
*Emslie and Simpson Ltd v Aberdeen City District Council* [1994] 1 EGLR 33
*Director of Buildings and Lands v Shun Fung Ironworks Limited* [1995] 2 AC 111
*M & B Precision Engineers Limited v Ealing London Borough Council* (1973) 13 RVR 81
*Smith v Birmingham Corporation* (1973) 29 P&CR 265
*Service Welding Limited v Tyne & Wear County Council* [1979] 1 EGLR 36
*Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A firm)* [2002] EWCA Civ 879
*Emslie & Simpson Ltd v Aberdeen District Council (No.2)* [1995] RVR 159
*Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1430

The following cases were referred to in argument:

*Fishenden v Higgs and Hill Ltd* [1935] All ER Rep 435
*Colneway Limited v Environment Agency* [2004] RVR 37
*Franks v Sinclair* [2006] EWHC 3656 (Ch)

## DECISION

### Introduction

1. On 6 October 2015 the Tribunal issued an interim decision in these references ([2015] UKUT 0439 (LC)). A costs addendum was issued on 10 November 2015. The references had been adjourned part-heard after a nine day hearing on the agreed basis that I would make findings of fact on the evidence already received. No expert evidence was heard at the first hearing.

2. A case management hearing was held on 1 December 2015 and by an order dated 3 December 2015 the Tribunal directed that the parties' experts in like disciplines should meet no later than 29 January 2016 to discuss their expert reports and statements of agreed facts in the light of the Tribunal's interim decision. The parties' experts were directed to file and exchange any amended or supplemental expert reports no later than 26 February 2016 and to file and exchange any rebuttal reports no later than 18 March 2016. The parties also provided their dates of availability to attend the resumed hearing which was subsequently listed for a total of 12 days commencing on 18 April 2016.

3. On 10 December 2015 the claimants applied to the Tribunal for permission to appeal against its interim decision. The Tribunal refused this application on 18 December 2015. On 15 January 2016 the claimants applied to the Court of Appeal for permission to appeal against the Tribunal's interim decision and applied to the Tribunal for the references to be stayed until the outcome of the application and any subsequent appeal was decided. The application for a stay of proceedings was refused, with a detailed statement of reasons, by order dated 4 February 2016. The order stated that, apart from minor changes to the hearing dates, the Tribunal's directions in its order dated 3 December 2015 remained in effect.

4. The claimants made a second application to the Tribunal for the references to be stayed on 24 February 2016. It was refused, with a detailed statement of reasons, on 3 March 2016. The Tribunal said:

> "1. The parties have known for over a year that the references would be heard in two stages. The first hearing dealt only with the evidence of fact and the expert evidence was held over to a second hearing. The parties' expert evidence has long since been filed and exchanged and the Tribunal's order dated 3 December 2015 set out a clear programme for the preparation for the second hearing and gave details of the key points of the Tribunal's interim decision that the experts would need to consider. The effect of that interim decision was to reduce the expert evidence that is required and the listing of the second hearing on 18 April 2016, over four months from the Tribunal's December 2015 order, gave ample time for the parties' experts to review, discuss, amend and give proper consideration to their evidence.
>
> 2. Under these circumstances it is not accepted, as the claimants now argue, that the second hearing has been arranged 'far too soon to enable the claimants to have sufficient time to raise the necessary funds…'

3. The parties should comply with the directions of the Tribunal. Failure to do so will not be accepted as a reason for delay. By now the experts should have met to discuss their expert reports and statements of agreed facts in the light of the Tribunal's interim decision. They should have filed and exchanged any supplemental expert reports. If no such reports are filed then the Tribunal will proceed with the evidence already before it.

…"

5. On 31 March 2016 the claimants applied to the Tribunal to include 16 documents in the trial bundle, eight of which were disputed by the acquiring authority. The claimants also sought leave for one of their expert valuation witnesses, Mr Howard Day, to serve a supplemental report on severance and injurious affection issues.

6. The Court of Appeal refused the claimants permission to appeal against the Tribunal's interim decision on 11 April 2016.

7. On 12 April 2016 the Tribunal refused to admit Mr Day's supplemental report saying that the claimants' application was late despite the parties having been given adequate notice of the Tribunal's requirements for the service of such supplemental reports. The Tribunal admitted two of the disputed documents but refused to admit the remaining six.

8. Also on 12 April 2016 the Tribunal informed the parties, in response to a letter to the acquiring authority dated 8 April 2016 from the claimants' instructing solicitor, that were the claimants to make an interlocutory application to admit details of the comparables upon which their expert Mr Huitson relied in his expert valuation report it would be minded to refuse it since these details were available to him when his expert report was submitted in May 2014 and should have been exhibited to it at that time.

9. By the time the hearing resumed on 18 April 2016 the Tribunal had received revised statements of agreed facts between experts in respect of the valuation issues arising from the alleged loss of light at 4 Waterloo Street ("4 W St") and a revised Scott Schedule prepared by the quantity surveying experts regarding the costs of works at Unit 1, 4 W St. The claimants submitted no supplementary evidence that conformed with the Tribunal's directions following its interim decision. The Tribunal agreed that Mr Peter Smith could give expert evidence on behalf of the claimants about the accounts of the Convenience Store ("CS") and Especially 4 You ("E4Y") notwithstanding that the profit figures they contained were to be included with Mr Nedas's profit figures for the Happy Chip Leisure Group ("HCLG") given the Tribunal's finding in its interim decision that there was only one family business.

**The expert evidence**

10. Mr Matthew Horton QC appeared for the claimants at the resumed hearing having first been instructed to advise them on whether there were any grounds to appeal against the Tribunal's interim decision. He did not appear at the first hearing. He called the following expert witnesses:

(i) Mr Robert Huitson MRICS, Principal of DB Associates, Chartered Surveyors, gave quantity surveying evidence on the cost of adapting Unit 1 at 4 W St and valuation evidence on rights of light.

(ii) Mr Howard Day BSc (Hons), FRICS, MAE, Director of Davis Coffer Lyons (but at the time of his expert report a Director of Harper Dennis Hobbs), gave valuation evidence on severance and injurious affection.

(iii) Mr Peter Smith BSc (Hons), FCA, MAE, Managing Director of Quantis, Chartered Accountants, gave accountancy evidence about CS and E4Y.

(iv) Mr Jeffrey Nedas MA (Cantab), FCA, Principal of Jeffrey Nedas & Co, Chartered Accountants, gave accountancy evidence about HCLG.

(v) Mr Philip Smith BSc (Hons), Dip.Bldg.Cons (RICS), MRICS, Director of Smith Marston LLP, gave evidence on rights of light.

(vi) Mr John Cairns FNAEA, FICBA, Consultant to Graveleys BTA Ltd, gave evidence on the open market value of the reference property.

11. Mr Vincent Fraser QC appeared for the acquiring authority and called the following expert witnesses:

(i) Mr David Wardle Dip Surv (QS), quantity surveyor with Newcastle City Council, gave quantity surveying evidence on the cost of adapting Unit 1 at 4 W St.

(ii) Mr Michael King FRICS, Senior Director, Valuation Consultancy Department, GVA gave valuation evidence on severance and injurious affection, the open market value of the reference property, disturbance compensation and rights of light.

(iii) Ms Alison Ewing BSc (Hons), FCA, Associate Director, Forensic & Investigation Services, Grant Thornton LLP, gave accountancy evidence about HCLG, CS and E4Y.

(iv) Mr Neil Lovell-Kennedy BSc (Hons), MRICS, Director of GVA, gave evidence on rights of light.

**Revisions to the claims**

12. The claimants' previous counsel, Mr Barry Denyer-Green, in his summary of claims dated 1 February 2015 which was submitted during the course of the first hearing, claimed total compensation for all the claimants of £8,764,200.

13. Mr Horton submitted an amended claim with his skeleton argument on 13 April 2016 which he said took account of the findings of the Tribunal's interim decision and claimed total compensation for all the claimants of £8,331,314. The largest item was £5,518,961 claimed by Mr Thariq Mohammed ("TM") and Mr Sajit Mohammed ("SM") for disturbance and other losses of HCLG. Mr Horton itemised the elements of this head of claim but these only totalled

£5,044,004. The correct revised total of the claims at the start of the resumed hearing therefore appeared to be £7,856,357.

14. By the end of the resumed hearing, with the Tribunal having heard all the expert evidence, the claimants' position as represented by Mr Horton in his closing submissions had changed considerably. The total compensation claimed for all the claimants was now £667,106. In addition, in respect of loss of profits for HCLG, Mr Horton submitted that:

> "The member should recoil therefore from a result that no compensation for loss of profits be awarded and award such sum as in its discretion it considers would be fair."

15. This revised total comprised £550,000 for the open market value of the reference property (payable to TM) and £117,106 for disturbance and other rule (6) losses payable to HCLG (90% to SM and 10% to TM).

16. The revised claim for disturbance and other rule (6) losses comprised the following heads of claim:

*(i) Costs of moving to Unit 1*

17. Mr Horton said that although the claimants' expert, Mr Huitson, "was an unsatisfactory witness" there was a sound basis for awarding the sums of £21,177 and £26,862 in respect of work which it was agreed was done and for which evidence existed. Alternatively a reduction of 20% from those figures would be fair to reflect the possibility that the quality of the work was unsatisfactory. In the revised joint statement of agreed facts Mr Wardle had agreed a total of £53,837 for this head of claim having reduced the sum of £67,296 by 20% to reflect the "DIY standard of the works". Accordingly, submitted Mr Horton, the sum awarded under this head of claim should be at least £53,837.

*(ii) Other disturbance costs*

18. This head of claim was set out in Mr Nedas's evidence and originally amounted to a total of £1,495,471. Mr Fraser analysed this part of Mr Nedas's evidence in his closing submissions. Mr Horton said that he was "not able to identify any evidence to counter them" and accepted that the only recoverable item was £450 for partnership time as determined in the Tribunal's interim decision. But he said that the claimants were entitled to their legal and professional fees of making the claim. Mr Horton also submitted that there were legitimate heads of claim for three other matters (notwithstanding that the first two of them appeared in the evidence of Mr Nedas which Mr Horton now concedes):

> *(a) Legal costs paid to Dickinson Dees (now Bond Dickinson)*
>
> These costs were incurred in relation to obtaining planning permission for the use of Unit 1 at 4 W St as a hot food takeaway/convenience store; an appeal against the condition restricting opening hours; an appeal against an enforcement notice to stop trading after midnight; and issuing challenges (not subsequently pursued) against the Secretary of State's

decisions on both appeals. The total amount claimed in Mr Horton's closing submissions was £40,543.

*(b) Compliance with planning conditions for Unit 1*

The planning permission for Unit 1 dated 22 July 2004 contained a number of conditions and Mr Horton submitted that the claimants were entitled to recover the cost of complying with them which he identified in his closing submissions to be £13,981.

*(c) New equipment in Unit 1*

Mr Horton identified a number of items of "new equipment" that had not been included in Mr Huitson's bills of quantities and which cost £8,295.

19. The present position regarding the other heads of claim identified by Mr Horton in his skeleton argument is set out below.

***1. Loss of profits claims for CS and E4Y***

20. Mr Fraser said that the claimants' expert, Mr Peter Smith, had accepted that his expert evidence depended upon the establishment of a particular factual situation and, especially, upon the submitted accounts. Given the Tribunal's interim decision that those accounts were not a reliable starting point Mr Smith admitted that his evidence was without substance and could not stand. Nor, said Mr Fraser, had Mr Smith considered any contribution that CS and/or E4Y might have made to HCLG in the light of the Tribunal's finding that there was only a single family business. Mr Fraser then considered, and criticised, Mr Smith's detailed evidence, including a claim for blight period losses. He concluded that:

> "On any basis, and in the light of the evidence, no sums are recoverable with respect to any of the matters raised."

Mr Horton noted Mr Fraser's closing submissions in the light of which and "having regard to the absence of supporting evidence" he was "unable to submit that they should not be accepted by the Tribunal."

***2. Disturbance claims for CS and E4Y***

21. Mr Fraser submitted that since the Tribunal had found that these were not two distinct businesses but were part of a single family business, separate claims for disturbance could not be sustained for them. Mr Peter Smith agreed that it could not be assumed that any of the claimed disturbance items would have been incurred in any event by HCLG and there was no evidence to support any claim by HCLG for these costs. For this reason, and following a detailed critique of Mr Smith's evidence on the point, Mr Fraser again said that no sums were recoverable with respect to any of the matters raised. Mr Horton accepted these submissions and said that he "is unable to submit that there is a proper basis for the Tribunal to award any other sums claimed."

### *3. Severance and injurious affection to 4 W St*

22. Mr Horton submitted that a claim under section 7 of the Compulsory Purchase Act 1965 for compensation for severance and injurious affection depended upon 4 W St being held with 15 W St and that this requirement had been satisfied on the factual evidence. But in relation to the compensation claimed in reliance on Mr Day's expert evidence for the claimants Mr Horton said that he "is unable to submit that this evidence came up to proof, or to counter the critique by [Mr Fraser] set out in …. his submissions. Accordingly it is conceded that [the] severance claim has not been proved." I take this to mean any claim under section 7, including that for injurious affection. Given Mr Horton's concession on the amount of compensation I do not consider it is necessary for me to examine further whether 4 W St was held together with 15 W St.

### *4. Claim for loss of rights to light*

23. Mr Horton submitted that the expert evidence of Mr Philip Smith "was carefully considered and coherent" and had established that 4 W St had lost light as a result of the redevelopment of the reference land and adjoining properties under the CPO. But he continued:

> "In relation to whether the loss of light amounted to a nuisance that had resulted in loss of value to No.4, it is conceded that the evidence of Mr Huitson was discredited in cross-examination so that the claim has not been proved."

24. Mr Horton concluded his closing submissions by saying that although the claimants had been deprived of a flourishing business:

> "Because of their failure to produce proper records the whole of the loss which in law is compensatable cannot be awarded. The Tribunal can and should however award the sums identified in these submissions."

25. On 27 June 2016 the Tribunal received a letter from the claimants asking the Tribunal to admit an amended version of Mr Horton's closing submissions, the original having been issued without "the prior approval" of the claimants. It appears that the claimants' amendments were not seen in advance by either Mr Horton or the claimants' instructing solicitor, Mr Thompson, neither of whom were aware of the correspondence to the Tribunal from the claimants. On 4 July 2016 the Tribunal replied to the claimants and refused their application noting that the deadline for their closing submissions was originally 3 June 2016 (two weeks after those of the acquiring authority) but which was extended to 10 June 2016 following an interlocutory application made by the claimants. The claimants were therefore given every opportunity to prepare and serve their submissions which they duly did through their appointed representative, Mr Horton. The claimants say that Mr Masriq Mohammed ("MM") advised the Tribunal by telephone on 17 June 2016 that they proposed to amend the closing submissions but the Tribunal has no record of such a conversation. The Tribunal has therefore relied only upon the submissions made by Mr Horton on 10 June 2016.

26. In summary the claimants have conceded the loss of profits and disturbance claims of CS and E4Y, the claim for severance and injurious affection to 4 W St and their claim for compensation for loss of light to 4 W St. They had already conceded, following the Tribunal's interim decision, their claims for the open market value of the purported leasehold interests in the reference property and for losses arising from a second move to Unit 2 at 4 W St.

**Discussion of the revised claims**

27. In my judgment Mr Horton's concessions were correctly made in the light of the expert evidence which was strongly, and at times overwhelmingly, in favour of the acquiring authority on these issues. I comment on some specific aspects of the claimants' expert evidence at paragraphs 39 to 42 below.

28. The claimants' expert accountancy evidence was predicated on the accuracy and reliability of the claimants' accounts and tax returns. The interim decision made clear that neither the accounts nor the tax returns were reliable. At the case management hearing on 1 December 2015 I gave the claimants a further opportunity to put in additional expert evidence to address the findings of the interim decision. The acquiring authority have fairly described this as being most unusual given that all the expert evidence in these references was filed and exchanged in the expectation that there would be a single hearing for all the evidence, both factual and expert. In the event the claimants refused to allow their accountancy experts (Mr Nedas and Mr Peter Smith) to talk to their accountant (Mr Newton) either at all or until it was too late for them to amend their evidence. Mr Nedas, the accountancy expert for HCLG, said in examination in chief that he had suggested a letter be sent to HM Revenue & Customs ("HMRC") to confirm they had received HCLG's tax returns and accounts and to obtain relevant copy documents. Mr Nedas was not instructed to contact HMRC directly and he asked that such an approach be made by Mr Thompson or via Mr Newton. Mr Nedas understood that in the event no contact had been made with HMRC. Mr Nedas also asked the claimants to provide their VAT returns at the time he was writing his expert report but he was told that they were not available.

29. Mr Peter Smith, the claimants' accountancy expert for CS and E4Y, said that he was "pretty sure" that he had asked the claimants for permission to speak to Mr Newton before preparing his expert report but, despite him having explained the reasons why he needed to do so, the claimants did not give their permission until a few days before the resumed hearing was due to begin, by which time it was too late for him to amend his report. Mr Smith described his clients' refusal of permission as unusual and said that he was not given any explanation of why they had not given their permission until the last moment.

30. The claimants therefore failed to respond to the opportunity I gave them to review their evidence in the light of the interim decision and they steadfastly refused to allow their accountancy experts to conduct any investigations with Mr Newton or HMRC that might have assisted their case.

31. The need for independent corroboration of the claimants' evidence was made explicit in paragraph 26 of the interim decision but despite this the claimants made no effort to corroborate

their accountancy or tax return evidence despite having been given a further opportunity to do so. Not only this but during the resumed hearing the claimants continued to pursue what I described in the interim decision as a "cavalier approach … exemplified by the piecemeal production of relevant documents as the hearing progressed" (paragraph 23). At the start of day eight of the resumed hearing Mr Horton, under instructions, applied (unsuccessfully) to admit a document which he said had just been given to his instructing solicitor by the claimants. It was a copy of a letter from the Inland Revenue to TM dated 17 May 2004 referring to a schedule of future payments (apparently in respect of a National Insurance settlement). Its unexpected discovery followed prolonged cross-examination of Mr Nedas, Mr Peter Smith and Ms Ewing regarding the lack of evidence from the claimants about the assessment and payment of tax. I agree with Mr Fraser that this was another example of the claimants' "blatant failure to disclose" relevant documents and of their chutzpah in producing such documents only when they thought it would help their case.

32. In his closing submissions Mr Horton said:

> "In a compensation claim the onus of proof is agreed to be on the Claimant. The apparent failure, therefore, to keep adequate records is the fault of the Claimants as is the fact that the witnesses did not speak with Mr Newton until December 2014 (sic).
>
> It is inevitable that the Claimants' own behaviour has raised doubts about their honesty and reliability."

Despite this statement Mr Horton urges the Tribunal to take into account the strong sense of grievance of the claimants, their bitterness about what they consider to be the acquiring authority's "entirely inadequate (indeed derisory) offer" and the fact that they had an "extraordinarily successful and profitable" business. But the claimants' accountancy experts, Mr Nedas and Mr Peter Smith, both accepted that they had relied upon the accounts provided to them by the claimants and given those accounts were an unreliable starting point, as the interim decision found, their assessment of loss was unsubstantiated. Ms Ewing only used those accounts to provide illustrative calculations of loss; she did not accept their reliability. Mr Horton submits that it is most unsatisfactory if, in consequence, no compensation for loss of profits is awarded since the accounts must have some evidential value. He says that there is some evidence that MM's tax returns were submitted as shown and that those returns were generally consistent with the submitted accounts (paragraphs 180 and 192 of the interim decision). It must follow, says Mr Horton, that a sum should form part of the earnings of HCLG. But Mr Horton says later that he is "unable to submit" that Mr Fraser's submissions that MM's claim for loss of profits at CS, namely that no sums are recoverable, should not be accepted by the Tribunal and in cross-examination Mr Peter Smith said that he had not considered any contribution that CS may have made to HCLG. I gave the claimants the opportunity to amend their expert reports in the light of the interim decision and it would have been possible for them to have provided further evidence about MM's tax returns and tax payments and to clarify the issues I raised in paragraph 192 of the interim decision if they considered this to be relevant. They chose not to do so.

33. The Tribunal is urged by Mr Horton to award "such sum as in its discretion it considers would be fair" by way of compensation for the loss of profits of HCLG. In considering this request I have considered whether this is the type of case where I might adopt the "robust approach" first described by the Tribunal, Douglas Frank QC, President, in *W Clibbett v Avon*

*County Council* [1976] 1 EGLR 171 in which he said about a claim for the loss of goodwill at 172:

> "I propose, therefore, to adopt a robust approach similar to that used by the courts in assessing general damages and to award a sum which, in my judgment, in all the circumstances is reasonable. It seems to me that my function is comparable to that of the courts in assessing damages for loss of future earnings."

34. The Tribunal, V G Wellings QC, followed this approach in *Tragett v Surrey Heath Borough Council* [1976] 1 EGLR 175 at 177M and added:

> "I am nevertheless grateful to the district valuer for his evidence, because it assisted me to direct my mind to the bracket in which my finding should lie."

I have no such assistance in this case; the claimants have adduced accounting and tax return evidence which I have found to be unreliable and the acquiring authority cannot help since they have no independent knowledge of what was the level of profits, if any, of HCLG.

35. Mr Horton suggested to Ms Ewing in cross-examination that nobody paid more tax than they had to and that it was reasonable to infer that the claimants' tax returns represented a realistic floor for the profits made by HCLG. Ms Ewing accepted the point in principle but said that although she was not suggesting the claimants' accounts and tax returns had been fabricated, they were inaccurate, unreliable and unexplained. Mr Nedas sought to address this issue and to corroborate the tax returns by checking them with HMRC but the claimants did not instruct him to do so directly and no contact with HMRC was made by either Mr Thompson or Mr Newton. The expert evidence has therefore thrown no further light on the matter and has not altered the conclusions that I reached in my interim decision. In effect, given that the submitted accounts are not a reliable starting point upon which to base expert accountancy evidence (interim decision paragraph 174) and the tax returns are not a reliable source of information (interim decision paragraph 195), I am being asked to make an arbitrary award in the absence of good evidence.

36. I do not agree, as was submitted by the acquiring authority's counsel in *Tragett*, "that the tribunal had power if it thought it right to do so, as it were, to pluck a figure out of the air…" I referred in the interim decision to *Lancaster City Council v Thomas Newall Limited* [2013] EWCA Civ 802 where Rimer LJ said at [32] of a claim for management time:

> "It was, in substance, a straightforward common law claim for compensation that had to be made good on the evidence; and if there was no evidence sufficient to make it good, the Tribunal's duty was to reject it. The Tribunal's error was to make an award of compensation when there was no evidence proving loss. That was unquestionably an error of law …"

So it is with the claim for loss of profits by HCLG. The evidence submitted by the claimants does not sustain their claim and it is not possible to make a rational subjective determination of what, if any, the loss of profits of HCLG might have been.

37. The claimants were given every opportunity to present their case fully. For whatever reason they did not do so despite being told by their experts what was required and being professionally advised throughout these proceedings. In the absence of any reliable accountancy or other evidence proving loss I make no award for the loss of profits of HCLG.

38. In view of the concessions made in Mr Horton's closing submissions I do not consider it necessary to review in detail the expert evidence dealing with the loss of profits and disturbance claims for CS and E4Y, the claim for severance and injurious affection to 4 W St and the claim for compensation for loss of light to 4 W St. But I am concerned about the poor quality of some of the purportedly expert evidence adduced by the claimants on these issues, in particular that of Mr Day, Mr Huitson and Mr Cairns on valuation matters. I comment on the evidence of the first two experts below and that of Mr Cairns in the next section.

***Mr Day's Evidence***

39. Mr Horton acknowledged that Mr Day's valuation evidence, which informed the claim for compensation for severance and injurious affection to 4 W St, did not come up to proof and he was unable to counter Mr Fraser's detailed criticisms of it. That evidence was inconsistent in several respects with that of Mr Huitson, with, for instance, the experts making different and contradictory assumptions about the use of the first floor at 4 W St, with Mr Day assuming a commercial use and Mr Huitson a residential one. It did not seem to me that Mr Day exercised a sufficiently rigorous or impartial approach to his instructions. It may be that he was hampered by his admitted lack of compulsory purchase expertise and the presentation of his evidence as answers to a series of specific questions, but the criticisms of his evidence by Mr Fraser are fair and accurate as Mr Horton appears to accept. Most tellingly Mr Day did not stand back and look at his valuations in the light of the evidence. He valued 4 W St at the valuation date (29 January 2004) at £2,267,000 in the no scheme world and £1,282,000 in the scheme world but was unable to give any convincing reason why this value should have increased from the price paid by TM in September 2000 of £420,000. I agree with Mr Fraser's conclusion that:

> "Even the most cursory sense check would have suggested that the figures were nonsense. The fact that [Mr Day] was prepared to advance such figures (without any evidence to support them) seriously undermined his evidence."

***Mr Huitson's Valuation Evidence***

40. Mr Huitson agreed with and relied upon Mr Philip Smith's report on rights of light but he badly misinterpreted it. Mr Huitson did not use Mr Smith's descriptive categories for the loss of light to rooms in 4 W St but instead devised his own categories and in so doing he inaccurately described the extent of the loss of light to those rooms. Mr Huitson then applied a variable (but largely unexplained) percentage loss in value to the categories identified by Mr Smith but he failed to appreciate what rooms they should be applied to. Mr Huitson's mistake was compounded by the fact that Mr Smith had met him to explain the extent of the loss of light to the rooms in 4 W St. Eventually, and somewhat reluctantly, Mr Huitson agreed that his evidence was inconsistent with Mr Smith's report and that his valuation was in error. He acknowledged that such a fundamental error meant that the Tribunal could not attach weight to his report.

41. Mr Fraser reviewed a number of other weaknesses in Mr Huitson's approach in his closing submissions including a lack of detail about his 12 so-called comparables; a valuation approach that Mr Huitson agreed was not normal; a valuation that was not undertaken at the valuation date but some 18 months later; an asserted, but unsupported, premium value for second and third floor accommodation (without consideration of whether there was a lift); the use of a "check valuation" that I pointed out was in fact the same as his original valuation (but which Mr Huitson had miscalculated); a failure to take into account the cost of the assumed residential development of the first floor; and a failure to undertake a sense check when his valuation (of just the first, second and third floors) gave a figure of £2,120,038 compared with the purchase price of the whole building of £420,000 in September 2000.

42. In my opinion Mr Huitson's valuation report did not demonstrate the standard of expertise or competence that I would expect of a Chartered Surveyor when giving evidence before the Tribunal.

**The open market value of the freehold interest in the reference property**

*The case for the claimants*

43. In his expert report Mr Cairns said that the open market value of the freehold interest was £810,000 comprising:

| | | |
|---|---|---|
| (i) | Fish and chip shop, 15 W St: | £513,000 (rounded) |
| (ii) | Convenience Store, 1A S St: | £52,000 |
| (iii) | E4Y, basement, 15 W St: | £60,000 |
| (iv) | Flat at 1 S St: | £135,000 |
| (v) | Car parking area: | £50,000 |

44. Mr Cairns valued areas (i) to (iii) by capitalising the rents payable under the three leases said to have been entered into between TM and SM, MM and ShM in 2001. (These leases were found to be shams in the Tribunal's interim decision.) He capitalised the rent of area (i) at 7% and the rents of areas (ii) and (iii) at 10%. The yields were not supported by comparable evidence in Mr Cairns' report but he gave a brief analysis of four comparables in his first supplemental report which he said showed yields (after costs) of between 5.4% and "less than 9%".

45. Although Mr Cairns presented a number of tables of comparables in his original report he did not rely upon any of them in his freehold valuation. He gave details of four further comparables in his first supplemental report but again did not relate these directly to his valuation of £810,000 for the reference property.

46. Similarly, although Mr Cairns gave brief details of the sale prices of 36 flats in the vicinity of the reference property, including 20 flats in Central Lofts at 21 Waterloo Street, he did not relate these in terms to his valuation of the flat at 1 S St in the sum of £135,000. In his first supplemental report he referred to the acquisition for £120,000 of the flat above the ground floor takeaway at 34-36 Westmoreland Road as part of the CPO.

47. Mr Cairns assumed that it was possible to park at least three cars in the area of forecourt owned by the claimants (TM). He said (without providing supporting evidence) that the value of a commuter car parking space in Newcastle was "around £19,000" and he adopted a figure of £50,000 for three spaces to allow for a quantum discount. In his first supplemental report he supported this figure by reference to the compulsory acquisition of another plot in Waterloo Street forming part of a council car park and which he analysed at £940 per $m^2$. Applying this figure to his adopted car parking area for the reference property of 50 $m^2$ gave a value of £47,000.

48. Mr Cairns relied upon photographic evidence to determine the condition of the reference property at the valuation date and said that the fish and chip shop was in good condition and the remainder of the reference property was generally clean and in a reasonable state. He maintained this view despite the acquiring authority's condition survey report which he said Mr King had not interpreted fairly.

49. At the end of his first supplemental report Mr Cairns said in paragraph 12.1:

> "As an alternative (assuming, but which is not agreed, that the leases are to be disregarded) I am of the opinion that the freehold value in February 2004 with an established A3 use and unrestricted trading hours with vacant possession between a willing seller and a willing buyer is in the region of £550,000."

Mr Cairns gave no written explanation of how this figure was derived. But when asked to explain it by Mr Fraser in cross-examination, Mr Cairns said it was a matter of supply and demand and that at the valuation date the market was buoyant. He was then asked to give the context of that comment and to provide evidence to support his figure. Mr Cairns replied that he found that a difficult question to answer and said that £550,000 was "what I believed could be achieved." Mr Cairns also relied upon the asking price of £450,000 for a comparable fish and chip shop in Heaton known as "The Golden Chip" even though it was sold in March 2005 for only £245,000. Mr Cairns said that the only reason it did not reach the asking price was because it was a private sale. He considered the purchaser had "stolen that business. It was a very, very good business sold way below market value."

50. The expert valuers, Mr King and Mr Cairns, produced a joint statement of agreed facts. At the hearing considerable time had to be spent by Mr Fraser in cross-examination establishing the status of this document because Mr Cairns said in examination in chief that he had been put under pressure to sign it and that he did not agree with its contents. At the end of the cross-examination, having been taken through every paragraph of the statement by Mr Fraser, Mr Cairns accepted that in his professional opinion he agreed with everything it contained and that he knew he would be held to it as an agreed document.

51. Paragraph 2.5 of the agreed statement says:

> "Mr Cairns' valuation [£550,000] is based on the profitability of the "Happy Chip" business and thus is effectively based on a going concern and hence trading entity."

Mr Fraser raised this point in cross-examination and asked Mr Cairns whether his figure of £550,000 was for a going concern. At first Mr Cairns denied this and said that his figure was just for the freehold interest, but Mr Fraser took him to paragraph 12.1 of his first supplemental report (see paragraph 49 above) and Mr Cairns accepted that all he had done in his revised valuation was to strip out the value of the 2001 leases (which had been found to be shams). His revised figure of £550,000 was a going concern value which included the freehold value.

52. Mr Cairns confirmed the basis of his valuation approach during re-examination. He was asked by Mr Horton about his main comparable, The Golden Chip, which was the only one of his comparables which comprised an actual sale rather than an asking price. Mr Cairns explained that the sale price of £245,000 included the freehold interest, fixtures and fittings and the going concern value of the business, which he calculated by applying a multiplier, in this case 25, to the weekly turnover of some £6,000 to give a going concern value of £150,000. This left £95,000 as the value for fixtures and fittings and the freehold interest. Mr Horton asked him to apply that approach to the valuation of the Happy Chip assuming a purchaser in a no scheme world and assuming a turnover of £500,000 per year or £10,000 per week. Mr Cairns said a multiplier of 30 to 35 "would not be out of the way" and valued the going concern at £350,000. Mr Horton then asked whether a figure would still be required for the freehold interest in the building. Mr Cairns said that it would.

53. Mr Fraser had previously explored the implications of this approach with Mr Cairns. Mr Cairns accepted, albeit reluctantly, that given he now valued the reference property as a going concern in the sum of £550,000, and given also that he valued the business at £350,000, it followed that the value of the freehold interest, including fixtures and fittings, the flat and the parking spaces, and assuming it to be in good condition, must be the difference between the two figures, i.e. £200,000. Mr King valued the freehold interest in the reference property at £190,000 which Mr Fraser pointed out to Mr Cairns was almost the same as the figure derived from the analysis of Mr Cairns' revised approach. Mr Cairns replied:

> "£190,000 seems low. But if you use that methodology you are probably right."

54. Mr Horton submitted that Mr Fraser was wrong to say that Mr Cairns had valued "The Happy Chip [as] if sold as a business as a going concern". Mr Horton said that it was common sense for prospective purchasers in deciding what to pay for a shop to:

> "ask themselves what is the prospect of trading successfully having regard to the suitability of the premises and the location for proposed business. They are not buying goodwill; they are buying the premises and, in deciding what to pay, are evaluating the prospect of attracting customers and thereby establishing goodwill in their own right. To suggest, as [Mr Fraser] does… that such a purchaser is buying a going concern is nonsense. By virtue of being put on the market, what is being sold has ceased to be a going concern. The purchaser is buying the opportunity to establish a going concern again by buying the

premises. That is value which attaches to the premises and, in the case of a compulsory acquisition, should be compensated on that basis."

55. Mr Horton distinguished between businesses which by their nature are portable and are therefore not attached to premises and businesses which by their nature, such as The Happy Chip, have to operate from particular premises. Mr Horton accepted the accuracy of Mr Fraser's statement that the reference property was a modest old corner shop in poor condition but said that this did not recognise its potentiality, which Mr Horton said was a key element of its value.

56. Mr Horton said the concept of potentiality was recognised by the House of Lords in *Cedars Rapids Manufacturing and Power Company v Lacoste* [1914] AC 569 where Lord Dunedin stated two propositions at 576:

> "(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future..."

57. The concept was also considered in *In re Lucas and the Chesterfield Gas and Water Board* [1909] 1 KB 16, a case concerning the special adaptability of land for use as a reservoir. Mr Horton said that although the legal principles there discussed had now been superseded the broad principle still applied that in assessing compensation it was the "possibility and not the realized possibility" of the land being suitable for a particular purpose that should be taken into account when valuing the land taken, per Vaughan Williams LJ at 28.

58. Mr Horton argued that to value a business as a going concern was to value a "realised possibility". He said:

> "In assessing open market value that is not permissible (although in assessing disturbance compensation it is permissible) since by virtue of it being put on the open market it is, in fact, no longer a going concern. It is clear however from *In re Lucas and Chesterfield* that there is no principle precluding the assessment of open market value by reference to the possibility that the purchaser may re-establish it as a going concern."

59. Mr Horton said that Mr Cairns had stressed his final figure of £550,000 was not for a going concern. Mr Cairns' experience was superior to that of Mr King in relation to fish and chip shops and it was Mr Cairns' opinion that the reference property enjoyed a unique position and was a one-off and was worth a lot more than Mr King's valuation for the reasons that he gave. Mr Horton submitted that the Tribunal should be slow to ignore Mr Cairns' "patent sincerity and conviction about the correct value."

60. With regard to the condition of the reference property at the valuation date Mr Horton said that the claimants had only stripped it out in order to move their fixtures and fittings to Unit 1 at 4 W St and thereby mitigate their loss. Mr Cairns said that a seller would not strip out the fixtures and fittings in the real world. The claimants should be compensated for the value of their premises for its existing use as well as for the disturbance costs of having to relocate in

accordance with the principle of equivalence set out in *Horn v Sunderland Corporation* [1941] 2 KB 26.

*The case for the acquiring authority*

61. Mr King said that the open market value of the freehold interest was £190,000 (rounded) comprising:

| | | |
|---|---|---|
| (i) | Fish and chip shop, 15 W St: | £90,000 |
| (ii) | Convenience Store, 1A S St: | £32,000 |
| (iii) | E4Y, basement, 15 W St: | £22,000 |
| (iv) | Flat at 1 S St: | £45,000 |
| (v) | Parking area: | Nil. |

62. Mr King valued areas (i) to (iii) of the reference property by the investment method of valuation using comparable sales to derive rents and yields. He adopted rents of £23 psf for area (i), £20 psf for area (ii) and £14.44 psf (£50 per week) for area (iii). He adopted a yield of 10% for areas (i) and (ii) and 12% for area (iii). Area (iv), the flat at 1 S St, was valued by reference to comparable sales and by reference to a sense check valuation using a rental value of £85 per week and a yield of 10%. As a further sense check Mr King compared the capital value of the reference property (£130 psf in his valuation) against those of shop property sales in the locality. He concluded that his valuation showed a figure that was higher than the tone of the (superior) comparable properties.

63. The comparables used by Mr King were all included in the experts' statement of agreed facts which was said to have informed the experts' valuation opinions. Mr King assumed that the condition of the reference property was as it was on the valuation date as evidenced by the acquiring authority's condition survey on 6 February 2004, although he made no specific allowance for condition. Mr King said that, in any event, the market would assume a shell finish.

64. Mr Fraser submitted that by the end of cross-examination it was Mr Cairns' evidence that the freehold value of the reference property was £200,000. That figure was too high for two reasons: firstly, Mr Cairns had wrongly assumed that the property was in good condition at the valuation date; and, secondly, Mr Cairns had wrongly attributed value to the forecourt for car parking. In the light of that evidence there was no basis for awarding anything more than Mr King's valuation of £190,000 which Mr King described as "generous" and "more than fair and reasonable."

65. Mr Fraser then gave a detailed analysis of Mr Cairns' evidence which he said raised serious doubts about Mr Cairns' "credibility, reliability and simple competence as an expert witness which call into question whether any credence can be given to his evidence."

66. Mr Fraser said that the law was clear that the reference property had to be valued as at the valuation date: see *West Midlands Baptist Association v Birmingham Corporation* [1970] AC 874 and now section 5A of the Land Compensation Act 1961. He submitted that the fact that the House of Lords in *West Midlands Baptist Association* had overruled the earlier decision of *Phoenix Assurance Co v Spooner* [1905] KB 753 meant that the property had to be valued in its actual physical condition as at the valuation date.

67. The claimants could not be compensated twice for the same loss; once for the costs of relocation including the cost of moving fixtures and fittings from the reference property and for losses on forced sale and again for the value of the property as though none of this had happened.

68. Mr King had explained that this type of property was normally valued as a shell with no regard to fittings. What mattered was the poor condition of the structural fabric of the building and not just its appearance once it had been stripped out. Mr Fraser argued that the claimants' reliance upon the stripping out reflected their failure to distinguish between the value of the property and the value of the business if sold as a going concern. Mr Cairns' comparables were sales of fish and chip shops as going concerns and he acknowledged that the value of the fitting out was reflected in the value of the business and not the value of the property from which that business was conducted.

69. The claimants had stripped out the reference property of their own volition; it was not a requirement of the acquiring authority. In any event Mr Cairns valued the reference property as though it was in good condition but had still come to a valuation that was lower than that of Mr King.

70. Mr King valued the reference property using the investment method of valuation and relied upon comparable rents and yields derived from market transactions and CPO settlements for the commercial element. He had adopted Mr Cairns' approach of dividing the property into constituent parts (Happy Chip, Convenience Store, Especially 4 You) for ease of comparison. But he said in his expert report that:

> "I consider it extremely unlikely that the property would be sold in separate parts. As noted in the Buyers Report for The Golden Chip provided by Mr Cairns in his report …, I concur with the view that the most likely scenario is that a property like this would be sold as a single entity to an owner occupier and this forms the basis of my valuation approach."

The experts agreed in the statement of agreed facts that one would normally expect the freehold of this type of property to be sold as a single entity. This explained the lack of direct comparables for the sale of flats independently from the ground floor commercial element.

71. Mr Fraser said the acquiring authority did not accept that there was a parking area or that it would have added value to the property. There were no allocated or marked out parking spaces; Mr Cairns had exaggerated the size of the forecourt; cars could not park without obstructing the highway (a criminal offence); nobody would attribute value to a possible use which was illegal and liable to be restrained (and which in any event fell to be disregarded under section 5 rule (4) of the Land Compensation Act 1961); there was no evidence of any established use rights to park

or that planning permission for such a use would have been granted; and the parking of cars was contrary to the claimants' proposed use of 1A S St as a kiosk. Nor had Mr Cairns adduced any reliable evidence to support his figure of £50,000 for the value of the parking area.

*Discussion*

72. Both experts originally valued the reference property using the investment method of valuation. Mr Cairns valued the freehold at £810,000 adopting the rents which were stated in the purported leases from TM to SM, MM and ShM. Mr King valued the freehold at £190,000 using rents and yields that he derived from market transactions and CPO settlements. Following the Tribunal's interim decision which held that the purported leases were shams, Mr Cairns adopted an alternative valuation of £550,000.

73. In cross-examination Mr Cairns (eventually) explained that his valuation of £550,000 was an estimate of what the property would have sold for on the open market fitted out as a fish and chip shop and with the benefit of a trading record which Mr Cairns assumed showed a weekly turnover of £10,000. The value of £550,000 comprised the value of the business (£350,000) and the value of the freehold including the trade inventory, the flat and the parking area (£200,000). The value of stock and consumables would presumably have been separately assessed at the date of sale.

74. Mr Cairns is not a Chartered Surveyor or a qualified valuer. He is, put simply, a person whose experience lies in the transfer of businesses, specialising in the sale of fish and chip shops in the north of England. He is not an experienced expert witness and has no working knowledge of compulsory purchase. He found cross-examination a challenging experience and was frequently confused and often contradictory in the evidence he gave. He admitted to having made mistakes, several of which were exposed by Mr Fraser, and was apt to change his mind when subjected to persistent (but fair) questioning. His was not a confident performance and at times he became defensive, prefixing many of his answers by saying "if you put it that way" but offering no alternative approach. But I am satisfied, despite the many deficiencies of his evidence, that Mr Cairns knows how the market for fish and chip shops operates. It does so, as is shown by the sales particulars constituting Mr Cairns' comparables, by reference to the actual sales achieved. In other words Mr Cairns, as he says at paragraph 2.5 of the agreed statement (see paragraph 51 above), treats a fish and chip shop as a trade related property the value of which depends upon the physical property, the trade inventory and the market's perception of future trading potential for that use.

75. The recognised method of valuing a trade related property is by using the profits method of valuation. This requires the assessment of the fair maintainable turnover that can be generated by a reasonably efficient operator from which is derived a fair maintainable operating profit which is then capitalised at an appropriate rate of return. In using this method a valuer will take into account, *inter alia*, the location and physical characteristics of the building, the trading accounts of the present operator, an analysis of the trading results of similar businesses and an assessment of future trading potential, profitability and market demand.

76. This type of valuation appears to me to satisfy the attributes described by Mr Horton in his closing submissions, namely that the value of the freehold reflects the opportunity for a purchaser to establish a going concern rather than the established going concern as it exists in the hands of the vendor. Mr Horton distinguishes between these two by saying that the former takes account of the "possibility" of the land being used as a fish and chip shop whereas to value a business such as HCLG as an existing going concern is to value a "realised possibility".

77. Mr Horton bases this distinction on an analysis of case law that was concerned with the special suitability of land for use as a reservoir. The "possibility" referred to there concerns the demand for the use of agricultural land as a reservoir independently of the "realised possibility" represented by the acquiring authority's compulsory purchase for that use. I do not consider that to be analogous with the facts of the present case where the use of the property to be valued is already long established in private ownership. It is, in that sense, a going concern. I think a better distinction is between open market value (reflecting the trading potential of the reference land to a reasonably efficient operator) and the value to the owner (reflecting the actual trading potential as established in the hands of the claimants). The valuation for open market value should be of the property as a place to do business and not a valuation of the business itself.

78. Mr Horton went on to submit that Mr Cairns' valuation of £550,000 is an open market valuation rather than the value to the owner, i.e. the value of the going concern of HCLG. Mr Cairns had "stressed" that his "final figure" of £550,000 "was not for a *going concern*". I do not accept that submission in the light of Mr Cairns' evidence for the following reasons:

(i) Mr Cairns based his valuation on the turnover that he had been told was achieved by HCLG, namely £0.5m per annum or £10,000 per week. There was no analysis of whether this turnover could be achieved by a reasonably efficient operator.

(ii) Throughout his cross-examination Mr Cairns referred to going concern value and the value of the business. I understood him to be referring to the actual business of HCLG and not a hypothetical business in the hands of a reasonably efficient operator.

(iii) Mr Cairns' valuation of £550,000, which was not based on a profits method of valuation as conventionally understood, was specifically said by him not to be simply the open market value but also included the value of the (HCLG) business valued by capitalising the assumed turnover of £10,000 per week by a multiplier of 35. He acknowledged that logically if the business was worth £350,000 and his final figure was £550,000, the difference between the two, £200,000, must be the value of the freehold interest, although he continued to rail against this as being far too low.

79. The profits method of valuation combines the value of the business with the value of the property from which it is conducted. Its outcome is, in effect, a composite of these two values. The value to the owner cannot be less than the open market value, but it can be more if the capitalised profits that are actually achieved exceed those which are considered in the market to be fairly maintainable. The value of any such excess represents the current operator's personal goodwill and it is that which I think Mr Horton seeks to exclude when considering the open market value of the reference property under rule (2). But the profits method of valuation does not produce a separate freehold value distinct from the value of the business use which is

conducted from the property. The two are inextricably linked and together give the value of the land to the owner. As Lord Nicholls said in *Shun Fung* at 125H:

> "In practice it is customary and convenient to assess the value of the land and the disturbance loss separately, but strictly in law these are no more than two inseparable elements of a single whole in that together they make up the value of the land to the owner…."

The profits method of valuation, unlike the investment method, goes straight to the value of the "single whole".

80. It was open to the claimants to argue that Mr Cairns' figure of £550,000 represented the "lock stock and barrel" combined value of their property and business but they did not do so. I do not accept Mr Horton's description of this figure as the open market value of the property; it is a composite figure as emerged from Mr Cairns' cross-examination. Mr Cairns did not value the reference property using a formal profits method of valuation. Instead he simply capitalised weekly turnover by a multiple reflecting the trading potential of the property. In this case Mr Cairns assumed the turnover would be £10,000 per week but there was no reliable evidence to support that amount as I found in the interim decision. He adopted a multiplier of 35 which he justified by what he described as the unique location of the reference property and its unrestricted trading hours. His valuation was therefore £350,000. It might have been possible to reconcile this method of valuation with the profits method but the claimants made no attempt to do so. It might also have been possible to argue that the figure of £350,000 was the value of the "single whole" to the claimants, but that was not done either. Instead Mr Cairns was faced with a difficulty of his own making. He stated the "freehold value" to be £550,000 in his first supplementary report without explaining how he had obtained that figure. But since that was his starting point and given that he had capitalised the assumed weekly turnover at £350,000, he could do nothing other than accept that the difference between these two figures, i.e. £200,000, had to be the value of the freehold interest. What else could it be?

81. Mr Cairns was obviously unhappy about this outcome and it was clear by the end of his cross-examination that he did not believe £200,000 was a fair assessment of the open market value of the reference property, notwithstanding that by logically analysing the component parts of his valuation Mr Fraser had ineluctably taken him to that figure and obtained his acceptance of it.

82. Mr Cairns said that his best (indeed his only) comparable sale of a fish and chip shop was that of The Golden Chip in Heaton. For his part Mr Cairns said that he relied upon asking prices rather than sale prices. The asking price of The Golden Chip was £450,000 but the office copy register of title showed the price paid for the freehold interest on 14 March 2005 as £245,000. Such a substantial difference (a reduction of 46%) between the asking price and the price said to have been paid invites scrutiny. I think it is possible that the recorded price for the freehold interest may have been apportioned out of a larger sale price that included a payment for goodwill, i.e. the price paid may have exceeded the value of all the tangible assets. But that did not form any part of Mr Cairns' evidence and he did not suggest it in terms as a reason for the discrepancy between the asking price and the price recorded in the office copy entry. But he did speculate in re-examination that the recorded price did not reflect the whole consideration and

suggested that this may have been because it was "a private transaction". Mr Cairns produced no evidence to support this assertion. When asked about this comparable in cross-examination he analysed it by estimating the value of the business as £150,000 (estimated weekly turnover of £6,000 capitalised by a multiplier of 25) and deducted this from the recorded purchase price of £245,000 to give a value of £95,000 for the freehold. Mr Cairns did not suggest that the value of the freehold was £245,000.

83. Mr Cairns assumed that the reference property was in good condition at the valuation date and that it should be valued as a fully operational trading entity. As a matter of fact the trade inventory had been removed by the valuation date. Mr Horton intimated that the claimants were on the horns of a dilemma with respect to this inventory: if they had not removed it they risked being accused of failing to mitigate their loss; but if they did remove it they risked the open market value being reduced to reflect the need of an incoming purchaser to re-fit the premises before being able to trade. The condition of the property and whether it contained trade inventory affects a profits method valuation (and whether that method is appropriate). In my opinion Mr Fraser is correct for the reasons that he gave in saying that the property falls to be valued in the condition in which it is found at the valuation date and therefore it was not a fully equipped operational entity at that time because the trade inventory had been removed.

84. The reference property was not purpose built as a fish and chip shop but had been adapted to that use for many years. MM purchased it as such in 1996. It was readily adaptable to other A1 or A3 (as it then was) uses and Mr King did not consider that this was a trade related property. He assumed that an incoming tenant would expect a shell finish and the claimants' stripping out of the trade inventory did not affect his investment valuation. But he did reflect the poor structural condition of the property as revealed in the condition report prepared by the acquiring authority in February 2004. Mr King's rent and yield comparables were accepted by Mr Cairns in the statement of agreed facts and Mr King's resultant open market freehold value of £190,000 is well supported by such evidence.

85. In my opinion Mr King was right not to have attributed any value to the car parking spaces. Mr Horton took no issue with Mr Fraser's legal analysis of the position regarding such parking but said that "in practice the forecourt was used for parking for No.15". The claimants' case was based upon the added value which they said the availability of such car parking spaces gave the reference property. But given Mr Fraser's analysis concluded that such use was illegal and always liable to be restrained, any increase in the value of the reference property that was due to the use of the car parking space, whether by the claimants or by customers, would fall to be ignored under section 5 rule (4) of the Land Compensation Act 1961. I therefore place no value on the car parking spaces.

86. I do not doubt the sincerity of Mr Cairns' conviction that the reference property was worth more than £200,000 as an operational entity at the valuation date but that conviction was not supported by any evidence other than the asking price of The Golden Chip. During cross-examination Mr Cairns accepted that his evidence was "obviously not" reliable but, he said, "I still have my opinions". But the mere assertion of a value does not constitute evidence of that value, however experienced may be the person making the assertion. Mr Cairns provided details of the asking prices of other fish and chip shops but in none of these did he offer any meaningful

analysis of the transactions that might have been of assistance to the Tribunal and in his closing submissions Mr Horton did not suggest that Mr Cairns had relied upon them.

87. Mr Cairns' "freehold value" of £550,000 was not justified by him. Neither that figure nor the lower figure of £350,000 that Mr Cairns calculated by reference to weekly turnover was said to be the "all in" value to the owner. Even if such an argument had been made it would have depended upon turnover figures that I found to be unreliable in the interim decision. In my opinion the open market value of the freehold interest in the reference property is fairly estimated on the evidence by Mr King in the sum of £190,000 and I so determine.

**Disturbance claim: costs of moving to Unit 1 at 4 Waterloo Street**

*The case for the claimants*

88. Mr Horton submitted that the creation of Unit 1 at 4 W St was caused by the imminent threat of compulsory acquisition of the reference property and therefore the costs of moving were recoverable as disturbance compensation.

89. Originally the claimants relied upon the total of invoices (£401,662) contained in TM's witness statement. But this was abandoned in favour of Mr Huitson's expert evidence in which he priced bills of quantities, based upon those invoices, for the relocation and adaptation works in the sum of £368,034.

90. In cross-examination Mr Huitson said that he had assumed that the works had been undertaken to a reasonable standard of workmanship and assuming good practice. He accepted that building regulations approval had not been granted for the works and that at the time the works were undertaken there were no detailed engineering drawings or structural calculations available. When asked about the quality of the work Mr Huitson said that he had first seen the property in 2014, 10 years after the works had been done and that therefore it was difficult to comment upon on the quality of the original work given that it may have deteriorated in the meantime. But he acknowledged that the photographic evidence before the Tribunal (both Mr Wardle's and his own) showed examples of poor workmanship that was unaffected by the passage of time and that he should have drawn the Tribunal's attention to this fact. Indeed Mr Huitson said that "the building was in a horrendous state in 2014". However Mr Huitson disagreed with the 20% reduction in costs that Mr Wardle had made for what he described as the "DIY standard" of the works. Mr Huitson accepted that he could not verify works had been done where these were not visible upon inspection, and that he had not provided any assessment in his report of what works had or had not been so verified.

91. In the light of Mr Fraser's further detailed cross-examination Mr Horton said in his closing submissions that Mr Huitson "was an unsatisfactory witness". Nevertheless he submitted that there was a sound basis for awarding sums where Mr Wardle had accepted the works were not grant aided and for which there was some evidence that they had been carried out. These works totalled £21,177 (before Mr Wardle's reduction of 20% for the poor quality of the works) in

respect of bills of quantities ("BQ") pages 3/2 to 3/5 and £26,862 (before Mr Wardle's 20% reduction) in respect of BQ 4/1, 4/2, 5/1, 6/1 and 7/1 totalling £48,039. Mr Horton said that if the Tribunal was not satisfied that those sums should properly be awarded a reduction of 20% (to £38,431) would be fair since to award nothing for work which it was agreed was done would be "patently unfair".

92. Mr Horton further submitted that in the Scott Schedule attached to the joint statement of the experts Mr Wardle had given a final estimated cost of £53,837 after making a 20% reduction for the poor quality of the work and that this should therefore be the minimum sum awarded under this head of claim.

*The case for the acquiring authority*

93. Mr Fraser said that it was understood that Mr Huitson's evidence was required because it was accepted that the invoices submitted by TM were not reliable. That being so it was illogical to rely on those invoices to provide the basis for Mr Huitson's valuation. If the invoices were unreliable they could not then be relied upon to demonstrate, still less to establish, that the claimed works were actually done. Mr Huitson's evidence was based upon the claimants' unreliable invoices and did not support the claim.

94. Mr Fraser emphasised Mr Huitson's failure to assess properly the quality of the work said to have been done given that he had not contested Mr Wardle's evidence with respect to that quality. Indeed in cross-examination Mr Huitson had conceded the poor quality of the work. Mr Fraser said Mr Huitson's failure to deal with this matter and to draw those deficiencies in quality to the attention of the Tribunal reflected badly on him as an expert witness. It was simply inadequate for Mr Huitson to say this omission "might be an oversight" and was "not deliberate". It called all of his evidence into question.

95. Mr Fraser noted that in his report Mr Huitson said "Bills of Quantities have been prepared making responsible assumptions where specific detailed information has not been available." But Mr Huitson failed to identify either what assumptions he had made or what information he needed that was unavailable. This meant that he was unable throughout his bills of quantities to provide evidence either that the works described were actually works for fitting out Unit 1 or that they were actually undertaken.

96. Mr Fraser said that Mr Huitson accepted that the cost of any grant aided works was not recoverable as part of the claim and that the claimants had contributed to the grant works as a condition of obtaining the grant. Mr Fraser identified items BQ 1/1, 1/2, 2/1 and 3/1 as having been claimed as compensatable by the claimants but which in fact were part of the package of grant funded works. Mr Huitson denied this in his report and made an erroneous distinction between grant funded works as being external works and the claimants' contribution as being for internal works, a distinction which he subsequently contradicted during cross-examination. In any event, submitted Mr Fraser, the works which Mr Huitson said were paid for by the claimants (but which were in fact the "price" of getting the grant) were done in advance of the CPO and irrespective of whether the CPO was confirmed. Mr Huitson had therefore had to accept that

even if these items were not "grant works" they could not be claimed as a consequence of the CPO.

97. During cross-examination Mr Huitson explained that he had calculated the value of these disputed grant works items on the basis of what TM had told him, a fact which Mr Fraser described as "a quite staggering revelation" given that Mr Huitson was supposed to be providing an independent expert opinion in the light of the claimants' invoices which had been found to be unreliable, as indeed was TM's own evidence.

98. Mr Wardle accepted that a number of items within BQ 3/2, 3/3, 3/4 and 3/5 (totalling £21,177 before adjustment for quality) were not grant aided works and were supported by some evidence as to having been carried out. Mr Fraser said that this alone did not mean that they were properly claimable or that the whole sums would be compensatable. The claimants had not shown a causative link between the CPO and the works and "given the totally unsatisfactory nature of their evidence" said Mr Fraser, there was no basis to give them "the benefit of the doubt".

99. Even if a causative link could be established the claimants would have received value for money since the works were done to allow the unit to be used for trading and insofar as they served any purpose that purpose remained and the claimants retained the value of the works. Nor had the claimants addressed the issue of betterment identified by Mr King, i.e. where they were claiming the cost of a new item to replace an old one. Mr Fraser submitted that in the circumstances none of the figure of £21,177 was recoverable.

100. Mr Fraser submitted that similar arguments applied to those items identified by Mr Wardle in BQ 4/1, 4/2, 5/1, 6/1 and 7/1 (totalling £30,093 before adjustment for quality) where he had accepted that there was some evidence that the works had been done and were not the subject of grant monies.

101. The evidence relied upon by Mr Huitson to support the claim in BQ 7/1 was examined in detail by Mr Fraser in his closing submissions. Mr Wardle's total figure for this BQ was £26,862 as set out in the supplementary joint statement with Mr Huitson dated 19 February 2016. Mr Fraser submitted that a lower figure was recoverable and that in four instances Mr Wardle "was agreed [by Mr Huitson in cross-examination] to be plainly in error in appearing to accept any sum in the Scott Schedule."

102. Mr Wardle's error was said to have arisen by taking into consideration invoices raised by TMSCL which the Tribunal found to be unreliable (as to payment) in its interim decision and which preceded the date of confirmation of the CPO in June 2003. Mr Fraser submitted that for items BQ 7/1(8), 7/1(9), 7/1(10) and 7/1(12) Mr Wardle should not have accepted any sum in the Scott Schedule. All of these items were put to Mr Huitson in cross-examination and he accepted that none of these costs were claimable as they were incurred before June 2003. For his part Mr Wardle said during examination in chief that the claimed works had been done in January and February 2003 which was before the CPO had been confirmed and should therefore not be allowed. Mr Fraser also pointed out that in respect of BQ 7/1(8) part of the costs claimed related

to a TMSCL invoice that was dated 5 November 2005 and which could have nothing to do with the CPO or the relocation of The Happy Chip to Unit 1.

103. There was a total of 15 items in BQ 7/1. Apart from the four discussed above Mr Wardle allowed no claimable costs against another six items. Mr Wardle attributed value to all of the remaining five items in the Scott Schedule but Mr Fraser said that of these only one, BQ 7/1(1), was a possible exception to the lack of evidence that any of them was properly attributable to the CPO. BQ 7/1(1) was supported by an invoice from a third party, Welbeck Repair Services Ltd, dated 6 February 2004. Mr Fraser said (i) the details "remain sketchy"; (ii) there was no evidence the claimants had mitigated their costs by seeking competitive quotations; and (iii) the issue of value for money and betterment had not been addressed.

104. Mr Fraser's criticism of item BQ 7/1(7) (gas pipework to gas appliances) was based upon Mr Huitson's observations about the invoice that the claimants had produced to support it. Mr Huitson said in the "Claimant Comments" section of the joint statement:

> "The invoices are as issued – CLIENT insists work to gas/water supply rear of premises – asked for drawings and build-ups. No drawings received as yet."

The only invoice adduced was that from TMSCL dated 1 December 2003 which Mr Huitson said seemed to be for a reasonable price (£55,319). He had nothing else to support the figure although he had asked the claimants "several times" for further information. He accepted that the evidence for a credible claim did not exist. Mr Fraser concluded that "plainly nothing can be recoverable under this item" although Mr Wardle allowed the sum of £5,000 which he said was a "suitable allowance to cover works evident on site."

105. Mr Fraser made no separate submissions on items BQ 7/1(2) or (4) where the experts had agreed figures of £1,500 and £386 respectively. There appears to have been no invoice to support the former but the latter was supported by an invoice from Welbeck Repair Services Ltd dated 11 February 2004.

106. Mr Fraser conceded that there appeared to be evidence that the work itemised at BQ 7/1(11) had been carried out but said the claimants had received value for it and there was no basis for a claim. The item was supported by a quotation from npower dated 4 November 2003 and Mr Wardle appeared to have agreed it on the basis of photographic evidence that indicated a gas meter had been fitted.

107. Mr Fraser made no separate submissions on item 7/1(15), an item headed "building works in connection with services". This item was unsupported by any invoices but was agreed between the experts.

108. Mr Fraser submitted that Mr Huitson had allowed excessive time for preliminaries by suggesting (based upon instructions received from MM) that the works actually occupied the site for 50 weeks. Mr Huitson had allowed 22 weeks in the Scott Schedule but this too was excessive bearing in mind it had been established that the claimants had not taken steps to move to 4 W St

before November/December 2003 and had completed the move by February 2004. Mr Wardle had made an appropriate allowance of 8 weeks. Mr Fraser also said that Mr Wardle's adjustment of 20% to reflect the poor quality of the works was modest and generous to the claimants.

*Discussion*

109. Mr Fraser argues that (i) there is no causative link between the expenditure claimed and the CPO; (ii) the claimants have received value for money or betterment by way of new for old; and (iii) the invoices could not be relied upon as an accurate description of the works said to have been undertaken. I deal with these points below.

110. The claimed losses are the costs said to have been incurred in order to relocate the claimants' business from the reference property to Unit 1 at 4 W St. As such they are said to be costs that relate to the specific dispossession, or specific threat of dispossession, of the claimants from the reference property rather than a general threat of dispossession under the CPO.

111. In *Emslie and Simpson Ltd v Aberdeen City District Council* [1994] 1 EGLR 33 Lord President Hope said of this type of loss at [38]:

> "Where … loss incurred under the threat of dispossession has been held to be recoverable, this is because the dispossession has followed and the loss has been shown to have been caused by the dispossession."

112. The parties agreed that losses which arose before possession of the reference property was required (shadow period losses) are compensatable if they satisfied the three conditions set down by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Limited* [1995] 2 AC 111 at 126:

(i) There must be a causal connection between the acquisition and the loss;

(ii) The loss must not be too remote;

(iii) The claimant must behave reasonably and mitigate his loss.

113. I do not accept as a matter of principle that the necessary causal connection cannot be established where the claimed costs were incurred before confirmation of the CPO. I found at paragraph 250 of the interim decision that an indication that the reference land was, or was likely, to be acquired by the council was first given when the council approached the claimants in April 2001 to see whether they would be prepared to sell the reference property. At that time a clear and specific intention to acquire the reference property became manifest, supported by the threat of compulsory purchase powers. It is true that at that time the CPO had neither been made or confirmed but as was said by Lord Nicholls in *Shun Fung* at 136H:

> "Coming events may cast their shadows before them, and [acquisition] is such an event. A compensation line drawn at the place submitted by the Crown [the date of acquisition]

would be highly artificial, for it would have no relation to what actually happens. That cannot be a proper basis for assessing compensation for loss which is in fact sustained."

114. However, Lord Nicholls went on to say at 138G:

"The less certain the prospect of [acquisition], the greater will be the burden of showing that [the claimant] acted reasonably in running down his business and that the losses were caused by the prospect of [acquisition]."

115. In the interim decision (paragraph 357) I found that the claimants' evidence of invoices in support of the works said to have been done by TMSCL on Unit 1 at 4 W St was not reliable as to payment. I said that it would be a matter for expert evidence whether it was a reliable approach for the claimants to describe the nature of the work done by reference to those invoices. I have now heard that expert evidence and I am not persuaded that it was a reliable approach. Mr Huitson did not analyse those invoices objectively; he seemingly accepted them at face value as an accurate description of the work that was undertaken. Mr Fraser's thorough cross-examination of Mr Huitson revealed the failings of his uncritical approach and I do not accept that the invoices are a trustworthy description of what works were undertaken at Unit 1 at 4 W St. Mr Fraser appears to rely upon the dates of those TMSCL invoices to establish that the purported works they describe were undertaken before the CPO was confirmed and therefore (regardless of any other argument) had nothing to do with the CPO or the relocation of HCLG to Unit 1. But if, as I have found, the invoices are unreliable, they are unreliable for all purposes, not just for those which suit the acquiring authority. The dates of the invoices cannot be relied upon either.

116. Mr Horton accepted, rightly in my opinion, that Mr Huitson was an unsatisfactory witness on this issue and therefore the only items of cost that effectively remain in dispute are those identified by Mr Wardle but which Mr Fraser submits he was "plainly in error" to have accepted.

117. Mr Fraser says that Mr Wardle's error was to accept work done prior to the confirmation of the CPO as being compensatable. But as I have discussed above I do not consider that date to be critical for the proper determination of compensation. As Lord Nicholls said in *Shun Fung* at 138E:

"Losses arising after the inception of the scheme will attract compensation, however short or long the shadow period, provided they satisfy the criteria mentioned above." (See paragraph 112 above.)

118. In the interim decision I determined that "it was reasonable in principle for the claimants to move the short distance from the reference property to 4 W St [Unit 1]…" (Paragraph 330). I am satisfied that the work which Mr Wardle accepted had been undertaken at Unit 1 at 4 W St was compatible with the removal of HCLG from 15 W St, a move which did take place and which, in my opinion, can reasonably be said to have been caused by the threat of dispossession. Mr Fraser suggests that this work may have taken place in any event as part of the claimants' re-ordering of their business. The evidence does not, in my opinion, support the conclusion that the claimants would have created Unit 1 (or some variation of it) in the absence of the scheme, although the claimants incurred the costs of creating Unit 1 at a time when they were vigorously objecting to

the CPO and had they been successful in their objection such costs would be abortive and not compensatable. They were taking a clear financial risk by incurring these costs early, i.e. before the CPO was confirmed (although even then they could not be certain that the CPO would be implemented). Despite the inconsistency between the claimants' actions I am satisfied that the work done to Unit 1 was in response to the threat of dispossession under the CPO, would not have been done but for that threat and is compensatable in principle.

119. Mr Wardle agreed that at least some construction works were done which were not part of the grant aided works (although having rejected TMSCL's invoices it is not known when these took place). There is some objective evidence of specific works of removal from 15 W St to Unit 1 at 4 W St, e.g. an invoice from Welbeck Repair Services Ltd dated 6 February 2004 for £10,868 and said to be for, inter alia, the supply and fitting of a frying range. Mr Wardle costed these works at £53,837 after making a 20% deduction for the poor quality of the works. I consider such a deduction to be justified on the evidence and from the site inspection which I undertook at the time of the first hearing. I also prefer Mr Wardle's allowance of 15% for preliminaries. Of this amount £42,084 was agreed with Mr Huitson in the Scott Schedule (adopting Mr Wardle's adjustments for preliminaries and quality of work). Whether some or all of the £53,837 for this head of claim is compensatable depends upon Mr Fraser's submissions about the claimants having received value for money for such expenditure.

120. In this connection Mr Fraser relies upon his closing submissions at the end of the first hearing where he said at paragraph 299:

> "The next fundamental problem with these invoices, and indeed the claim, is that they relate essentially to substantial structural and similar works to Unit 1. This unit remains as part of the property. The unit was clearly considered to create value as can be seen from the marketing of the unit. The works appear to be works which should properly be to the cost of the landowner who retains the value of the created unit, but peculiarly they are attributed to the HC which only had a purported leasehold interest in the unit.
>
> It is clear that in reality the works done to create Unit 1 were works that TM intended to do for the purposes of adding value to 4 W St. They are not costs which in any sense can be said to be properly attributable to the CPO and/or the need for the HC to relocate. Furthermore TM is to be taken to have obtained value for the works: there is no credible evidence that he has not. In reality all claims with respect to Unit 1 are an invalid attempt to get the AA to pay for TM's plans for re-ordering his property."

121. I consider the issue of value for money against the following case law.

122. In *M & B Precision Engineers Limited v Ealing London Borough Council* (1973) 13 RVR 81 the Tribunal, Mr R C G Fennell FRICS, said at 84:

> "It is assumed that the subject property was transferred to the council at market value and the new premises occupied by the claimants were acquired at market value. In other words, money's worth is deemed to represent deficiencies in the new premises in comparison with the subject premises, and the cost of alterations and improvements of the new premises in order to bring them up to the standards of the old premises are not admissible."

123. In *Smith v Birmingham Corporation* (1973) 29 P&CR 265 the Tribunal, Mr J R Laird FRICS, said at 274 that "the same principles [as in *M&B*] apply" and disallowed expenditure in respect of structural additions and improvements at the alternative premises to which the claimant moved.

124. In *Service Welding Limited v Tyne & Wear County Council* [1979] 1 EGLR 36, Bridge LJ said at 37M:

> "What the authorities ….. very clearly establish, however, is that when an occupier, whether residential or business, does, in consequence of disturbance, re-house himself in alternative accommodation, *prima facie* he is not entitled to recover, by way of compensation for disturbance or otherwise, any part of the purchase price which he pays for the alternative accommodation to which he removes, whether that accommodation is better or worse than, or equivalent to, the property from which he is being evicted. The reason for that is that there is a presumption in law, albeit a rebuttable presumption, that the purchase price paid for the new premises is something for which the claimant has received value for money. If he has made a good bargain and acquired premises which have a value in excess of what he has paid for them, that is not something for which the acquiring authority is entitled to any credit. If the claimant has made a bad bargain and has paid a great deal more for the new premises to which he is moving than they are really worth, that is not something for which the acquiring authority can properly be charged.
>
> …. This presumption is, of course rebuttable. There may be circumstances in which, for example, the displaced claimant, in order to render the new premises which he acquires suitable for his own purposes, must expend money on adapting them in a way which will not enhance their value. In those circumstances, the cost of adaptation would properly be recoverable as part of his disturbance compensation."

125. TM did not acquire 4 W St (September 2000) under threat of dispossession from 15 W St (April 2001). It was not purchased as a specific replacement property. The conversion of part of 4 W St into Unit 1 appears to have been designed in January 2003 ("Ove Arup drawings showing "suggested procedure and details for corner doorway construction") by which time the CPO had been made (1 August 2002) and the acquiring authority's intention to acquire the reference property was known. As I have found above (paragraph 118) the evidence does not conclusively show that Unit 1 was designed for any other reason than to house the displaced Happy Chip. It cannot fairly be concluded that it would have been created as a separate shop unit in any event.

126. The works which Mr Wardle agrees have been done to Unit 1 but which did not form part of the grant aided works inure to the benefit of TM as the freeholder of 4 W St (although it does not seem that he paid for them). The creation of Unit 1 meant that TM had an asset that he could dispose of following the relocation of the HCLG a second time, to Unit 2. Indeed the trial bundle contains details of the proposed letting of Unit 1 as early as March 2004 and which describe it as "a superb opportunity to trade". In my opinion the cost of creating Unit 1 represented value for money except for expenditure that did not enhance its value. Mr Day said that the formation of Unit 1 did not increase the value of 4 W St. But that conclusion was said by him in examination-in-chief to be "extremely marginal" and depended on valuations which were criticised at length in cross-examination and summarised in Mr Fraser's closing submissions. Mr Horton replied,

rightly in my opinion, that he was unable to submit that Mr Day's evidence as to compensation - and thus the valuations upon which his estimate of such compensation was based - came up to proof, or that he was able to counter the critique of that evidence contained in Mr Fraser's closing submissions.

127. The amount that is compensatable is that part of the £53,837 agreed by Mr Wardle as being the reasonable cost of the works done less the cost of works for which TM as freeholder continued to obtain value for money. I bear in mind Mr King's remarks that A3 units such as this are usually sold in shell condition, and that incoming tenants will usually want to fit out the unit to their own requirements. So, for instance, the wall and floor finishes that were fitted by the claimants may be of no value to an incoming tenant. I also consider that the claimants would not dispose of Unit 1 to a competitor fish and chip shop operator bearing in mind they moved HCLG again to Unit 2. With this in mind, and doing the best I can from the latest Scott Schedule, I consider that 60% of the cost or £32,500 (rounded) is a reasonable estimate of the compensation payable to the claimants under this head of claim.

**Disturbance claim: other costs**

128. Mr Horton made the preliminary point that the claimants are entitled to their reasonable legal and professional fees "since there can be no doubt that such fees were incurred and are payable as part of the disturbance claim". I assume that Mr Horton is referring here to the pre-reference costs of conveying the reference property to the acquiring authority in accordance with section 23 of the Compulsory Purchase Act 1965 and to the costs of dealing with the notice to treat and preparing the claim. There are two problems with this element of the claim:

(i) The claimants did not make clear the nature and extent of their claim as can be seen from the repeated amendments to their statements of case and a lack of an initial claim that satisfied the requirements of section 4 of the Land Compensation Act 1961 (see paragraph 23 of the interim decision);

(ii) The claimants have not given details of the amounts which they are claiming for such fees. (Mr Nedas included a figure of £89,278 for the years 2003 to 2006 but said that he had not seen the invoices which constituted this sum. He speculated that this amount "arose as a consequence of the CPO" but there is no evidence to support this assertion and I do not accept it.)

I have no evidence about the extent of any dispute and I can only record that the claimants are entitled to their reasonable conveyancing fees and reasonable professional fees in dealing with the notice to treat and preparing the claim, although they are now too late to make a further reference to the Tribunal on this aspect of their claim in the event of any dispute between the parties as to the amount of such costs. Unless the appropriate figure has been agreed, in which case it can be supplied and included in an addendum to this decision, the claimants have therefore failed to prove any entitlement under this head of claim.

*Legal costs paid to Dickinson Dees (now Bond Dickinson)*

129. Mr Horton submitted that six invoices for work undertaken by Dickinson Dees in connection with obtaining planning permission for the use of Unit 1 at 4 W St for a fish and chip shop with unrestricted opening hours are payable as part of the claimants' disturbance claim. He says that these costs were incurred as part of the claimants' attempt to mitigate their losses.

130. The council received complaints about the use of Unit 1 at 4 W St as a hot food takeaway in early 2004 and served a planning contravention notice on 9 February 2004 to which TM responded on 25 February 2004. A retrospective planning application for a change of use to mixed A1 (retail) and A3 (hot food takeaway) was made on 24 March 2004. The proposed hours of working for the A3 use were 8am to 12.30am every day including Sundays and bank holidays.

131. Mr Horton said that the first Dickinson Dees invoice dated 31 March 2004 was in respect of this planning application. The total amount before VAT and disbursements is £2,600 of which £250 is said to relate to unspecified "CPO matters". The remaining £2,350 relates to planning matters including meetings with the client and also a meeting with the council to discuss enforcement matters. General advice was also given on "planning strategy for convenience store, proposed café/bar/restaurant and 'African Grill Bar'". In my opinion it was reasonable for the claimants to incur expenditure on obtaining planning permission to enable them to continue their business at 4 W St. But I do not consider it was reasonable for them to have commenced trading as The Happy Chip without such planning permission and therefore to having incurred expenditure on obtaining advice about planning enforcement. Nor do I consider that the acquiring authority should be required to pay for unspecified CPO advice after the valuation date. I therefore allow £1,500 in respect of the first invoice which I consider to be a reasonable sum for the claimants to submit the necessary planning application. After VAT and an apportionment of disbursements the (rounded) total is £1,920.

132. The second invoice, dated 4 February 2005, is in the precise sum of £5,000 including VAT and is described as "to professional charges in respect of planning appeals". No further detail is given on the invoice although Mr Horton refers in his closing submissions to the relevant supporting documents in Volume D of the trial bundle. (There are further documents in Volumes K and L.) I have commented at some length in the interim decision about the conduct of the claimants in dealing with the planning authority in their attempts to obtain longer opening hours for the relocated Happy Chip; see, for instance, paragraphs 16 to 18. It is conduct which, in my opinion, reflected poorly upon the claimants and involved a strategy of pretence that the core business was the A1 convenience store when in fact it was the A3 fish and chip shop which was the main concern of the claimants and for which they wanted longer opening hours. The planning appeal submitted by Dickinson Dees on 15 October 2004 was concerned with condition 2 of the planning permission granted on 22 July 2004 which limited the hours of business of both the A1 and A3 uses to midnight with a requirement for staff to leave by 00.30. Ostensibly the claimants were only concerned with the hours of business of the A1 convenience store, arguing that such a use did not give rise to the type of effects associated with the A3 use which they identified as "odours and early a.m. concentrated periods of activity, for example when nearby pubs….. close at 1.00am and 2.00am." They appeared to accept that the hours of opening of the A3 use (The Happy Chip) should be restricted to midnight. But thereafter they continued to trade in breach of

the trading hours condition in the planning permission and an enforcement notice was served on 24 November 2004. The claimants appealed against the enforcement notice on 23 December 2004.

133. I am prepared to allow some costs in respect of the appeal against the trading hours for the A1 use which I consider was reasonable given that those hours were unrestricted at 15W St, that the planning application had sought unrestricted hours at 4 W St for the A1 use (but not the A3 use where the claimants had not asked to open beyond 00:30) and that I found in the interim decision that there was a single family business. But I do not accept that the cost of the appeal against the enforcement notice was a direct and reasonable consequence of the acquisition. The claimants were knowingly trading in breach of the July 2004 planning permission and I see no reason why the acquiring authority should be expected to pay for the consequences of that action. The claimants were not mitigating their losses by so trading and the costs of dealing with and appealing against the enforcement notice are too remote from their dispossession from the reference property to be compensatable.

134. I am satisfied, however, that the majority of the cost of the second invoice relates to the provision of information leading to the grant of planning permission in July 2004 and the subsequent appeal. I therefore allow 75% of this invoice or £3,750.

135. The third invoice (£8,799.06) is dated 18 April 2005 and is said to cover planning and legal services for the period 13 December 2004 to 17 March 2005. This invoice therefore appears to overlap with the second invoice which was dated 4 February 2005. Mr Horton suggests that the third invoice covers the claimants' additional statement of case, the council's statement of case, the claimants' comments on the council's statement and the enforcement notice. The claimants' statement of case on the planning appeal was prepared on 1 December 2004 and their comments on the council's statement of case were submitted on 6 January 2005. I assume that the costs of both of these were included in the second invoice. Dickinson Dees wrote a long letter to the council on 3 March 2005 seeking to provide sufficient information to discharge six of the conditions attached to the July 2004 planning permission. I consider the cost of this letter to be compensatable. The claimants also prepared a unilateral undertaking dated 9 March 2005 in which they proposed, in summary, to limit the hours of working of what became known as Unit 2 ("the Green Land") in the event that the planning appeal against condition 2 of the July 2004 planning permission was successful. Again I consider the cost of this document to be compensatable. The remainder of the invoiced items appear to me to be concerned with the enforcement notice which I do not consider claimable for the reasons previously given. I allow 50% of this invoice or £4,400 (rounded).

136. The fourth invoice (£7,317.94) is dated 29 July 2005 and is said to cover the period from March to July 2005. It potentially overlaps with the third invoice for the first half of March 2005. This invoice contains a more detailed description of the work undertaken than is found in the other invoices. The work can be broken down into four parts:

(i) general advice about a new Use Classes Order;

(ii) planning advice about the "triangular" unit to the south (Unit 2);

(iii) work on the enforcement appeal; and

(iv) attending the planning inspector's site visit in connection with the appeal against condition 2 of the planning permission and advising about the inspector's decision.

In my opinion items (i) and (ii) are nothing to do with the compulsory acquisition, and item (iii) is not compensatable for the reasons I have previously given. Only item (iv) is compensatable and I allow 20% of the invoice amount or £1,465 (rounded).

137. The fifth invoice (£5,396.55) is dated 15 September 2005 and concerns the preparation and submission of documents challenging the planning inspector's decision on the planning appeal dated 22 July 2004. The challenge was apparently not pursued. In my opinion such expenditure is too remote from the acquisition to be compensatable and I make no award in respect of this invoice.

138. The sixth and final invoice under this head of claim (£10,703.03) is dated 16 November 2005 and is headed "Enforcement Appeal – s289 challenge". For the reasons given earlier I do not consider any costs incurred on the enforcement notice to be compensatable and I make no award in respect of this invoice.

139. None of the invoices are receipted and four of them are copies provided by Dickinson Dees. But I have made the pragmatic assumption that had the first four invoices not been paid (in respect of which I award, at least in part, compensation) then Dickinson Dees would not have continued to work for the claimants, as evidenced by the last two invoices.

140. I therefore award the following amounts under this head of claim:

| | |
|---|---|
| (i) invoice dated 31 March 2004: | £ 1,920 |
| (ii) invoice dated 4 February 2005: | £ 3,750 |
| (iii) invoice dated 18 April 2005: | £ 4,400 |
| (iv) invoice dated 29 July 2005: | £ 1,465 |
| (v) invoice dated 15 September 2005: | Nil |
| (vi) invoice dated 16 November 2005: | Nil |
| | £11,535 |

*Cost of compliance with July 2004 planning permission*

141. This head of claim was dealt with for the claimants in evidence by Mr Nedas who said that the cost of complying with the conditions attached to the planning permission dated 22 July 2004 was £13,521 although he did not provide supporting invoices despite, he said, having seen them.

142. Mr Horton submitted that the claimants were entitled to receive a total of £3,850.05 in respect of the costs of complying with the conditions attached to the July 2004 planning permission (the correct total is £3,870.05). He also submitted that the claimants should be reimbursed the cost of £10,111 for the flue system "included in Mr Huitson's bills." Mr Horton had previously described Mr Huitson as an unsatisfactory witness and did not rely on his cost estimates. The figure for the flue system was included in those estimates and if it cannot be relied upon under one head of claim (the costs of moving to Unit 1) it cannot be relied upon under another (the costs of complying with the July 2004 planning permission). A summary of the costs of complying with the planning permission is given at Volume D page 866 of the trial bundle in which the cost of "additional works" to the flue system is said to be £12,000 including VAT. There is an invoice from TMSCL for this amount dated 1 December 2005 (two weeks after the claimants say they moved to Unit 2) and I have already found at paragraph 115 above that such invoices are not a trustworthy description of the works that were undertaken to Unit 1. The provenance of Mr Huitson's cost figure of £10,111, against which he wrote in his supplementary expert report "See Invoice!!!", is uncertain and the figure he adopts is not even supported by the (unreliable) TMSCL invoice, even if one deducts VAT. I therefore disallow the claim for the cost of the flue under this head of claim.

143. The amount claimed (including VAT) comprises the following invoices:

| | | |
|---|---|---|
| (i) | EMAT Limited (invoice No.s I04113 and I05006) for an acoustic survey of 4 W St: | £1,214.95 |
| (ii) | EMAT Limited (invoice No. I04020) for an acoustic assessment of 4 W St: | £1,123.30 |
| (iii) | Paul E Lynn: pedestrian/vehicular traffic survey of Waterloo Street: | £ 418.00 |
| (iv) | NVA (UK): noise measurement/assessment of ventilation extraction flue: | £ 258.50 |
| (v) | AAC Eurovent Limited: carbon filter unit: | £ 855.30 |
| | | £3,870.05 |

144. Mr Fraser submitted that Mr Nedas had not provided invoices to support this head of claim and had not shown that it was properly claimable as being due to the CPO.

145. Copies of the relevant documents were included in the trial bundle at Volume D at pages 866 to 874A and formed part of the exhibits to TM's witness statement. The summary of this head of claim (totalling £15,850.05) at page 866 includes items (i) to (v) above, although item (v) is shown as £835.30 which may explain Mr Horton's arithmetical error. The balance of £12,000 relates to the invoice from TMSCL to SM in connection with the flue installation. It is not possible to reconcile the total figure with that given by Mr Nedas in his evidence.

146. It is not accurate of Mr Horton to say that all of the costs claimed in items (i) to (v) above were incurred in respect of complying with planning conditions attached to the July 2004 planning permission. Thus the EMAT noise assessment of the kitchen extract ventilation was required before the local planning authority would accept the validity of the planning application and was actually undertaken in March 2004, four months before planning permission was granted. It is this report (reference EMAT/R/412A) that forms the subject of invoice No. I04020 dated 9 March 2004 and which is claimed as item (ii) above. This is an invoice which was accepted by Mr Wardle as relating to "additional works to the flue system" in the revised Scott Schedule (see BQ 7/1(8)) and which I have included within my allowance of £32,500 under the head of claim for the costs of moving to Unit 1 at 4 W St (see paragraph 127 above). This cost has therefore already been allowed and to award it again under this head of claim would be double counting.

147. There are said to be two further invoices from EMAT Limited which are claimable (see item (i)). I assume that these invoices relate to a report from EMAT dated January 2005 concerning a noise assessment of the internal walls and floors of 4 W St and which was copied to the local planning authority in a letter dated 3 March 2005 from Dickinson Dees in connection with the satisfaction of condition 4 to the July 2004 planning permission. The details of the scheme for sound insulation were approved by the local planning authority.

148. The only document in support of payment of these invoices is a letter from EMAT Ltd to TM (addressed to TMSCL) dated 4 May 2005 referring to them as remaining unpaid. The letter states: "I appreciate your agreement to have a cheque for the full amount of both unpaid invoices, £1,034 plus VAT, 1st class in the (sic) today's post." There is no evidence that the invoice was in fact paid. There is no copy of either of these invoices. In the absence of any proof of payment I disallow item (i) of this head of claim.

149. Item (iii) concerns the conduct and analysis of a pedestrian/vehicular traffic survey undertaken on 11 December 2004 by Mr Paul Lynn, Chartered Town Planner. The survey was undertaken in connection with the planning appeal against condition 2 of the July 2004 planning permission which limited the trading hours of Unit 1. I consider that it was reasonable for the claimants to pursue this appeal and to try and obtain unrestricted trading hours similar to those enjoyed at the reference property. The invoice is receipted by hand and signed by Mr Lynn whose signature is corroborated on his report dated 17 December 2004 which is also in the trial bundle. I therefore allow this item of claim but reduce it from £418 to £380, the difference being in respect of a "credit charge" of 10% (£38) which is to be deducted if payment is made within 28 days. The invoice was dated 18 December 2004 and the receipt is dated 20 December 2004 so the claimants either did, or should have, received this discount.

150. Item (iv) is an invoice for £258.50 from NVA (UK) Limited dated (and receipted) 6 April 2005. It is in respect of "noise measurement/assessment - modified cooking/ventilation extract at 2nd floor level." NVA's report dated 19 January 2005 was attached to Dickinson Dee's letter to the local planning authority dated 3 March 2005 and was concerned with condition 6 of the 2004 planning permission regarding noise attenuation and the installation of roof plant. It dealt with the likelihood of noise from the extract unit affecting neighbouring residential dwellings and concluded that "there is little likelihood of noise related complaints." The local planning authority said that they were also concerned about the effect that noise from the unit might have

on the proposed second and third floor residential dwellings in 4 W St and that the report had not addressed this issue. The local planning authority concluded that the report did not demonstrate compliance with Newcastle City Council's UDP policy statement 22. The local planning authority refused the submitted details in respect of condition 6. I do not consider that the acquiring authority should pay for the cost of the claimant's failure to justify the construction of an extraction system (in breach of the July 2004 planning permission) which did not satisfy either condition 6 or condition 8.

151. The final document (item (v)) is a quotation for £680 plus VAT (totalling £799) in respect of the supply and installation of an activated carbon filter unit to assist in the removal of cooking odours. Such a filter appears to have been suggested by the local planning authority and they refused to approve the details of the proposed facilities for the extraction of cooking fumes without a satisfactory filtration system. Although the handwritten word "ordered" appears on the quotation there is no evidence that the filter, if indeed it was actually fitted, was paid for. I therefore disallow this item. In any event the amount claimed, whether £835.30 as shown at Volume D page 866 of the trial bundle or £855.30 as stated in Mr Horton's closing submissions, appears to be wrong.

*New equipment*

152. Mr Horton submitted that the cost of a number of items of new equipment which were installed in Unit 1 and which were not included in Mr Huitson's bills of quantities were compensatable. These items are all supported by invoices and are summarised below:

| | | |
|---|---|---|
| (i) | 21 January 2004 – Wellbeck Repair Services Limited – alarm system: | £2,042.90 |
| (ii) | 30 January 2004 – John Dodd Limited – 2 x chest freezers: | £ 716.75 |
| (iii) | 27 February 2004 – D & L Sheet Metal – counter support frame and other stainless steel items: | £ 951.75 |
| (iv) | 10 March 2004 – Eblett Ellison – advertising expenses: | £ 235.00 |
| (v) | 27 May 2004 – D & L Sheet Metal – stainless steel front for fish range: | £ 94.00 |
| (vi) | 6 July 2004 – SDS – Menus: | £3,196.00 |
| (vii) | 6 September 2005 – John Dodd Limited – preparation machines: | £1,057.50 |
| | | £8,293.90 |

153. These items were not specifically referred to in the expert evidence but formed part of a larger "schedule of invoices for equipment for Unit 1" that was attached as exhibit 94 to TM's

witness statement. Mr Fraser did not (specifically) address these items since they were not identified in expert evidence (although they may have been included in the figures adopted by Mr Nedas but which he was unable to explain or verify). The acquiring authority's general approach to such items was (i) there was no supporting expert evidence or explanation of the amounts; and/or (ii) the claimants received value for money for their expenditure.

154. Item (i) is said to be in respect of an alarm system. The addressee of the accompanying invoice has, in my opinion, been redacted. The invoice does not specify which property this relates to and I therefore disallow this item.

155. Item (ii) is an invoice for two chest freezers and states "paid in full by MasterCard". No explanation is given of why it was necessary to purchase these freezers rather than move the freezers that were already being used in the reference property. It may be that the existing freezers were due for replacement in any event but that is not an expense that properly falls to be borne by the acquiring authority since it was not caused by the dispossession. In my opinion this is an expense for which the claimants received value for money and I disallow this item.

156. Item (iii) is an invoice dated 27 February 2004 from D & L Sheet Metal in the sum of £951.75 including VAT. The invoice has no addressee and no reference to a particular property. Several items make up the invoice, none of which refers specifically to Unit 1 or the activities carried out therein (although reference is made to a "serving counter top"). There is a signature on the invoice but no reference to payment having been made. The invoice does not appear to have been referred to by either Mr Huitson or Mr Wardle in their expert reports and Scott Schedule. That does not mean that the invoice was overlooked; it may equally mean that it was not considered relevant or that it did not refer to Unit 1. There was no opportunity to consider the point at the hearing since neither expert relied upon these invoices for "new equipment" and Mr Horton only introduced them in his closing submissions (although the invoices are in the trial bundle). I am not satisfied that the claimants have established (i) that this invoice was actually paid; (ii) that it relates to Unit 1; or (iii) that it was a natural and reasonable consequence of dispossession for which the acquiring authority should be responsible. I therefore disallow this item.

157. Item (iv) is an invoice from Eblett Ellison RMS Commercial Limited in the sum of £235 including VAT. It is dated 10 March 2004 and was receipted the same day. It is headed "to advertising expenses". In my opinion this invoice relates to the preparation of marketing material for the sale of Unit 1 as referred to in paragraph 119 of the interim decision. The copy of the sole selling rights agreement between Eblett Ellison and TM is included in Volume A of the trial bundle at page 335. Clause 5 of this agreement states "The seller agrees to pay on the signing of this agreement the sum of £200 plus VAT to cover initial marketing/press advertising expenditure". It was not a cost that was caused by the dispossession of the claimants and is not allowable.

158. Item (v) is another invoice from D & L Sheet Metal. It is in the sum of £94 including VAT and is dated 27 May 2004. It is for the "supply [of] stainless steel for front of fish range." It appears to have been receipted by a signature that I take to be that of Mr Dave Hunt, whose name

and telephone numbers appear at the bottom of the invoice. The signature is the same as that on another invoice from D & L Sheet Metal in respect of the subsequent move to Unit 2 (see Volume E page 1061A). (It is not the same signature that appears on the invoice at item (iii) above.) But there is no invoice number and no addressee and no reference to a named property. The date of the invoice is three months after the Happy Chip commenced trading in Unit 1 and three months after D & L's previous invoice. Although the reference to a "fish range" suggests that it does indeed relate to Unit 1 there is no explanation of why a stainless steel front was only being supplied at that late stage. It might be, for instance, that the front had been damaged and needed to be replaced. Without further detail I am not satisfied that the necessary causative link has been established between the cost and the dispossession of the claimants from the reference property and I disallow this sum.

159. Item (vi) is a receipted invoice from Sign Design Services (SDS) in the sum of £3,196. The invoice refers to "credit" of £1,598 and the balance due being £1,598. There is no explanation of the credit and whether it represented a discount. There is no invoice number and no addressee. The invoice is dated 6 July 2004, some five months after the Happy Chip commenced trading from Unit 1 at 4 W St. The invoice refers only to "8 No. menus" There is nothing to show that this cost related to the move from the reference property to Unit 1 or that it was even incurred in respect of The Happy Chip. There is no explanation of the product; on the face of it each "menu" costs £340 which is clearly nonsensical. It is more likely that each "quantity" was a box of menus. In my opinion the claimants' loss was the cost of any menus it had paid for but had then been unable to use at the reference property and which were made redundant following the move to Unit 1. No such circumstances have been established. The cost of printing new menus represents value for money and would have been a regular expense that the claimants would have incurred at the reference property in any event as their stock of menus diminished over time. I therefore disallow this item.

160. The final invoice, item (vii), is quickly dealt with. It is an invoice dated 6 September 2005 and relates to an Everest mincing machine and a vegetable preparation machine. The invoice is in the sum of £900 plus VAT. Given the date of the invoice I consider that it relates to the second move to Unit 2 and not the initial move to Unit 1. This is confirmed in Mr Huitson's bills of quantities for the move to Unit 2 where at page 921 of Volume Q of the trial bundle he shows an item for "Everest mincing machine: £900". I disallowed the costs of the second move from Unit 1 to Unit 2 in the interim decision at paragraph 336 and I therefore disallow this item.

**Disposal**

161. I determine that the following compensation is payable:

| | | |
|---|---|---|
| (i) | open market value of the freehold interest in the reference property: | £190,000 |
| (ii) | disturbance claim - costs of moving to Unit 1 at 4 W St: | |
| | (a) personal time (interim decision, paragraph 396): | £ 450 |
| | (b) costs of the move: | £ 32,500 |

| | | |
|---|---|---|
| (c) | legal costs (Dickinson Dees) re planning permission for A1/A3 use of Unit 1: | £ 11,535 |
| (d) | costs of complying with July 2004 planning permission: | £ 380 |
| | Total compensation: | £234,865 |

162. I award no compensation for the following heads of claim:

(i) loss of profits

(ii) new equipment at Unit 1 at 4 W St

(iii) severance and injurious affection to 4 W St

(iv) loss of rights to light

(v) pre-reference legal and surveyors fees (there being no identified dispute about such fees and subject to my comments in paragraph 128 above).

163. No basic loss payment is due under section 33A of the Land Compensation Act 1973 since under section 106(2) of the Planning and Compulsory Purchase Act 2004 it does not apply to pre-commencement acquisitions, i.e. where a CPO is made, or made in draft, prior to 31 October 2004. Similarly an occupier's loss payment under section 33C of the 1973 Act is not applicable to pre-commencement acquisitions.

164. Statutory interest is payable on the compensation from the valuation date (29 January 2004) although the statutory rate of interest has been nil since 31 March 2009.

**Concluding remarks**

165. This claim has taken up a disproportionate amount of the Tribunal's resources. It should have been obvious that many of the claimants' heads of claim were grossly exaggerated and were simply unsupported by the evidence. Nobody on the claimants' team seems to have stood back and asked themselves whether what was being claimed was remotely realistic. The claimants' experts accepted much of what they were told by the claimants far too readily and at times failed to exercise the type of meaningful critical and objective judgment that the Tribunal reasonably expects of an independent expert witness. It is not sufficient simply to rely on what the claimants told them; an expert should not be the puppet of their client but should act in a way commensurate with the duties set out in rule 17(1) of the Tribunal's Procedure Rules 2010:

> "It is the duty of an expert to help the Tribunal on matters within the expert's expertise and this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid."

I have highlighted the most egregious examples of the experts' failure to meet this duty throughout this decision.

166. It is disappointing that so much time had to be spent by Mr Fraser in cross-examination that would have been unnecessary had the experts exercised a modicum of common sense by not pursuing the exaggerated figures to which they were led by the claimants. The belated result was the welcome (and sensible) recognition by Mr Horton in his closing submissions that many elements of the claimants' case were not sustainable on the evidence and had to be conceded.

167. I appreciate the strength of emotion and anxiety that is felt by those whose land is compulsorily acquired. It is often an unpleasant and difficult experience. But that is not a reason for claimants to assume they have carte blanche to exaggerate their claim to an absurd degree while no doubt expecting that the acquiring authority will compromise, at least a little, in their favour. In this reference the acquiring authority clearly considered that they were being duped by the claimants and were rightly determined to protect the public purse. They are vindicated in their action by this decision.

168. This decision is final on all matters other than the costs of the reference. The parties may now make submissions on costs and a letter giving directions for the exchange of submissions accompanies this decision. Those submissions should also address the costs of the first hearing which were reserved in the addendum on costs to my interim decision dated 10 November 2015.

Dated 31 October 2016

A J Trott FRICS
Upper Tribunal (Lands Chamber)

## ADDENDUM ON COSTS

169. Submissions on costs have now been exchanged. The acquiring authority seeks all of its costs on an indemnity basis, subject to a detailed assessment if not agreed, from the vesting date or the date when the Tribunal determines that the notices of claim should have been served. The costs should include any costs associated with the interlocutory applications concerning disclosure.

170. The claimants seek their costs on the standard basis between the date of the references and 24 November 2011, the date of the acquiring authority's sealed offer. The claimants also submit that they succeeded overall in the interlocutory applications concerning disclosure and should therefore have their costs of such applications. Alternatively each side should bear its own costs of the interlocutory applications.

171. The costs of the first (interim) hearing were reserved in an addendum on costs dated 10 November 2015.

172. The acquiring authority made a number of unconditional offers in writing. On 24 November 2011 it made an offer of £235,000 to TM in full and final settlement of all heads of claim. The offer included "professional costs arising from your ownership of the freehold of 15 Waterloo Street and 1 and 1A Sunderland Street." In addition the acquiring authority said that it would pay for TM's reasonable legal and surveyors' costs in the Tribunal claim to the date of the offer as well as statutory interest. By the same letter the acquiring authority made an offer of £107,500 to TM, KM and SM trading as HCLG in full and final settlement of all of the heads of claim and otherwise on the same terms as the offer to TM. Further and, in the case of HCLG, higher offers were made by the acquiring authority in letters dated 24 November 2014. Offers were also made at that time to MM (£100,000) and ShM (£5,000).

173. In the light of paragraph 128 above the claimants said that they intended to try and agree their pre-reference costs with the acquiring authority, failing which they would apply to the Tribunal to re-open the hearing so that it could determine such costs. Such a determination might mean that the Tribunal's award exceeded the sealed offer, in which case the costs of the entire hearing should be awarded to them. It appears that their attempts to reach agreement with the acquiring authority failed because on 9 December 2016 the claimants applied to re-open the hearing. This application, which also sought to re-open the hearing to reconsider the issue of loss of light to 4 W St, was refused on 20 December 2016. A second application, contesting the Tribunal's refusal of the first, was made on 20 January 2017 and refused on 23 January 2017. In the absence of agreement with the acquiring authority the claimants have failed to prove any entitlement to pre-reference legal and professional fees. As I have previously stated the claimants were given every opportunity to adduce such evidence as might assist them to establish their heads of claim and their failure to do so is their responsibility.

174. Even had the claimants been able to sustain the figure for such costs stated in Mr Nedas's evidence (£89,278) or the combined (unsupported) total of the figures contained in the final

versions of the claimants' statements of case (£89,572), it would still come to less than the 2011 sealed offers (£342,500) when added to my award of £234,865.

175. Section 4(1)(a) of the 1961 Act applies where the acquiring authority have made an unconditional offer in writing which is not exceeded by the Tribunal's award. It therefore applies in these references and, in the absence of any reasons why it would be proper not to do so, I award the acquiring authority their costs of the reference from 24 November 2011, being the date of their first sealed offers.

176. The acquiring authority also seeks its costs from the vesting date to the date of its sealed offers and relies upon section 4(1)(b) of the 1961 Act. This states that where the Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by him and containing the particulars mentioned in subsection (2), the Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the time when in the opinion of the Tribunal the notice should have been delivered. Subsection (2) requires the claimant to state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amounts claimed under each head is calculated.

177. The claimants manifestly failed to meet the requirement for a timely submission of their claims. None of the claimants made any claim, detailed or otherwise, before they submitted their statements of case following the making of the references. Before then the acquiring authority had little or no idea of the claimants' property interests, the personal and business connections between the siblings or the nature of their purported businesses. In my opinion there was no reasonable prospect of the acquiring authority being able to make any offer absent such fundamental prerequisites.

178. The statements of case of TM, SM and KM were all submitted in July 2010 and were revised in September 2011. MM submitted his statement of case in January 2011 but it only gave partial details of his claim. His (nearly) completed claim was not submitted until July 2013. ShM did not submit her statement of case until September 2013. The acquiring authority responded quickly to the revised statements of case of TM, SM and KM by making sealed offers two months later. At that time they could not make similar offers to MM and ShM because those claimants had not submitted their statements of case.

179. I do not think it is reasonable to expect the claimants to have submitted their claims immediately after the vesting date. They needed a reasonable amount of time to prepare the claim for disturbance given that they moved their business to Unit 1 at 4 W St. In their replies to the claimants' statements of case the acquiring authority said that it would seek an order pursuant to section 4(1) of the 1961 Act that the claimants should pay the acquiring authority's costs since 1 January 2006 "being the date by which such a notice [of claim] could reasonably have been delivered". In my judgment the claimants should have delivered notice in writing giving full details of their claims by 1 January 2006 and it follows that in the absence of special reasons for a

different course, the claimants' should bear the acquiring authority's costs from that date to 24 November 2011.

180. The claimants submit that there are two special reasons why the acquiring authority should not receive all of its costs:

(i) The acquiring authority submitted evidence that was inappropriate and inconsistent with the overriding objective, namely historic evidence about rates, licensing, environmental health and planning; and

(ii) The separation of the hearing into two parts, which increased costs, was not the claimants' fault but was due to the unreasonable and unexpected length (five days) of the acquiring authority's cross-examination of TM.

181. I do not accept that either of these factors constitutes special reasons why the acquiring authority should not receive its costs. The acquiring authority's factual evidence was necessary to place the claims into context and the claimants cross-examined seven of the acquiring authority's nine witnesses of fact. Ms Swaddle's evidence was not subject to cross-examination but was still relevant in deciding the issues; see, for instance, paragraph 116 of the interim decision.

182. TM was the claimants' key witness of fact and also gave evidence on behalf of ShM under a power of attorney. His evidence was crucial to the claimants' case and was extensive, comprising three witness statements and five lever arch files of supporting documents. It was appropriate for Mr Fraser to cross-examine TM in depth and at length and I do not consider such cross-examination to have been unreasonable. Had TM been a more straightforward and cooperative witness the cross-examination would not have taken as long as it did.

183. The claimants also say that an order requiring them to bear their own costs and to pay the acquiring authority's costs "would be grossly oppressive and disproportionate" and that they should not be penalised for attempting to resist being dispossessed of their property against their will and disturbed in the conduct of their business. The claimants were of course entitled to, and did, resist the making of the CPO but once the CPO was confirmed and the property was vested in the acquiring authority, the authority was entitled to know within a reasonable time what claim was being made against it for compensation. I am satisfied that in all the circumstances of this case, which are considered in detail in the two decisions in these references, there are no special reasons why the acquiring authority should not receive its costs incurred from 1 January 2006 and I so order. The basis of those costs is considered further below.

184. The claimants also seek their costs of various interlocutory applications.

185. The costs of the case management hearing on 17 September 2011 were to be costs in the references in the Tribunal's order dated 21 September 2011 and in the light of my decision I determine that the acquiring authority shall receive its costs of this hearing.

186. The Tribunal's order dated 21 September 2011 directed that the claimants should provide standard disclosure of documents. There followed a protracted dispute about whether certain of those documents were privileged which resulted in a series of applications, responses, revised applications (including an application by the claimants to amend their statements of case) and further responses which continued until 22 February 2013. The parties agreed that the Tribunal should determine the dispute on the basis of written representations. The Tribunal issued its reasoned decision on which of the disputed documents would be admitted in evidence and which would not be admitted on 2 April 2013. The Tribunal also granted permission for the claimants to amend their statements of case and allowed the acquiring authority's restored application for the disclosure of personal income tax returns. The decision did not refer to costs. On 5 April 2013 the claimants applied for five further documents to be classified as privileged and not admissible in evidence. The Tribunal found against the claimants in a reasoned decision dated 24 June 2013 and admitted all of the documents. The general rule, as set out in direction 12.3 of the Tribunal's Practice Directions, is that the successful party ought to receive their costs. In my judgment the interlocutory applications should not be treated as a discrete issue but should be considered as part of the wider proceedings of determining the claims. That being so, and the acquiring authority having been successful, I determine that the acquiring authority shall receive its costs of these interlocutory applications.

187. The claimants submit that KM should be excluded from any costs order. Her claim was small (£5,867 plus professional fees) and limited to her share of the alleged loss of profits of HCLG during part of the "shadow period" (1 January to 31 May 2001). I noted at paragraph 7 of the interim decision that "Mr Denyer-Green did not act for Ms Kishwar Mohammed who he believed was no longer proceeding with her claim." She did not make a witness statement, called no expert evidence and took no part in either the interim or final hearings. But no notice to withdraw her (separate) reference was made and the acquiring authority incurred costs in replying to her statement of case. I see no reason why the acquiring authority should not receive their costs in respect of KM's claim. I assess such costs on a summary basis at £1,000.

188. The final issue is the basis upon which the acquiring authority's costs should be awarded. The acquiring authority asks that its costs be awarded on an indemnity basis whereas the claimants submit that to do so would be "grossly oppressive and disproportionate".

189. Direction 12.4 of the Tribunal's Practice Directions states:

> "The Tribunal will normally award costs on the standard basis….Exceptionally the Tribunal may award costs on the indemnity basis."

In exercising its discretion on costs the Tribunal must have regard to the matters set out in direction 12.2 (subject to the particular rules applied by section 4 of the 1961 Act):

> "…the Tribunal will have regard to all the circumstances, including the conduct of the parties; whether a party has succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct of a party will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which a party has conducted their case; whether or not they have exaggerated their claim…"

190. In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A firm)* [2002] EWCA Civ 879 The Lord Chief Justice (Lord Woolf) said at [32] that:

> "…before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

The relevant question will always be: is there something in the conduct of these references or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs? In my opinion the answer to this question is yes.

191. I have been critical, at times severely so, of the claimants' conduct throughout these proceedings. The following examples are typical:

> "The claimants seemed to treat the claim as a gambit from which they could resile at will. This cavalier approach is exemplified by the piecemeal production of relevant documents as the hearing progressed. All of these should have been produced much earlier following my orders for disclosure made on 21 September 2011, 2 April 2013 and 24 June 2013. I share Mr Fraser's exasperation that these documents were not produced until the hearing had commenced…In my opinion [the claimants'] failure to disclose them when ordered to do so goes to the credibility of their evidence." (Interim decision [23])

> "At the start of day eight of the resumed hearing Mr Horton, under instructions, applied (unsuccessfully) to admit a document which he said had just been given to his instructing solicitor by the claimants…I agree with Mr Fraser that this was another example of the claimants' 'blatant failure to disclose' relevant documents and of their chutzpah in producing documents only when they thought it would help their case." (Final decision [31])

> "I have considered the June 2001 leases in a wide context and in the light of my doubts about the credibility of the claimants' evidence. I am not satisfied that these were genuine leases and, in my opinion they were shams….It seems to me that the purported leases were little more than an accounting device to justify the levels of rent that are recorded in the four sets of the family's accounts. It was put to TM that the separate leases were a device intended to increase the compensation claim and I am persuaded that this was at least part of the claimants' motivation for their creation. I do not rely upon these leases and I give them no weight." (Interim decision [103])

> "I am bound to say that I consider this part of TM's evidence to be fanciful." (Interim decision [145])

> " I gained no assistance from the claimant's uninformative responses when asked about the makeup and origin of their accounts. I appreciate that the claimants may not understand the format of the accounts, but it is wholly unsatisfactory for the claimants to evade questions through protestations of ignorance about the information upon which the accounts are based when they provided such information to their accountant in the first place and where they did not call their accountant to explain the discrepancies between the accounts and their own evidence." (Interim decision [171])

> "The claim for personal time as originally presented was utterly unconvincing and obviously exaggerated. The supporting evidence was, as Mr Fraser described it, preposterous and a joke. It lacks any credibility…. I am concerned, however, that the claimants changed this head of claim several times and continued to do so both immediately before and during the hearing. That lends weight to Mr Fraser's criticism that the claimant's case was being amended 'on the hoof'". (Interim Decision [385])

192. In my opinion the conduct of the claimants was manifestly and consistently unreasonable both before and during the proceedings.

193. At the final hearing the claimants' expert evidence was criticised and found wanting to an unusual degree, even to the extent that Mr Horton conceded some of the heads of claim. I have summarised my views on the claim as a whole in paragraphs 165 to 167 above which I described as being "grossly exaggerated". A claim which succeeds only in part is not necessarily deserving of sanction in indemnity costs. As Lord Morison said in *Emslie & Simpson Ltd v Aberdeen District Council (No.2)* [1995] RVR 159 at 163:

> "…it is perfectly reasonable that, having been put to the expense of establishing a right which has been disputed, a claimant should put forward his claim on the maximum basis which he can reasonably support and should be entitled to the expenses of doing so if he is successful in the general assertion of his right."

It is therefore acceptable (and to be expected) that a claimant will maximise his claim, but this must be on a basis that "he can reasonably support". Deliberate exaggeration falls into a different category. There are, of course, likely to be differences of opinion among experts about what level of claim can reasonably be supported. For a claimant to present a version of the primary facts within his own knowledge which is found to be exaggerated is less easily understandable.

194. In *Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1430 Potter LJ said at [36]:

> "…exaggeration alone is not enough in the event of a large disparity between the sum claimed and the sum awarded. The matters to which the Tribunal should have regard are (a) the reasons for that disparity and (b) their effect upon the conduct of the claim. As to (a), if the reasons are defensible, in the sense that there was a legitimate, albeit unsuccessful, argument put forward in support of the figure concerned, there can be no good reason to regard the claim as exaggerated in the pejorative sense necessary to justify a sanction in costs. As to (b), if, in any event, the effect on the proceedings in terms of the time spent and the costs incurred in disposing of the issue or argument concerned is relatively insignificant, then again an adverse order is unlikely to be appropriate."

I do not consider that the reasons put forward by the claimants and their experts in support of their exaggerated claims are defensible for the reasons I have given at length in my two judgments. Not only that but some heads of claim, for instance the claims for personal time, the value of leases that were shown to be shams and the move to Unit 2 were unsustainable and unreasonably pursued.

195. For the above reasons I conclude that the claimants' conduct of the case was unreasonable and takes it out of the norm. It is therefore appropriate for the acquiring authority to receive their costs on an indemnity basis and I so determine.

**Disposal**

196. I determine that:

(i) the claimants shall bear their own costs;

(ii) the claimants shall pay the acquiring authority's costs on an indemnity basis from 1 January 2006.

(iii) the acquiring authority's costs in respect of KM's claim are assessed summarily at £1,000.

Such costs if not agreed shall be the subject of a detailed assessment by the Registrar.

Dated 13 March 2017

AJ Trott FRICS
Upper Tribunal (Lands Chamber)

## REVISED ADDENDUM ON COSTS

197. On 8 May 2017, following an application by the claimants for permission to appeal, I directed the parties to make further submissions on costs in respect of the period from 4 July 2013 (MM) and 2 September 2013 (ShM) because I was satisfied that a procedural irregularity had occurred when I conflated all the claims for the purpose of determining the claimants' liability for costs as from 24 November 2011. The claims of MM and ShM should have been considered separately.

198. There was no consequential effect of this irregularity so far as concerns the periods 1 January 2006 to 4 July 2013 (MM) and 2 September 2013 (ShM) since neither MM nor ShM delivered to the acquiring authority a written notice of claim during that time such as to enable it to make a proper offer of compensation (section 4(1)(b) of the 1961 Act). But that left the period after 4 July 2013 (MM) and 2 September 2013 (ShM) when MM and ShM submitted statements of case containing a summary of their heads of claim. During that period the acquiring authority did not make an unconditional offer to either MM or ShM, although it made conditional offers to them both on 24 November 2014.

199. Given this procedural irregularity and in accordance with Rule 54 of the Tribunal's Procedural Rules, I considered it to be in the interests of justice to set aside paragraphs 175, 179 and 196(ii) of the costs addendum dated 13 March 2017 with respect to the claims of MM and ShM, but, for the avoidance of doubt, not the other claimants.

200. I have now received further costs submissions from both parties.

201. The claimants seek to re-open the question of pre-reference costs but for the reasons I gave in the Tribunal's directions dated 8 May 2017 that issue has been determined and will not be re-opened. The claimants also seek to identify special reasons why they should not bear their own costs and pay the costs of the acquiring authority for the period prior to 4 July 2013 and 2 September 2013. That is contrary to the said directions where I explained the reasons why the procedural irregularity did not affect my decision on costs for that prior period. In any event I agree with the acquiring authority that the reasons given are not special and provide no basis for qualifying the application of section 4(1)(b) of the 1961 Act.

202. The offers made by the acquiring authority to MM and ShM on 24 November 2014 were time limited to 21 days, an adequate period in my opinion for the claimants to obtain professional advice on them. Neither offer was accepted and the references proceeded to a hearing commencing on 26 January 2015.

203. The acquiring authority says that MM and ShM's statements of claim did not satisfy the requirements of section 4(1)(b) of the 1961 Act to provide sufficient particulars to enable the acquiring authority to make a proper offer. Although it made offers to MM and ShM, that did not mean it had been placed in possession of enough information to make a reasonably informed assessment of the true value of the claims and the acquiring authority says it was severely

prejudiced in deciding upon the appropriate offers to make. It described the making of the offers as a pragmatic attempt to limit the costs involved in proceedings which it was clear would be lengthy and reflected the litigation risks involved.

204. I accept the acquiring authority's submission that the statements of case of MM and ShM dated 4 July 2013 (MM) and 2 September 2013 (ShM) did not contain the necessary detail to enable the acquiring authority to make a proper offer. They indicated the nature and amount of their claims without providing details of how each head of claim was calculated. Repeated attempts by the acquiring authority to obtain disclosure of relevant information were largely unsuccessful and I was strongly critical of the claimants' approach to such disclosure in paragraph 23 of the interim decision.

205. The claims continued to be revised during the first hearing and it became clear that the statements of case, even as revised, bore little relation to the compensation that was actually being sought. This led Mr Fraser to ask for an undertaking from the claimants that in every respect the claims were limited to the summary of claims produced by their then counsel, Mr Denyer-Green, and that anything in the statements of case suggesting more was to be formally abandoned. Mr Denyer-Green gave such an undertaking at the start of day seven of the first hearing.

206. Both MM and ShM said in their statements of case that compensation was payable for the value of their purported leases; relocation costs; loss of profits for their purported business; costs on total extinguishment of those businesses; and professional fees. They failed to secure any individual award of compensation under these heads of claim. MM and ShM did not seek to amend their statements of case to take account of the interim decision and, in particular, made no attempt to identify or quantify what, if any, elements of the claim for the family business might be attributable to and recoverable by them. The claims were unsustainable for the detailed reasons given in the interim and final decisions and were not supported by proper factual or expert evidence.

207. The acquiring authority incurred much greater costs than it would have done had the claims been pursued properly and responsibly by MM and ShM who did not accept offers made in an attempt to avoid the hearings and limit costs and which exceeded the compensation subsequently awarded.

208. Mr Thompson, the solicitor acting for MM and ShM, submitted that they had reasonable grounds for believing they had carried on separate businesses for which compensation should be paid. That belief was ill-founded and unsubstantiated. Mr Thariq Mohammed made submissions in response to the acquiring authority's submissions. These again seek to re-open matters which have already been determined and are not relevant to the present issue. I derive no assistance from them.

209. I am satisfied, given the general conduct of the proceedings which has been fully described in the interim and final decisions, that MM and ShM should bear their own costs and pay the costs of the acquiring authority from 4 July 2013 (MM) and 23 September 2013 (ShM) on an indemnity basis, including the acquiring authority's costs arising from the further submissions.

Dated: 20 July 2017

A J Trott FRICS
Upper Tribunal, (Lands Chamber)