IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 74 (LC)
Case No: ACQ/26/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – acquisition of flat in tower block as part of major regeneration scheme – valuation – disturbance – compensation determined at £305,625

IN THE MATTER OF A NOTICE OF REFERNCE

BETWEEN:

(1) ALFRED YAZDIHA

(2) MOHAMMAD SYED FATEMY — **Claimants**

- and -

LONDON BOROUGH OF BRENT — **Acquiring Authority**

Re: Flat 91, Gloucester House, Cambridge Road, Kilburn London NW6 5XJ

- -

Hearing date: 10 January 2018

Before: Paul Francis FRICS

Royal Courts of Justice, London WC2A 2LL

- -

One of the claimants, Mr Alfred Yazdiha, in person
Angela Piears, instructed by London Borough of Brent, Legal Services, for the Acquiring Authority

The following cases are referred to in this Decision:

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 1 EGLR 19

Ryde International PLC v London Regional Transport [2004] EWCA Civ 232

DECISION

Introduction

1. This is a decision to determine the compensation payable to Mr Alfred Yazdiha and Mr Mohammad Syed Fatemy ("the claimants") by the London Borough of Brent ("the Council") following the compulsory acquisition of the leasehold interest in Flat 91, Gloucester House, Cambridge Road, Kilburn NW6 5XJ ("the property") under the London Borough of Brent (South Kilburn Regeneration Phase 2b – Gloucester House and Durham Court) Compulsory Purchase Order 2014 ("the CPO").

2. The claimants, who are litigants in person and were thus unrepresented, issued their Notice of Reference on 15 March 2017, and said in their statement of case that at the agreed valuation date of 19 January 2016, the property was worth £400,000 to which must be added a basic loss payment of £30,000 (7.5% of the value) under ss.33A and 33C of the Land Compensation Act 1973 ("the 1973 Act"), together with various disturbance costs amounting to £57,094, bringing the total to £487,094.

3. The Council was represented by Ms Angela Piears of counsel, who called Mrs Rachel Covill BSc (Hons) MRICS, a Principal Surveyor at the Bromley office of District Valuer Services, Property Specialists for the Public Sector. She valued the property at £275,000 and argued that whilst the claimants' entitlement to a basic loss payment was not in issue, compensation for disturbance should amount to no more than £10,000. Mr Denish Patel, the Council's Case Manager with responsibility for this matter, was also called to give evidence of fact.

Facts

4. Gloucester House is an 18-storey residential tower block of non-traditional "Large Panel System" construction with concrete panels to the elevations on a reinforced concrete Bison frame supported on raft foundations, originally built in about 1960 as council flats on the South Kilburn Estate. There are 17 floors containing a total of 169 flats with the ground floor, street level, consists of garaging. The area is predominately residential in nature, with a mixture of traditional properties and large swathes of local authority built medium and high-rise blocks of flats. Kilburn High Road mainline railway station is 0.5km to the north-east and Kilburn Park underground (Bakerloo Line) is about 0.25 km to the north.

5. No. 91 is a ninth storey self-contained flat located on the west side of Gloucester House and contains entrance hall, living room with door to an enclosed balcony, one double bedroom, kitchen and bathroom. The flat has a Gross Internal Floor Area ("GIA") of 55 m^2 (592 ft^2) and an Effective Floor Area of 39 m^2 (420 ft^2). All floors to the block are accessed by two passenger lifts (from first-floor level) serving communal halls and passageways.

6. The claimants held the property under the terms of a lease for 125 years which commenced on 10 September 1990 at an annual ground rent of £10. There were thus approximately 99 years unexpired at the valuation date.

7. The CPO was made on 9 May 2014 (and subsequently confirmed by the Secretary of State) as part of the Council's objective to assemble sufficient land interests to facilitate and implement a major phased housing-led regeneration of the South Kilburn Estate in accordance with the South Kilburn Master Plan. By a General Vesting Declaration made on 17 December 2015, and served on 21 December 2015, the property vested in the Council on 19 January 2016, that being the valuation date for the purposes of this reference. The claimants' claim for compensation was served on the Council on that date, assessing the value of the property at £320,000 and claiming that sum together with a £24,000 basic loss payment and a further £23,200 of disturbance costs (total £367,200).

8. Negotiations both before and after the vesting date having failed to achieve a result, the 1st claimant signed and returned to the Council, on 7 September 2016, a form entitled 'Receipt for Advance Payment of Compensation' (under section 52(3) of the 1973 Act) and giving details of his bank account to facilitate the transfer of funds. Whereas that form's title suggests it was a receipt for payment it was, in fact no such thing. It was a document whereby the claimants state their agreement to the sums being offered and provide the further information sought. Only following receipt of that acknowledgement and the required information were the necessary steps then taken by the Council to facilitate a payment being made. On being advised, following completion of the form, that he was required to appoint a solicitor to whom the payment could be made, Mr Yazdiha instructed Perrin Myddleton, Solicitors, who then made formal application on 25 October 2016. That payment, of £246,037.50 (being 90% of the Council's then estimate of the value of the property in the sum of £245,000, a Basic Loss payment of £18,375 and its estimate of £10,000 as the owners' costs entitlement), was

transferred to the claimants' solicitor's account on 9 December 2016 and acknowledged as received on 12 December 2016.

9. Meanwhile, on 17 August 2016 the claimants completed a claim form for submission to the Barnet County Court Money Claims Centre, which was acknowledged by the court as served on 7 September 2016 (claim No. 72YM510). Damages were claimed from the Council, but not specifically itemised, in the sum of £400,000 together with £10,000 relating to the court fee and interest. The particulars of claim stated that no income had been received since the vesting date, and "due to the failure of the defendants to pay compensation …[the claimants]… have been unable to locate and purchase a suitable replacement property for which to provide an income to themselves." It was explained, in paragraph 11 that:

> "Despite repeated written requests by the Claimant and deadlines given by the Claimant and written promises by the Defendant's authorised representatives to the Claimants the Defendant have *(sic)* failed to expeditiously and with any reasonable speed agree a figure of compensation and prevaricated negotiations as regards the agreed compensation to be paid to the Complainant."

10. The Council issued a defence on 23 September 2016, disputing the claim generally, advising that the claimants had signed the receipt for an advance payment and pointing out that, in any event, the County Court did not have jurisdiction to deal with the matter. On 20 October 2016, it made an application for transfer of the claim to this Tribunal because under section 1 of the Land Compensation Act 1961 ("the 1961 Act"), it was the correct forum for determination of the matter.

11. On 6 February 2017, District Judge Marin sitting in Barnet County Court, and having heard from the claimants in person and from the solicitor for the Council, ordered that:

> "(1) This case shall be transferred to the Upper Tribunal (Lands Chamber) for determination including the issue of who should pay the costs of the proceedings in the County Court.
>
> (2) Costs reserved to the Tribunal."

The claimants then filed a notice of reference to this Tribunal on 17 March 2017.

Issues

12. The issues for determination are:

(1) The open market value of the long leasehold interest in the property at 19 January 2016 (section 5(2) Land Compensation Act 1961).

(2) The basic loss payment (s.33(A)) Land Compensation Act 1973).

(3) The claimants' entitlement to claimed costs and losses relating to legal and professional fees, stamp duty, furniture and loss of rent (section 5(6) Land Compensation Act 1961).

(4) The question of costs relating to the application to Barnet County Court.

Statutory provisions

13. Section 5 of the Land Compensation Act 1961 provides, where relevant to this reference:

"**5. Rules for assessing compensation**

Compensation in respect of any compulsory purchase shall be assessed in accordance with the following rules:

(1) …

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

(3) – (5) …

(6) The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land; …"

14. Section 33(A) of the Land Compensation Act 1973 provides:

"**Basic Loss Payment**

(1) This section applies to a person—

(a) if he has a qualifying interest in the land

(b) if the interest is acquired compulsorily, and

(c) to the extent that he is not entitled to a home loss payment in respect of any part of the interest.

(2) A person to whom this section applies is entitled to payment of whichever is the lower of the following amounts-

(a) 7.5% of the value of his interest;

(b) £75,000."

Preliminary

15. On 8 January 2018 at 16.41, the Council's Civil Litigation solicitor sent an email to the Tribunal saying that it was intended to email an application for costs and a costs schedule "tomorrow" and asked whether a fee was required. The application was duly sent on 9 January 2018, one day before the hearing, seeking summary assessment of its costs "to be placed before the Tribunal on 10 January" and enclosed two detailed schedules. The first, in the sum of £2,144.10 related to its costs incurred in defending the County Court claim and the second, for £11,502.20 was for its costs in the reference. It was confirmed that copies had been passed to the claimants for their comments. At 11.55 on 9 January the Tribunal responded to the email of 8th, saying that it was far too late for an application to be made, and that the respondents could make their application at the commencement of the hearing. When that application was duly made, I advised that the question of costs in the reference would be dealt with in the normal way after the decision was issued. The matter of costs relating to the court application is considered under issue 4 below.

16. An application was also made at the commencement of the hearing to admit the evidence of Mr Denish Patel, who has lately had responsibility for conduct of this matter on behalf of the Council. He had not produced a witness statement, but nevertheless I allowed the application and gave Mr Yazdiha the opportunity to ask questions of him if he wished to do so.

The evidence

17. The first claimant, Mr Alfred Yazdiha, is a property investor of Dollis Hill, London N3, trading as Alfred Yazdiha "Luxury Home Provider to Professionals". He, along with the second claimant (his father-in-law) purchased the leasehold interest in the property on 5 February 2010 for the purpose, it was said, of providing Mr Fatemy with a source of income. The property was subsequently let – the tenant remaining in occupation at the valuation date. Mr Yazdiha said that the property was bought without a mortgage (properties of that type of construction being virtually un-mortgageable), but loans towards the purchase were obtained through re-mortgaging other properties and through business loans. Mr Yazdiha acknowledged that they had first been notified of the regeneration proposals in 2013, and of the possibility of CPO measures being pursued during 2014.

18. The itemised claim for compensation, Mr Yazdiha said, was made on the very day the property was vested in the Council. In an email to Mr Joao DaSilva (the Council's Leasehold and Voids Officer, Estate Regeneration Team) dated 19 January 2016, to which the claim was attached, he said:

> "I am sure you do not agree with our claim figure but we will consider any reasonable offer. Please note that our property was held for investment and we are only requiring a reasonable compensation to replace the same. We would be delighted if you could make

> suggestion of any property which we can buy with the compensation monies you would offer."

Apart from receiving, on the same day, a copy of an internal email from Mr Richard Barrett, the Council's Estates Regeneration Manager, to Mr DaSilva asking him to concentrate on gaining possession of the property due to [the claimants'] failure to provide vacant possession, nothing further was heard for several months. Eventually, following various chase-ups which Mr Yazdiha said were also ignored, he wrote to Mr Barrett on 8 June 2016, reminding him that to date no offer of compensation had been received and advising him of the anguish that was being caused by the lack of progress, and the fact that their plans for reinvestment of the proceeds were being delayed. The email concluded with the words "If I do not hear from you within the next seven days, I will issue a money claim against the Council without further communication." Mr Barrett responded on 9 June saying that a full response would be provided "within the next week."

19. An email was eventually sent by Mr DaSilva on 20 June 2016 confirming receipt of the claim for compensation and advising that the claimants' assessment of market value (then at £320,000) was not agreed, and that the Council would be arranging for DVS to undertake a valuation as at the vesting date (to update the one that was undertaken in July 2015). The email also advised that, if agreement could not be reached, the Council "will be able to make an offer of compensation based upon 90% of the total compensation due as estimated by the Council until an agreement is reached."

20. In response, on 21 June, Mr Yazdiha advised Mr DaSilva that due to the Council's delays and the fact that there were still no concrete proposals on the table, the valuation should be at "today's date" as, with increasing property values as time goes by, the chances of the claimants being able to replicate what they had were becoming less and less. He also said that unless such proposals were received by 24 June, the court claim would proceed and that the issue fee of £10,000 would also be claimed.

21. There followed an intense flurry of email exchanges between Mr Yazdiha, Mr DaSilva, Mr Barrett and, latterly, Mr Patel. Mr Barrett said on 21 June that "it would appear you do not fully understand the CPO process and rules governing the acquisition of your property." He said that rather than pursuing a money claim, a meeting with Mr DaSilva might be more beneficial, and went on to say:

> "As he [Mr DaSilva] has explained, whilst we are in dispute in regard to the sum payable, the Council is willing to pay 90% of our valuation figure immediately. The remainder is payable on agreement of purchase price either through negotiation or independent determination via court as appropriate."

Mr Yazdiha's response to that (on the same day) was that he was aware of the CPO process (indeed referring to the matter being finally resolved through the tribunal process, rather than court as Mr Barrett had wrongly said), and reiterated that only having received confirmation of the claim some 6 months after it was made meant that the claimants were continuing to be kept out of the money to which they were legally entitled.

22. The formal offer of £246,037.50 was then eventually made in an email from Mr DaSilva on 24 June 2016. The offer was broken down into its constituent parts (set out in paragraph 8 above). In reply, on 29 June, Mr Yazdiha called the offer abysmal, and reminded him that at a meeting the two of them had in December 2015, before the valuation date, the Council had verbally offered £270,000.

23. Mr Patel then got involved, and sent an email on 1 July 2016 reminding the claimants of the basis of the advance payment and saying:

> "Either party can of course apply to the First Tier Tribunal [*incorrect*] for a determination of the compensation entitlement. However, our preference is to come to an agreement with the claimant. I would therefore propose that the claimant appoints a chartered surveyor to prepare a Red Book valuation report on his behalf. Both parties' surveyors will then be in a position to discuss the comparable evidence and begin to narrow the points in dispute. The claimant will be able to reclaim his reasonable professional fees."

On 5 July, Mr Yazdiha confirmed acceptance of the advance payment offer and said he would appoint a surveyor to act on his behalf if required.

24. There was then a further delay, the Council insisting that it had not received that confirmatory email. In the meantime, Mr Yazdiha said that he had prepared the court application and advised the Council on 10 August that he would be issuing it on 24 August. On 11 August he confirmed that he would not be appointing a surveyor as "we have more than adequate historic experience and expertise…and the comparables were already forwarded to you several weeks ago."

25. Also on 11 August, Mr Patel advised that because the Council had not received Mr Yazdiha's email of 5 July confirming that the claimants were prepared to accept the advance payment until it was re-sent very recently, it would not be possible to meet the deadline that the claimants had set for receiving the relevant forms for completion, and that "we will get back to you shortly". Mr Yazdiha subsequently confirmed, on 17 August, that, having heard nothing further, he had lodged the claim and particulars at the County Court.

26. The Council's 'Receipt of Compensation' form was finally submitted to the claimants on 2 September 2016, which Mr Yazdiha returned, signed, on 7 September. Due to the further delays occasioned by having to appoint a solicitor to receive the payment, Mr Yazdiha told me that it was not until 12 December 2016 that his solicitor acknowledged that it had been received, that being nearly 12 months after their income from the property ceased. It was also claimed that the Council had not paid over the advance payment within three months of it being requested (as required under section 52(2) of the 1973 Act). Three months and five days elapsed between Mr Yazdiha returning the signed acceptance form on 7 September to the date when his solicitors acknowledged receipt of the advance payment.

27. The claimants were therefore claiming from the Council all costs, including loss of rent suffered from the vesting date until the final compensation is determined, together with fair compensation for the property's value and the court fee that had been paid.

28. The Council said that it had been seeking to acquire the property by agreement since May 2014, but to no avail even though all the other long leasehold interests in Gloucester House have been successfully acquired by agreement with the occupiers. At the time it served its original statement of case, the Council said that the claimants were being professionally represented by Perrin Myddleton Solicitors LLP and by Dunsin Chartered Surveyors but that was no longer the case. The Council's original valuation of the leasehold interest at £245,000 (from July 2015) had been revised upwards to £270,000 in Mrs Covill's expert witness report of 27 September 2017, and with the associated basic loss payment at 7.5% and £10,000 estimated claimant's costs and professional fees entitlement, the total amount offered was £305,625. That was the offer that remained on the table, less the advance payment already paid. The disturbance element, Mr Patel explained, was assessed at £3,750 Stamp Duty Land Tax ("SDLT") at the rate applicable on the valuation date, and £3,125 for legal fees and the same for other professional fees, these being based upon typical packages agreed in other similar cases. As to the alleged delay in making the advance payment, the clock would have started ticking when the claimants' solicitor formally provided the required information, and in any event, even if the three month period for payment began to run on 7 September, the Council's banking records showed that the money was actually transferred by BACS on 9 December 2017– only two days late.

29. Mr Patel only became directly associated with this matter as the relevant Residential Property Manager in July 2016. He said that he had a number of staff working for him who would have been more closely involved, and on being asked if he had ever met Mr Yazdiha, he said he could not precisely recall, but "may have met him once" (although in Mr Yazdiha's response to Mr Patel's first email of 1 July 2016 he reminded him that they had met at his property "three years ago"). Mr Patel was unable to explain how it was that the Council had allegedly made a verbal offer of £270,000 to the claimants in December 2015, as the offer eventually made was based upon the valuation at £245,000 that had been carried out by DVS in July 2015. As to the alleged delays in payment of the advance payment, it was his view that it had been made in reasonable time. However, on being asked by Mr Yazdiha about the delays that he had encountered from late 2015 until the money was actually paid over to the claimants in December 2016, Mr Patel acknowledged that his was a small team dealing with a very large regeneration programme, that they were under significant pressure and "sometimes things get overlooked".

30. I now turn to consider the rest of the evidence on an issue by issue basis.

Issue (1) The value of the property

31. Mr Yazdiha said that whilst he accepted Mrs Covill's evidence as an expert (as confirmed by the details of the six principal comparables of open market, arms-length, ex-council flat sales that she had relied upon set out in the agreed statement of facts), he insisted that because

the property had a GIA of 55 m^2, it was larger than many one-bedroom flats and could easily, and at very modest cost, be converted into a two-bedroom unit. This would be achieved by converting the existing spacious kitchen into a second bedroom, and providing a small open plan kitchen area within the living room. He said that Mrs Covill had not taken this into consideration, nor the positive effects that possibility would have on value.

32. Mr Yazdiha provided at the hearing a revised spreadsheet (an earlier version had been produced and submitted to the Council as part of the negotiations) based upon Mrs Covill's schedule of comparables to demonstrate that, based upon the average prices per m^2 of the sold flats, adjusted to January 2016 by the Nationwide Building Society and UK HPI property price indices, the value of the subject property came to approximately £425,000. However, it was pointed out by the Council that this methodology was clearly flawed. For each of the comparables, Mr Yazdiha had divided its sale price by its EFA to give a value per m^2. He then totalled the sale prices of all six comparables and their EFAs and divided the resultant totals by six to give an average price per m^2 (£7,722 per m^2). That figure was then multiplied by the GIA of the property (55sq m) to give the suggested figure of £425,000.

33. Mr Yazdiha had therefore multiplied the average EFA by the subject's GIA which was not comparing apples with apples. If the multiplier had been by the accepted EFA (39 m^2) the result would have been, on the claimant's basis, £301,158. Mr Yazdiha did not seem to take the error point. He noted that Mrs Covill took EFA figures from the Valuation Office Agency's own records, and had also taken GIA figures from Energy Performance Certificate ("EPC") calculations where they were available. Mr Yazdiha said that EPC figures were notoriously unreliable and he had taken the GIA of the property from Dunsin's valuer's measurement.

34. The claimants also included a list of other comparables that produced even higher average values per m^2 (bundle p.414) but accepted that these were not sold properties, and were merely asking prices in March 2017 taken from information (mainly Zoopla) on the internet.

35. Mrs Covill produced a comprehensive, well researched and clear expert witness report. She described the property as in average condition and said that the residential market for flats in the area was active from 2014 to the valuation date, and remained so until mid-2016. She pointed out however, that due to the non-traditional form of construction, the market for the property would be limited because traditional mortgage providers were reluctant to lend on such properties. Nevertheless, she produced details of six flats that were similar in age, design and construction that had been sold in the area between August 2014 and July 2016. She then made allowances for material differences such as specific location and proximity to rail and bus routes, and relied upon the HPI and Nationwide Price Indices to make appropriate adjustments for time. All of these comparables and the information relating to them were accepted by the claimants and were, as I have said, included within the joint statement of agreed facts. From this information and her inspection of the property Mrs Covill concluded that its open market, vacant possession value as at the valuation date was £275,000.

36. Following the hearing Mr Yazdiha submitted a revised plan of the layout of the flat and said that in his view the enclosed balcony should have been taken into account when calculating the EFA whereas Mrs Covill had excluded both the balcony and the entrance hall/corridor within the flat when converting GIA to EFA. Although not obliged to do so once the hearing had finished, particularly as the question of floor areas had been agreed and comprehensively dealt with in evidence, I sought her comments on the point. In response, copies of the relevant provisions within the RICS Code of Measuring Practice were provided, from which it is clear that whilst open balconies, walkways and the like will be included in GIA, they are specifically excluded from EFA. From Mrs Covill's own layout plan and area calculations, it is clear that she followed the Code to the letter, and I accept those submissions.

37. This has been a long and tortuous saga, which in my judgment could and indeed should, have been avoided.

38. I note from the papers (bundle p.438) that in a meeting between Mr Yazdiha, Mrs Covill and Mr Paul Pierides of the VOA on 7 November 2017, Mr Yazdiha confirmed that he would not be relying upon the valuation he had obtained from Dunsin Chartered Surveyors in 2015, as he was not impressed with the valuer who came to inspect the property. Asked whether his own valuation at £400,000 was as at the valuation date, Mr Yazdiha (according to the meeting note) indicated that that was not necessarily the case, and that the claimants were open to dialogue, but that the Council's revised valuation of £275,000 could not be agreed.

39. The Dunsin valuation was included with the claimants' documents. Following consideration of a number of comparable sales, it gave an estimated open market value "assessed in accordance with the compensation code" at £290,000 as at 17 September 2015 on the basis that it was available with vacant possession. That was within a whisker of the figure that Mr Yazdiha said he was verbally offered by the Council in December 2015. Mr Yazdiha chose to dis-instruct Dunsin because, he said, he did not like the young man who carried out the inspection and thought he lacked experience in the area. There was no indication that further valuation advice was then sought or obtained.

40. In my judgment, Dunsin's valuation was well within the correct range. Indeed, the claimants' own assessment of value as at the valuation date, and included within the claim, was £320,000, only about 5% more than Dunsin's had valued it at in September 2015, and not the £400,000 now claimed. There was no persuasive evidence to support this latter figure, Mr Yazdiha's calculations suggesting a value of around £425,000 based on prices per m^2 being clearly incorrect, and the additional comparables being asking prices in March 2017. I am entirely satisfied that Mrs Covill undertook a thorough and professional job, and indeed Mr Yazdiha stated that he had no issue with her report, or the comparables she produced. With there being not a scintilla of evidence to support the claimants' figure, I accept her assessment of value at £275,000.

Issue (2) The basic loss payment

41. In accordance with section 33(A)(2) of the 1973 Act this is calculated at 7.5% of the value of the property, and is therefore in the sum offered by the Council: £20,625.

Issue (3) Disbursements

42. The claims under this head were summarised in the Claimants' statement of case thus:

Valuation fee (Dunsin Chartered Surveyors)	£ 1,200.00
Stamp Duty for purchase of replacement investment property (5% of £400,000)	£20,000.00
Legal & professional costs	£14,354.00
Furniture in property used by tenant	£ 2,500.00
Loss of rent	£19,040.00
Total	£57,094.00

43. The valuation fee is a valid head of claim, even though the claimants' former surveyor did not represent them in the reference. Evidence of Dunsin's charges was provided. However, there was no explanation as to why this was not included under the heading of "legal and professional costs" for which a further £14,354 was claimed. No documentary evidence to support that claim was produced, such as copies of paid invoices to solicitors. Indeed, regarding legal fees, it is clear from the documentary evidence that Mr Yazdiha included within his bundle of documents (mainly copy email exchanges) that the claimants have not been legally or professionally represented in connection with either the County Court claim, or this reference. The only apparent formal involvement of Perrin Myddleton was in connection with the transfer of the advance payment, Mr Yazdiha emailing the Council with confirmation of their appointment on 10 September 2016.

44. Mr Patel explained that in accordance with the Council's normal policy, the offers of professional and legal fees in the sum of £3,125 each were "based upon a typical disturbance package and fees agreed on other similar acquisitions". In my judgment, the Council has been more than fair in its offer of £6,250 regarding legal and professional costs for a claim where, apart from the Dunsin valuation, there was no evidence that such costs have been incurred. I therefore determine that part of the disbursements issue at £6,250 – to include the Dunsin valuation fee.

45. As to the claim for SDLT, the claimants' argument was that it should be calculated at the rates prevailing when the value of the property is finally determined (in other words, the date of this decision). Recent government legislation has significantly increased SDLT rates on buy-to-let properties, and Mr Yazdiha thus urged the Tribunal to reflect the effect of the increase to 5% on the purchase price in its decision. The Council agreed to make such a payment but pointed out that section 5A, Land Compensation Act 1961 requires compensation for the value of land taken to be determined as at the vesting or valuation date. That is how the Council has calculated the claimants' entitlement under this head of claim and I agree that the appropriate

sum should be assessed as at the valuation date. However, the claimants have adduced no evidence that they have yet incurred the cost of acquiring a replacement property, and as such no liability for SDLT has so far been incurred, The Council's offer under this head is thus effectively an award by consent. I therefore determine this part of the claim at the £3,750 offered.

46. There was no support of any description produced by the claimants in respect of the claim for value of furniture left in the property other than that it remained for the use of the tenant. Mr Patel referred to s.10A of the 1961 Act which provides:

> "10A Expenses of owners not in occupation
>
> Where, in consequence of any compulsory acquisition of land
>
> (a) the acquiring authority acquire an interest of a person who is not then in occupation of the land; and
>
> (b) that person incurs incidental expenses in acquiring, within the period of one year, beginning with the date of entry, an interest in other land within the United Kingdom
>
> The charges or expenses shall be taken into account in assessing the compensation as they would be taken into account if he were in occupation of the land."

He said that the claimants should have ensured that their tenant had left the property by the vesting date, and in any event they had not subsequently purchased a replacement property within the UK. The provisions do not therefore apply. It was also submitted by counsel that the Council had been put to additional costs and losses in having to take steps to remove the tenant by eviction, with the assistance of bailiffs, and vacant possession was not achieved until 26 September 2016. Any such costs would be recoverable by deduction from the compensation payable to the person in occupation who failed to give possession when required to do so. The claimants were not themselves in occupation. I nevertheless disallow this head of claim because of an absence of any evidence from the claimants concerning the value of any furniture which may have belonged to them and which may have remained in the property.

47. Turning to loss of rent, there had been no explanation of how the amount claimed had been calculated. However, at the hearing, Mr Yazdiha said that the rent of the flat at the valuation date was £1,190 per calendar month. The figure claimed was the loss of that income from the vesting date until the time of preparing the statement of case to this Tribunal - 22 March 2017, due to the Council's "*failure to expeditiously and with any reasonable speed, agree a figure of compensation.*" This failure led to the claimants being in a position where the compensation offered (and the advance payment eventually made based upon that offer) was not sufficient to allow them to purchase an equivalent property and thus reinstate the rental income. However, as almost another year had passed by, he said that the losses should be calculated at the monthly rate up until the date the decision was issued, and the compensation figure was finally determined. The losses would, therefore, be significantly more than the £19,040 set out in the claim. It was asserted that the claim was justified on the principle of equivalence as the claimants should not be worse off due to the compulsory purchase.

48. For the Council, it was submitted that, aside from whether or not the loss of rent was a justifiable head of claim, the sum sought in the particulars of claim (which had a handwritten date of 22 March 2017 (page 136 of the claimants' bundle)), if divided by the stated monthly rate, was equal to approximately 16 months' rent, which would take the claim up to 8 May 2017.

49. In any event, Ms Piears said, this head of claim is actually a claim for future rent after the vesting date and it should therefore be denied for the following reasons. Firstly, the claim is too remote, and the loss of income was not caused by the compulsory acquisition (see *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 EGLR 19). Secondly, the claimants (and all the other affected leaseholders) were provided with a copy of the South Kilburn Regeneration Programme "Guide for Leaseholders" dated January 2013 and investor owners also had available a further booklet produced by the Department of Communities and Local Government (DCLG) entitled 'Compulsory Purchase and Compensation – Compensation to Business Owners and Occupiers' dated October 2004. The DCLG booklet said:

> "*<u>Disturbance to Investment Owners</u>*
>
> *In order to be entitled to compensation for disturbance you must normally be in physical occupation of the land. There is however a limited right to disturbance for owners of investment properties who are not in occupation. Compensation is payable in respect of incidental charges or expenses incurred in acquiring, within a period of one year of date of entry, an interest in other land in the United Kingdom."*

The claimants did not acquire a replacement property within the twelve-month timescale, and have not therefore taken reasonable steps to mitigate their loss (also per *Shun Fung*). Regarding mitigation the DCLG booklet said:

> *"In all disturbance cases, whether on the basis of relocation or a total extinguishment, there is a duty on the claimant to 'mitigate his loss'. This means that you must act reasonably at all times, and take all rational and reasonable steps to avoid incurring additional losses where possible. If the acquiring authority is able to show that your losses were greater than they might have been, due to unreasonable behaviour on your behalf, the compensation should be adjusted to reflect this."*

If the claimants had heeded the advice that they had received from a professional valuer shortly prior to the valuation date and used it to attempt to negotiate a higher price, rather than dismissing it entirely and seeking, first before the wrong forum and then before this Tribunal, a figure that was some 37% higher (without the benefit of professional advice), then they could have been in funds to acquire a replacement property. Even though they have received 90% of the Council's (earlier) estimate of value, Mr Yazdiha on his own evidence has still chosen not to purchase another property and therefore not to recover any rent at all.

50. Thirdly, no evidence of the rental income (such as bank statements, copy rent book entries etc) have been provided, and fourthly there is no evidence as to what attempts, if any,

the claimants have made either to try to finance another purchase with the funds that they have had the benefit of since 9 December 2016, or to replicate the income generating potential in some other way.

51. Fifthly, as set out in *Ryde International PLC v London Regional Transport* [2004] EWCA Civ 232, even if the claimants had been deprived of any profit, they have also been deprived of any corresponding risk. The value of the property as determined under rule (2) contains any value that there may be in the opportunity to obtain a rental income, and therefore cannot come within the ambit of rule (6) disturbance as it is directly related to the value of the land.

52. It was submitted that despite Mr Yazdiha's protestations about lack of response from the Council in the first half of 2016, the claimants had themselves made no contact (such as seeking an advance payment) between the vesting date and 8 June 2016.

53. As to the suggestion that the Council had the benefit of the rent on the property until the tenant was evicted, it was denied that any rent has been received from the Claimants' former tenant, and indeed the Council has incurred the costs of gaining vacant possession which should have been provided at the valuation date.

54. For all these reasons, it was submitted that the claim for loss of rent should not be allowed.

55. There is no doubt in my mind that the Council was dilatory in the extreme in progressing the matter once the property was vested in it, and it is clear from the copy email exchanges that despite regular chase ups, no meaningful progress was made between 19 January and 20 June 2016. It was not until then that Mr DaSilva confirmed receipt of the claim [Claimant's bundle p.62]. That confirmation followed a long and detailed email that Mr Yazdiha had written to Mr Richard Barrett of the Council on 8 June expressing considerable frustration at the lack of meaningful response, and threatening to pursue a money claim through the courts. The criticism of the claimants by counsel for not making contact until June 2016 was, in my view unwarranted. The claim, duly quantified and itemised, was made on the vesting date and it was not even acknowledged until 20 June. The summary of events after that date (which were not disputed by the Council) leads me to conclude that despite much of the Council's criticism of the Claimants being justified, it was not above criticism of its own actions.

56. Whilst these views cannot alter what I say below about the loss of rent claim, it is most certainly something I shall consider when dealing with the question of costs in the reference.

57. I accept the Council's submissions on the loss of rent aspect of the claim. It is clearly not a justified head of claim under Rule (6) for the reasons given. I therefore dismiss this head of claim.

Issue (4) The County Court claim

58. This matter can be dealt with very shortly. The claim made to Barnet Crown Court on 7 September 2016 was on the basis that due to the Council's dilatory approach, delay and prevarication and their having failed to "expeditiously and with any reasonable speed agree compensation" it was in breach of the compulsory purchase process. That, it was alleged, was contrary to common law, and despite repeated written requests from the Claimants no payment had been made and no compensation had been agreed some eight months after the property vested in the Council.

59. As I have said above, all leaseholders were provided at an early stage with two booklets which set out in clear and understandable terms what compulsory purchase means, the steps that affected owners need to take and how they should go about obtaining further advice and assistance. The Council's Regeneration Strategy booklet is an impressive and helpful document in which the author(s) can, in my judgment, be justifiably proud. It was specifically directed to all those affected by this scheme and in addition to explaining the CPO procedure and the occupiers' rights in explicit detail, also gave details of other sources of information. Further, Mr Yazdiha is a property investor who undoubtedly has considerable experience in the residential property market. Also, although there is no record anywhere in the papers relating to the County Court claim that the Claimants were being legally represented, it is clear that he was in touch with Perrin Myddleton both before and after service of the notice.

60. I therefore find it extremely difficult to comprehend why Mr Yazdiha chose to take that route. He was certainly advised by the Council that the County Court was the wrong forum and indeed in his response to Mr Barrett's email of 21 June 2016 he said:

> "**I believe I am aware of the CPO process and the rules governing the Council acquisition of the property** but in any event I do appreciate the clarification…
>
> You will appreciate that I have already had one meeting with Mr Joao DaSilva and what I am trying to convey …is that this meeting took place several months ago and the Council has confirmed the vesting of the property in the Council since January 2016 and despite this and to date my elderly father-in-law and myself have still not received any form of prior offer of compensation or indication or communication from the Council. If we had had this then we could at least have received 90% of the disputed amount **pending the final figure being resolved via negotiated agreement or via the Tribunal Process** …" (my emphasis)

61. Further, the claimants would most certainly have been told the same if they had either a compensation surveyor or a solicitor (or both) formally acting for them. The timing of service of the County Court claim also, as strenuously pointed out by the Council, coincided precisely with the point at which the claimants signed and returned the unfortunately titled 'Receipt of Advance Payment of Compensation' form, but it was not referred to in the claim.

62. The fact that the leaseholders in all the other privately-owned flats in the block have agreed compensation provides to me further support (if indeed it were needed) for my conclusion that the claimants' actions in taking the matter to court without any advice or professional representation was ill considered and unnecessary.

63. There can be absolutely no merit in the claimants' argument that the Tribunal should determine that the Council pay the £10,000 filing fee. That fee was not caused by the compulsory acquisition of the property, and the Claimants' choice to incur it was not a reasonable step in mitigation of the loss they sustained. The Council, on the question of costs incurred in defending the claim, sought the sum of £2,144.10, but I have no jurisdiction to deal with those costs.

Disposal

64. This decision disposes of the issues before me, and I determine that the Council shall pay the balance of the compensation as follows:

Value of the property at 19 January 2016		£275,000.00
Basic loss payment		£ 20,625.00
Disturbance		
SDLT	£3,750	
Legal & professional fees (to include Dunsin's fee)	£6,250	
		£ 10,000.00
		£305,625.00
Less Advance payment	£246,037.50	
Net compensation		**£ 59,587.50**

65. This decision is final in all respects other than the costs of the reference. The parties may now make submissions on such costs, and a letter giving directions for the exchange submissions accompanies this decision.

Dated: 8 March 2018

Paul Francis FRICS

ADDENDUM ON COSTS

66. Submissions on costs have been received only from the Council. Firstly, in connection with the proceedings in the County Court, it was acknowledged that, as I indicated in paragraph 63 above, this Tribunal does not have jurisdiction to deal with the question of costs which have been incurred by the Council in defending that claim. My views on the question of the claimant's filing fee was dealt with in the same paragraph. The Council requested that I should refer the costs issues back to the County Court and, further, suggested that I either provide a determination about who is to pay the costs or alternatively produce a summary of the relevant parts of the decision (in particular paragraphs 58 – 63) sufficient to enable the County Court to make such an Order and proceed to a summary assessment.

67. It is for the County Court to deal with this issue, and I cannot make the determination requested. The Council should pursue the matter by making its own application to the County Court, and should, by copy of this decision refer to the paragraphs it wishes the court to consider. I would say that the CPR do not provide generally for cases to be transferred by the County Court to the Tribunal, but deal specifically with transfers only to the Competition Appeal Tribunal (CPR 30.8). It may be that Judge Marin had in mind the provisions for transfer contained in section 176A of the Commonhold and Leasehold Reform Act but those provisions only apply to specific landlord and tenant jurisdictions, and not to compensation claims. The transfer order should not therefore have been made.

68. Turning to the costs of the proceedings in this Tribunal, the Council submitted that it should receive its costs on the grounds that it was the successful party. The Tribunal's determination was precisely the same as the figure set out by Mr Denish Patel in the Council's

revised statement of case that was submitted at the time of the hearing on 10 January 2018. That was based upon the revised valuation included in Mrs Covill's expert witness report of 27 September 2017, and the disbursement offers that had previously been made.

69. The Council had also made a sealed offer on 22 December 2017 in the overall sum of £355,000 which would, if it had been accepted, have had the effect of increasing the balance to be paid to the claimants (taking into account the advance payment already made) from £59,587.50 to £108,962.50 'in full and final settlement'. However, this offer was rejected by the claimants on 31 December 2017 by their counter-offer which formed the basis of their position during the hearing.

70. It was also submitted that, under Rule 10(3) of the Tribunal's Rules, an order for costs may be made in the Council's favour if the Tribunal agrees that the claimants have acted unreasonably. It was the Council's case that claimants' refusal to accept a reasonable offer to settle which was significantly above the amount finally determined constituted unreasonable conduct. It was also said to have been unreasonable for them to have failed to support their case with evidence.

71. On that latter point, the fact is that the claimants did (through Mr Yazdiha's submissions) provide their own evidence but they did not rely upon the report of an expert witness. It cannot be said to be unreasonable conduct for parties to rely only upon their own views and opinions in proceedings before a specialist tribunal, where it can reasonably be expected that all expressions of opinion, lay or expert, will be subjected to informed scrutiny. However unwise it may be, it is especially difficult to regard the claimants as having acted unreasonably where their representative has some knowledge and practical experience of the issues. As to the sealed offer, it is also not unreasonable to bring a claim which falls short. The argument as to unreasonableness is therefore misconceived.

72. The general principle is that the successful party should pay the costs incurred by the unsuccessful party, unless there is reason for the Tribunal to make a different order. The claimants are the successful party in this case up to the point they refused the Council's offer, which they subsequently failed to beat. I therefore determine that the Council shall pay the claimants' costs up to 31 December 2017, the date upon which, by their submission of a counter offer (which was not specific in terms), the claimants effectively declined the Council's offer of 22 December 2017. The Council has been the successful party after 31 December 2017, and the claimants should pay its costs from that date.

73. The claimants have not yet submitted any information concerning the costs they have incurred. No criticism is intended of that omission, but it is in contrast to the position taken by the Council, which has provided a Costs Schedule giving details of its own costs, which enable a summary assessment to be undertaken thus saving the delay and further expense of a detailed assessment. If the claimants also wish the Tribunal to carry out a summary assessment of their costs they are invited to submit, within 14 days of the date of this addendum, details of any costs they incurred *in respect of the reference* (with supporting copy paid invoices or other such

proof of payment) for the period between the date the notice of reference was filed and 31 December 2017. Those costs will then be summarily assessed, and the amount awarded will be deducted from the costs incurred by the Council post 31 December 2017 (which are summarily assessed below) and which I determine the claimants should pay.

74. The Council provided Costs Schedules at the opening of the hearing on 10 January 2018 together with updates that include work undertaken following the hearing. They can be summarised as (post 31 December 2017):

1. Council's in-house Solicitors' costs (Fabian Peter - 5 hrs 12 min @ £165 per hr)	£ 858.00
2. Counsel's fees	£ 3,975.00
3. Expert witness charges (post hearing)	£ 406.00
TOTAL [plus VAT]	£ 5,239.00

75. Regarding (1) Legal costs, I note that items 30 and 31 of the revised schedule relate to the filing and service of the skeleton argument, and the delivery of hard copy bundles to the Tribunal. These are administrative steps and not chargeable solicitor's tasks and I therefore disallow the £280.50 claimed under those heads. As to (2), Counsel's fees, item 38 of the schedule relates to "advice on costs" which would ordinarily be part of the brief fee itself. The £375 claimed under this head is disallowed.

76. In connection (3), Mrs Covill's expert witness report of 27 September 2017 was based upon a fixed fee of £6,385.60. A further charge of £3,500.00 was claimed in the schedule under the heading "witness statement" and upon this being queried by the Tribunal, the Council's solicitor advised that it actually related to the amended version of her report served on 22 November 2017. The only charges in the schedule relating to the expert's fees for the period commencing 1 January 2018 were the £406.00 referred to above for post hearing submissions. It seems to me that the £3,500 claim for to the amended report would not in any event be justified even if related to work undertaken in 2018 as the amendments to the original report (which were listed in an attachment (bundle page 113)), were not extensive and principally consisted of corrections and minor alterations to the text. It also stated that "No new facts or evidence has been introduced via these amendments", and the valuation remained the same.

77. In my judgment, the costs incurred by Mrs Covill for preparation for, and attendance at, the hearing and the conference should be the responsibility of the claimants, and I consider that the fairest conclusion would be to simply to allow the Council a lump sum comprising half the fixed fee for the report (that sum to include the £406 referred to above) for expert's costs post 31 December 2017.

78. The allowed costs are therefore:

Legal fees		£ 577.50
Counsel's fees		£3,600.00
Expert's fees		£3,192.80
Sub Total	£7,370.30	(Plus VAT)

79. I determine therefore that the claimants shall be liable for the Council' costs of £7,370.30 (plus VAT where applicable), against which their costs when summarily assessed are to be offset. If the claimants do not take the steps I have identified in paragraph 73 above towards obtaining a summary assessment of their own costs, they must pay the Council's costs in full within 28 days of today, i.e. by 14 May 2018.

DATED: 17 April 2018

P R Francis FRICS