UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 162 (LC)
UTLC Case Number: ACQ/84/2017

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – waste transfer and skip hire business extinguished – dispute as to whether pre-valuation date business losses due to shadow of the scheme – implication of that for assumed maintainable earnings figure – dispute as to appropriate multiplier – comparability of quoted companies and other company sales transactions – whether use of profit before tax multiplier appropriate to reflect claimant's lack of debt – working capital adjustment – total compensation (including agreed items) determined at £8,116,023

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN: WELCOCKS SKIPS LIMITED

Claimant

and

NETWORK RAIL INFRASTRUCTURE LIMITED **Respondent**

Re:Railway Sidings
Bolina Road,
Bermondsey,
London, SE1

Before: Her Honour Judge Alice Robinson and A J Trott FRICS

Sitting at: Royal Courts of Justice, Strand, London, WC2A 2LL
on
9 January 2019 – 16 January 2019

Alexander Booth QC, instructed by Squire Patton Boggs, for the claimant
Rebecca Clutten and *Daisy Noble*, instructed by Eversheds Sutherland, for the respondent

The following cases are referred to in this decision:

Director of Building and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111
Horn v Sunderland [1941] 2 KB 26
Optical Express (Southern) Limited v Birmingham City Council [2005] 2 EGLR 141

DECISION

Introduction

1. This is a reference by Welcocks Skips Limited ("the Claimant") to determine the compensation payable upon the extinguishment of its business of a waste transfer station, skip hire and recycling station at Bolina Road, Bermondsey, London SE1 ("the Premises") owing to a compulsory purchase by Network Rail Infrastructure Limited ("the Acquiring Authority") to facilitate the Thameslink 2000 scheme. The Premises were compulsorily acquired under the Network Rail (Thameslink 2000) Order 2006 ("the Scheme") which came into force on 13 December 2006. A notice to treat was served by the Acquiring Authority on the Claimant on 9 November 2011 and a notice of entry was served on 23 February 2012. The Acquiring Authority took possession of the Premises on 26 June 2012 (the "Valuation Date").

2. Mr Alexander Booth QC of counsel appeared on behalf of the Claimant and called Mr Brian Lewis, formerly Divisional Sales and Marketing Manager (Disposal and Recycling Division) of Veolia Environmental Services (UK) plc[1]; Mr David Mitchell, a Chartered Accountant and a Partner and Head of Valuations (UK) in BDO LLP; Mr Frank Cocks, the Director of the Claimant; and Mr Andrew Crawford MRICS a member of Matthews & Son LLP.

3. Ms Rebecca Clutten and Ms Daisy Noble of counsel appeared on behalf of the Acquiring Authority and called Mr John Hughes, who at the relevant time was employed by the Acquiring Authority as Development Manager (Consultation and Consents) for the Scheme; Mr Rainer Zimmann, a Chartered Engineer, Chartered Waste Manager and Chartered Water and Environmental Manager and an Associate Director of Ove Arup & Partners Limited; and Mr Charles Lazarevic, a Chartered Accountant and Director of Vero Consulting Limited.

Facts

4. From the evidence and the statement of agreed facts and issues we find the following facts.

5. Prior to the Valuation Date, the Claimant operated a waste transfer station, skip hire and recycling station at the Premises which comprised activities including waste sorting, recycling (albeit that the extent and nature of recycling carried on is in dispute), skip hire, supply of roll-on roll-off bins, 'wait and loads' operations and site clearance.

6. At the Valuation Date the Premises were held under four leasehold interests (the "Leases") as follows:

    (i) Lease between (1) Network Rail Infrastructure Limited and (2) Welcocks Skips Limited dated 25 November 2003 (the "Area A Lease");

[1] Known as Cleanaway UK prior to its acquisition by Veolia

(ii) Lease between (1) Network Rail Infrastructure Limited and (2) Welcocks Skips Limited dated 25 March 2010 (the “Area B Lease”);

(iii) Lease between (1) Network Rail Infrastructure Limited and (2) Welcocks Skips Limited dated 18 May 1992 (the “Area C Lease”); and

(iv) Lease between (1) Network Rail Infrastructure Limited and (2) Welcocks Skips Limited dated 26 June 2009 (the “Area D Lease”).

7. The Leases of Areas A and C (the “Reference Land”) were subject to the protection of the Landlord and Tenant Act 1954 (the “1954 Act”). The Leases of Areas B and D did not benefit from the protection of the security of tenure provisions in the 1954 Act. The Leases of Areas B and D were terminated by the Acquiring Authority pursuant to contractual notices served on 17 October 2011.

8. The Claimant originally began its operations from the Premises in 1990 and initially only occupied the land now demised the Area A Lease . The Claimant subsequently took Leases of the other three areas. Area C was previously sublet to F M Conway, who took up occupation of the area demised by the Area C Lease on 1 July 2005. F M Conway vacated Area C on or around 31 January 2012. As at the Valuation Date, the Claimant had possession and use of Area C.

9. Areas A and C shared a common access route from Bolina Road, such right being reserved under the relevant Leases. A right of way would therefore have existed between Areas A and C for the use of the Claimant.

10. The following is the chronology of the making of the 2006 Order and its subsequent implementation:

(a) The original application for a Transport and Works Act Order (“TWAO”) facilitating the Thameslink 2000 Scheme was made on 19 November 1997. During 1997 the Claimant was notified by the Acquiring Authority’s predecessor (Railtrack) that the Premises were to be subject to permanent acquisition and/or temporary possession powers pursuant to a TWAO. The Claimant and Railtrack had a meeting on 21 October 1997 in which the Claimant became aware of the potential impact of the TWAO upon the Premises.

(b) By a letter to the Secretary of State dated 13 January 1998, the Claimant objected to the TWAO application on the grounds that the order, even just the temporary possession powers, would destroy the Claimant’s profitable business.

(c) A further application was made for a variation to the TWAO on 23 September 1999. The applications were consolidated on 3 April 2000. Further correspondence was also sent by Railtrack to the Claimant during 2000 relating to the TWAO and its impact upon the Premises.

(d) The Scheme TWAO was made on 22 November 2006 following a second public inquiry that took place between September and December 2005 and came into force on 13 December 2006.

(e) From 13 December 2006 onwards, the Premises were formally subject to the prospect of compulsory acquisition pursuant to the Scheme. On 24 July 2007 the Secretary of State announced funding for the whole Scheme but this decision was reviewed following the financial crisis of 2008. On 25 November 2010 the Secretary of State announced that, following the government's spending review, the government would fund and deliver the Scheme in its entirety.

(f) By letter dated 3 December 2010, the Acquiring Authority wrote to the Claimant enclosing a notice under Section 5A of the Acquisition of Land Act 1981 seeking information about the Claimant's continued ownership of the land. Prior to this formal notice being served, the Claimant's understanding of the potential impact upon the Premises derived from the discussions it had held with Railtrack between 1997-2000 and the existence and contents of the Scheme.

(g) In 2011 the Claimant sought to come to an agreement with the Acquiring Authority to share occupation of the Premises during the period of the works which were permitted by the Scheme. In a letter dated 6 October 2011 the Acquiring Authority agreed to share occupation of the Premises and agreed that the Claimant could retain exclusive possession of part of the Premises. On this basis, the Acquiring Authority confirmed that notice to treat would only be served in order to preserve its compulsory purchase powers; the Acquiring Authority was not intending to exercise those powers in respect of the Premises "at this time". Notice to treat was duly served by the Acquiring Authority on 9 November 2011.

(h) In a letter dated 23 February 2012, the Acquiring Authority gave notice to the Claimant that it was no longer able to share occupation of the Premises with the Claimant. On the same day it served a notice of entry on the Claimant authorising the Acquiring Authority to enter on and take possession of the Reference Land after 31 May 2012. Possession was taken on 26 June 2012, the Valuation Date.

(i) The Claimant took a short term let of premises at Erith (the "Erith Site") to assist in closing down the Claimant's business, including the storage of vehicles and plant prior to sale. Waste transfer activities were not permitted nor possible at the Erith Site.

11. But for the Scheme, the Claimant would have continued to operate its business from Areas A and C. The Claimant remains extant for the purposes of its compensation claim.

The claim

12. The claim for compensation has eight heads:

(1) Shadow losses
(2) Business value
(3) Corporation tax liability
(4) Professional fees
(5) Staff payments
(6) Miscellaneous losses
(7) Statutory loss payment
(8) Statutory interest

Heads (4) to (6) have been agreed in the sum of £558,387.37. It is agreed that no statutory loss payment is due under head (7). On the first day of the hearing, by agreement, the Claimant withdrew its claim under head (3). Head (8) falls to be calculated when the rest of the compensation has been determined. There is no claim for the value of land taken. Accordingly, the outstanding issues for the Tribunal are the determination of heads (1) and (2).

13. Under head (1), shadow losses, the Claimant asserts that it lost trade from Veolia ES Cleanaway (UK) Limited ("Veolia Cleanaway") in the period 2010 to 2012 in the sum of £610,206 due to the threat of compulsory acquisition of the Reference Land. The Acquiring Authority's case is that the Claimant lost such trade for reasons unrelated to the Scheme and that the Claimant has not proved its case that the loss of trade was caused by the Scheme. However, the Acquiring Authority does not challenge the figure relied upon by the Claimant. Thus, if the Tribunal is satisfied that the trade was lost only because of the Scheme, there is no dispute that the appropriate compensation is £610,206.

14. Under head (2), business value, it is agreed that the Claimant is entitled to compensation for the total extinguishment of its business subject to the deduction of income received after the valuation date as discussed in paragraph 17 below and the release of working capital (if to be deducted) as discussed at paragraph 162. Both parties' experts calculate the value of the business by reference to its future maintainable earnings before interest, taxation, depreciation and amortisation ("EBITDA" or "the multiplicand"). The multiplicand is then capitalised by an appropriate multiplier. The Claimant, but not the Acquiring Authority, also calculates the value of the business by reference to an alternative multiplicand, namely profits before taxation ("PBT"), and a different multiplier.

15. As to the multiplicand, an EBITDA figure of £1.1m is agreed between the parties on the basis that the Claimant lost the Veolia Cleanaway business for reasons that had nothing to do with the Scheme. If the Tribunal considers that some Veolia Cleanaway business would have continued absent the Scheme but at the levels generated prior to 2008, the parties are agreed that the appropriate multiplicand is £1.21m. If the Tribunal considers that the Veolia Cleanaway business would have continued absent the Scheme at the level generated in 2008/2009, then the parties are agreed that the appropriate multiplicand is £1.3m.

16. As to the multiplier, the Claimant's expert, Mr Mitchell, adopts figures of 7.0 from comparable quoted company multiples ("QCM") and 7.6 from comparable transaction company multiples ("TCM") and applies them to his EBITDA multiplicand of £1.3m to give enterprise values of £9.1m and £9.88m respectively. He adopts a comparable PBT multiplier of 12.0 and applies it to his PBT multiplicand of £1.1m to give an equity value of £13.2m. He then averages the three results to give a valuation on extinguishment of £10.727m. The Acquiring Authority's expert, Mr Lazarevic, adopts a multiplier of 4.4 which he obtains from two comparable TCMs and applies it to his EBITDA multiplicand of £1.1m to give a valuation on extinguishment of £4.84m.

17. The parties agree that the sum of £688,364 should be deducted from the extinguishment value of the business, comprising:

(i) income of £288,474 from the New Covent Garden Market Authority ("NCGMA") received after the Valuation Date; and

(ii) proceeds of £399,890 from the sale of fixed assets.

18. In addition, Mr Lazarevic makes a further deduction of £364,000 for the release of working capital.

19. The Claimant therefore claims £10,038,636 under head (2) whereas the Acquiring Authority's assessment is £3,787,636.

The law

20. The basis for the Claimant's entitlement to compensation under disputed heads (1) and (2) is section 5, rule (6) of the Land Compensation Act 1961, which states:

> "5. Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:
>
> …
>
> (6) The provisions of rule (2) [the open market value of land taken] shall not affect the assessment of compensation for disturbance or any other matter not directly related to the value of land."

21. There is no dispute about the applicable law. The guiding principle is one of 'equivalence': *Director of Building and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 per Lord Nicholls at page 125C. This means the Claimant has the right to be put, so far as money can do it, in the same position as if the land had not been taken from him: *Horn v Sunderland* [1941] 2 KB 26 per Scott LJ at page 42. A claimant should not be left in a position that is either better or worse due to the acquisition being compulsory.

22. It is well established that business losses are claimable pursuant to rule (6), subject to the Claimant satisfying the three conditions set out in *Shun Fung*, i.e. that:

(i) there is a causal connection between the compulsory acquisition and the loss suffered;

(ii) the loss is not too remote; and

(iii) the claimant has behaved reasonably.

23. Compensation awarded under rule (6) forms part of the value of the land. In this instance, value is 'value to the owner'. The parties are agreed that the Claimant will receive 'value to the owner' if it receives compensation reflecting the market value of its business at the Valuation Date.

24. In calculating future losses pursuant to rule (6), facts and events occurring after the date of dispossession may generally be taken into account, and it is for the Tribunal to determine the question of the weight that may be given to them as indicators of loss at the date of dispossession: *Optical Express (Southern) Limited v Birmingham City Council* [2005] 2 EGLR 141, per Mr PH Clarke FRICS at page 153M.

Issue 1: Shadow losses

(i) Evidence

25. It is the Claimant's case that had it not been for the threat of compulsory acquisition under the Scheme it would have continued to receive income of £890,000 per annum from Veolia Cleanaway from 2010 until the Valuation Date, this being the average turnover (rounded) achieved in 2008 and 2009. There is no dispute about the level of trade the Claimant enjoyed from Veolia Cleanaway (and its predecessor Cleanaway Limited Croydon) which (from 2001) is as follows:

Date	Turnover
2001	£389,524
2002	£533,485
2003	£508,596
2004	£517,449
2005	£542,291
2006[2]	£163,242
2007	£211,799
2008	£814,297
2009	£972,168
2010	£143,229
2011	£281
2012	Nil

26. Therefore, the loss of turnover was £746,771 in 2010 and £890,000 (rounded) in 2011[3]. For 2012 the Claimant apportioned the assumed annual turnover of £890,000 on a pro rata basis (from 1 January to 26 June) to give a loss of turnover of £397,248. (We consider the correct

[2] This was the year Cleanaway was sold to Veolia. The 2006 income comprises £152,275 from Cleanaway Limited Croydon and £10,967 from Veolia Cleanaway.
[3] For example, the 2010 the calculation is £890,000 - £143,229 = £746,771.

apportionment is £430,410[4].) The total loss of turnover from 2010-2012 was said to be £2,034,019.

27. To obtain the loss of profits the Claimant, advised by BDO (Mr Mitchell) in two reports dated 19 May 2015 and 15 December 2017, takes a "cost-to-income margin" of 70% (or, in other words, the gross profit margin is taken at 30%). In these reports Mr Mitchell says:

> "We consider this margin to be conservative, as the cost-to-income margin for the overall business averaged circa 60% for the period between 2007 and 2011."[5]

The "cost" is the cost of sales excluding depreciation and administrative expenses.

28. Applying a gross margin of 30% to the lost turnover of £2,034,019 gives a loss of (gross) profits of £610,206 which is the amount of the claim for shadow losses. The compensatable loss should be for the loss of net profit, i.e. after administration expenses have been allowed for; see, for instance, *Optical Express* at page 149[74]. The adoption of a loss based on gross profit (albeit at a margin that was less than the historic average) assumes there would have been no reduction in administration costs arising from the reduced turnover. We think this is questionable but as the Acquiring Authority have accepted the Claimant's figure should we find in favour of the Claimant on Issue (1) we do not consider the matter further.

29. It should be noted that the loss being claimed is only in respect of the trade with Veolia Cleanaway. The Claimant also traded with other subsidiaries of the Veolia Group both before and during the shadow period 2010-2012, but no loss of profits claim is made in respect of such trade.

30. The Acquiring Authority deny any causal link between the threat of compulsory acquisition under the Scheme and the shadow losses and therefore say that no compensation is payable under this head of claim.

31. The Claimant's evidence on this issue was largely provided by Mr Lewis and Mr Cocks. Mr Cocks stated that the Claimant had a strong working relationship with Veolia Cleanaway (and its predecessor, Cleanaway Limited Croydon) who worked out of Croydon for many years.

32. It is evident from the Claimant's turnover figures that trade dropped significantly in 2010. In his first witness statement Mr Cocks stated that:

> "24. In 2010, Veolia reduced the amount of tonnage that was handled by Welcocks for them. In the first instance, I was told verbally, during a telephone conversation with Brian Lewis of Veolia in or around early 2010, that Veolia must be able to guarantee their waste management and that they were concerned that Welcocks could not provide this guarantee. This decision that Welcocks could not provide any certainty in respect of

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[4] 177/366 days x £890,000 = £430,410. The actual income from Veolia Cleanaway in 2012 is said to be nil.
[5] The average cost-to-income margin for the years 2007-2011 is 58.6%.

Veolia's waste management was, in my opinion, due to the rumours in the industry in 2010 relating to the Thameslink proposals.

25. Once we received the Notice of Entry from Network Rail…, I asked that Veolia put in writing the reason for their decision to cease using the Welcocks business for their waste management needs...[copy exhibited]

26.Welcocks did not inform Veolia of the Thameslink proposals as I was, at the time, under the impression that Welcocks would be able to continue to operate from the Bolina Road Site. I suspect that Veolia were told of the Thameslink proposals by a competitor in the waste management sector."

33. Mr Lewis responded to Mr Cocks's request by email dated 12 December 2012 which stated:

"Following our recent discussion, I confirm that there were certainly rumours in the trade about the long term future of your facility last year, and in discussions with my colleagues in the trade waste side of the business, this had also been mentioned. As you are aware they are looking to dispose at long term guaranteed disposal outlets, with agreed rates, so that they may contract securely with their customer base, should this not be possible with any given site, they will contract elsewhere."

34. In his second witness statement, which deals with the contract with NCGMA, Mr Cocks stated that between February and June 2012 he was keen to maintain business as usual with customers so waited to inform them that the business was to close until it became clear in June 2012 they would not be able to relocate (paragraph 25). In his third witness statement, Mr Cocks said it was not the case that the market was unaware of the potential compulsory acquisition of the Premises until after the Acquiring Authority's letter dated 3 December 2010. He stated that after confirmation of the Scheme and in particular between 2008 and 2010 there were rumours in the market relating to the Scheme and its potential impact on the land affected including the Premises, i.e. the threat to the Claimant's business as a result of the threat of compulsory acquisition. The Claimant did not tell its employees or customers about this threat to avoid losing business: "We therefore maintained secrecy, to the extent that we were able to in the light of the rumours in the market surrounding the order" (paragraph 32). He believed the market's perception was that the Claimant's business was potentially at risk and it was for this reason only that Veolia Cleanaway ceased using the Claimant: "That was the basis upon which I had discussions with Mr Brian Lewis in late 2009 and early 2010." (paragraph 33).

35. In cross examination Mr Cocks said he was there referring to the discussion he had with Mr Lewis at a Christmas lunch in 2009 and what Mr Lewis told him in 2010 after Mr Cocks rang him up to ask why trade had dropped off. He rang Mr Lewis because, although he worked in the Disposal and Recycling Division (which bought waste from the Claimant after it had been sorted) rather than the Collection Division which was responsible for tipping at the Premises, Mr Lewis was the main contact he had had for many years, and was a senior manager in Cleanaway and then Veolia. There was nothing in writing apart from the December 2012 email because the Claimant and Veolia Cleanaway did not correspond; their business was mainly done over the phone. Mr Cocks did not ask Mr Lewis for confirmation of events in writing earlier because he had no reason to do so before 2012, after the Acquiring Authority had taken possession of the Premises. Mr Lewis also said that letters would not have been written; all the work was done by

invoicing against purchase orders with any issues being dealt with over the phone. When asked to explain why other Veolia companies continued to trade with the Claimant, Mr Cocks said different depots had different managers and, by implication, took different views. He said the Claimant may have lost business from smaller clients though he was not aware of any.

36. Mr Lewis was the Divisional Sales and Marketing Manager in the Disposal and Recycling Division of Cleanaway and then (from 2006) in Veolia. He first met Mr Cocks in 1986 when he worked at Cleanaway and was responsible for managing the contract between Veolia Cleanaway and the Claimant for disposal and recycling. He stated that the Claimant was used due to its location, prices and turnaround times which were important to Veolia. He was in regular contact with Mr Cocks, with whom he had a longstanding and positive relationship, and was responsible for negotiating disposal and recycling rates with him. The rates payable by the Claimant had to be reasonable so they could be passed on to Veolia Cleanaway's Collection Division. Prices would be negotiated once or twice a year.

37. In his first statement Mr Lewis said he first became aware the Claimant's site was under threat of compulsory purchase after being informed of it by Mr Cocks during a formal annual waste industry Christmas lunch in 2009. He was told there was a risk the Premises could be acquired but the threat had been around for years and the Claimant hoped to carry on trading as the compulsory purchase had not yet happened. He was also told it would be very difficult for them to find a suitable alternative site. Mr Lewis also stated he attended a meeting with other managers from Veolia in late 2009/early 2010 when it was reported that there was talk among Veolia drivers that the Claimant was going to close in the not too distant future as their site was being compulsorily acquired. He and the other Veolia managers were well aware of the uncertainty surrounding the Claimant's future. "As a result of the uncertainty surrounding the future of the Welcocks business, the decision was taken by Veolia to cease trading with Welcocks and to place the waste contract elsewhere" (paragraph 18). In his view, had the Premises remained open and the Claimant continued to trade, Veolia would have continued to use the Claimant due to their reliability and competitive prices.

38. Mr Lewis gave further details in his second statement after he said he had had the opportunity to look back at his diaries for the period. The meeting of Veolia managers took place on 24 November 2009. He took the opportunity to discuss 'back to back' business deals with other managers because it was important to understand where their depots were tipping waste. He had budgets and targets to meet and if Veolia Collection Division was tipping with a company, that company would usually then tip their waste with Veolia Disposal and Recycling Division in turn. He stated it was at this meeting he 'would have heard' there was a risk the Premises were going to close as a result of compulsory purchase and the same was true with another customer in Bermondsey who was also subject to the Scheme. When asked in cross examination about his use of the phrase 'would have', he said that was his recollection, drivers are great gossips and a manager said his driver told him about the rumour so Mr Lewis decided to check out the position.

39. After the Veolia's management meeting in November 2009, Mr Lewis attended the Chartered Institute of Waste Management lunch on 11 December 2009. He asked Mr Cocks about the risk to the Claimant and had the conversation reported in his first statement (see paragraph 37 above). Mr Lewis was asked in cross examination why his first statement, written in 2016, said he first heard about the threat of compulsory purchase from Mr Cocks at the

industry lunch whereas in his second statement in 2018 he said he first heard about it at the managers' meeting. He said he had not checked his diary for the exact dates until his second statement and when he made his first statement "I didn't even think about it, I was dealing with it more generally." As to the discrepancy between his evidence and the 2012 email which says he heard about the rumours "last year" i.e. 2011 not 2009, he said he just sent a quick email without double checking the dates and he did not see it (the dates) as significant at the time although he accepted that now it seemed a surprising error.

40. In answer to questions from the Tribunal Mr Lewis said he did not pass on the information he was given by Mr Cocks to the Collection Division. However, in his second statement he said that drivers would pick up on any potential issue with disposal sites and pass this on to their depot managers who would switch sites without waiting for the site to close if it was thought that a particular provider was not going to be able to continue to provide a service. This was so they could secure the most competitive prices rather than effectively being held to ransom (our word not his).

41. In cross examination Mr Lewis accepted that it was the Collection Division which was responsible for deciding where to tip the waste, but he could not remember who the manager was at the time, they changed so often.

42. For the Acquiring Authority Mr Hughes drew attention to the chronology of the Scheme. He stated that although funding was announced for the Scheme in 2007, there was uncertainty as to whether the entirety of the works would be carried out until the announcement on 25 November 2010 that it would proceed. The part most at risk related to the proposed works at London Bridge and which would affect the Premises. When asked in cross examination what evidence there was of any uncertainty he referred to press reports but accepted that he had not produced any of them nor said in his statement that any uncertainty was public knowledge. Nor did he say that any press reports would have enabled a member of the public to realise that the uncertainty about London Bridge affected the Premises. He agreed that there had been no government statements in between those in 2007 and 2010. He could not say what the public would have known but there was no more likelihood that they would have known of a threat to the Premises in 2009 than in 2007. He said orally, but not in any of his written evidence, that at three meetings in 2011 the Claimant had not told the Acquiring Authority that they were losing business because of the impending implementation of the Scheme.

43. In its evidence, the Acquiring Authority put forward a number of reasons why the claimant lost Veolia Cleanaway's business in the period 2010/2011 or would have done in the future. Some of these it no longer relies upon. Veolia's Integrated Waste Management Facility ("IWMF") in the London Borough of Southwark did not open until January 2012 after the trade had been lost and the Acquiring Authority accepts it could not affect the shadow loss claim. Development of the Olympic Park in Stratford was relied upon but after seeing Mr Lewis's evidence that Veolia did not tip any waste from the Olympic Park at the Premises this point was also dropped.

44. In his first report Mr Zimmann suggested it was unlikely Veolia Cleanaway would have ceased trading with the Claimant because of uncertainty about the future availability of the Premises because commercial waste contracts were short term and the business highly

competitive so there was a lot of flexibility. Veolia Cleanaway may have lost some key commercial contracts or decided the Claimant's recycling rates were too modest having regard to corporate responsibility issues which were important to Veolia. Their corporate strategy was to achieve audited recycling targets. He also stated that, having spoken to Mr Keith Riley, a former Managing Director of Veolia from 2002 to 2012, the Claimant may have lost trade because of a difficult transition when Veolia acquired Cleanaway, the latter having less sophisticated contractual arrangements. After the Claimant challenged whether Mr Riley was Managing Director of Veolia, Mr Zimmann accepted he was the Managing Director of Technical Services, but said he was also a Director of several Veolia companies from 2001 to 2012. There were changes in staff after the acquisition and in Mr Zimmann's opinion, it would be wrong to assume that the Claimant's relationship with Veolia Cleanaway would have remained unchanged.

45. In his last report, Mr Zimmann provided evidence which shows that the drop in waste tipped by Veolia Cleanaway at the Premises coincides with the reopening by Veolia Cleanaway of the Croydon Waste Transfer Station ("WTS"). That facility was closed from 2002 to 2009 but re-opened in April 2010, something he was not previously aware of, which was when the trade with the Claimant dropped. In cross examination he said this was not information he had been given by any of the people he had spoken to at Veolia. It arose because of information he had recently been sent by the Environment Agency.

46. Mr Cocks's fourth statement responds to the reasons given by the Acquiring Authority for why the Veolia Cleanaway trade stopped. As to concern about the Claimant's recycling rates, Mr Cocks said that neither Cleanaway or Veolia Cleanaway ever requested reports from the Claimant relating to recycling rates. Mr Cocks said Mr Riley only held the position of Managing Director of a subsidiary, Veolia ES Selchp Limited, and only from June 2011 to February 2012.

47. As to any change in contractual arrangements, Mr Cocks stated that the Claimant was always given a customer purchase order by Veolia Cleanaway and denied that any change in procurement procedures would have affected the Claimant's relationship with Veolia. Mr Lewis said there was no change in senior or middle management after Veolia acquired Cleanaway and if there had been any change in procurement procedures he would have heard about it. The procedure remained the same at all times when he was working for Cleanaway and Veolia: Veolia would raise a purchase order for a specified amount, and when waste was tipped a WTS provider such as the Claimant would raise an invoice which Veolia would then tick off against that purchase order and when the amount was used up Veolia would raise a further purchase order.

48. As to the Croydon WTS, Mr Lewis said Veolia drivers would not use this in preference to the Premises because it is more cost effective to tip waste close to where it is collected. Vehicles collecting and tipping waste in the Bermondsey area would not tip in Croydon because of the time, distance and costs involved. Thus, vehicles based in Croydon would leave the depot, go and collect waste, then tip it at the nearest local provider before returning to Croydon with the last load at the end of the day. Similarly, waste collected in Croydon would have been tipped in Croydon where there were many waste transfer stations even before the re-opening of Veolia's Croydon WTS.

49. In cross examination Mr Lewis did not dispute that the only evidence as to where waste tipped at the Premises had been collected from was 'south London' which includes Croydon. He also agreed that if waste had been collected in, for example Bromley, it could have been taken to either Croydon or the Premises since they were equidistant, but where the waste was taken would depend on where the next job was and whether there was a local facility, there being at least two waste transfer stations in Bromley. Furthermore, Veolia would not take waste to Croydon just because it was a site owned by them, because it charged internally and would not run at a loss just to keep the business. As to the fact that the IWMF accepted waste from a wide area, Mr Lewis said it depended on the type of waste and its potential for recycling. This could explain why some waste had been brought a longer distance than would normally be expected e.g. Windsor or Dover to Southwark.

50. Mr Crawford also disputed that Veolia Cleanaway would have used Croydon WTS in preference to the Claimant for similar reasons and by reference to data as to the dates and times of visits to the Premises by particular vehicles. His evidence was that some vehicles would arrive early in the morning, then return later in the morning with further loads, suggesting the waste had been collected locally. However, he accepted in cross examination that these were only a few of the vehicles which tipped at the Premises, many of which only tipped once a day. He also stated that the waste delivered to Croydon WTS was of a different type to that tipped at the Premises. Nevertheless, he agreed that the Premises received a substantial proportion of waste in the same category as that received at the Croydon WTS[6] and which accounted for around half of Veolia Cleanaway's waste received by the Claimant. Finally, he referred to other waste facilities in the Croydon area and stated that it was likely that waste collected by Veolia Cleanaway in the locality of Croydon would have been deposited in one of those rather than at the Premises. He had not looked at the date waste management licences for these sites had been granted and his material showed that only three of the sites he relied upon had a licence at the relevant time. However, he made the point that he had subsequently discovered two other sites for which the Environment Agency had returns in 2008/2009.

(ii) Discussion

51. In its submissions, the Acquiring Authority focused on the Claimant's explanation for the loss of Veolia Cleanaway trade and the only alternative explanation relied upon was the opening of the Croydon WTS. Notwithstanding this and that it is for the Claimant to prove its case rather than for the Acquiring Authority to explain the loss in trade, the Tribunal considers it convenient to consider first the various grounds on which the Acquiring Authority's evidence suggests that the Veolia Cleanaway trade would have been lost in any event in the period leading up to the Valuation Date.

52. There is no doubt that because of the relatively short-term nature of the contractual arrangements between the Claimant and Veolia Cleanaway, the latter could have ceased tipping at the Premises at short notice. However, the fact that it had the flexibility to do so does not of itself explain why as a matter of fact it did cease to tip there. There is no evidence that the Claimant was undercut by someone offering better terms, but Mr Lewis said that the variation in the Claimant's trade with Veolia Cleanaway would be affected by Veolia winning or losing

[6] Category reference 200301: mixed municipal, commercial and industrial waste

business (see paragraph 78 below). In what is acknowledged to be a highly competitive industry, the Claimant had secured and maintained business from Cleanaway and then Veolia Cleanaway for over 20 years since 1986. Pricing changes may well have affected the level of trade which the figures show fluctuated over time and competitors can use price to gain market share. However, the Claimant would have gone out of business if it was not generally offering competitive rates. In our judgment pricing alone seems unlikely to account for the total cessation of business from a long standing and substantial customer.

53. Further, although he managed Veolia Cleanaway's Disposal and Recycling Division rather than the Collection Division, Mr Lewis's evidence that he discussed with Collection Division managers the 'back to back' deals which were going on was not challenged. The Collection Division was the Claimant's customer (for the tipping of collected waste) and the Claimant was the Disposal and Recycling Division's customer (for the landfill tipping of sorted and processed waste). Mr Lewis said that he had to negotiate reasonable rates with the Claimant in order that it would in turn reflect these in the rates it charged the Collection Division. Price was one of three key drivers that determined where Veolia's depot managers chose to tip the collected waste; the other two being location and turnaround times. Overriding these were the need for Veolia to be satisfied that a waste transfer station could provide continuity and security (6 to 12 months) of service. Decisions about where to tip waste were taken by the Collection Division twice a year. Mr Lewis acknowledged that this arrangement was essentially insecure so far as the receiving waste transfer station was concerned. It was not suggested to Mr Lewis in cross examination that a lack of competitiveness on the Claimant's part may have been a reason for the drop in trade. On the contrary, he said Veolia used the Claimant because it was competitive.

54. There is no evidence that the loss of Veolia Cleanaway's trade had anything to do with the Claimant's recycling rates. Firstly, Mr Cocks's evidence is that he was never asked by them for information about recycling rates. Secondly, Mr Crawford's unchallenged evidence is that the overwhelming majority of the waste from Croydon WTS appeared to go to landfill in Essex. In other words, if waste was being diverted by Veolia Cleanaway from the Premises to their Croydon WTS, it was not to increase the rate at which the waste was being recycled. In this connection we note that the rate at which the waste was being recycled by the Claimant was said by Mr Cocks to have risen from 62.85% in 2010 to 77% in 2012. (Mr Cocks's definition of "recycling" was disputed by Mr Zimmann who said the highest recycling rate achieved by the Claimant was 59.5% in 2011.) It is notable that it was not suggested to Mr Lewis in cross examination that Veolia's corporate recycling strategy would have affected its business with the Claimant. This is something he would be expected to know about as manager of the division that was buying recycled and other waste material from the Claimant.

55. Mr Zimmann's evidence about the different contractual arrangements of Cleanaway and Veolia was not persuasive. His description of these in his first report is not inconsistent with the evidence of Mr Cocks and Mr Lewis about the contractual arrangements between the Claimant and Veolia Cleanaway. There is no reason why a customer purchase order would not be subject to Veolia's general conditions. He also refers to Mr Riley's information about power struggles within various divisions which did not settle down until after 2007 and contractual arrangements were not aligned until approximately 2009. It is of interest that there was a drop in the Claimant's trade with Veolia Cleanaway (and the Veolia group generally) in 2006 but a substantial increase between 2007 and 2009. This evidence does not account for a drop in 2010 and 2011.

56. Moreover, Mr Zimmann's opinion that "I believe that Cleanaway was much less sophisticated about its contractual arrangements and procurement procedures than Veolia" (paragraph 11.5 of his first witness statement) is not one attributed in his written evidence to any information provided by Mr Riley, whatever his position with Veolia. Only in cross examination did he assert that this was something Mr Riley said to him. In our view, if this was information provided by Mr Riley, it is surprising that Mr Zimmann did not say so in his report rather than mentioning it as an opinion before referring to any information provided by Mr Riley.

57. Finally on this point, having regard to the competitive and efficient business the Claimant was operating, it is in our judgment inherently unlikely that the Claimant would allow itself to lose such a large customer by not being prepared to sign up to updated contractual arrangements. It is again noteworthy that neither Mr Cocks or Mr Lewis were cross examined about this issue. In our judgment, there is no credible evidence that any difficulties over contractual arrangements arising out of the acquisition by Veolia of Cleanaway account for the drop in Veolia Cleanaway's trade with the Claimant.

58. As to the Croydon WTS, at first sight the coincidence between the opening of this facility and the drop in the Claimant's trade with Veolia Cleanaway appears striking. However, Mr Zimmann produced not only annual but also monthly trade figures, see figure 3 of his fourth report, which show that trade appears to have virtually ceased by the time Croydon WTS opened.

59. The Acquiring Authority criticised the reasons given in the Claimant's evidence as to why Veolia Cleanaway's trade with the Claimant was not diverted to Croydon. We agree that Mr Crawford's evidence as to the timing of deliveries by individual vehicles was only a snapshot and the analysis does not extend to the majority of vehicles delivering to the Premises. Nonetheless, the fact that his attempt to prove by empirical data that vehicles would not have gone to Croydon was unpersuasive does not mean the principles he and Mr Lewis relied upon are unsound. The Acquiring Authority did not dispute the general proposition that decisions as to where to tip waste would be taken on the basis of cost effectiveness. The Acquiring Authority's main point on this aspect of the case was that it is not possible to tell where the waste tipped at the Premises came from other than 'South London' and the figures for the IWMF show that specialist waste may be sent from many miles away to its destination.

60. The characteristics of the IWMF operations are very different from those of the Claimant. As Mr Zimmann told us, the IWMF is an enormous facility which includes an 85,000 tonnes per annum ("tpa") Materials Recovery Facility ("MRF") for sorting household dry mixed recyclables, an 87,500 tpa Mechanical Biological Treatment facility which uses household waste to produce solid recovered fuel for the SELCHP Energy Recovery Facility in Landmann Way SE14 as well as a 25,000 tpa re-use and recycling centre for residents and a 25,000 tpa WTS, making a total capacity of 222,500 tpa. This had increased to 302,000 tpa by October 2012. By contrast, the Premises was much smaller and comprised only a WTS with some 'rudimentary' recycling carried out using a trommel screen and sorting by hand. In our view it is not surprising that the IWMF would attract business from a wider catchment area than the Claimant. Nobody suggested that waste arising in, for example, Windsor or Dover would be sent to the Premises.

61. It may well be that some waste arising in south London which was previously sent to the Claimant would instead be sent to Croydon WTS after it re-opened on the basis that it would be

more cost effective to do so. However it is difficult to believe that all of Veolia Cleanaway's waste previously tipped at the Premises would have been sent to Croydon given it was 19km away. We note that Mr Lewis's evidence to the effect that Veolia Cleanaway would operate an internal charging system was not challenged so the Croydon WTS would not automatically be cheaper than the Premises. Further, there were other waste facilities in Croydon before the Croydon WTS reopened. Mr Crawford identified eight sites within a 3km radius of the Croydon WTS which were likely to have received similar types of waste to that received at the Premises, although only three of these sites were known to have been licensed in 2010. Mr Crawford said in cross examination that the Environment Agency had made him aware of two more such sites, although he did not provide details of them. It is likely there would have been other waste facilities between the Premises and the Croydon WTS and Mr Lewis referred to two such sites in Bromley. If, prior to the opening of the Croydon WTS, it was more cost effective to tip around £800,000 worth of waste per annum at the Premises rather than in Croydon or, say, Bromley, it is unlikely that the opening of a single additional WTS in Croydon would have made it more cost effective to tip all or even the majority of that waste in Croydon instead of at the Premises.

62. Mr Crawford did not think the waste received at the reopened Croydon WTS was diverted from the Premises. Instead he thought Veolia Cleanaway would have diverted it from one or more of the WTSs near Croydon WTS that they already used to dispose of collected waste. So there would be no net effect on the amount of waste received at the Premises. This assumes there was no change in the collection pattern of the Veolia Cleanaway vehicles based at Croydon Depot following the reopening of Croydon WTS given the Claimant's evidence about the importance to the operator of minimising transport costs. But no evidence was given on this point.

63. In addition, although both the Premises and Croydon WTS accepted waste in the category 200301 (mixed municipal waste) which was about half of the waste received from Veolia Cleanaway, Mr Cocks's evidence that the other 40-50% received at the Premises was construction and demolition waste was not challenged, nor was Mr Crawford's evidence that Croydon WTS did not receive such waste. It could not therefore have been diverted from the Premises to Croydon WTS.

64. For all these reasons we are satisfied that the opening of the Croydon WTS cannot account satisfactorily for the total loss of the Claimant's trade from Veolia Cleanaway.

65. While the Claimant may have benefited from the tipping of waste by Veolia Cleanaway that may previously have been tipped at Manor Place WTS, that cannot account for the Claimant's loss of trade prior to the opening of the IWMF.

66. We also note that, as pointed out on behalf of the Claimant, despite the fact that Mr Zimmann spoke to three people who worked for Veolia (see paragraph 3.3 of his first report), apart from Mr Riley's information about contractual arrangements which we have already dealt with, none of them apparently said anything to support Mr Zimmann's theories as to why the Claimant lost all of Veolia Cleanaway's trade prior to the Valuation Date.

67. We turn therefore to the evidence relating to the impact of the Scheme.

68. It was submitted on behalf of the Acquiring Authority that it was inherently implausible that Veolia Cleanaway ceased trading with the Claimant from 2010 onwards as a result of rumours about the Premises being compulsorily acquired for the Scheme. The Scheme was made in 2006 and funding for it announced in 2007. After this the Claimant's trade with Veolia Cleanaway grew significantly. Further, even after Veolia Cleanaway's trade dropped off and funding was confirmed in November 2010, other Veolia companies continued to trade with the Claimant. By contrast, the trade of another Veolia company ceased in May 2009 well before Mr Lewis said he was aware of the risk to the Premises. It was also submitted that Mr Lewis did not work for the relevant department of Veolia Cleanaway, that there was a lack of contemporaneous evidence to support the Claimant's case and that Mr Lewis's evidence as to what he was aware of and when was inconsistent.

69. It was submitted on behalf of the Claimant that the Scheme was funded from 2007 and there was no evidence of any uncertainty about whether it would go ahead in the public domain as opposed to within the Acquiring Authority. Nor was there any evidence that the waste industry would have been aware of any uncertainty affecting the Premises. It was in fact widely known that the premises lay in the path of the Scheme. The precise time when the rumours gathered enough currency to affect Veolia Cleanaway's trade was outside the Claimant's control. The evidence of Mr Lewis and Mr Cocks was demonstrably reliable and credible as well as consistent in important respects.

70. We have not found this an easy issue to resolve. It is useful to begin with the uncontested evidence and we set out below two tables summarising the Claimant's sales history with Veolia Cleanaway, other Veolia companies and third parties from 2006 to 2011.

TABLE 1: Claimant's total sales

Year	Total sales[7] (£)	% Change from previous year	Veolia (all companies) sales[8] (£)	% Change from previous year	Total sales excluding Veolia (all companies) (£)	% Change from previous year
2006	3,310,505		353,429		2,957,076	
2007	4,525,227	36.7	467,904	32.4	4,057,323	37.2
2008	5,272,356	16.5	1,080,706	131.0	4,191,650	3.3

[7] Source: Welcocks' accounts; Mr Mitchell's first report, Volume 4, tab 11, exhibit F
[8] Source: Ibid, Volume 4, tab 11, exhibit H

2009	4,726,655	(10.3)	1,176,635	8.9	3,550,020	(15.3)
2010	3,735,430	(21.0)	254,054	(78.4)	3,481,376	(1.9)
2011	3,174,872	(15.0)	116,700	(54.1)	3,058,172	(12.2)

Table 2: Claimant's Veolia sales

Year	Veolia (all companies) sales (£)	% Change from previous year	Veolia Cleanaway sales[8] (£)	% Change from previous year	Veolia sales excluding Veolia Cleanaway (£)	% Change from previous year
2006	353,429		163,242		190,187	
2007	467,904	32.4	211,799	29.7	256,105	34.7
2008	1,080,706	131.0	814,297	284.5	266,409	4.0
2009	1,176,635	8.9	972,168	19.4	204,467	(23.3)
2010	254,054	(78.4)	143,229	(85.3)	110,825	(45.8)
2011	116,700	(54.1)	281	(99.8)	116,419	5.0
2012	190	(99.8)	-	(100)	190	(99.8)

71. These tables illustrate several points:

(i) Over the period in question Veolia Cleanaway sales were significantly more volatile than sales to other Veolia companies or to the Claimant's third-party customers;

(ii) The exceptional growth in sales to Veolia Cleanaway from 2007 to 2009 of 359% was not explained by the Claimant. This compares with a fall in sales over the same period of 20.2% to other Veolia companies and 12.5% to third party customers;

(iii) The growth in trade with Veolia Cleanaway came at a time (2008 and 2009) which Mr Cocks said was a period during which the rumours in the market about the potential impact of the Scheme on the Premises were "particularly" prevalent[9];

(iv) There was no evidence that the decline in sales to other Veolia companies or to third party customers from 2008 was due to the Scheme. Mr Cocks said that "Whilst turnover declined temporarily in the period of 2008 to 2011, this was due to the world recession and consequent lack of construction being undertaken."[10]

72. The data about the Claimant's trading record with Cleanaway Ltd Croydon goes back to 2001, although the evidence showed they had been the Claimant's customer for 15 years before that. Between 2001 and 2003 this was apparently the Claimant's only Cleanaway customer. From 2004 the Claimant started trading with Cleanaway Ltd and in 2006 it began trading with Cleanaway Ltd Thurrock. But most of the trade between 2001 and 2005 was with Cleanaway Ltd Croydon and sales averaged just under £500,000 pa.

73. Veolia took over Cleanaway in 2006 and thereafter the Claimant sold to six Veolia companies including Veolia Cleanaway who were, apart from 2006 and 2007, the largest Veolia company customer by sales. In 2006 and 2007 the Claimant's largest Veolia customer was Veolia ES Cleanaway Thurrock[11] ("Veolia Thurrock"). Trade with Veolia Thurrock began in 2006 and stopped in May 2009. There was no evidence about why this trade suddenly stopped but the Claimant did not suggest that it was due to the Scheme.

74. Veolia ES all but stopped trading with the Claimant in 2009 and Veolia Basildon only traded for a single year in 2009. There was no evidence about why this trade stopped. On the other hand, both Veolia Tunnel Approach and Veolia ES Rochester began trading with the Claimant in 2009 and continued until 2011. Trade with the Claimant's third-party customers continued at a high, but reducing, level until at least the end of 2011. Mr Cocks said that "For the five months in 2012 when Welcocks was able to operate, turnover was increasing."[12] Such third-party trade only declined by 2% in 2010 and the Claimant does not say that it was adversely affected by the Scheme.

[9] See Mr Cocks's third witness statement at paragraph 31
[10] See Mr Cocks's first witness statement at paragraph 21
[11] Including Cleanaway Ltd Thurrock in 2006
[12] See Mr Cocks's first witness statement at paragraph 22

75. The Claimant's business did not depend upon long-term contracts, although there was a long-term relationship between the Claimant and Veolia Cleanaway. The evidence showed that business was done by phone and not in writing. Formal contracts were eschewed in favour of the issue of purchase orders against which invoices were raised. The award of work depended upon the quoted rates for receiving waste, such rates being regularly reviewed every six months. The evidence was that this was a highly competitive industry.

76. The Acquiring Authority are right to say that nothing happened in 2009 that objectively increased the chances of the Premises being compulsorily acquired. The Premises had been under threat of compulsory purchase since the TWAO came into force in December 2006 and funding was announced in July 2007. Thereafter the Scheme was subject to a government spending review which was not completed until November 2010, eight months after Veolia Cleanaway had stopped trading with the Claimant. In short, nothing had changed for two years at the time the Claimant says the shadow of compulsory purchase fell across its business.

77. The Claimant experienced at least one other sudden cessation of trade from a Veolia company: Veolia Thurrock started trading with the Claimant in 2006 and in that year and in 2007 it had the highest sales to the Claimant of any of the Veolia companies. But that trade stopped in May 2009, well before Mr Lewis said that he heard of the rumours concerning the compulsory acquisition of the Premises at a management meeting in November 2009. So there is a precedent for the cessation of a major trading relationship between the Claimant and a Veolia company that was not attributed to the Scheme, despite that relationship existing largely during the period when the Premises were under threat of compulsory purchase.

78. Mr Lewis was asked in cross examination about the reasons for the fluctuations in quarterly income that the Claimant received from Veolia Cleanaway. He said the trading figures would be affected by Veolia winning and losing business. This would explain the Claimant's pattern of trade with Veolia Cleanaway between 2006 to 2009 which saw a drop in the Claimant's income from the long-term average of about £500,000 pa to just over £163,242, before an increase in 2007 to approximately £211,800 and a quadrupling of trade in the following two years. It might also explain the subsequent drop in trade.

79. In his closing submissions Mr Booth said at paragraph 17:

> "The existence of the Scheme was widely known as was the fact that funding had been approved in 2007 – there is no suggestion otherwise. Also widely known was the fact that the Premises lay in the path of that scheme. Mr Cocks explained (XX) that he was forever addressing queries about the point. That is the start and finish of it."

Such knowledge was attributed earlier in that paragraph to drivers of waste vehicles at the Veolia depot in Croydon. Mr Booth went on to say:

> "…the Scheme had been approved and the Premises were required for it. Hence the rumours about the loss of the Premises."

80. That knowledge was in the public domain by July 2007 but Mr Booth submits the rumours of pending acquisition had not "gathered enough currency" for Veolia Cleanaway to

stop trading with the Claimant until "the turn of 2009/10." It is significant that the surge in sales to Veolia Cleanaway took place (2008 to 2009) at a time when Mr Booth says those rumours existed and Mr Cocks says they were particularly prevalent. Nothing changed between then and March 2010 except, we are told, the rumours gathered currency. But based on what? Objectively nothing happened during that period to encourage the growth of such rumours. We find it surprising that a large company such as Veolia Cleanaway would have decided to stop trading with the Claimant, a company which had satisfied Veolia's operational requirements for some 24 years, and with which it had just significantly increased its business, on unsubstantiated rumours from one or more of its drivers; rumours which, by then, had been circulating for at least two years. That does not seem plausible to us.

81. Mr Lewis said he heard about these rumours at a management meeting in November 2009 which was also attended by the (unidentified) manager of the Collection Division. Mr Lewis and Mr Cocks then discussed the prospective compulsory acquisition of the Premises at a Christmas lunch in 2009 at which Mr Cocks explained the current position regarding the Scheme. Mr Lewis says that he did not pass on this explanation to the Collection Division. Such passivity strikes us as strange given that his own division would presumably lose significant custom from the Claimant if they lost the trade of the Collection Division and where the relationship between Veolia Cleanaway and the Claimant was a personal one between Mr Lewis, Mr Cocks and Mr Welsh. For his part Mr Cocks says that he tried to mitigate any shadow period losses by not telling anyone (employees or customers) about the Scheme. But once Mr Lewis had put the potentially damaging rumours directly to him it seems Mr Cocks did not then contact the Collection Division (the Claimant's customer) to explain the position, as he had done to Mr Lewis. At that time (2009) Veolia Cleanaway represented over 20% of the Claimant's total turnover and, in our opinion, the Claimant should have made more positive efforts to secure that level of trade (assuming it was likely to continue at those levels in the future in the absence of the Scheme) than it apparently did. There is no evidence that the Claimant did anything other than talk to Mr Lewis at the Christmas lunch (and again in a subsequent phone call by which time Veolia Cleanaway had stopped trading with the Claimant). We do not think, under the circumstances, that was sufficient to mitigate its loss.

82. Much was made at the hearing of the email sent by Mr Lewis to Mr Cocks on 12 December 2012. The email does not say in terms that Veolia stopped trading because of the threat of compulsory acquisition, but the email must be read as a whole and in context. The context was that there had been a discussion between Mr Cocks and Mr Lewis at the Christmas lunch in 2009. In the light of the contents of the email it is difficult to see what the discussion can have been about other than the loss of Veolia trade. Mr Cocks's evidence is that "I asked that Veolia put in writing the reason for their decision to cease using the Welcocks business for their waste management needs." The email says, in summary, there were rumours about the long-term future of the Premises that had been discussed amongst Mr Lewis's colleagues. They wanted long-term guaranteed disposal outlets and if that was not possible they would go elsewhere. The Claimant did not satisfy that requirement because there were rumours about the future of the Premises. Because of that Veolia Cleanaway managers sought alternative suppliers. That approach was said by Ms Clutten to be contradictory as Mr Lewis had also emphasised in his evidence Veolia Cleanaway's policy of seeking flexible waste disposal arrangements rather than enter long-term contractual ones; hence the practice of issuing purchase orders and reviewing cost rates every six months. We do not think there is a contradiction; Veolia Cleanaway wanted to have flexibility in dealing with suppliers but would only deal with those suppliers who could show a reasonable prospect of their business's continuance. In circumstances where compulsory

powers existed and funding had been announced (albeit under review) it was incumbent upon the Claimant to take all reasonable steps to assure its clients that the Premises would remain open for a sufficiently long period to satisfy their customers' operational needs. For the reasons we have given above we do not think it did this.

83. There was a discrepancy in Mr Lewis's email which the Acquiring Authority considered to be compelling. He said the rumours of compulsory purchase had circulated "last year", i.e. 2011 and not 2009. Objectively that makes sense because the Acquiring Authority had done nothing until December 2010 to indicate that compulsory purchase of the Premises was likely to proceed and did not serve notice to treat until 9 November 2011. But we are not disposed to reject Mr Lewis's evidence because of any inconsistency about timing and other matters. He and Mr Cocks worked in the waste industry and are not lawyers. We are not surprised there is a lack of contemporaneous evidence given their propensity to do business by phone. In our judgment it is credible that Mr Lewis wrote this email hastily without thinking carefully about dates which did not matter to him and which he probably had no idea he might one day have to justify in evidence before a tribunal. The difference between his two statements is modest and he is more likely to have got the timing right in 2018 after checking his contemporaneous diaries (albeit we were not shown copies of them) than by simple recollection in 2016, some six to seven years after the event. Nevertheless, it shows that, without meeting minutes or other documents to support it, Mr Lewis's evidence has not been corroborated and rests upon his memory of events that took place many years ago.

84. It would have been preferable to have evidence from a manager in the Collection Division of Veolia Cleanaway. However, we note Mr Lewis said he could not remember who the manager was at the time because they changed so often. We do not accept that Mr Lewis could not be expected to know what was going on in the Collection Division. As he said, the purpose of the November 2009 meeting was to pass on information. He discussed back to back business deals because "it was important for me to understand where our depots would be tipping waste in the following year"[13]. This goes beyond simply passing on information about prices and it is inconceivable that he would not have been told if a significant amount of waste tipped at the Premises was going to reduce to virtually nil within months, or that he would not have asked why. But Mr Lewis did not say he had been told the Collection Division was planning to stop using the Claimant imminently. He said that he "would have heard that there was a risk that the Bolina Road Site was going to be closed as a result of the Order." Given that these were unsubstantiated rumours, and given also that the Claimant was a long-standing supplier to Veolia Cleanaway and other Veolia companies, it is equally inconceivable that Mr Lewis would not have said at that meeting that he would "check out the position with these customers at the [Christmas] lunch."[14] There would be no need to do this if the Collection Division manager had already decided to stop using the Claimant. Having discussed the rumours with the Claimant, and having been told by Mr Cocks that "this threat had been around for years and [Welcocks] hoped to carry on trading as the compulsory purchase had not yet happened"[15], we are told that neither Mr Lewis nor Mr Cocks passed this information to the manager of the Collection Division. If the rumour of compulsory acquisition posed such a significant threat to 20% of the Claimant's business (and indirectly to that of Mr Lewis's division) then one or both of them would surely have discussed it promptly with the manager of the Collection Division. That

[13] Mr Lewis's second witness statement at paragraph 9
[14] Ibid paragraphs 10 and 11
[15] Mr Lewis's first witness statement at paragraph 16

neither of them did so casts doubt upon the veracity of the claim that the loss of Veolia Cleanaway's business (but not that of other Veolia companies or third party customers who, presumably, were also party to the same rumours) was due to the impending compulsory purchase of the Premises, or means that the Claimant failed to mitigate its loss.

85. In this context we note Mr Zimmann's evidence that he had spoken to three people who work or worked for Veolia. But the Acquiring Authority has not called evidence from anyone as to the reason for the cessation in trade with the Claimant despite having the opportunity to do so. But neither did the Claimant call evidence from anyone at the Collection Division of Veolia Cleanaway.

86. In the light of all the evidence we are not satisfied that the Claimant has established that Veolia Cleanaway's trade wholly ceased because of the impending compulsory acquisition. Trade with Veolia Cleanaway was especially volatile and it grew at a time when according to Mr Cocks the rumours of compulsory purchase were particularly rife. The waste disposal industry is highly competitive and trade stopped at short notice for reasons unconnected with the Scheme, such as that between the Claimant and Veolia Thurrock. Mr Lewis said the meeting in November 2009 was the inaugural meeting of the London Forum at which information was to be exchanged and shared. That being so, and if compulsory purchase of the Premises was considered imminent, we do not see why other Veolia companies did not stop trading with the Claimant at the same time. There was no objective change in the status of the Scheme in late 2009/early 2010. The Acquiring Authority had not taken, and were not about to take, any steps to implement its compulsory purchase powers under the TWAO.

87. We consider it to be inconceivable that a major company such as Veolia Cleanaway would decide to divert trade worth nearly £1m in 2009 from a well-established and reliable supplier solely because of unsubstantiated rumours from one or more of its drivers. It is, of course, possible that the then manager of the Collection Division had other contacts in the industry that he wished to use instead of the Claimant, but there is no evidence on the point. Mr Lewis does not appear to have had a close working relationship with the Collection Division whose managers, he said, frequently changed. But if, as Mr Cocks had been made aware by Mr Lewis, the rumours of the forthcoming closure of the Premises had secured some purchase within the Collection Division's senior management, albeit wrongly, it was incumbent on the Claimant to make direct contact with the division (his customer) to explain the factual position as it then was. The duty to mitigate loss does not impose a high standard of reasonableness in such circumstances, but it does require more than doing nothing. In our opinion this head of claim has not been established and we make no award for compensation for shadow losses.

Issue (ii): Business value

Multiplicand

88. Having found that the loss of income from Veolia Cleanaway was not due to the Scheme it is not necessary for us to consider whether, in any event, some or all such income would have been lost in the future for other reasons.

89. The parties' expert accountants agreed in their joint statement dated 13 July 2018 that the Claimant's future maintainable EBITDA was £1.1m assuming the loss of Veolia Cleanaway's trade was not due to the Scheme. This agreement was repeated in the expert accountants' second joint statement dated 2 November 2018. We adopt this figure as the multiplicand.

Multiplier

90. The accountancy experts agreed the valuation of the Claimant's company should be based on value to the owner and that a multiple of earnings approach was appropriate. The Claimant's approach to the multiplier, as set out in Mr Mitchell's evidence, is to derive multipliers from three sources: QCMs (7.0), TCMs (7.6) and a PBT figure (12.0). The results of applying these multipliers are then averaged. Initially, the Acquiring Authority's approach, as set out in Mr Lazarevic's evidence, was to pick a mid-point of 4.4 between the multiplier for QCMs (4.7) and that for TCMs (4.0). However, Mr Mitchell pointed out that, using Mr Lazarevic's figures, the correct figure for Mr Lazarevic's QCM multiplier was 7.1. Thus, although they both used different companies and made different adjustments, in the event there is no real dispute between the forensic accountancy experts as to the appropriate QCM figure, namely 7.0/7.1.

91. However, Mr Lazarevic changed his evidence and by the time of the hearing he had decided to place very little emphasis upon QCM multipliers. It is therefore necessary to set out some of the evidence about QCMs from both parties in order to determine whether the QCM figure should play any part in calculating the final multiplier. We set out the evidence in the chronological order in which it was served.

(i) EBITDA multiplier based on quoted company comparables (QCM)

92. In his first report Mr Mitchell identified eight "broadly comparable" waste management QCMs with EBITDA multipliers ranging from 4.3 to 11.7 and an average of 7.5. He rejected three of these QCMs because they were substantially larger than the rest. The remaining five QCMs had an average EBITDA multiplier of 6.8. Mr Mitchell considered Welcocks' profitability to be above-average relative to this peer group and he therefore adopted a slightly higher multiplier of 7.0.

93. Mr Mitchell said the control premium and private company discount offset each other (first report, paragraph 7.14 and Appendix 6). In his third report he said the control premium and size and diversity discount net off (paragraph 7.26). It is not clear to us that the private company discount and the size and diversity discount are the same thing but in the November 2018 statement of agreed facts reference is only made to a size and liquidity discount. Mr Mitchell thought Mr Lazarevic's figure of 40% for this discount was at the upper end of a suitable range but he did not consider it to be unreasonable given the large size of Mr Lazarevic's comparable companies. It was the same percentage as Mr Mitchell made for a control premium and so the two factors cancelled each other out. Unlike Mr Lazarevic, Mr Mitchell made no allowance for a liquidity discount because this was an assumed sale of the whole of the Claimant's business and not just a minority shareholding in it.

94. In his first report Mr Lazarevic selected five QCMs from a sample of large quoted waste management businesses which showed EBITDA multipliers ranging from 6.3 to 11.7 and an average of 8.5. Three of his QCMs were those rejected by Mr Mitchell as being too large to be comparable with Welcocks. Mr Lazarevic then made three adjustments: he added a control premium of 20% to reflect the fact that all of the Claimant's company was being sold rather than simply a few shares; he deducted a liquidity discount of 25% to reflect the fact that full ownership of the Claimant would be less easily traded; and made a size and diversity discount of 40% to reflect the fact that the QCM companies "are far larger than Welcocks and provide a much greater range of waste management services, including specialised and higher value services, to broad customer bases across a wide geographical area." (Lazarevic1 paragraph 3.3.3). Applying a net discount of 45% to his figure of 8.5 gave a multiplier of 4.7.

95. In his first report Mr Zimmann stated that the four QCM companies Mr Mitchell used to derive his multiplier in a business extinguishment valuation report to the Claimant dated 19 May 2015[16] did not have similar operations to the Claimant, since they provided high value specialist waste management services, the majority in the hazardous waste sector. He made similar points in more detail in his second report, commenting on the size of the businesses, their geographic market dominance and specialist services.

96. In his second report Mr Mitchell noted that he and Mr Lazarevic had only one QCM in common, Shanks Group plc. He stated that it was very difficult to find directly comparable companies and considered Mr Lazarevic's comparables were much bigger than the Claimant and operated in very different sectors. He noted Mr Zimmann's criticism of his (Mr Mitchell's) QCM companies on the grounds they were not comparable but such criticisms applied equally to Mr Lazarevic's comparables. He also noted the different multipliers that he and Mr Lazarevic had arrived at for the same companies and criticised Mr Lazarevic's approach to adjustments. Mr Lazarevic applied his control premium, size and diversity discount and liquidity discount to the enterprise value (i.e. including debt) rather than just to the market capitalisation (equity value). Adopting Mr Lazarevic's adjustments (with which he disagreed), Mr Mitchell said the correct multiplier figure was 7.1 and not 4.7.

97. In his second report, Mr Lazarevic said that although he agreed with the use of QCMs, he did not agree with Mr Mitchell's QCM figures or the adjustments he made to them and he defended his overall net discount of 45%. He also noted in paragraph 2.4.13 that "Welcocks had no debt, however all of the quoted companies used by Mr Mitchell funded their businesses partly with debt." He gave this as a reason for rejecting Mr Mitchell's reliance on PBT multipliers.

98. In section 2 of his third report, Mr Lazarevic agreed that his QCM companies were far larger than the Claimant, offering a wider range of services and operating across a wide area. However, with one exception, he said the companies were involved in the waste management sector to some degree and he had applied a size and diversity discount of 40% to reflect those differences (paragraph 2.1.2). He then referred to Mr Mitchell's comment that it is difficult to find directly comparable companies to the Claimant since listed companies tend to be larger,

[16] These four companies are also included in Mr Mitchell's first report to the Tribunal. In addition, Mr Mitchell relied in his first report upon a fifth QCM, Environnement S.A.

have a greater range of operations and carry significant borrowings whereas the Claimant had none. Mr Lazarevic continued:

> "I agree with Mr Mitchell that it is difficult to find directly comparable quoted companies and that is why my view is that the transactions in smaller, less diversified waste management businesses are a more appropriate and more reliable source of evidence for an EBITDA multiplier for Welcocks. Having considered Mr Mitchell's rebuttal report in my view less reliance should be placed on the quoted companies identified by Mr Mitchell or by myself than to the company transactions considered by Mr Mitchell or by myself." (paragraph 2.1.3)

He then set out reasons why he considered Mr Mitchell's QCM companies were not comparable, the gist of which was that they were much too specialised, dealing with hazardous and maritime oil/gas waste. Later he again criticised Mr Mitchell's adjustments to his QCMs.

99. In his third report Mr Mitchell noted that Mr Lazarevic had not previously suggested in his first two reports that less weight should be placed on QCMs than on transactions. Mr Mitchell stated that although Mr Lazarevic's QCM companies had multiple differences from the Claimant he still regarded them as sufficiently comparable to Welcocks to provide assistance. (In his second report Mr Mitchell said he thought his own QCMs provided greater assistance than those of Mr Lazarevic. Both experts relied upon Shanks Group plc as a QCM.) He repeated that it was difficult to find comparable companies and stated that his (Mr Mitchell's) comparable companies were exposed to the same risks as the Claimant. He concluded that Environnement SA was less comparable but, he considered it should remain in his comparator group, even though it had a low multiplier and its exclusion would have increased Mr Mitchell's adopted figure. He again criticised Mr Lazarevic's adjustments to the QCM multipliers.

100. In cross examination, Mr Zimmann was asked whether he considered the QCM comparables that Mr Lazarevic referred to in his reports were comparable or not. He agreed that he and Mr Lazarevic had discussed Mr Lazarevic's report before it was finalised, including the QCMs. After some prevarication he said that in his opinion, although Mr Lazarevic's QCM companies were different from the Claimant and there were limitations in finding comparables, they were in the waste management industry undertaking similar activities and as quoted companies they were comparable. He did not tell Mr Lazarevic that it would be wrong to give them equal weight to the TCMs and said, "as quoted companies they are comparable."

101. In examination in chief Mr Lazarevic was asked why he had changed his view about the weight he attached to his QCMs. He said the TCMs were private companies of similar size to the Claimant and had been sold close to the Valuation date. It was attractive to consider QCMs because there were a lot of them but difficulty arose when adjusting them for various factors, including for gearing. When preparing his first report he had appreciated that his QCMs had some debt but until his last report he had not realised their high level of gearing whereas the Claimant had no debt.

102. In cross examination Mr Lazarevic was constrained to accept that nowhere in his third report did he accept his QCM calculations had been wrong and it had been left to the Acquiring Authority's skeleton argument to make this clear. He said he was comfortable when the QCM and TCM figures were relatively close but when he realised the figures were so different he

investigated further which resulted in him putting less weight on the QCMs. He did not elaborate on this.

Discussion

103. There is no doubt that the companies relied upon by both Mr Mitchell and Mr Lazarevic are not directly comparable to the Claimant. Mr Lazarevic's companies are larger with more diverse, widely spread operations and Mr Mitchell's, though smaller, specialise in different aspects of the waste management industry to the Claimant. However, both experts considered that the QCM multiples were sufficiently comparable, after adjustments, to take into account for the purpose of calculating a multiplier to value the Claimant company. Indeed, both accountants gave the QCMs equal weight to the other comparable evidence, TCMs in Mr Lazarevic's case and TCMs and PBTs in Mr Mitchell's case.

104. We find Mr Lazarevic's explanation for suddenly giving "very little emphasis"[17] to the QCM comparables wholly lacking in credibility. First, he was well aware from the outset of the size and diverse range of operations of his comparables. Indeed, he made an adjustment to reflect that. The two points he relied upon most in oral evidence for his change of heart were the debt levels of his comparables and the fact that the recalculated QCM multiplier was very different from that of the TCMs.

105. As to debt, Mr Lazarevic knew about the distinction between the Claimant, which was debt free, and the QCMs which were financially geared, before Mr Mitchell pointed out the error in Mr Lazarevic's calculations[18], see for example paragraph 2.4.13 of Mr Lazarevic's second report dealing with PBTs. Further, Mr Mitchell set out the debts of Mr Lazarevic's comparables in paragraph 7.29 of his second report. This was information that he had requested from Mr Lazarevic and was attached in an email sent by Mr Lazarevic to Mr Mitchell on 21 September 2018. A mere glance at this attachment would tell any accountant that Mr Lazarevic's QCM companies had high levels of debt. We reject Mr Lazarevic's suggestion in cross examination that he did not realise the implications of these figures for his QCM multiples.

106. As to the revised calculation of QCM multiples, Mr Lazarevic failed to explain why the difference between 7.1 and 4.0 required any more careful consideration of the QCM multiples than the difference between 4.7 and 4.0 or why it required the wholesale rejection of the QCM multiple figures.

107. If either this or the gearing of his QCM companies was a genuine reason for the change in his evidence, we would have expected it to have been clearly flagged up as soon as possible. There was no clear reference to either in his third report which simply refers to the QCMs as "larger" with a "greater range of operations" and "significant borrowings" and says that "less reliance should be placed on the QCMs" (not <u>very little</u> reliance) because the TCMs are more comparable.

[17] Examination in chief
[18] Mr Lazarevic erred by applying his adjustments to the enterprise value rather than the equity value

108. Equally significantly, there is no reference at all to either in the Joint Statement agreed by Mr Mitchell and Mr Lazarevic dated 2 November 2018. The passage relating to QCMs merits quoting in full:

> **"Issues on which the experts are agreed**
> Both experts agree that it is difficult to find a listed comparable company that only carries out the same activities as Welcocks. The larger, listed companies reviewed by DM and CL used debt financing whereas Welcocks did not.
> Both experts believe that a quoted comparable company multiple methodology is one of the potential sources of evidence when valuing Welcocks and this valuation methodology was used in DM1, DM2, CL1 and CL2.
>
> **Issues on which the experts are not agreed – CL's opinion**
> CL acknowledges and accepts that the large waste management businesses that he has in part used to arrive at an appropriate EBITDA multiplier for Welcocks are not properly comparable to the waste consolidation and transfer business of Welcocks. The large waste management businesses are more sophisticated, have a wider range of services, larger and more diverse customer bases and operate across greater geographical areas. It is in recognition of this that CL considers that a significant size and diversity discount needs to be applied to the EBITDA multipliers of large, diversified waste management businesses."

Mr Lazarevic went on to criticise the comparability of Mr Mitchell's QCM companies as being smaller and more specialist.

109. Finally, Mr Lazarevic's position was not put to Mr Mitchell in cross examination for his comment. The highest it was put was that, in the context of a PBT, it is difficult to apply a multiple from a geared company to one that is ungeared. Mr Mitchell agreed with that proposition and added that it is also a problem with using EBITDA multiples which is why he relied in part upon PBT multiples. This is far removed from the proposition that because of the level of debt of Mr Lazarevic's QCM companies very little reliance should be placed upon them or that the difference between the multiples of 7.1 (QCMs) and 4.0 (TCMs) was so great as to undermine the usefulness of the QCMs.

110. The reality is that Mr Lazarevic got his sums wrong and he tried to row back from the position he had previously adopted as to the relevance of QCM multipliers on grounds which he was unable to support with reasoned evidence.

111. Mr Lazarevic's decision to put "less reliance" on the QCMs in his third report was heavily criticised by Mr Booth on behalf of the Claimant. We agree with his characterisation that Mr Lazarevic's miscalculation was a fundamental error. Moreover, for the reasons already given we consider that his attempt to claw back from this error was wholly lacking in credibility and we reject it. It was submitted on behalf of the Acquiring Authority that the differences between the Claimant company and the QCM companies were "fundamental", like the difference between a dog and a cat as opposed to a dog and a wolf. If this was genuinely the case Mr Lazarevic would not have relied upon them in the first place or, as he said in his first two reports, the adjustments he made to the multiples took those differences into account. Given that, when

properly adjusted, the experts' QCMs are the same, the criticisms of Mr Mitchell's QCM companies have little relevance.

112. We are therefore left with QCMs of 7.1(Lazarevic) and 7.0 (Mitchell) for companies which are not directly comparable to the Claimant but which all operate in the waste management industry. These multipliers were derived by adjusting for the difference between the QCMs and the Claimant in terms of the nature of the interest being sold (controlling interest and liquidity discount) and the diversity and size of their operations. The experts did not agree on the amount and/or the applicability of these adjustments[19], but given that the respective results are virtually identical it does not require further analysis. The only difference that is not reflected in the adjustments is the difference in debt. We agree this is a difference that needs to be considered but we do not agree that as a result the QCM multiple should be ignored completely. This is not the position of Mr Mitchell who seeks to take the lack of debt into account by including a PBT multiplier in his calculations. Nor was it Mr Lazarevic's position; until he realised he had got his sums wrong, he was perfectly happy to include the QCMs as part of the overall evidence of comparables. Further, Mr Zimmann confirmed in oral evidence that, subject to recognition of their differences, the QCMs are comparable to the Claimant. We therefore consider it appropriate to take the QCM figure into account as part of the overall evidence when valuing the Claimant company and we adopt Mr Mitchell's multiplier of 7.0.

(ii) EBITDA multiplier derived from transactions in comparable companies (TCM)

113. Both experts adopted this method of calculating the appropriate EBITDA multiplier.

114. Mr Mitchell identified eight relevant market transactions but only relied on the four most recent sales: ECT Recycling ("ECT"), June 2008, multiplier of 3.7; London Recycling Ltd ("LRL"), June 2009, multiplier of 11.6; Pearsons Group Holdings Ltd ("PGH"), November 2010, multiplier of 9.6; and NWM Holdings Ltd ("NWM"), July 2012, multiplier of 5.3. The average of these transactions gave a multiplier of 7.6.

115. Mr Lazarevic adopted three of the same comparables in his initial report but calculated different multipliers for two of them: LRL (14.3[20]), PGH (9.6) and NWM (4.0). In addition, Mr Lazarevic relied on the sale of JWT Holdings Ltd ("JWT") in July 2012 at a multiplier of 3.9 which he later changed to 4.0. He thought the sales of NWM and JWT, being very close to the Valuation Date, were the best comparables. Mr Lazarevic took the appropriate multiplier as 4.0. Mr Zimmann undertook a technical evaluation of Mr Lazarevic's four transaction comparables and concluded that of the four JWT was the most comparable and suggested that "an EBITDA multiple of around four would be appropriate".

116. The differences in the multipliers for the company transactions both experts considered comparable, i.e. LRL, PGH and NWM, were due to several factors:

[19] For instance, Mr Mitchell did not think it was appropriate to make a liquidity allowance
[20] Including net debt of £1.5m in the enterprise value.

(i) Mr Lazarevic used the weighted average historic EBITDA of the acquired businesses over the last three years[21], whereas Mr Mitchell used the EBITDA from the most recently available financial statements prior to the transaction date. Mr Lazarevic acknowledged in his first report (paragraph 3.3.10) that buyers of these businesses might have focussed on current or prospective EBITDA but he adopted a weighted average to be consistent with the measure used for Welcocks' maintainable EBITDA.

(ii) Both experts calculated the EBITDA multiplier of PGH as 9.6, but apparently they did so on different assumptions. Mr Lazarevic said the enterprise value at the date of sale was £16m and he divided this by the three-year weighted average EBITDA of £1.672m. Mr Mitchell did not challenge Mr Lazarevic's figure for the enterprise value in his second report where he presented a table showing corrections in Mr Lazarevic's calculations (at paragraph 6.16). But Mr Mitchell took the enterprise value of PGH at £18.34m (first report at paragraph 7.31 and Appendix 5). He gave the source of the figure as company accounts but gave no analysis of how the figure had been obtained. If Mr Lazarevic's figure for the 2010 EBITDA of £1.994m is correct[22] Mr Mitchell's EBITDA multiplier (using his enterprise value figure) should be 9.2 and not 9.6[23].

(iii) The difference in the multiplier for NWM was due in part to a difference of approach to the treatment of a contingent liability (£1m); an earn out clause (£1.2m); and the level of net debt (£0.1m). The contingent liability was in respect of a guarantee made to the Environment Agency to the value of £1,044,602 (in 2012) regarding NWM's obligations to restore its landfill site, on completion of its life, back to its original condition. Mr Mitchell said this was a debt-like item that would need to be paid in the future and any potential purchaser would take this cash outflow into account when purchasing NWM because the company did not have enough cash to meet this obligation when it was acquired, the amounts owed to group undertakings (£4.2m) exceeding its cash balance (£4.1m) by £0.1m. The earn out formed part of the consideration and could not be ignored. Mr Mitchell therefore added these amounts[24] to the equity value (cash consideration paid) of £8.6m to give an enterprise value of £10.9m. He divided this by the EBITDA of £2.045m for 2012 to give a multiplier of 5.3. Mr Lazarevic said the contingent liability was not debt; it was an operational liability incurred during trading and was not a financial liability. A provision for site restoration had been made in the accounts and so the costs had already been included in historic EBITDA. To include the contingent liability in the enterprise value was akin to double-counting. The earn out was not certain and was probably made contingent on the achievement of a future (unspecified) event, e.g. an earnings target. Mr Lazarevic based his multiplier on historic earnings and he said it would be wrong to include any consideration based on future earnings. Mr Lazarevic treated net debt as zero.

117. Of the remaining two transaction comparables Mr Lazarevic dismissed ECT in his second report because it was the largest UK community sector operator in the municipal waste

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[21] Except JWT where only two years of historic earnings information was available.
[22] First report, Appendix 4 at page 29.
[23] In the first experts' statement of agreed facts Mr Mitchell adopts an EBITDA of £1.9m.
[24] Contingent liability £1.0m + earn out £1.2m + net debt £0.1m = £2.3m

recycling market and specialised in household waste collection and recycling through long-term local government contracts worth £175m. He did not consider this to be a comparable business to Welcocks. Mr Mitchell said that ECT and Welcocks shared the same SIC code[25] (38110: the collection of non-hazardous waste) which suggested they had similar operations.

118. Mr Mitchell said the 2012 JWT accounts were not available at the time of its sale in July 2012 and therefore only the 2011 accounts should be used. But these were in abbreviated format and there was no profit and loss account, just a balance sheet. Consequently, it was not possible to calculate an EBITDA multiplier from the information that was available at the Valuation Date. Mr Mitchell said the 2012 accounts used by Mr Lazarevic were published in the name of Viridor Waste (Atherton) Limited following the acquisition of JWT by Viridor in July 2012. Although the 2012 accounts state that the trading entity was formerly known as JWT, Mr Mitchell said that it was unclear whether Viridor had covered other group costs such as directors' emoluments or finance functions.

119. Mr Mitchell also noted that JWT's accounts for the year ended 31 March 2013 showed the company had lost a number of contracts, had made a financial loss and suffered a 17% reduction in revenue. He thought that due diligence done at the transaction date in July 2012 would have revealed these problems and be reflected in the purchase price.

120. Apart from his reservations about the use of the 2012 JWT accounts, Mr Mitchell said that an upward adjustment was required for directors' emoluments which were shown as £9,000 and £6,000 in 2012 and 2011 respectively for a business that achieved revenue of £8.3m and £6.9m in those years. Those levels of remuneration were not reflective of market rates for a senior management team. Mr Mitchell adopted instead the equivalent figures for directors' remuneration from the NWM accounts which were £194,749 (2012) and £165,093 (2011). Substituting these values reduced Mr Lazarevic's weighted EBITDA from £1.93m to £1.753m and increased the TCM from 3.9 to 4.3.

121. Mr Lazarevic said that JWT's March 2012 accounts recorded trading results which had already occurred at the time of its sale in July 2012. They would have been available in some form, e.g. management accounts, albeit not in the public domain, by that time. It was unrealistic to assume that the purchaser, Viridor, would not have reviewed and considered the latest trading results when acquiring the company. He addressed Mr Mitchell's views about the loss of trade in the year ending 31 March 2013 by referring in cross examination and re-examination to Viridor Waste Management Limited's[26] accounts for the same financial year. The notes to those accounts showed that JWT Holdings Ltd had made a loss of £1m before tax for the period since acquisition (4 July 2012) to 31 March 2013. But Viridor Waste (Atherton) Ltd's (formerly JWT Waste Services Ltd) accounts for the year ending 31 March 2013 showed a loss before tax of only £0.421m. Mr Lazarevic said this meant JWT must therefore have made a profit (of £0.579m) in the period from 31 March 2012 to 4 July 2012[27]. Similarly, Mr Lazarevic said that the 17% reduction in revenue was attributable to the period after the sale of JWT in July 2012.

[25] Companies House: Standard Industrial Classification of Economic Activities

[26] The company who acquired JWT Holdings Ltd (renamed Viridor Waste (Atherton) Holdings Ltd) and JWT Waste Services Ltd (renamed Viridor Waste (Atherton) Ltd) for £6.578m, including net debt, on 4 July 2012.

[27] PBT 1 April 2012 to 4 July 2012 + PBT 4 July 2012 to 31 March 2013 = PBT 1 April 2012 to 31 March 2013, i.e. £0.579m + (1.0m) = (£0.421m)

Revenue for the period 4 July 2012 to 31 March 2013 (nine months) was £2.5m and revenue for the year ending 31 March 2013 was £6.373m, so the revenue between 1 April 2012 and 4 July 2012 (three months) was £3.873m. This suggested that the slowdown in revenue occurred after the acquisition.

122. Mr Lazarevic disputed Mr Mitchell's adjustment to the figure for directors' emoluments in JWT's accounts. In the two years prior to its acquisition JWT had a single director, Mr JW Thomasson, who had significant other business interests. Mr Lazarevic thought it likely that Mr Thomasson's role was effectively akin to that of a non-executive director. Mr Lazarevic analysed the total payroll costs (directors and staff) of NWM and JWT in 2011 and 2012. He found that the average pay of JWT was a little higher than that of NWM and concluded there was no evidence that the overall payroll costs of JWT were artificially or abnormally low.

123. At the hearing Mr Lazarevic increased his multiplier for JWT from 3.9 to 4.0 by amending the allowance for directors' emoluments. Instead of adopting the low figures shown in JWT's accounts he took instead the figure of £57,200 shown in the Claimant's accounts as being the director's salary in 2010 and 2011 and which Mr Mitchell had adopted in his first report in respect of the claim for lost salary earnings. Like Mr Cocks, Mr Thomasson was a sole director of his company.

124. Mr Mitchell said Mr Lazarevic's claim that Mr Thomasson had other significant business interests was not supported by data obtained from Companies House. Those revealed that Mr Thomasson took up a directorship shortly before JWT was sold and that he set up two other companies in the month of the acquisition. Mr Mitchell said this suggested that Mr Thomasson had been too busy to run other businesses while still a director of JWT. Mr Mitchell said a possible explanation for why JWT's average pay was higher than NWM's was its higher EBITDA margin (28% compared to 18%). This could justify higher market based salaries for the directors at JWT. The accounts of JWT and NWM explicitly stated directors' emoluments and Mr Mitchell thought these should be compared on a like for like basis rather than comparing average pay for the respective workforces.

125. In his second and third reports[28] Mr Lazarevic said his four transaction comparables showed a pattern of declining multipliers over time (from 2009 to 2012) which he thought might have been due to the financial crisis and consequent economic recession as well as changes in the structure of the waste disposal industry with greater emphasis on recycling and the discouragement of landfill through an increasing landfill tax. In cross examination Mr Lazarevic conceded that to say a trend had been established from just these four transactions was "putting it too highly".

Discussion

126. We consider first the question of whether, in determining the appropriate transaction multiplier, the most recent year's EBITDA to the transaction date should be adopted (Mr

[28] Second report at paragraph 3.3.20; third report at paragraph 2.2.4

Mitchell) or whether a weighted average of three years' EBITDA figures should be used (Mr Lazarevic).

127. It is a basic principle of valuation practice that one capitalises the subject in the same way as one analyses the comparable. So, if a transaction price is analysed by using as a divisor last year's EBITDA, the resultant multiplier should be applied to the last year's EBITDA of the subject. That raises the question of what is the status of the agreed EBITDA of £1.1m for Welcocks? Is it a single year's figure or an average?

128. The agreed figure of £1.1m is said to be the estimate of the Claimant's maintainable EBITDA. As such it is not the EBITDA shown in Welcocks' accounts for the year ending 31 December 2011, the last accounts before the compulsory acquisition. That figure was approximately £0.93m. In his first report[29] Mr Mitchell said the three-year weighted average of the Claimant's normalised EBITDA was £1.34m, including the contribution from Veolia Cleanaway sales which the Claimant said was lost due to the Scheme. The second statement of agreed facts says that the maintainable EBITDA, without making an adjustment for the claimed loss of Veolia Cleanaway income, is £1.1m. Mr Lazarevic says in his first report that this figure "is broadly based on Welcocks' 3-year weighted average historic EBITDA adjusted for certain non-recurring items and any income or expenditure not directly related to Welcocks' waste management business such as the rent paid and received on the sub-let part of the site (Area C)"[30]. We are satisfied that the agreed EBITDA, excluding the loss of Veolia Cleanaway income, has been calculated as a weighted average over three years.

129. Given that the Claimant's agreed EBITDA is derived from a three-year average, it is consistent to use the same approach when analysing the comparable transactions and deriving the multipliers. We therefore adopt Mr Lazarevic's approach to the analysis of the comparables.

130. In the light of this conclusion we adopt the multipliers calculated by Mr Lazarevic for LRL (14.3) and PGH (9.6).

131. The third company transaction which both experts consider relevant is the sale of NWM. We adopt the three-year weighted average EBITDA of £2,149,159 and the actual figure for net debt of £0.1m. That leaves the dispute about the treatment of the contingent liability and the earn-out clause.

132. The contingent liability is a guarantee made to the Environment Agency in respect of Quercia Limited's[31] obligation to restore its landfill site, on completion of its life, to its original condition. NWM made provisions in its consolidated balance sheet for both the cost of restoration and aftercare of the restored site, amounting to £1.11m and £1.03m respectively as at March 2012. By recognising these liabilities as provisions NWM accept that a present obligation has arisen because of a past event (the opening of a landfill site and the need for its subsequent restoration), that payment is probable and the cost of restoration can be estimated reliably. The

[29] Paragraph 7.1
[30] Paragraph 3.1.6
[31] A trading subsidiary of NWM Holdings Ltd that operates a landfill site.

guarantee is treated as a contingent liability and is disclosed but not recognised in the accounts. This is because it is unlikely to be called upon (adequate provision for payment having been made in the balance sheet). In our opinion it is necessary to consider whether the restoration provision, rather than the contingent liability, should be included as part of the enterprise value. (Neither party suggested that any adjustment should be made for aftercare costs.)

133. Mr Lazarevic said it was not necessary to add back the contingent liability as a debt-like amount because it was reflected in a provision which had been deducted as an expense, thereby reducing the historic EBITDA. But at the date of sale NWM did not have sufficient cash available to cover the restoration costs, its net debt at that time being £0.1m. Mr Lazarevic also said that the restoration was an operational liability and not a financial one, but in our opinion a company's enterprise value is the value of its core business operations to all the investors in the company and the costs of restoration relate to a core part of NWM's business, namely operating a landfill site. The fact that the amount of the provision is not interest-bearing debt does not mean it should not be added back; the restoration cost is a future liability that will have to be met by the purchaser in the same way that debt will have to be paid off or re-financed when the purchaser buys the company. We agree with Mr Mitchell that this is a debt-like payment which signifies a claim upon the NWM's assets and as such we think the amount of £1.1m should be added to the consideration paid when calculating the EBITDA multiplier.

134. There is very little information about the NWM earn out clause. A press release from the purchaser's[32] parent company, Cementir Holding, said:

> "An additional GBP 1.2 million earn-out is payable by Recydia on the occurrence of certain events over the next 36 months. Çimentas A.S. has guaranteed this additional payment."

The nature of the said events is not specified and it is not known whether the earn out clause was triggered.

135. Earn out clauses have several advantages: they allow the purchaser to pay part of the purchase price only if certain targets are met, they allow the vendor to receive additional consideration if the business performs to their expectations and they encourage key staff to stay with the company. But such clauses can take many forms and can be triggered by a variety of events. In order to value an earn out clause it is necessary to know far more than the basic information that is before us. In principle the present value of the earn out clause, reflecting the probability and timing of its occurrence, should be added to the consideration paid to give the enterprise value. But in the absence of more specific detail it would, in our opinion, be wrong to add the whole £1.2m as Mr Mitchell has done which, in effect, assumes immediate payment of the earn out. We prefer Mr Lazarevic's view that in circumstances where: (i) there is no information about whether the earn out was paid; (ii) the analysis of the transaction is based upon a three-year average of historic (not future) EBITDA; and (iii) nothing is known about the circumstances under which the earn out would be triggered, it is not appropriate to make any adjustment for it and we do not do so.

[32] The purchaser was a Turkish subsidiary, Recydia A.S.

136. We therefore take the enterprise value of NWM as £9.81m[33]. Adopting Mr Lazarevic's figure of £2,149,159 as the appropriate EBITDA gives a transaction multiplier of 4.6.

137. That leaves two further TCMs, ECT and JWT, which are relied upon by Mr Mitchell and Mr Lazarevic respectively.

138. At £15.3m ECT's enterprise value was of the same order of magnitude as that of LRL, PGH and NWM. But that disguises the fact that ECT's turnover in its last year before acquisition (2007) was substantially greater than the corresponding figures for the other three companies: £45.9m compared to an average[34] of £8.1m. As Mr Lazarevic pointed out, the nature of ECT's activities was different to that of Welcocks. ECT described its principal activity as the collection and sale of recyclable materials, through the operation of green box schemes under contract to local authorities, i.e. kerbside collection. In our opinion that is different in kind to the Claimant's business (see paragraph 5 above).

139. We also note that ECT was a Community Interest Company ("CIC"). CICs are limited companies that operate to provide a benefit to the community which they serve and although they are not strictly "not for profit" their primary purpose is one of community benefit rather than private profit. Returns to investors are allowed but they must be balanced and reasonable to encourage investment in the social enterprise sector while ensuring that community benefit remains at the core of the enterprise. This corporate structure and ethos is achieved using "The Asset Lock" which is a general term used to cover all the provisions designed to ensure that the assets of the CIC (including any profits or other surpluses generated by its activities) are used for the benefit of the community. The activities of the CIC must not be carried on for the benefit of the company's directors and staff rather than for the benefit of the community. This is achieved in part by a "Dividend Cap", i.e. the maximum dividend per share is limited; there is a maximum aggregate dividend (currently 35% of the distributable profits); and the ability to carry forward unused dividend capacity from year to year is limited (currently to five years). These are significant differences to how a private company operates and is funded. The Asset Lock and the Dividend Cap could encourage a CIC to be more dependent on debt rather than equity financing and we note that £11.9m of ECT's enterprise value of £15.30m was net debt.

140. For the above reasons we do not consider that ECT is a useful comparable transaction when valuing the Claimant and we exclude it from our consideration.

141. In our opinion JWT's accounts for the year ending 31 March 2012 are a useful source of information notwithstanding they were not signed until 21 December 2012 and therefore after the Valuation Date. As Mr Lazarevic said the accounts describe the actual business done by JWT in the last financial year before its acquisition and the relevant information was likely to have been available to the purchaser in management accounts by the date of purchase. Mr Mitchell said that the 2013 accounts revealed that JWT[35] lost a number of contracts at some time between 31 March 2012 and 31 March 2013, and that this might have been known to (or anticipated by) the purchaser in July 2012, leading to the payment of a reduced price. Although

[33] Consideration £8.6m + provision for reinstatement £1.11m + Net debt £0.1m
[34] LRL: 2007, PGH: 2008, NWM: £9.654m
[35] Then known as Viridor Waste (Atherton) Limited

it is not known for certain when during the financial year ending 31 March 2013 these contracts were lost, we think Mr Lazarevic's analysis of the Viridor and JWT accounts suggests they may have been lost after the date of acquisition. In cross examination of Mr Lazarevic, Mr Booth made the point that in the Viridor Waste Management Ltd 2013 accounts the financial data shown for the period from the date of acquisition to 31 March 2013 is for JWT Holdings Ltd whereas the financial data for the whole year was taken from the Viridor Waste (Atherton) Ltd 2013 accounts, i.e. the company that was formerly JWT Waste Services Ltd. That being so, said Mr Booth, Mr Lazarevic was comparing figures from different companies. Although Mr Booth is correct we accept Mr Lazarevic's view that the figures contained in the notes to the 2013 Viridor accounts are those of the trading company, JWT Waste Services Ltd. The notes to Viridor's accounts just refer to the purchase of JWT Holdings Ltd, but Viridor acquired the holding company and JWT Waste Services Ltd at the same time. In a press release dated 5 July 2012[36] Viridor said it "has completed the acquisition of Manchester based JWT Holdings Ltd (trading as JWT Waste Services)". We think the purchase price fairly reflects the value of JWT before the loss of contracts later in the financial year. In any event this is a highly competitive market and it seems to us that loss of business is a foreseeable risk that would be reflected in the multiplier in any event.

142. We accept the JWT accounts should be adjusted for directors' emoluments. We prefer Mr Lazarevic's amended approach which he explained during examination in chief and which he set out in a calculation submitted to the Tribunal during the hearing. This adopted the figure of £57,200, being the amount shown in Welcocks' accounts as directors' salaries for both 2010 and 2011. We make a further minor adjustment by including pension contributions of £397 to the figure for directors' remuneration, giving a total figure for directors' emoluments of £57,597. Like JWT, Welcocks had a sole director and this figure (£57,200) was used by Mr Mitchell when assessing the claim for lost salary earnings in his first report[37]. Mr Mitchell's proposed adjustment for directors' emoluments is taken from NWM's accounts, a company which had three directors, not one and we consider it to be too high.

143. Mr Mitchell also said it was unclear from JWT's 2012 accounts whether "any other group costs were covered by the Viridor group, such as director's emoluments or costs for finance functions." But, as Mr Mitchell pointed out, those accounts, while published in the name of Viridor Waste Management Limited, state that the company was formerly known as JWT Waste Services Limited. The 2012 accounts were for the years ending 31 March 2012 and were published on 21 December 2012. JWT was acquired by Viridor in July 2012. As such we do not think the attribution of any group costs to the Viridor group would be material[38]. We also note that this point was not put to Mr Lazarevic in cross examination.

144. The two-year weighted average EBITDA for JWT, revised for an increased allowance for directors' remuneration, is £1.88m and the transaction multiplier which we adopt is therefore 4.0.

[36] File 6, tab 21, exhibit 14, page 215
[37] Paragraph 8.4
[38] We note that the audit fee in respect of the year ended 31 March 2012 was paid by the intermediate parent company, Viridor Waste Management limited, and not recharged.

145. In summary, we conclude that the EBITDA multipliers for the four transactions which we consider to be comparable are:

LRL: 14.3
PGH: 9.6
NWM: 4.6
JWT: 4.0

146. Mr Lazarevic says that only the two most recent transactions (NWM and JWT) which both took place close to the Valuation Date, should be considered. Mr Mitchell disagrees although we note that he has also filtered out comparables by reference to the date of transaction. In his first report at paragraph 7.31 he identified eight transaction comparables but then adopted "the average of the four latest transactions", omitting the four earlier ones. He stressed this approach at paragraph 8.1 of his third report.

147. But Mr Lazarevic accepted in cross examination that LRL and PGH were comparable companies, that he had selected them and had analysed them on that basis. In an earlier report dated 7 October 2016[39], before he became aware of the JWT transaction, Mr Lazarevic took an average (not weighted) of the transaction multipliers of LRL, PGH and NWM without expressing any reservations about the usefulness of the earlier transactions (LRL and PGH). Mr Lazarevic also said in cross examination that he had "put it too highly" in his reports by suggesting the transactions showed a downward trend in multipliers between 2008 and 2012. In the absence of such a trend, the older transactions would still be relevant.

148. In our opinion all four transaction comparables are relevant and should be considered when valuing Welcocks' business. But we do not give them equal weight. We agree with Mr Lazarevic that a transaction close to the Valuation Date is a better indicator of market conditions at that time, even if the transactions are of otherwise similar companies. It is another basic principle of valuation practice that a comparable sold close to the valuation date of the subject is better than one sold several years previously, even in a market where prices are relatively stable. The waste disposal industry is highly regulated by environmental legislation. The industry reviews that were submitted in evidence in Mr Mitchell's first report emphasised the move towards recycling and away from landfill. The MBD UK Waste Management Market Development Report, February 2011 stated at paragraph 2.4:

> "The waste management sector has been increasingly subject to legislation and environmental pressures, driven by the historically low levels of recycling within the UK…the share of municipal waste sent to landfill has been reduced significantly during the last decade, with an estimated 46% of waste sent to landfill in 2010, down from 75% in 2002."

The IBISWorld Industry Report on Non-Hazardous Waste Collection in the UK, April 2012 stated in its executive summary:

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[39] Mr Lazarevic denied this was an expert report. We note that the report states (paragraph 1.1.1) that Mr Lazarevic had "been asked to prepare this Expert Accountant's Report" but he also said later (paragraph 1.3.3) that "I have been asked to prepare this report to assist with the negotiation of the amount claimed", which suggests to us that the report may not necessarily have been independent or objective.

> "The Non-Hazardous Waste Collection industry is being swept along by a shift to recycling and recovering waste. The race to divert waste from landfill is increasing demand for recyclable material collection services."

These were trends developing over time. Also, the industry in 2009 (the date of the LRL sale) was more immediately affected by the uncertainties of the financial crisis and recession than in 2012. In our opinion a comparable transaction which is close to the Valuation Date captures the contemporary industry context better than one which took place three years previously.

149. We do not think that any of the transactions are intrinsically more helpful as comparables than others and we are not persuaded by Mr Zimmann's RAG analysis that NWM and JWT are more comparable to Welcocks. It seems to us that given the experts did not have any detailed personal knowledge of the four transactions or of the companies being sold, it is unreasonable to draw conclusions solely from publicity material as to the relative hierarchy of comparability between them. We therefore treat the four transaction companies that were sold as being equally comparable to Welcocks in their activity.

150. We give the LRL and PGH transactions a weighting of 20% each and the NWM and JWT transactions a weighting of 30% each. This gives a weighted average transaction multiplier of 7.4[40] as shown in the following table:

Transaction	**EBITDA multiplier**	**Weighting**	**Adjusted multiplier**
LRL	14.3	0.2	2.86
PGH	9.6	0.2	1.92
NWM	4.6	0.3	1.38
JWT	4.0	0.3	1.20
Weighted average transaction multiplier			7.36
		Say	7.4

[40] The arithmetic average is 8.1

(iii): PBT multiplier

151. Mr Mitchell relied on PBT multipliers as a means of reflecting the debt-free capital structure of the Claimant's business. He said the absence of debt meant Welcocks' equity was at less risk than that of a company which was geared. The use of EBITDA multipliers on their own failed to distinguish the level of gearing (debt) of comparable quoted companies. By taking PBT as the multiplicand rather than EBITDA the interest payments on a company's debt were deducted and the benefit to a debt-free company would be reflected in a higher maintainable PBT.

152. Mr Lazarevic did not rely on a PBT multiplier derived from geared comparables to value a debt-free business such as Welcocks. He said such a multiplier would inevitably be higher than the equivalent EBITDA multiplier and would lead to distorted valuations. Thus, Mr Mitchell's valuation of Welcocks using a PBT multiplier was 45% higher than his valuation using an EBITDA multiplier, despite both valuations being based on comparison with the same comparables and financial data. That was too great a variation to be reliable and he felt Mr Mitchell's use of a PBT multiplier was flawed.

153. Mr Mitchell obtained his PBT multiplier from QCMs. In his first report Mr Mitchell identified eight such quoted company comparables and he seems to have considered all of them when obtaining the appropriate PBT multiplier for the Claimant, whereas in his second report he does not take into account the results of the three largest of his quoted companies, saying they were much larger than Welcocks and that the relative size of comparable companies was a key factor in determining comparability[41]. Thus, at paragraph 7.28 of his first report he notes that Welcocks had a higher PBT margin (33%) than all the comparables except Pennon Group plc (35%). But in his second report Pennon Group plc is one of the three quoted companies that he omits from his analysis.

154. The PBT multipliers obtained from the quoted companies ranged from 6.5 to 15.2. There was no figure available for one of the eight companies[42]. The average PBT multiplier was 11.0. Because Welcocks had a comparatively good PBT margin, Mr Mitchell took its PBT multiplier to be higher than average at 12.0. (The average PBT multiplier for the five quoted companies that Mr Mitchell subsequently relied upon in his second report was slightly higher at 11.1.) Mr Mitchell said the Claimant's PBT, excluding the income from Veolia Cleanaway, was £0.9m. Applying his multiplier of 12.0 gave an equity value of £10.8m. As Welcocks had no debt the equity and enterprise values were the same.

Discussion

155. The enterprise value of a company is a measure of its underlying business operations and is unaffected by the source of the funds necessary to trade. It is the aggregate value of a company to all its providers of capital. Because it is not concerned with the funding structure of a company, enterprise value permits a consistent comparison of companies regardless of the

[41] Second report at paragraph 5.4
[42] Veolia Environnement SA

amount of debt they have. On the other hand the use of EBITDA as the multiplicand when obtaining enterprise value means that no account is taken of the fixed assets required to operate the business and is a measure which is removed from the bottom line - depreciation, interest and taxation are costs that will impact on a company's performance and thus its value.

156. Using PBT gets closer to the bottom line, albeit the appropriate allowance for depreciation is subjective. But by deducting interest PBT makes the funding structure of a company relevant to the assessment of its value. Mr Mitchell considers this to be appropriate given the use of enterprise value/EBITDA obtained from geared quoted company comparables does not, in his view, reflect the benefit to Welcocks of having no debt and a surplus of cash.

157. The equity value of a company with debt is more vulnerable to a reduction in its earnings than that of a company without debt, but conversely its return on equity will benefit from the gearing effect of debt when earnings increase. Mr Lazarevic pointed out that having debt is not always a bad thing; much depends on the predictability and stability of a company's earnings. However, we are satisfied that the waste disposal industry was highly competitive and subject to structural change at the Valuation Date and we accept Mr Mitchell's opinion that Welcocks' absence of debt was a positive factor that should be reflected in its value.

158. Mr Mitchell obtained the PBT multiplier by adjusting (reducing) the price earnings ratio of his quoted company comparables by the UK Corporation Tax rate of 26% for the fiscal year commencing 6 April 2011[43]. This means the multiplier is derived from the equity value (market capitalisation) of the quoted companies and not their enterprise value. It therefore excludes debt (and depreciation). But Mr Mitchell accepted that the use of PBT multipliers derived from geared companies was problematic when used to value a debt free company such as Welcocks (see paragraph 109 above).

159. Since the enterprise and equity values of Welcocks are the same (because it had no debt) one would expect its EBITDA and PBT multipliers to be (at least broadly) in the same ratio as its EBITDA and PBT. The latter ratio is 1.22[44] and given that the average EBITDA multiplier is 7.2[45] one would expect the PBT multiplier to be in the region of 8.8. But according to the analysis of Mr Mitchell's five quoted company comparables the average PBT multiplier is higher at 11.1. The ostensible reason for this is because the comparable quoted companies have debt, the interest on which must be deducted from EBITDA when determining the (smaller) PBT. Mr Lazarevic baulks at this discrepancy and the use of average comparable PBT multipliers to value the Claimant as not comparing like with like. (Although we were not told the debt status of Mr Mitchell's five comparable quoted companies, it was not suggested they were debt free.) But it seems to us that the analysis of PBTs gives some market based support for the agreed view that the absence of debt in a company in the waste disposal industry would be an advantage that sounds in an increased value. On balance we think it is better to use the PBT derived from the market rather than make a subjective adjustment for the benefit of having no debt. But we do not think it is appropriate in a context where little is known about the gearing of the comparable companies to further increase the average PBT multiplier to reflect what Mr Mitchell describes

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[43] Mr Mitchell's first report, paragraph 5.19 and Appendix 4; and File 7, tab 49.
[44] EBITDA £1.1m/PBT £0.9m
[45] 7.0 (QCM) and 7.4 (TCM) as determined above

as the Claimant's high PBT margin. We therefore take the PBT multiplier at 11.1 and not Mr Mitchell's figure of 12.0.

Summary

160. We have determined the following multipliers and values:

Quoted company multiplier

EBITDA	£1.1m
Multiplier	7.0
Enterprise value	£7.7m

Transaction Multiplier

EBITDA	£1.1m
Multiplier	7.4
Enterprise value	£8.14m

PBT

PBT	£0.9m
Multiplier	11.1
Equity value[46]	£9.99m

Average enterprise value	£8.61m

161. The average value using the two EBITDA multipliers is £7.92m. By including the PBT multiplier in the analysis the average is increased by just under 9% which we consider to be a fair reflection of the benefit to the Claimant of having no debt. We also consider the figure of £8.61m fairly reflects the balance between the Claimant's ability to generate good margins from its existing business model and the industry trend towards greater levels of recycling which the Claimant would only have been able to satisfy, in our opinion, by greater capital expenditure in the future.

Working capital

162. Working capital is the difference between a company's current assets, e.g. cash and debtors, and its current liabilities, e.g. creditors. It is a measure of a company's short-term financial health in terms of liquidity and operational efficiency.

[46] The same figure as the enterprise value as there is no debt.

163. The Claimant's working capital at the Valuation Date remains unknown. Mr Mitchell acknowledged that working capital is a factual matter that should be known at the Valuation Date. The Claimant has not explained why the figure is still unavailable. Both experts accepted that in these circumstances the figure for working capital in the latest (2011) accounts should be adopted. At 31 December 2011 the Claimant had cash of £735,585 and debtors were £106,000 greater than creditors. Consequently, Mr Mitchell thought 100% of the cash held by Welcocks was surplus and that there should be no deduction for working capital.

164. In his first report Mr Mitchell said that if the Claimant company was sold "then the cash would either be distributed to the owners prior to any transaction or it would be included as part of the assets transferred in exchange for an addition to the purchase price and paid on a pound for pound basis."[47] He said it would be added to the enterprise value of Welcocks in the transaction to give the equity value. Mr Mitchell therefore added the whole of the cash (rounded to £736,000) to the claim for business losses.

165. Mr Lazarevic said in his first report that the 2011 accounts "showed net current assets of some £734,000." In a footnote he described this figure as "Cash and debtors less liabilities, therefore effectively working capital." We do not understand how Mr Lazarevic obtained this figure, assuming that by "liabilities" he is referring to current liabilities. According to the 2011 accounts, cash (£735,585) plus debtors (£947,621) less creditors (current liabilities) (£841,213) is £841,993, or £106,408 greater than the cash balance, as Mr Mitchell notes in his first report.

166. Mr Lazarevic went on to say that Welcocks had held substantial amounts of cash since at least 2004, being shown in their annual accounts as never less than £650,000. He thought the Claimant would not have held such large amounts unless, at least in part, it was required for day to day operations and working capital. He assumed that some 50% of the 2011 cash balance, or £370,000, was surplus to the working capital requirements of the Claimant. This meant, he said, the sum of £364,000, being the balance of net current assets[48], would have been released on extinguishment. Mr Lazarevic therefore deducted this amount from his estimated enterprise value.

167. In his second report Mr Mitchell maintained that the cash balance on 31 December 2011 was £736,000 and that this was surplus to the requirements of the business (since debtors exceeded creditors by £106,000). Consequently, he disagreed with Mr Lazarevic that 50% of the cash balance was required as working capital. Mr Lazarevic said in his second report that while it would be appropriate for the purposes of a sale valuation to add surplus cash which is passed to the buyer, it was inappropriate to do so here, because what was being calculated was the loss to the owner upon the extinguishment of a business. Any surplus cash was not lost by Welcocks but was retained by them. Mr Lazarevic said there was no evidence that Welcocks could operate with no cash balance and historically they had held substantial amounts of cash. He maintained his view that an allowance of 50% of the cash balance being surplus was reasonable.

[47] Paragraph 9.4.
[48] £734,000 - £370,000

168. In his third report Mr Mitchell maintained that 100% of the cash balance was surplus, but he went on to say that as he was unable to reconcile the working capital position of Welcocks as at the Valuation Date, "I have reverted to using Mr Lazarevic's working capital figure, adjusted for 100% surplus cash balance." That figure was £734,000 which Mr Mitchell deducted from the cash balance of £736,000 to give what is described in the Claimant's skeleton argument as "a residual surplus cash figure of £2,000" and which Mr Mitchell adds to the Claimant's enterprise value as "working capital release"[49]. He no longer added the whole of the cash balance to the enterprise value to give an equity value[50].

169. Mr Mitchell submitted a further note on this topic on Day 3 of the hearing. This emphasised the cash generative nature of the Claimant's business and noted that the Claimant made substantial payments on dividends and pension contributions whilst maintaining a high cash balance. He reiterated that on 31 December 2011, the date of the latest accounts, debtors exceeded creditors (by £106,408) and therefore the cash balance was entirely surplus.

170. In his closing submissions Mr Booth QC for the Claimant conceded that the sum of £2,000 should not be added to the enterprise value. By the end of the hearing therefore the difference between the experts was that Mr Mitchell considered all the cash balance was surplus and that there should be no adjustment for working capital, while Mr Lazarevic said a deduction of £364,000 should be made for working capital released.

Discussion

171. We are concerned that the Claimant did not produce the figure for working capital as at the Valuation Date. Mr Mitchell accepted in cross examination that this would be the relevant figure, that the Claimant company was extant at that time, that it still needed to keep accounts and that it had filed accounts in December 2012. The figure had to exist and no reason was given why it was not produced. Mr Mitchell emphasised that what mattered was the position at the Valuation Date and said that what had happened in earlier years was not relevant. And yet we are not told what the position was at that date and are invited instead to adopt the working capital as it was on 31 December 2011.

172. Mr Lazarevic pointed out that in previous years the Claimant's cash balance had not been 100% surplus to working capital requirements. The position at 31 December 2011 was unusual. We set out below the Claimant's cash position for the years 2006 to 2011:

£'000	2006	2007	2008	2009	2010	2011
Current assets (CA)						

[49] Third report, paragraph 10.1
[50] First report, paragraph 9.4

excl. cash						
Debtors	707	809	629	757	768	945
Stock	-	-	219	-	-	-
	707	809	848	757	768	945
Current liabilities (CL)						
Creditors	1,520	1,497	1,045	1,419	1,171	841
CA-CL	(813)	(688)	(197)	(662)	(403)	104
Cash balance	721	784	955	912	835	736
Cash surplus	(92)	96	758	250	432	736
Surplus as % of cash balance	(13%)	12%	79%	27%	52%	100%

173. In circumstances where the Claimant has not disclosed the amount of working capital at the Valuation Date, we do not accept that the position as at the end of the previous financial year should be taken as a proxy for it where that is the only recorded instance of the cash balance being 100% surplus. We agree with Mr Lazarevic that significant cash was required for day to day operations and working capital and we accept his assessment that only £370,000 or some 50% of the 2011 cash balance was surplus to the working capital requirements of the business. The remainder of the net current assets, which at 31 December 2011 we think amounted to £470,000[51], would have been released upon extinguishment. But just as we do not know the cash balance at the Valuation Date neither do we know the figure for net current assets and we

[51] Net current assets (£104,000) + Cash balance (£736,000) – surplus cash (£370,000) = £470,000

consider that Mr Lazarevic's deduction of £364,000 for working capital release is reasonable and we adopt it.

Business value summary

174. We determine the Claimant's business loss as follows:

Enterprise value:	£8,610,000
Less NCGMA (agreed):	£288,474
Less fixed assets (agreed):	£399,890
Less working capital release:	£364,000
Business loss:	£7,557,636

Determination

175. We determine the compensation payable as follows:

Shadow losses:	£Nil
Business value:	£7,557,636
Agreed items:	£558,387.37
Total compensation:	£8,116,023.37 plus statutory interest.

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

Dated 17 July 2019

Her Honour Judge Alice Robinson

A J Trott FRICS