UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – preliminary issue – ransom value – scheme highway – whether section 14(5)(d) of the Land Compensation Act 1961 engaged so as to prevent the assumption of planning permission – determined not so engaged

IN THE MATTER OF SECTION 14(5)(d) OF THE LAND COMPENSATION ACT 1961

AND IN THE MATTER OF AN ARBITRATION PURSUANT TO SECTION 1(5) OF THE LANDS TRIBUNAL ACT 1949

Before: **Sir David Holgate, Chamber President**
and A J Trott FRICS

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
14 December 2017

The following cases are referred to in this decision:

Batchelor v Kent County Council (1990) 59 P & CR 357
Waters v Welsh Development Agency [2004] 1 WLR 1304
Transport for London v Spirerose Limited [2009] 1 WLR 1797
Horn v Sunderland [1941] 2 KB 26
Trocette Property Co v Greater London Council (1974) 28 P & CR 408
Ryde International plc v London Regional Transport plc (No.2) [2004] 2 EGLR 1
Margate Corporation v Devotwill [1970] 3 All ER 864; (1971) 69 LGR 271; (1971) 22 P & CR 328
J.S Bloor (Wilmslow) v Homes and Communities Agency (2017) 2 P & CR 5
Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment [2000] 2 AC 307
Director of Buildings and Lands v Shun Fung Ironworks Limited [1995] 2 AC 111
Ryde International Plc v London Regional Transport [2004] EWCA Civ 232
Stock v Frank Jones (Tipton) Limited [1978] 1 WLR 231
R v Secretary of State for the Environment ex parte Spath Holme [2001] 2 AC 349
Attorney General v Horner (1884) 14 QBD 245, 257
Central Control Board (Liquor Traffic) v Cannon Brewery Company Limited [1919] AC 744
Colonial Sugar Refining Company v Melbourne Harbour Trust Commissioners [1927] AC 343
Westminster Bank Ltd v Ministry of Housing and Local Government [1971] AC 508
Union Railways (North) Ltd v Kent County Council [2010] PTSR 90
Cargo ex Argos (1873) LR 5 P.C. 134
Barras v Aberdeen Steam Trading and Fishing Co Ltd [1933] AC 402
Cusack v Harrow LBC [2013] 1 WLR 2022
Thomas Newall Ltd v Lancaster City Council [2010] UKUT 2 (LC)
Wards Construction (Medway) limited v Barclays Bank plc (1994) 68 P & CR 391
Walker v Centaur Clothes Group Ltd [2000] 1 WLR 799
DCC Holdings (UK) Limited v Revenue and Customs Commissioners [2011] 1 WLR 44

REDACTED DECISION

Note: *This is a decision of the Upper Tribunal acting as an arbitrator on a reference by consent pursuant to section 1(5) of the Lands Tribunal Act 1949. The parties have agreed to the publication of that part of the decision which relates to the proper interpretation of section 14(5)(d) of the Land Compensation Act 1961, because of the public interest in the subject, on condition that the parties and the site are not identified. This version of the decision reflects the redactions suggested by the parties with minor editorial changes. This decision should be cited as In re section 14(5)(d) of the Land Compensation Act 1961 [2018] UKUT 0062 (LC)*

Introduction

1. These are two references by consent made pursuant to section 1(5) of the Lands Tribunal Act 1949 in which the Tribunal is acting as an arbitrator.

The basis of the claims

2. The Claimants are seeking compensation for the value of their land based on its pre-existing ransom or key value. They argue that their land is necessary for the provision of a suitable access to enable the comprehensive redevelopment of an area of land lying outside their ownership ("the Site"). Without such land the redevelopment could not proceed.

3. The Respondent denies that the Claimants had any such pre-existing value and says that the acquisition of land to enable the provision of access to facilitate the comprehensive redevelopment of the Site (as authorised by the Planning Permission which had been granted) was not simply dependent upon the acquisition of the Claimants' land but also depended upon the acquisition of separate interests for which compulsory purchase powers were required. The Respondent also argues that on the proper application of the planning assumptions in section 14 of the Land Compensation Act 1961 ("the LCA 1961") the Claimants' land did not possess development or key value. The Respondent says that an alternative development proposed by the Claimants would not have obtained planning permission without the provision of a similar eastern access to that contained within the Planning Permission and which required the acquisition of a significant number of interests for which compulsory purchase powers would be necessary.

The preliminary issues

4. On 17 August 2017 the Deputy President ordered five preliminary issues to be determined at a hearing beginning on 14 December. By the time the hearing began the parties had agreed that only one issue remained to be determined by the Tribunal, namely issue (2).

5. The Claimants use the term "Compensation Development" to refer to a scheme which they say could have been delivered in the absence of any compulsory purchase order, through agreements reached between landowners. They contend that this scheme would have involved the carrying out of residential and commercial development on the Site similar to that proposed in the scheme underlying the CPO, but without the accesses comprised in that scheme.

6. The Claimants' case is that in the absence of the scheme underlying the compulsory acquisition, the Site would have been developed using their land to provide a western access, so that their land had a ransom value or key value, pre-existing (or independently of) the CPO scheme (*Batchelor v Kent County Council* (1990) 59 P & CR 357; *Waters v Welsh Development Agency* [2004] 1 WLR 1304 at paragraphs 64 - 65 and 157).

7. However, that raises the question whether the Compensation Development would have been approved by the planning authorities. There was no planning permission in force for the Compensation Development on the valuation dates. Neither Claimant seeks to rely upon the Planning Permission, which did remain in force. No doubt that is because the Planning Permission requires accesses to be provided which are dependent upon the use of land owned by the Respondent and/or the subject of the CPO. Accordingly, the Claimants do not rely upon section 14(2)(a) of the LCA 1961, which provides that when the value of land is being assessed under rule (2) of section 5, regard may be had to a planning permission in force at the relevant valuation date, whether for development on the reference land being valued or other land.

8. Instead, the Claimants rely upon an "assumed outline planning permission with all matters reserved except access". The Claimants have not yet set out clearly in their pleadings how they advance this contention. Under section 14(2)(b) of LCA 1961, regard may be had to the *prospect* of planning permission being granted, on or after the relevant valuation date, for development on the reference land or other land, on the assumptions set out in section 14(5), but otherwise in the circumstances known to the market on that date. Alternatively, under section 14(3)(a) and 14(4) it may be assumed that planning permission is *in force* at the relevant valuation date for any "appropriate alternative development." Here, that term refers to development on the reference land (or on that land together with other land) for which planning permission could reasonably have been expected to be *granted on the relevant valuation date*, on the assumptions set out in section 14(5) but otherwise in the circumstances known to the market on that date. Alternatively, under section 14(3)(b) and 14(4) the assumption may be made that on the relevant valuation date it is *certain* that planning permission for appropriate alternative development (on the reference land or that land together with other land) *will be granted at the later time* at which "it could reasonably have been expected to be granted" (on the assumptions set out in section 14(5) but otherwise in the circumstances known to the market on the valuation date).

9. The Claimants' Statements of Case do not make it plain on which basis they intend to proceed, although the sum claimed would suggest that they are relying primarily on section 14(3)(a), rather than section 14(2)(b) (or section 14(3)(b)). A key difference between the assumption in section 14(3)(a) and the assumption in section 14(2)(b) is that the former assumes that planning permission for "appropriate alternative development" is in force on the relevant

valuation date, whereas the latter deals with the mere *prospect* of planning permission being granted (in accordance with *Transport for London v Spirerose Limited* [2009] 1 WLR 1797).

10. Nonetheless, both of these provisions are subject to the assumptions required by section 14(5), which gives rise to issue (2):

> "In the light of the answer to (1), is section 14(5)(d) of the LCA 1961 engaged so as [to] prevent an assumed planning permission for the Compensation Development"

This is now the single issue with which this preliminary decision is concerned.

Issue (2)

11. The assumption which section 14(5)(d) of LCA 1961 requires to be made is that:

> "If the scheme was for use of the relevant land for or in connection with the construction of a highway ("the scheme highway"), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet."

12. In summary, the Respondent's QC submits that issue (2) should be answered "yes". This is because the scheme involves using the land belonging to each of the Claimants for the construction of a highway and so it must be assumed that "no highway" will be built to meet the same or substantially the same need as that "scheme highway." They say that that assumption applies not only to any highway achieved through the use of compulsory purchase powers, but also a road built by a private landowner or group of landowners without the use of any such powers, which is then dedicated as a highway. They accept that the effect of their reading of section 14(5)(d) would be to prevent a claimant from recovering compensation in accordance with the decision of the Court of Appeal in the *Batchelor* case, notably pre-existing "key value," as part of the open market value of the acquired land, for the use of that land to provide highway access to a development site.

13. The Claimants' QC submits that issue (2) should be answered "no". They contend firstly, that section 14(5)(d) only applies where the "scheme" referred to is solely for the construction of a highway, and not where, as here, the scheme is for a mixture of development purposes, including the construction of a highway. Secondly, they submit that if the Tribunal should reject their first submission, then the disregard in section 14(5)(d) does not extend to highways constructed solely by a private landowner or group of landowners without the use of compulsory purchase powers. The Claimants' submit that section 14(5)(d) (and its statutory predecessor) reduced the effect of the decision of the House of Lords in *Margate Corporation v Devotwill* [1970] 3 All ER 864; (1971) 69 LGR 271; (1971) 22 P & CR 328, but did not go so far as to reverse the decision in *Batchelor* regarding pre-existing "key value" through providing highway access to a development site.

14. The resolution of these competing arguments depends upon a closer examination of those two decisions and the history of the relevant legislation.

Land Compensation Act 1961 (as originally enacted)

15. Sections 6 to 8 and schedule 1 of the LCA 1961 set out the statutory principles for disregarding any increase or decrease in the *value* of land attributable to the carrying out, or prospect of carrying out, of so much of the statutory "scheme" as would not have been likely to be carried out, if the acquiring authority had not acquired, and did not propose to acquire, any of the land authorised to be acquired (or if the statutory designations set out in schedule 1 had not been made). The provisions represent an enactment of the *Pointe Gourde* principle.

16. Sections 14 to 16 contained provisions for determining what *planning permissions* should be assumed to have been granted in relation to the reference land when assessing compensation (section 14(1)). Any such assumed planning permission was additional to any permission actually in force at the date of the notice to treat (section 14(2)). The rules for assuming a grant of permission did not preclude the Tribunal from having regard to the *prospect* of other permissions being granted according to the evidence presented (section 14(3) and *J.S Bloor (Wilmslow) v Homes and Communities Agency* (2017) 2 P & CR 5 at paragraph 37).

17. Where the reference land fell within an allocation in a development plan, sections 16(2) to (3) required the assumption to be made that planning permission would be granted on that land for development in accordance with that allocation, provided that it was "development for which planning permission might reasonably have been expected to be granted." It is important to note that that key phrase was defined in section 16(7) as referring to:

> "development for which planning permission might reasonably have been expected to be granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers"

These, and other related provisions, enabled the value of the reference land to take account of alternative forms of development to which it might have been put if it were not being compulsorily acquired (e.g. residential or commercial or employment development). For the purposes of that exercise it had to be assumed that the scheme of acquisition was cancelled on the date of the notice to treat (*Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment* [2000] 2 AC 307; *Bloor* at paragraph 14). As originally enacted the LCA 1961 did not contain any provision similar to section 14(5)(d), the "highway disregard," when determining the planning permissions to be assumed in the assessment of compensation.

Margate Corporation v Devotwill Investments Limited

18. The Margate case was concerned with the operation of this statutory code for determining what planning permissions should be assumed for alternative forms of development of the reference land. The claimants owned 1.35 acres of land fronting a busy trunk road. The site was

allocated on the Town Map for residential development. But planning permission had been refused for that purpose because the land was needed for a highway scheme to by-pass a congested part of the town and because residential development was considered to be premature until the route of the by-pass had been finalised. The local authority accepted a purchase notice served by the claimants and compensation for the acquisition of the land fell to be assessed on the basis of a deemed notice to treat.

19. The Lands Tribunal decided that planning permission should be assumed for residential development in accordance with section 16(2) of the LCA 1961 and awarded compensation on that basis (1968 19 P & CR 458). When applying the disregard in section 16(7), the Tribunal decided that it must be assumed that there could be no by-pass on the reference land or on the line proposed by the Corporation, but because there was an urgent need to relieve the congestion, it had also to be assumed that that need would be met by a by-pass on some other line (p 464). The Court of Appeal (by a majority) upheld the Tribunal's decision ([1969] 2 All ER 97).

20. We cannot accept the suggestion by the Respondent's QC that the issue which had to be determined by the House of Lords concerned the application of the *Pointe Gourde* principle, or the statutory enactment of that principle (i.e. disregarding the scheme in the valuation of the reference land). Instead, the issue was what planning permissions might reasonably have been expected to be granted if no part of the land were proposed to be acquired by any authority possessing compulsory purchase powers. That was because of section 16(7) of LCA 1961. There was no need for the *Pointe Gourde* principle to be applied ([1970] 3 All ER at p867f-h). The issue was whether the value of the land being acquired should be based on its potential for *other* development. In particular, the issue was whether it should be assumed that the land would receive planning permission for residential development, notwithstanding the fact that planning permission for that purpose had in fact been refused.

21. It is plain from the decision in the Lands Tribunal, the majority judgments in the Court of Appeal and the leading speech of Lord Morris in the House of Lords on the effect of section 16(2), (6) and (7) of the LCA 1961 (see eg [1970] 3 All ER at pp 866 - 867) that the case was concerned with the basis upon which planning permission for residential development might be assumed. It had to be assumed that the Corporation's by-pass would not be built across the claimant's land and so that land was available for residential development (p 867j). By virtue of the allocation in the Town Map and section 16(2) it had to be assumed that planning permission would have been granted for residential development, but the issue was what permission might reasonably have been expected to be granted and subject to what conditions, in accordance with section 16(6) and (7) ([1970] 3 All ER at pp 867j to 868c).

22. The House of Lords decided that the Tribunal had erred in law, but on a relatively narrow basis, namely that it had been wrong to conclude that because the by-pass was not going to be built on the proposed line, it was an "*inevitable* corollary" that a by-pass would be built to meet the same need on a different alignment. It held that the possibility of an alternative route for the by-pass was a relevant consideration, but as a matter to be determined on the evidence, and not as an assumption of necessity. The evidence should deal with the realities of the actual conditions subsisting on the relevant date. That evidential question would depend on such factors as whether an alternative by-pass could physically be built elsewhere and on the likelihood of

that happening, whether there were alternative solutions for dealing with the problem of congestion, and whether the development capacity of the claimant's land might be restricted or partially deferred. The Tribunal should not determine what planning permission for residential development would reasonably be expected to be granted on the claimants' land by assuming that, as a matter of law, the relief of the congestion problem in the town was to be either ruled out or resolved. The Tribunal was entitled to assess the likelihood of that issue being resolved by an alternative by-pass or some other highway improvement (such as road-widening) or a traffic management solution ([1970] 3 All ER at pp 868 – 870).

Batchelor v Kent County Council

23. The County Council acquired land compulsorily for highway purposes which had been allocated in the Town Map as part of a larger area for residential development. Pursuant to that allocation, planning permission had been granted for 1750 dwellings on neighbouring land subject to a condition which prevented the occupation of one phase until off-site highway works needed to provide access to that phase had been completed. A year later the Council had made an agreement with the developer to construct a new roundabout which would unlock the development potential of that phase. The Council made the CPO in relation to the claimant's land to enable the roundabout to be constructed.

24. The Lands Tribunal decided that for the purposes of applying the *Pointe Gourde* principle in the valuation of the land, the scheme underlying the compulsory acquisition was the construction of the roundabout. On that basis, the County Council argued that if that scheme was ignored, the value of the acquired land did not have any "ransom" or "key" value to unlock the development potential of the neighbouring land. The Court of Appeal held that, even in the absence of the acquiring authority's scheme, the effect of the access condition in the developer's planning permission was that that party would have been keen to purchase the Claimant's land in order to overcome the inhibition on carrying out one phase of its residential development.

25. Mann LJ stated (page 361):

> "If a premium value is "entirely due to the scheme underlying the acquisition" then it must be disregarded. If it was pre-existent to the acquisition it must in my judgment be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would be to contravene the fundamental principle of equivalence (see Horn v Sunderland Corporation)"

That important statement of the law was expressly endorsed by the House of Lords in *Waters* [2004] 1 WLR 1304 at paragraphs 65 and 157.

26. The "equivalence principle" states that a claimant is entitled to be compensated fairly and fully for his loss. The corollary is that a claimant is not entitled to receive more than fair compensation. A person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. There are generally three conditions which must be

satisfied: (1) there must be a causal connection between the compulsory acquisition and the loss in question, (2) the loss must not be too remote, and (3) the loss must have been incurred reasonably, or compatibly with the Claimant's duty to mitigate his loss (*Horn v Sunderland* Corporation [1941] 26, 49; *Director of Buildings and Lands v Shun Fung Ironworks Limited* [1995] 2 AC 111, 125-126; *Spirerose* [2009] 1 WLR 1797 at paragraph 89). We also note that in *Spirerose* Lord Neuberger pointed out (at paragraph 59) that the principle or "presumption of reality" as described in *Trocette*[1] "amounts to much the same thing as the principle of equivalence."

Planning and Compensation Act 1991

27. Section 64 of the 1991 Act added sub-sections (5) to (8) at the end of section 14 of the LCA 1961, with effect from 25 September 1991:

> "(5) If in a case where-
>
> (a) the relevant land is to be acquired for use for or in connection with the construction of a highway or,
>
> (b) the use of the relevant land for or in connection with the construction of a highway is being considered by a highway authority,"
>
> a determination mentioned in subsection (7) of this section falls to be made, that determination shall be made on the following assumption.
>
> (6) The assumption is that, if the relevant land were not so used, no highway would be constructed to meet the same or substantially the same need as the highway referred to in paragraph (a) or (b) of subsection (5) of this section would have been constructed to meet.
>
> (7) The determinations referred to in subsection (5) of this section are -
>
> (a) a determination, for the purpose of assessing compensation in respect of any compulsory acquisition, whether planning permission might reasonably have been granted for any development if no part of the relevant land were proposed to be

[1] Per Lawton LJ at (1974) 28 P & CR 408, 420 "It is important that this statutory world of make-believe should be kept as near as possible to reality. No assumption of any kind should be made unless provided for by statute or decided cases." See also *Ryde International Plc v London Regional Transport* [2004] EWCA Civ 232 at paragraphs 18-19.

> acquired by any authority possessing compulsory purchase powers, and
>
> (b) a determination under section 17 of this Act as to the development for which, in the opinion of the local planning authority, planning permission would or would not have been granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.
>
> (8) The references in subsections (5) and (6) of this section to the construction of a highway include its alteration or improvement."

Those provisions remained in force until 5 April 2012.

28. Despite their researches, Counsel have been unable to find any parliamentary material which might be admissible as an aid to the construction of section 64 of the 1991 Act. But in our judgment the construction and effect of this provision is clear in any event when it is read properly in context. Section 64 reduced the effect of the decision in *Margate* but it did not abrogate the "key value" principle in *Batchelor*. We reach that conclusion for a number of reasons.

29. First, the highway scheme disregard was created to deal with cases where land was to be compulsorily acquired for, or in connection with, the construction of a highway, or that use was being considered by a highway authority. The disregard was not expressed to apply simply because private landowners or developers would be interested in purchasing that land for the same purpose in the absence of a compulsory purchase order (e.g. to satisfy or overcome planning conditions constraining the carrying out of their own development).

30. Second, the disregard only applied in the context of an assessment of the compensation for the compulsory acquisition of the reference land (section 14(1)), to which rule (2) in section 5 and principles of open market valuation, including the reality principle, all apply.

31. Third, it is plain that the amendment made by section 64 only purported to alter the basis for determining what *assumed planning permissions* for *alternative* forms of development should be taken into account. Section 64 only applied when it was necessary to make a determination of the kind identified in section 14(7). Section 14(7)(a) cross-referred to the test which applied under section 16(7) (for example in cases falling within section 16(2) and (3)). It is therefore plain that these new provisions were intended to operate in the same statutory context as had been considered by the House of Lords in the *Margate* case. Likewise, section 14(7)(b) applied the new highway scheme disregard to the parallel provisions in sections 17 to 19 dealing with certificates of appropriate alternative development. Section 14(1) and (2) stated that planning permissions assumed under sections 15 and 16 were additional to any planning permission in force on the date when the notice to treat was served, such as a planning permission for the works to be carried out on the reference land. If planning permission for the

scheme works on the reference land did not already exist, then by section 15(1) it was assumed to have been granted. Thus, section 64 was simply concerned with the statutory basis for determining what *alternative* forms of development (i.e. alternatives to the scheme works and any permissions in force on the relevant date) would be permitted, and on what conditions, on the land being valued.

32. Fourth, section 64 of the 1991 Act made no attempt to alter the scope of the equivalence principle, in particular as expressed in the *Batchelor* case, or to amend the scheme disregard code in sections 6 to 8 of the LCA 1961, or the application of the *Pointe Gourde* principle. So an entitlement to claim a "ransom" or "key" value by providing access to a development site, which value pre-existed a highway scheme underlying a compulsory purchase, was not removed by section 64 of the 1991 Act.

33. Fifth, section 14(8) defined the "construction" of a highway so as to include the "alteration" or "improvement" of a highway. This shows that the draftsman had in mind one of the examples given by the House of Lords in the *Margate* case by which the congestion which inhibited residential development on the reference land could be overcome, namely by the local authority widening an existing road instead of constructing a by-pass on an alternative alignment. It would appear that in using this extended definition of "construction" the draftsman had in mind improvements and alterations which may be carried out by a highway authority under Part V of the Highways Act 1980. But we also note that the amendment made by section 64 did not remove reliance upon other possible solutions mentioned by the House of Lords for overcoming a constraint on development potential, such as traffic management measures.

34. Thus, section 64 of the 1991 Act only sought to prevent a claimant from relying upon an assumed planning permission for alternative forms of development on the reference land in so far as that depended upon the "construction" of a highway elsewhere to meet the same need as the authority's scheme. That has nothing to do with a situation where there would be demand in the market in the real world to purchase the reference land in order to use it for highway development (e.g. an access to a development site) in the absence of a compulsory acquisition of that land. Indeed, such market demand may exist irrespective of whether the compulsory acquisition is for the construction of a highway or for any other purpose. Analysed correctly, section 64 of the 1991 Act had nothing to do with the "key value" principle in *Batchelor*, or its abrogation. That is the correct position, irrespective of whether the disregard in section 14(6) applied to alternative highway schemes undertaken by the private bodies as well as to those of statutory authorities. Accordingly, a claim of the kind advanced in this reference would not have been precluded by the provisions in section 14(5) to (8) which were in force until 5 April 2012.

35. Although it follows that it is strictly unnecessary for us to go further, we would add that when section 14(6) is read properly in context, the disregard of highway schemes it contains was not intended to apply to works which might be carried out by private landowners and developers, as opposed to authorities exercising statutory powers of construction and improvement.

The Law Commission's proposals for reform of the statutory compensation code

36. In 2002 the Law Commission produced a Consultation Paper (CP 165): "Towards a Compulsory Purchase Code: (1) Compensation." The report contained a comprehensive review of the existing law and detailed proposals for reform. At that stage the Law Commission was chaired by Carnwath J (as he then was). Extensive consultation took place. The outcome was the Final Report (Law Com. No 286) presented to Parliament in December 2003 (Cm 6071).

37. Paragraph 7.36 of the Final Report records that the Commission specifically consulted on whether the principle in *Batchelor*, that the value of land compulsorily acquired includes any pre-existing ransom value, should be modified by providing, for example, that where land is required solely for access to, or to provide services for, new development, the compensation payable should exclude any element based upon the value of that development. The Commission accepted that any such proposal would involve a departure from the equivalence principle or the ordinary principle of "fair compensation," and would therefore need to be justified by "clear policy considerations and carefully defined". The Commission decided not to recommend any change in the law on this subject (paragraph 7.37).

38. In the consultation paper the Commission referred to section 64 of the 1991 Act as having reversed the effect of the House of Lords' decision in the *Margate* case in relation to road schemes (paragraphs 7.20 and A80 to A81). The Commission suggested that the approach in section 64 of the 1991 Act should be extended to deal with the disregard of the scheme's effect upon the value of the reference land (paragraph 7.21):

> "In our view, the same thinking should be applied generally. Thus, any increase or decrease in value due both to the particular proposal, and to any other statutory proposal to meet the same need, should be excluded. On the other hand, the possibility (where appropriate) of a similar *private* project can be taken into account in the valuation."

The Commission's view that it should be permissible to take into account the possibility of the same need or purpose being met by a private project is consistent with its conclusion that the principle established in *Batchelor* should not be modified. Plainly, the Commission did not consider that section 64 of the 1991 Act had already abrogated the "key value" principle in *Batchelor*.

39. The Commission referred to the same subject in its final report. It recommended (paragraphs 8.9 to 8.11) that the *Pointe Gourde* or "scheme disregard" principle be dealt with in new legislation which:

i) treated the statutory project as "cancelled" on the valuation date (following the approach in *Fletcher*);

ii) disregarded the effects of any action *previously taken* by a public authority wholly or mainly for the purposes of the statutory project; and

iii) disregarded the future prospect of the same or any other project to meet the same or substantially the same need as the statutory project, being carried out in the exercise of a statutory function, or by the exercise of statutory powers.

That proposal remained consistent with the Commission's view that the principle in *Batchelor* should not be modified, let alone removed.

40. In its response published in December 2005, the Government decided not to accept the Commission's recommendations for the introduction of a new compensation code. Instead, reform has proceeded on a piecemeal basis.

The Localism Act 2011

41. With effect from 6 April 2012, section 232 of the 2011 Act substituted new sections 14 and 15 in the LCA 1961 and removed section 16. Section 232 is headed:

> "Taking account of planning permission when assessing compensation".

It is these provisions which apply to the references before the Tribunal.

42. Section 15 simply provides for an assumption (in certain circumstances) that planning permission for the development of the reference land in accordance with the acquiring authority's proposals, or scheme, was in force on the valuation date if there was no such permission actually in force at that time.

43. Section 14 is headed:

> "Taking account of actual or prospective planning permission".

Section 14(1) declares that section 14 is concerned with assessing the value of land under rule (2) of section 5 of the LCA 1961 when assessing compensation for compulsory acquisition. However, as the title to the section indicates, it only dealt with planning issues affecting the reference land. It did not alter the valuation principles in section 5, nor the "scheme disregard" rules in sections 6 to 8, nor the *Pointe Gourde* principle. Legislative intervention to deal with those aspects did not take place until the Neighbourhood Planning Act 2017 (see below).

44. Section 14(2) to (5) provide:

> "(2) In consequence of that rule, account may be taken -
>
> (a) of planning permission, whether for development on the relevant land or other land, if it is in force at the relevant valuation date, and

(b) of the prospect, on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, of planning permission being granted on or after that date for development, on the relevant land or other land, other than –

(i) development for which planning permission is in force at the relevant valuation date, and

(ii) appropriate alternative development.

(3) In addition, it may be assumed –

(a) that planning permission is in force at the relevant valuation date for any development that is appropriate alternative development to which subsection (4)(b)(i) applies, and

(b) that, in the case of any development that is appropriate alternative development to which subsection (4)(b)(ii) applies and subsection (4)(b)(i) does not apply, it is certain at the relevant valuation date that planning permission for that development will be granted at the later time at which at that date it could reasonably have been expected to be granted.

(4) For the purposes of this section, development is "appropriate alternative development" if –

(a) it is development, on the relevant land alone or on the relevant land together with other land, other than development for which planning permission is in force at the relevant valuation date, and

(b) on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, planning permission for the development could at that date reasonably have been expected to be granted on an application decided –

(i) on that date, or

(ii) at a time after that date

(5) The assumptions referred to in subsections (2)(b) and (4)(b) are –

(a) that the scheme of development underlying the acquisition had been cancelled on the launch date,

(b) that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme,

(c) that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers, and

(d) if the scheme was for use of the relevant land for or in connection with the construction of a highway ("the scheme highway"), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet."

45. Section 14(6) defines the "launch date" by reference to the first publication of the notice of the compulsory purchase order or similar order having been made.

46. Section 14(7) provides that references in section 14(5)(d) to the construction of a highway include its alteration or improvement, re-enacting the former section 14(8) which had been introduced by section 64 of the 1991 Act (see paragraph 33 above).

47. The substituted section 14(8) lays down the principles for determining the scheme underlying the acquisition for the purposes of determining planning issues under section 14: -

"(8) If there is a dispute as to what is to be taken to be the scheme mentioned in subsection (5) ("the underlying scheme") then, for the purposes of this section, the underlying scheme is to be identified by the Upper Tribunal as a question of fact, subject as follows –

(a) the underlying scheme is to be taken to be the scheme provided for by the Act, or other instrument, which authorises the compulsory acquisition unless it is shown (by either party) that the underlying scheme is a scheme larger than, but incorporating, the scheme provided for by that instrument, and

(b) except by agreement or in special circumstances, the Upper Tribunal may permit the acquiring authority to advance evidence of such a larger scheme only if that larger scheme is one identified in the following read together –

(i) the instrument which authorises the compulsory acquisition, and

(ii) any documents published with it."

Although it reflects concepts which had previously been developed in the Law Commission's report, this definition of a "scheme" in the 2011 Act did not affect the scheme disregard code contained in sections 6 to 8 of the LCA 1961.

48. Counsel's researches have not revealed any admissible Parliamentary material or *travaux preparatoires* which could throw light on the proper construction of section 14(5)(d).

Neighbourhood Planning Act 2017

49. In contrast to the amendment made by the Localism Act 2011, the 2017 Act *does* amend the law on the disregard of the acquiring authority's scheme for the purpose of valuing land acquired for that scheme. Section 32 of the 2017 Act does this by repealing sections 6 to 9 of the 1961 Act and substituting a new code in the form of sections 6A to 6E. It did so with effect from 22 September 2017 and therefore does not apply to the present references.

50. Section 32 and the new section 6A are both headed: "No-scheme principle". Section 5 has been amended by the insertion of a new rule (2A):

> "The value of land referred to in rule (2) is to be assessed in the light of the no-scheme principle set out in section 6A"

Section 14 remains unaltered. Section 15 has been repealed.

Principles of statutory interpretation

51. The "golden rule" of statutory construction is that statutory words and phrases are to be applied according to their natural and ordinary meaning, in their context and according to the appropriate "linguistic register", without addition or subtraction, unless that meaning produces injustice, absurdity, anomaly or contradiction, in which case the natural and ordinary meaning may be modified so as to obviate such injustice, etc but no further (*Stock v Frank Jones (Tipton) Limited* [1978] 1 WLR 231 at p 235H). Lord Simon added that where there is ambiguity in the drafting, then it is open to the court to choose between potential meanings by various tests which throw light on the intention of the legislature (at p236B-G), the "purposive" rule.

52. Here, there is ambiguity in section 14(5)(d). Does it require the Tribunal to disregard the construction of any highway which would meet the same need as the "scheme highway," irrespective of whether that might be achieved by the use of statutory powers or by private means, or, read properly in context, is the ambit of the disregard more limited? Here, it is appropriate to consider the purpose of the legislation.

53. In *R v Secretary of State for the Environment ex parte Spath Holme* [2001] 2 AC 349 Lord Nicholls stated (at page 396) that ascertaining the "intention of Parliament" as expressed in the language used in the legislation, is an objective, not a subjective exercise. The phrase is

shorthand for the intention which the court reasonably imputes to the legislature in respect of the language it used. It does not refer to the subjective intention of the persons promoting the legislation or of the draftsman. The court may use non-statutory material, or external aids, to assist in identifying the purpose of the statute, including any mischief it was intended to cure, and also to assist in seeing whether the statutory language used is either clear or ambiguous. But given that citizens should be able to regulate their affairs on the basis of what has been enacted in legislation, and that external aids do not form part of the language through which Parliament has expressed its intention, a cautious approach to the use of such aids is necessary (at pages 397D to 398D).

54. It is a well-established principle of statutory construction that legislation is not to be interpreted as taking away, or interfering with, private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms (*Attorney General v Horner* (1884) 14 QBD 245, 257; *Central Control Board (Liquor Traffic) v Cannon Brewery Company Limited* [1919] AC 744, 752; *Colonial Sugar Refining Company v Melbourne Harbour Trust Commissioners* [1927] AC 343, 359; *Bennion on Statutory Interpretation* (7th Ed) section 27.8). In *Westminster Bank Ltd v Ministry of Housing and Local Government* [1971] AC 508 Lord Reid (with whom at least two other members of the House of Lords agreed) added that the intention of Parliament may appear not only from the express wording of the provision but also by "irresistible interference from the statute read as a whole", but "if there is reasonable doubt, the subject should be given the benefit of the doubt" (p529 B-D).

55. The same approach applies to the interpretation of provisions which deal with the measure of compensation. The underlying principle is that fair compensation should be given to the owner whose land has been compulsorily taken. The aim of compensation is to provide a fair financial equivalent for the land taken (Lord Collins in *Spirerose* [2009] 1 WLR 1797 at paragraph 89). If the natural meaning of the language used in the LCA 1961 would fail to comply with that principle, then some other interpretation may be justified in order to produce a fair result, by applying recognised *purposive* principles of statutory construction (Lord Walker in *Spirerose* at paragraph 36). Compensation legislation is to be constructed with a view to achieving, so far as is possible, a result consistent with the legislative aim of "fair compensation" (Lord Neuberger in *Spirerose* at paragraph 56). Likewise, in *Union Railways (North) Ltd v Kent County Council* [2010] PTSR 90 Carnwath LJ stated that a purposive approach should be taken to the modern statutory code, keeping in mind the general objects of the legislation:

> "which are to ensure, on the one hand, that compulsory powers are available if needed to acquire land for public projects, and, on the other, that those whose land is taken are properly compensated."

56. Consequently, the Respondent's QC accepted, rightly in our view, that legislation (whether section 64 of the 1991 Act or section 232 of the 2011 Act) should not be taken to have encroached upon the principle of equivalence, or fair compensation, unless clear words were used to show that that was the intention of the legislature. In our judgment, that must equally apply to a pre-existing "key" or "ransom" value attaching to the land being acquired because it has the attribute of providing a necessary access to land with development potential. As Mann LJ said in *Batchelor*, the expropriation of such value (or attribute) without compensation would contravene the fundamental principle of equivalence (see also *Waters* [2004] 1 WLR 1304 at

paragraphs 65 and 157). The Respondent's QC submits that section 14(5)(d) of the LCA 1961 contains language which is sufficiently clear to achieve that outcome.

57. Both sides have referred to certain canons of statutory construction. First, the Respondent submits that, taking into account section 14(5)(c) the construction of section 14(5)(d) advanced by the Claimants would render the latter otiose. It is said that where words are ambiguous and capable of two constructions, the Court should "adopt that which would give some effect to the words rather than that which would give none" (*Cargo ex Argos* (1873) LR 5 P.C. 134, 153). Second, where Parliament continues to use a phrase, the meaning of which has been settled by decisions of the courts, it is presumed that that phrase continues to have that meaning, in the absence of clear words to the contrary (*Barras v Aberdeen Steam Trading and Fishing Co Ltd* [1933] AC 402, 411). Here the established meaning of the phrase "the value of the land" in rule (2) of section 5, includes any pre-existing ransom value attaching to the land in question (see *Batchelor* and *Waters*). Third, section 14(5)(d) is not to be construed in isolation but in the context of the provisions associated with it, *noscitur a sociis*. Language may take its "colour" or meaning from its "surroundings" (*Bennion on Statutory Interpretation* (7th Ed) section 23.1).

58. In *Cusack v Harrow LBC* [2013] 1 WLR 2022 Lord Neuberger helpfully reminded us that canons of construction are to be "treated as guidelines rather than railway lines,...servants rather than masters" (paragraph 57). Canons of construction do not amount to rules, but reflect techniques adopted by courts to problems of statutory interpretation to promote consistency of approach (paragraph 59). Even where canons of construction point to different answers, they remain of real value so long as they are treated as guidelines "to illuminate and help" rather than as rules "to constrain and inhibit" (paragraph 60).

Discussion

59. We think it is helpful to begin by identifying the situations with which the *Margate* and *Batchelor* decisions were concerned.

60. Superficially it would appear that both cases were similar in that they were both concerned with land earmarked to be used for a public highway. But in fact the two decisions dealt with very different issues. *Margate* did not involve a compulsory purchase order in order to construct a highway, in that case a by-pass. Instead, the purchase notice was served because the existence of the authority's by-pass proposal had resulted in planning permission for the landowner's proposal to develop its land in accordance with an allocation on the Town Map being refused. The issue was whether it could nevertheless be *assumed* that planning permission would be granted for residential development (applying section 16(2), (6) and (7) of LCA 1961.) By virtue of section 16(7), and not the *Pointe Gourde* principle (see [1970] 3 All ER 867 f-h), the prospect of the by-pass being constructed by a *statutory authority* on the reference land had to be ignored. The House of Lords stated that, by virtue of the Town Map, the Tribunal had to assume that planning permission would have been granted for a residential development on the reference land ([1970] 3 All ER 867j). The issue for the Tribunal to determine was *the scale* of the development which might be allowed, either immediately or on a deferred basis, and the conditions which would be imposed on any permission, given the unsatisfactory traffic and

highway conditions on the trunk road from which the reference land gained access, and which the authority's by-pass was designed to relieve ([1970] 3 All ER pp 867 - 869). For that purpose, the Tribunal had to consider how the traffic issue might be addressed in the absence of a by-pass crossing the reference land. It was in that context, that it was decided that the possibility of other solutions to the traffic problems, including a by-pass on a different alignment could be taken into account (p 870), Plainly, the decision in *Margate* would have applied not only to cases involving purchase notices, but also to land acquired compulsorily for highway purposes, where the issue was what planning permission for *other development* on the reference land might be assumed in the absence of the acquiring authority's highway scheme.

61. By contrast, *Batchelor* was not concerned with the application of the planning assumptions in section 16(2), (6) and (7) of the LCA 1961. The Tribunal was not asked to determine whether planning permission for residential development (or *any* development other than a highway improvement) should be assumed. Instead, the reference land was compulsorily acquired for highway purposes in order to provide access to development land *elsewhere*. Having applied the *Pointe Gourde* principle, so as to disregard any effect on the value of the land taken attributable to the acquiring authority's highway scheme, the issue was whether regard could nevertheless be had to any demand in the market to acquire the reference land in order to gain access to the development site. That demand included the interest of the owners of that site to buy the reference land in order to overcome a restriction on the carrying out of their development imposed by a condition of the planning permission which they were implementing. It was held that that pre-existing "ransom" value or "key" value was an intrinsic characteristic of the value of the reference land which had not been created by the authority's scheme.

62. Thus, the pre-existing "ransom" value in *Batchelor* did not infringe the *Pointe Gourde* principle and/or section 6 and schedule 1 of the LCA 1961. Furthermore, the decision in *Batchelor* (both in the Lands Tribunal and in the Court of Appeal) did not turn either on section 16(2) and (7) of the LCA 1961 or on what planning permissions should have been assumed.

63. As we have previously explained, the introduction by section 64 of the 1991 Act of section 14(5) to (8) only affected the determination of what planning permission would have been granted for "any development" in the sense of alternative forms of development. Parliament did not seek to amend the LCA 1961 so as to exclude compensation for the value of land referable to pre-existing "ransom" or "key" value of land required to access a development site elsewhere, whether by amending section 5 or by extending the scope of the scheme disregard principle in section 6. The assumption required by section 14(6), namely that no highway would be built to meet the same or substantially the same need as the "scheme" highway, was only made for the purposes of deciding what planning permissions for development should be assumed on the reference land, applying sections 16(7) or 17 of the LCA 1961 (see section 14(7)). Thus, it is plain that Parliament only intended to reduce the effect of the decision in the *Margate* case (to the extent of the assumption contained in section 14(6)). We agree with the Law Commission's explanation of the effect of section 64 of the 1991 Act and its understanding that the principle laid down in *Batchelor* (and subsequently endorsed by *Waters*) remained intact.

64. We have reached the firm conclusion that essentially the same analysis applies to the further amendment of section 14 made by the 2011 Act.

65. First, there is no indication in any of the material provided to us that it was thought that the principle in *Batchelor* (and endorsed in *Waters*) had given rise to harmful consequences and so needed to be cut down or abolished. The Law Commission asked in its Consultation Paper whether the principle should be modified and recommended that no change be made. The Commission recognised that because a departure from the equivalence principle would be involved, a clear and carefully defined policy justification would be necessary. That was undoubtedly the case and yet there is no indication of any such exercise having been undertaken. Of course, having said that, if in the 2011 Act Parliament had enacted sufficiently clear language which had the effect of excluding from the value of land under rule (2) the component acknowledged in *Batchelor* and *Waters*, then that would indeed be the correct legal outcome.

66. Second, the 2011 Act followed the same course as the 1991 Act of making changes to the code for determining what actual or assumed planning permissions should be taken into account. No attempt was made to amend section 5 of LCA 1961, or to extend the scheme disregard principles enshrined in section 6 of the LCA 1961, so as to exclude the component of land value accepted in *Batchelor* and *Waters.* Instead, the disregard in section 14(5)(d) only applies for the purposes of dealing with assumed planning permissions (sections 14(2) to (4)). The amending legislation in 2011 relates to the structure of the LCA 1961 in a similar way as had the 1991 amendment and so is consistent with a legislative intention to reverse only the *Margate* decision and not the *Batchelor* decision.

67. Third, we conclude that section 14(5)(d) has been included in the code enacted by the 2011 Act essentially to retain the effect of section 14(5) to (8) of LCA 1961 introduced by the 1991 Act.

68. Section 14(5) in the version of the LCA 1961 substituted by the 2011 Act contains a fasciculus of assumptions, (a) to (d), for determining what planning permissions could "reasonably have been expected to be granted" on the stated dates, as part of the definition of "appropriate alternative development" in section 14(4)[2]. The exercise in determining appropriate alternative development relates back to section 16(7) of the LCA 1961 as originally enacted. That earlier definition of "development for which planning permission might reasonably have been expected to be granted" required the matter to be determined on the basis that "no parts of the [reference] land were proposed to be acquired by any authority possessing compulsory purchase powers".

69. Assumptions (a) to (d) in the 2011 version of section 14(5) serve a similar function to the former section 16(7). They now spell out in greater detail how the grant of planning permission is to be assumed in the absence of compulsory purchase powers. Paragraph (a) requires it to be assumed that the scheme of development underlying the acquisition was cancelled on the "launch date", a similar assumption to that laid down in *Fletcher* (albeit that the relevant date has been redefined[3]). Paragraph (b) adds to the "cancellation of the scheme" by requiring it to be assumed that the acquiring authority has not taken any action wholly or mainly for the purposes of the scheme, such as the acquisition of land and the carrying out of any development or works.

[2] Section 14(5) also applies when determining under section 14(2)(b) the *prospect* of planning permission being granted

[3] See the discussion at p. 188 of Denyer-Green Compulsory Purchase and Compensation (10th edition)

Thus far, paragraphs (a) and (b) involve the disregard of matters which have already occurred by the valuation date. Paragraph (c) is forward looking. It requires the Tribunal to assume that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of powers of compulsory purchase. The broad reference to compulsory purchase powers again harks back to the language of section 16(7) of the original LCA 1961 but there are two differences. First, paragraph (c) refers to compulsory purchase for the purpose of meeting the same need as the scheme is intended to meet, rather than to compulsory purchase powers in general. But second, paragraph (c) also applies to the *carrying out* of a relevant scheme in the exercise of *statutory function*s and not just by the use of compulsory purchase powers.

70. Pausing there, section 16(7) of the LCA 1961 as originally enacted did not exclude the achievement of the purposes of a scheme without relying upon compulsory purchase powers, in particular works carried out by the private sector. The same is also true of paragraphs (a) to (c) of section 14(5) introduced in 2011 which form part of the context for section 14(5)(d).

71. Section 64 of the 1991 Act introduced an additional disregard in relation to highway schemes. The relevant provisions (added to the LCA 1961 as section 14(5) to (8)) only applied if the reference land was acquired for use for or in connection with the construction of a highway, or that use was being considered by a highway authority (subsection (5)). In such a case, it was to be assumed that no highway would be constructed, to meet the same, or substantially the same, need as that highway (subsection (6)). Unlike the original section 16(7) which only resulted in the cancellation of the scheme in relation to the "relevant land," (the reference land) (*Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC)), the 1991 amendment required an assumption to be made in respect of the "highway" scheme which was not restricted to that land. That was because the object was to reduce the effect of the decision in the *Margate* case, which had allowed the Tribunal to consider the solution of highway issues inhibiting the grant of planning permission on the reference land by the taking of other steps by the highway authority (for example, the construction of a highway on a different alignment outside the reference land).

72. The Respondent's QC submits, contrary to the view expressed by the Law Commission, that because the assumptions in the 1991 version of section 14(6) referred to "no highway", and because the same language is used in section 14(5)(d) as now enacted, Parliament went beyond simply cutting down the scope of the principle in *Margate,* but also at the same time reversed *Batchelor*. He submits that the effect of the words "no highway" is that the Tribunal must disregard the construction of *any* highway to meet the same or substantially the same need as the acquiring authority's scheme would have met, whether constructed by a statutory authority or by the private sector, including developers.

73. As we have already observed, this construction of the legislation would involve a significant interference with the right of landowners to rely upon the equivalence principle. There are further implications in the present type of case. It has become relatively common for an acquiring authority's costs of compulsory acquisition in aid of private sector development to

be indemnified by the developer, for example in a development agreement.[4] In such cases the Respondent's argument would benefit other private or commercial entities at the expense of the landowner entitled to compensation and would not be for the legitimate protection of public expenditure by the acquiring authority.

74. Plainly, clear language would be required in order to achieve a reduction in the scope of the equivalence principle, and *a fortiori*, an effective transfer of value from a claimant entitled to compensation to third party landowners or developers. Indeed, the Respondent's submission could also remove or extinguish value to a landowner whose land is compulsorily acquired for the provision of a highway access to a large development area in several ownerships, but who could, in the absence of the authority's acquisition, access and carry out a freestanding development within his own landholding. The Tribunal must approach such issues very cautiously given that there is no indication that the Government of the day, or Parliament, ever sought to bring about such consequences or gave any consideration to the policy issues involved. We must also bear in mind that these issues were argued in this reference without any assistance from the Ministry of Housing, Communities and Local Government.

75. In our judgment, the phrase "no highway would be constructed..." must be construed purposively, in context and according to the "linguistic register" of the provisions alongside which it appears both in the version of section 14(5) to (8) introduced by the 1991 Act and in the current enactment of section 14(d). We refer to our analysis in paragraphs 27 to 35 above of the amendments introduced by section 64 of the 1991 Act.

76. The neighbouring provisions and the context are not materially different when we come to consider section 14(5)(d) introduced by the 2011 Act. First, the disregard in that provision only falls to be applied when the value of the land is being assessed in order to determine compensation for the compulsory acquisition of land (section 14(1)). Second, the disregard only applies if "the scheme of development underlying the [compulsory] acquisition" uses the reference land for or in connection with the construction of a highway. This is referred to explicitly as "the scheme highway". Third, the disregard only applies in the context of the group of "scheme" cancellation assumptions contained in section 14(5), in order to determine whether planning permission should be assumed in addition to any permission actually in force. It does not purport to deal with the use of the acquired land for the purposes of gaining access to a development site, applying the decisions in *Batchelor* and *Waters*. Accordingly, the phrase "no highway will be constructed" refers only to the construction of a highway involving the use of statutory powers of acquisition, and not by the private sector without the use of such powers.

77. The Respondent's QC objects to this construction being applied to section 14(5)(d) introduced in 2011 on the basis that it would render that provision otiose. This is said to be the consequence of the wider language used in the 2011 version of section 14(5)(c) as compared with sections 14 and 16 of the 1991 version of LCA 1961. The scope of section 14(5)(c) is not confined to the reference land. It requires the Tribunal to disregard not only the acquiring authority's scheme but also any other project to meet the same, or substantially the same, need as

[4] See *Wards Construction (Medway) limited v Barclays Bank plc* (1994) 68 P & CR 391) in relation to the *Batchelor* case itself.

that scheme. Thus, section 14(5)(c) uses language from the 1991 version of section 14(6). That language is also replicated in the current section 14(5)(d). The disregard in section 14(5)(c) also applies to the carrying out of a scheme or project in the exercise of a statutory function as well as to the exercise of compulsory purchase powers. It is only because of the use of this broad language in section 14(5)(c), that the Respondent can advance the linguistic argument that section 14(5)(d) would be otiose if it is not given the meaning for which they contend, namely that it requires the Tribunal to disregard the construction of highways for the same purpose by the private sector without the intervention of a statutory authority. But this is a weak argument. The Respondent has to accept that, in any event, there is a very large degree of overlap between section 14(5)(c) and (d) in relation to schemes involving the intervention of a statutory authority.

78. It is therefore possible to avoid section 14(5)(d) being treated as otiose *only* if it is construed as creating a disregard of purely *private* as well as *public* highway projects. But that begs the true question, namely whether Parliament has used language which is sufficiently clear to reduce the scope of the equivalence principle, and in particular to abrogate the "key value" principle in *Batchelor*. We have previously explained why we do not accept that section 64 of the 1991 Act produced that outcome. The fact that in the 2011 version of section 14(5)(d) Parliament used essentially the same language:

> "no highway will be constructed to meet the same or substantially the same need as the scheme highway...."

is a strong indication that Parliament did *not* intend to change the law in this respect.

79. Furthermore, the presumption that a statutory provision should be construed so as not to be superfluous is not an absolute principle. Indeed, in *Walker v Centaur Clothes Group Ltd* [2000] 1 WLR 799 Lord Hoffmann went so far as to say that an argument based upon "redundancy" seldom carries great weight (page 805D). It is recognised that specific provisions are sometimes inserted alongside more general provisions "out of abundance of caution, or otherwise without regard for the wider application of the general provision" (Bennion 7th edition page 519). Here, section 14(5)(d) carries forward the effect of the 1991 amendment for completeness and to avoid the impression being given that that disregard had been omitted or repealed. Furthermore, section 14(5) contains a number of statutory hypotheses. It is now well-established that the effects of such provisions should be tested by reference to the purposes of the legislation (see eg *DCC Holdings (UK) Limited v Revenue and Customs Commissioners* [2011] 1 WLR 44 at paras. 36 to 39). A purely linguistic approach would be inappropriate.

80. As we have previously explained, the equivalence principle represents a fundamental purpose of the compensation code. The "key value" principle is a well-established aspect of that principle, such that clear language would be required to abrogate it. The object of section 14(5)(d) (and its predecessor) can be simply stated. Parliament reacted to the *Margate* decision by removing an acquiring authority's obligation in a compulsory purchase for a highway scheme to pay compensation based on alternative development value, where the achievement of that value depends upon public expenditure on the "construction" of an alternative highway to meet the same need as the acquiring authority's scheme. There is nothing in the legislation or its history to indicate any intention to go further, and in particular to remove value from acquired

land which was not dependent upon the acquiring authority's scheme (nor any alternative public scheme).

81. The only purposive point which the Respondent advanced was that the construction of a highway provides public benefits and so does not exclusively benefit a private entity such as developer. We are wholly unimpressed by this argument. The benefits of highway schemes cover a wide spectrum. Some projects may create a wide range of public benefits on a large scale (e.g. a route for long distance traffic). Other highways may produce only localised, small-scale benefits, for example access to just one development area. Whatever the degree of those benefits, the scheme disregard rules are intended to strike a proper balance between fair compensation for landowners and public expenditure on a scheme. But where an authority's compulsory purchase for a highway is also necessary to enable a developer funding that scheme to realise the development value of his land, it does not follow that it is in the public interest for any legitimate "key value" (or access value) attaching to land compulsorily acquired for that scheme to be effectively transferred to the developer when compensation comes to be assessed. That would be a matter of policy for Parliament. The language used in the legislation passed to date does not indicate any intention to remove land value based on the decisions in *Batchelor* and *Waters*.

82. The Respondent submitted that the reference in the 1991 version of section 14(5)(b) to a "highway authority" does not appear in the 2011 version of section 14(5). That is a slender basis upon which to argue that the object of the 2011 enactment of section 14 was to reduce the scope of the equivalence principle. It ignores the context in which section 14(5)(d) appears, namely the determination of assumed planning permissions on the basis that no relevant scheme will be carried out, whether by the exercise of compulsory purchase powers or any *other statutory function*. The expression "highway authority" in the former section 14(5)(b) appeared in the same context. The mere omission of that limb in the current section 14(5) does not connote any legislative intention to widen the scope of the "highway scheme disregard" so as to include the private creation of highways without the use of statutory powers of acquisition or implementation.

83. For completeness, we should mention that we do not accept the Claimants' argument that section 14(5)(d) only applies to a scheme which uses land *solely* for, or in connection with, the construction of the highway and therefore does not apply to schemes which also have other purposes. The language used by Parliament in section 14(5) does not justify that restrictive interpretation. As the Respondent's QC pointed out, where Parliament intended to adopt the approach for which the Claimants' QC contended, it used explicit language to that effect, such as "wholly or mainly" in section 14(5)(b). But in any event the Claimants succeed on issue (2) on the main part of the argument.

Conclusion

84. We therefore conclude that the answer to issue (2) is "no." Section 14(5)(d) of the Land Compensation Act 1961 is not engaged to as to prevent an assumed planning permission for the Compensation Development.

Dated 8 March 2018

The Honourable Mr Justice Holgate
Chamber President

A J Trott FRICS
Member Upper Tribunal (Lands Chamber)