CON/145/2005

LANDS TRIBUNAL ACT 1949

COMPENSATION – Purchase of land by agreement for construction of distributor road by Authority possessing compulsory purchase powers – preliminary issues – initial advance payment – rights to further advance payment(s) – additional compensation for loss of opportunity to earn profits due to withholding of advance payments and refusal to permit registration of mortgage – determined that clamant has no right to additional advance payments under Agreement – that terms of Agreement not overridden by the Compensation Code (except where specifically provided for) and that no additional compensation payable for loss of opportunity to earn profits, per **Ryde International plc v London Regional Transport [2004] 2 EGLR 1**

IN THE MATTER of a NOTICE OF REFERENCE

BETWEEN **CLEMDELL LIMITED** **Claimant**

and

DORSET COUNTY COUNCIL **Respondent**

Re: Land at Verwood, Dorset

Before: HH Judge Reid QC and P R Francis FRICS

Sitting at: Procession House, 110 New Bridge Street, London EC4V 6JL
on
24 – 26 February 2009

Gordon Nardell, instructed by Brook Oliver, solicitors of New Milton, for the claimant
Andrew Tait QC and *Richard Honey*, instructed by Battens, solicitors of Yeovil, for the acquiring authority

The following cases are referred to in this decision:

BP Oil UK Ltd v Kent C C [2003] 3 EGLR 1
Director of Buildings & Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111
Harvey v. Crawley Development Corporation [1957] 1 QB 485
Horn v Sunderland Corporation [1941] 2 KB 26
Mallick v Liverpool City Council [1999] 2 EGLR 7.
Ryde International plc v *London Regional Transport* [2004] 2 EGLR 1

DECISION

Introduction

1. This is a decision on preliminary issues arising out of a claim for compensation following the acquisition of land by Dorset County Council ("DCC") from Clemdell Limited ("Clemdell") under an agreement ("the Agreement") dated 24 January 2003 (amended by a supplemental agreement dated 10 September 2003). The land, the subject of the agreement ("the Property"), was needed for the construction of the Verwood Distributor Road South ("VDR"). The Agreement had been preceded by a resolution of the cabinet of DCC to purchase, the service of a purchase notice by Clemdell on East Dorset District Council ("EDDC"), a reference to the Lands Tribunal pursuant to the purchase notice and the submission of a Compulsory Purchase Order to the Secretary of State for confirmation. The substantive claim for compensation is before the Tribunal by way of an arbitration reference under the Lands Tribunal Act 1949 s. 1(5), due to be heard in October 2009. The claim includes the value of the site and various ancillary rights, as well as injurious affectation and other consequential loss.

2. By an order made at a pre-trial review on 24 September 2008 the Tribunal ordered, so far as presently material:

> "BY CONSENT, the parties, without prejudice to their positions, agree that the Tribunal has jurisdiction to determine the following preliminary issues:
>
> (i) whether the Claimant has a right to any further advance payment pursuant to clause 14.1.1 of the Agreement, or otherwise
>
> (ii) whether the claim made in respect of the mortgage gives rise to any separate head of loss which falls to be compensated in addition to other compensation."

3. The Agreement contained special conditions ("SC") relating, among other things, to the purchase price and resolution of disputes. By SC 14.1.1, in default of agreement on the price, the Claimant was entitled to compensation to be settled by arbitration under Lands Tribunal Act 1949 ("LTA 1949"). By SC 14.2 DCC agreed on the first working day 28 days from the date of the Agreement to "pay the Purchase Price to [Clemdell] or if the Purchase Price has not been agreed beforehand [DCC] shall pay to [Clemdell] 90% of [DCC's] valuation…." The agreed valuation date, which was also the date of entry pursuant to SC 14.2 was 24 February 2003.

4. Following entry on 24 February 2003, DCC made payment of £1,106,100 as a 90% advance against a "first stab valuation" of £1,129,000. Clemdell however asserts that DCC had already adopted a valuation of £1.7 million for the same land in July 2000, that DCC had no basis for considering the value of the land to have fallen between 2000 and 2003, there was good reason to conclude that the land value had if anything risen (so it was worth at least £1.7 million in February 2003) and so DCC should have made a 90% advance payment of at least £1,530,000 on entry. Accordingly Clemdell asserts that it was underpaid by some £423,900 in

February 2003. As an addition or alternative to this, Clemdell asserts that following entry DCC revised its valuation and should have made further payments pursuant to a variety of revised "valuations". DCC says it had no obligation to make any payment over and above its initial payment of £1,106,000, but as a matter of grace made a further payment of £380,993 on 18 September 2006, when it revalued the Property at £1,559,259 following the issue of a Certificate of Appropriate Alternative Development under section 17 of the Land Compensation Act 1961 (" s.17 certificate") in respect of the Property, thus bringing the payments up to 90% of its current valuation. This gives rise to the first of the preliminary points.

5. The second preliminary point arises from a request by Clemdell that it be allowed to re-mortgage the Property for commercial reasons. DCC initially refused permission to this re-mortgage in order to prevent DCC's position being in any way prejudiced.

6. The parties formulated the questions to be decided on the preliminary issues in rather different terms, though the substance of the points was the same in each case. Clemdell's formulation of issue (i) was

> "a. Does the Agreement dated 24 January 2003 displace (as DCC contends), or does it incorporate or co-exist with (as the Claimant contends), the Claimant's rights under the statutory code, including the rights under LCA 1973 s.52 to an advance payment of 90% of the compensation as estimated by the acquiring authority, and to a further advance payment where it subsequently appears to the acquiring authority that their estimate was too low?
>
> b. Even if the Claimant's contention on question (a) were wrong, does the Agreement confer on the Claimant substantially the same rights as the statutory code?
>
> c. Is it properly to be inferred from the material before the Tribunal that (i) DCC's advance payment following entry in 2003 was based on a figure substantially lower than DCC's true estimate of the value of the land acquired (£1.7M), and/or that (ii) DCC's advance payment in 2006 was based on a figure substantially lower than its then true estimate of that value, as evidenced by the amounts reserved in its successive capital budgets referable to the cost of acquiring the Claimant's land (c. £3.1M)?"

7. DCC formulated the questions in relation to issue (i) thus:

> "a. Whether, on the premise of a further or different valuation by DCC, there is a right to a further advance payment under SC 14.1.1 of the Agreement;
>
> b. Whether, on the premise of it appearing to DCC that its estimate of compensation payable was too low (by reason of a further or different valuation), section 52(4A) of the Land Compensation Act 1973 applies to this acquisition;
>
> c. Whether the above premises apply, namely, whether further or different valuations were undertaken by DCC in 2000 or 2003 as alleged."

8. On issue (ii), Clemdell formulated the question as: "Does failure to agree to a mortgage following entry upon the land, and/or failure to make the advance payment(s) to which the Claimant was properly entitled, give rise to a head of loss within the scope of compensation (separate from and in addition to the payment of interest)?" DCC formulated the question: "Whether a failure to agree to a mortgage following entry upon the land gives rise to a head of loss within the scope of compensation (separate from and in addition to the payment of interest)."

9. In addition to the preliminary issues there were three procedural matters which Clemdell wished to raise at the hearing, one being in respect of a proposed minor amendment to the terms of issue (i). In the event it appeared that there was no need for the Tribunal to make any decision in relation to any of these points and no more need be said about them.

Facts

10. The parties produced an extremely lengthy chronology by way of an agreed statement of facts. For present purposes it is possible to outline the relevant facts reasonably briefly, though it will be necessary to revert to some points of fact in more detail at a later stage. There is actually little between the parties on matters of fact, and what there was was largely a matter of interpretation of the documents. The witnesses who gave oral evidence of fact were Messrs Sturgiss, Crowther, Gibb and Miller, all called on behalf of DCC. We found them to be in general reliable in their recollection, especially where assisted by documents, and to be fair and truthful witnesses. Mr Hannam's witness statement was admitted without the need for him to attend to give oral evidence.

11. DCC had acquired land at Bakers Farm in 1988 for a Fire Station and Police Station from Robert Thorne Ltd ("Thornes"). Because of the impact of the proposed VDR, additional land for the Police Station was purchased from Thornes. During initial discussions with Thornes, an indicative drawing of the alignment of the VDR was supplied to them. At this point Clemdell came on the scene. In July 1990 discussions took place with Thornes and Clemdell about the VDR, and in September 1990 Thornes and Clemdell entered into an option agreement for a period of 8 years during which Clemdell could acquire land to the north of the indicative alignment of the VDR in four tranches. The option agreement also included provisions: i) that Clemdell could require Thornes to transfer to them the land identified for the VDR if Clemdell entered into an agreement under section 38 of the Highways Act 1980, but not otherwise and ii) that for a period of 8 years Clemdell had a right of first refusal to buy land (identified as the "Adjoining Land") if Thornes wished to dispose of it to anybody other than DCC.

12. Between 1990 and 1996 Clemdell completed the purchase of the four tranches of the option land amounting to approximately 5.25 acres (which excluded both the VDR land and the Adjoining Land), and sold on this entire holding to EDDC in January 1999. During 1997 Thornes went into voluntary liquidation. On 11 December 1997 planning permission was granted for the VDR. On 22 December 1998 DCC purchased 24 Manor Road for the purposes of the VDR.

13. On 13 July 1999 the Executive Committee Appendix to the report on County Council Budget 2000/01 – the Capital Monitoring report, showed the VDR works costs were projected at £1 million to be funded by developer contributions and the land costs would be substantial. There were said to be no resources to fund the commitment for the land purchase in 2000/2001. In December 1999 the County Treasurer's Report for the 2000/01 Budget Strategy listed the VDR with other schemes. A CPO was said to be under preparation, which would result in the cost being incurred in 2000/2001, with the possibility of land acquisition costs of around £1.6 million.

14. On 17 January 2000 Humberts as agents for the Liquidator of Thornes (who was still negotiating with Clemdell for the sale of the Property and other land) wrote to Mr David Gibb of DCC about the proposed acquisition of land for the VDR: "I have attached a copy of a portion of the plan and edged in red that I believe will be your possible acquisition requirement for the construction of the Verwood Road South". Mr Gibb responded on 24 January that the 17 January 2000 letter "correctly reflects this Council's current position."

15. On 15 March the Executive Committee Agenda notes "The owners have at this stage served a Contract on the County Council", "if the County Council acquire the land needed for the distributor road the cost to the council would be in the region of £1.6 million at current values" and "if, as the developer argues, the County Council should also acquire the 'material detriment' land then the cost to the County Council could be in the region of £2.5 million at current values". The minutes of the DCC record at Resolution 129.1 that DCC "do not intend to acquire additional land included in the draft contract" (from Thornes and Clemdell).

16. In April 2000 there was correspondence between Humberts, acting on behalf of the liquidator of Thornes, and DCC. On 27 April there was a meeting at which Mr Stirgess of DCC discussed with Mr Butterfield of Humberts "areas regarding possible acquisition". Mr Butterfield proposed that DCC should acquire the whole of the area of Bakers Farm held by Thornes amounting to 3.265acres (1.32ha.). In the schedule of areas produced by Mr Butterfield the VDR land was apparently 2.45ac. (0.99ha). On 9 May Humberts wrote to DCC to offer to sell the land "as identified as the extent of works as shown in the Dorset County Council drawing number DC2140/8 dated 2/97" (i.e. the 2.45 acres) and stating that "The price to be paid is £1,700,000." This compares with the area of the Property, which is only 1.69 acres (0.68 ha). After taking advice from DCC's Legal Services Department, Mr Stirgess replied on 15 May 2000 that he was prepared to recommend acceptance of this, subject to the settlement by Thorne's Liquidator of all actions being pursued by Clemdell in respect of the VDR land. On 6 June DCC produced a plan, 'DC2140/14/2/Orig', headed "Compulsory Purchase Order 2000 Plot no2", identifying some of Clemdell's land as 0.776 hectares (about 1.86 acres).

17. In the event, the Liquidator could not meet the required conditions and on 30 June 2000 Mr Butterfield told Mr Stirgess that the action with Clemdell had been settled and Thornes' interest in the Property was being transferred to Clemdell.

18. On 26 June Mr Gibb had prepared a capital programme bid 2000/01 for the VDR for a total of £3,332,000. Total site cost was estimated at £2,147,000. Of this £332,000 was for

other sites required for the road and already expended before 31 March 2000 (i.e. it included £1,815,000 for further land acquisitions). Of the balance, £1,700,000 was projected to be paid in the year to 31 March 2001 and £115,000 in the year to 31 March 2002. The bid form states "Valuation still to confirm and the cost of land might be £1.8million." DCC did not have the funds to pay for the substantial land cost. DCC intended to fund the land purchase by advances from EDDC under a contributions agreement and the collection pot of its "Developer Contributions Fund". DCC was to refund the land purchase cost to the collection pot to fund construction and other highway schemes contained within the capital programme bid.

19. The Executive Committee approved the 26 June 2000 Capital Programme Bid for VDR and resolved that provision be made in future capital programmes for the early construction of the road in the next five years. On 5 July 2000 the Committee resolved that the VDR should go ahead and that there be an immediate release of the funds from EDDC to DCC by way of an apparently informal addendum to the contributions agreement.

20. On 11 July there was a meeting between representatives of DCC, Clemdell and Thornes. Mr Stirgess's note of the meeting states "Agreed Heads of Terms as in letter of 9th May from Humberts." On 17 July DCC wrote to Clemdell offering £1,700,000 for the land. DCC's drawing No DC2140/9 of February 1997 was said to show the affected land, but a revised land acquisition plan was to be prepared by DCC including a calculation of the area required. On 14 July Dave Gibb circulated a memo to Pete Holtom of DCC's engineering consultancy, which is annotated: "6 copies land plan to Tim Stirgess" and "act by 21/7/00". It had on it Clemdell's name and address.

21. On 17 July Mr Stirgess wrote to Clemdell confirming he was prepared to recommend that the acquisition of the land required for the VRD "should be on the following terms … 2) consideration of £1,700,000 is to be paid in full and final settlement under all heads of claim." The extent of the land required was said to be "that shown affected by the County Council's Drawing No DC2140/9 (Construction Details) dated 2/97." The area of land derived from that plan was 2.45ac. (0.99ha). [On 3 September Clemdell and DCC agreed that the letter of 17 July identified the relevant date for the s.17 certificate, rather than a date in March 1995 for which DCC had previously been contending.]

22. On 18 July 2000 Mr Pliskin of Clemdell wrote to DCC, saying that the letter of 17 July reflected the discussion of the 11 July and that Clemdell's solicitor would progress the heads of agreement to contract as soon as possible. He raised the issue of construction of a mini roundabout on Crane Drive to provide access to adjoining land in Clemdell's ownership. That letter envisaged that further discussions were required, and it was likely that the newly issued plan DC 2140/14/2A would be superseded as the area for acquisition would vary again if a mini roundabout was to be included in the VDR scheme.

23. Mr Stirgess had asked Dorset Engineering Consultancy ("DEC") for a revised land acquisition plan including a calculation of the area of the parcel required. On 19 July, DCC produced a revised drawing DC 2140/14/2A. This added Clemdell's name and address to the plan. On 21 July 2000 the plan was supplied to Mr Stirgess together with copies of e-mails sent to Clemdell's representatives, the Civil Engineering Practice. At this point, Mr Stirgess

was operating on the basis that the extent of land required was 2.45 acres (0.99 ha), as had been referred to in earlier correspondence.

24. On 9 August 2000 Mr Stirgess wrote to Mr Pliskin setting out his understanding of the position at that time. He referred to the need for an agreed land plan and to discussions about the Distributor Road land requirement. Mr Stirgess confirmed that if the extent of the land acquisition is to be reduced (i.e. below the figure derived from Drawing DC 2140/8 -2.45ac. /0.99ha.) "then I would have to review the total compensation payable". On 1 November there was a meeting between DCC and Clemdell at which DCC's solicitor recorded that it was agreed the highway land could be purchased for £1.7 million. These negotiations eventually foundered on matters of principle after discussions over a prolonged period and a letter of 7 March 2001 from DCC's solicitors effectively brought those negotiations to an end. In the meantime on 29 November the Executive Committee of DCC resolved that legal agreements be concluded to secure the land for the VDR.

25. On 23 January 2001 DCC's Environmental Services Overview Committee's capital estimates to 2004/5 showed the total cost of VDR at £2.875 million, made up of £1.44 million for the land, £1.25 million for construction costs and £185,000 for design fees.

26. On 10 September 2001 DCC produced drawing DC2140/41/1/orig in respect of the Clemdell land, with the area of the land to be acquired stated to be 7851 square metres approximately. This was to be checked by Mr Hannam of DCC's engineering consultancy.

27. In the same month, the budgeted costs of the VRD were shown to have risen to £3.582 million from £2.875 million, and the land cost was stated at £2.147 million. On 7 November DCC approved the VDR project as part of its capital projects. The capital programme for 2002/3 prepared by Mr Gibb showed gross total costs of 3.582 million, with a local plan contribution of £1.7 million. The net cost was therefore to be £1.83 million.

28. On 21 December 2001 Clemdell submitted an application to EDDC for a s.17 certificate. It showed residential development within the land required for the VDR. On 6 November 2002 EDDC issued a section 17 certificate specifying that the permitted development would have been for a maximum of 15 dwellings off three private driveways. [Subsequently Clemdell appealed against this notice and on 13 February 2003 EDDC conceded that there was an error in the decision.]

29. On 29 April 2002 EDDC entered into an agreement with Clemdell for the transfer to Clemdell of a small area of land known as "the Orange Land".

30. On 3 July 2002 Clemdell served a Purchase Notice on EDDC requesting EDDC to purchase the land "shown illustratively as the land edged red on the plan enclosed" (which was plan DC2140/20/1/B). On 17 September EDDC responded that DCC had agreed to take over responsibility for the Purchase Notice. On 2 October DCC replied to Clemdell rejecting the Purchase Notice as being defective. The same day, the DCC Cabinet was informed that an

environmental consultant was satisfied that the badgers on part of the Clemdell land could be moved, so phase 1 of the VRD would proceed. DCC then drew down £718,000 from the EDDC collection pot for phase 1 construction costs of the road.

31. In November DCC made revisions to the budgeted total cost, increasing them to £4,150,000 and revising the land cost up from £2,147,000 to £2,300,000. Notes to the schedule stated final land costs were "subject to the Lands Tribunal."

32. On 26 November 2002 Clemdell served a purchase notice on DCC for most of the Property and other land. This was rejected by DCC as being invalid. On 4 December 2002 Clemdell made a reference to the Lands Tribunal pursuant to its purchase notice. DCC then proceeded by way of a Compulsory Purchase Order ("CPO") in respect of the Property, identifying the area as 7,851 square metres. The CPO was made on 13 January 2003 but was never confirmed. Instead, on 24 January 2003, the Agreement was entered into. Pursuant to the Agreement Clemdell withdrew its disputed Purchase Notice and did not object to the CPO.

33. On 24 February 2003 DCC took entry of the Property and became obliged to pay 90% of its "valuation".

34. On that date Mr Sturgiss undertook a valuation of the Property. He sought clarification of its area as shown on plan DC1240/59/1/orig, dated 16 January 2003, which was the plan included in the Agreement. No area was quoted on the plan itself, or in the body of the Agreement, so he sought confirmation of the area from Mr Hannam of DEC. Mr Hannam confirmed that the area within the line shown on the plan was 6,833sq m (1.69 acres or 0.68 ha), considerably less than the area of 7,760sq m (1.92 acres or 0.77ha) shown on drawing No.2140/14/2A issued to Mr Sturgiss in July 2000.

35. Mr Sturgiss made his valuation, on the basis 6,833sq m, at £1,129,000, with the result that the 90% figure was £1,016,000 and this figure was provided to DCC's solicitors the same day. His valuation took into account the 2002 Section 17 Certificate and had regard to the then relevant current planning policies, e.g. the latest version of PPG3 concerning minimum residential development densities. His manuscript notes and calculations for that valuation were put in evidence. A telegraphic transfer of the 90% figure plus VAT was then made to Clemdell on 3 March, with the assistance of a further drawdown from the EDDC "pot". No challenge was made at the time to Mr Sturgiss's valuation nor was any challenge made in respect of the amount of the 90% payment. It was not until February 2005 that Clemdell contended there had been an underpayment.

36. On 16 June 2003 DCC received from the Land Registry notice of an application by Clemdell to re-mortgage the Property. On 30 June DCC objected, pointing out that 90% of the value had been paid on contract. The Land Registry cancelled Clemdell's application on 14 October 2003. Subsequently on 12 December 2003, Mr Crowther (then a solicitor with DCC) wrote to Clemdell's solicitors stating that DCC would not allow the charge to be registered to prevent DCC being prejudiced in any way. The reason for DCC's refusal was that it was not

persuaded that even if Clemdell executed a deed of priority protected on the Land Register by a caution, this would be sufficient to give DCC priority as against a mortgagee.

37. A second CPO of land for the VDR was made by DCC on 13 August 2003, which was confirmed by the Secretary of State on 21 January 2004. This second CPO did not include the Property as it was already the subject of the 2003 Agreement.

38. DCC and Clemdell entered into the supplemental Agreement on 10 September 2003. In March 2004 construction of the VDR commenced, and in October 2004 the road was opened.

39. Clemdell applied to EDDC, as the local planning authority, for two Section 17 certificates. Clemdell appealed the first certificate and the second certificate was appealed by DCC. Both appeals were heard together in January 2005. Following an agreement between the Clemdell, DCC and EDDC at the Inquiry, the Secretary of State issued identical replacement certificates on 27 May 2005 confirming the relevant date as being 17 July 2000 under which it was agreed that not less than 55 units would have been developed on the reference land.

40. Following the compromise of the appeals but before the formal decision of the Secretary of State, Clemdell made a request on 3 February 2005 for a further advance payment pursuant to "1973 Land Compensation Act s.52 (4A)." Mr Crowther of DCC responded that he agreed that Clemdell was entitled to a further advance payment under that section but that the amount would follow a further valuation which was dependent on the Secretary of State's decision.

41. Not content with that, Clemdell instituted proceedings in the Chancery Division for a declaration that it was entitled to a further £1.26 million or thereabouts under s.52(4A) of the Land Compensation Act 1973, asserting that not only were DCC obliged to pay further sums on account, but that DCC's estimate of compensation had increased by at least £1.4 million. The proceedings were stayed following a hearing before Deputy Master Bartlett.

42. In January 2006 Clemdell asked for, and DCC gave, permission to Clemdell to re-mortgage the Property. The reason for DCC's change of heart was that the Land Registration Rules had been changed since the previous application, and DCC formed the view that a notice on the register would now adequately protect its interest.

43. On 22 March 2006 a further valuation of the Property was undertaken by DCC. This valuation took account of the then current planning guidance, and also took account of the "new" section 17 certificate of 27 May 2005 which confirmed that not less than 55 units would have been developed on the Property (as opposed to the 15 units in the earlier certificate, on which Mr Sturgiss had based his valuation). The further valuation or estimate of compensation valued the property at £1,559,259

44. On 3 August DCC invited Clemdell to apply for a further advance payment on a "without prejudice" basis. On 18 August Clemdell made the request and on 18 September DCC made a

further advance payment of £380,993.10, making up the advance payment to 90% of the new valuation.

Issue (i): Construction

45. Clemdell's submissions in very short form were:

(1) DCC had adopted a valuation of the Property of £1.7 million, this being the sum which it offered Clemdell to acquire the same land on 17 July 2000**.** DCC had no basis for considering the value of the land to have fallen between 2000 and 2003. If anything, its view was that the land value had risen, so it was worth at least £1.7 million in February 2003. So DCC should have made a 90% advance payment of at least £1,530,000 on entry and Clemdell was underpaid by some £423,900 in February 2003.

(2) By late 2003, DCC's estimate of value had in fact risen to £3.1 million as demonstrated by disclosed DCC documentation, and the valuation remained at this figure, that being the minimum amount allocated for meeting land cost for the VDR that is identifiably referable to land acquired from the Claimant. On 3 February 2005 the Claimant requested a further advance payment and on this basis the request should have resulted in a further 90% payment of £1.26 million (that is, £2,790,000 less £1,106,100) on or before 3 May 2005.

(3) Clemdell is entitled to receive a further advance payment consisting of: i) the £423,900 underpaid as at February 2003; and (ii) the £1.26 million underpaid on the February 2005 request (with credit given for £380,933 paid as from the date of payment on 18 September 2006).

(4) The Agreement dated 24 January 2003 incorporates, or co-exists with, Clemdell's rights under the statutory code, including the rights under LCA 1973 s.52 to an advance payment of 90% of the compensation as estimated by the acquiring authority, and to a further advance payment where it subsequently appears to the acquiring authority that their estimate was too low.

(5) Even if that is wrong, the Agreement as a matter of construction confers on the Clemdell substantially the same rights as the statutory code.

46. DCC's response in summary was:

(1) DCC rejected the Purchase Notice which was defective, and therefore invalid, and it is therefore of no effect. The status of the Purchase Notice was conclusively resolved by the Agreement, and it was required to be withdrawn.

(2) The Property was acquired under the Agreement that was executed less than two weeks after the CPO was made by DCC. The CPO was never confirmed by the Secretary of State, and was withdrawn by DCC. The acquisition was made wholly by agreement between the parties, under the terms of the Agreement and outside the statutory compulsory purchase regime. Particular elements of the regime were incorporated into the Agreement, but the regime applies to no greater or different extent than expressly provided in the Agreement.

(3) DCC discharged its obligation to make an advance payment under the Agreement, and had no other obligation in relation to advance payments. Clemdell had no right to a further advance payment.

(4) DCC made no further valuation of the Property after the advance payment until March 2006, and did nothing else which could trigger a further advance payment even if there was a right to one.

47. It is convenient to take the questions as to whether there were any relevant valuations other than those of 24 January 2003 and 22 March 2006 after dealing with the construction elements of this issue.

48. Clemdell's starting point was that a contract for acquisition of interests in land by an authority with powers of compulsory purchase is entirely capable of co-existing with the seller's rights under the statutory code, and that there are good reasons of law and policy for a tribunal to lean against a construction that would displace those rights. This seems to us to begin from a false premise. When a landowner is threatened with compulsory purchase, he may either allow the statutory process to work its way through or (and this is to be encouraged), he may seek to reach a contractual solution with the acquiring authority. If he reaches a contractual settlement, the contract will govern the relationship between the parties.

49. We also reject the more extreme line of argument, which was advanced somewhat faintly, that the opening words of section 52(1) meant that in every case in which possession of land is taken pursuant to a contract made against the background of the possibility of a compulsory purchase order, there is a statutory obligation to make an advance payment under section 52(4) and to make further advance payments under section 52(4)(a). The argument depended on the definition of "acquiring authority" which by virtue of section 87(1) has the meaning given to it by section 39(1) of the Land Compensation Act 1961 "the person or body of persons the interest [in land] is or is proposed to be acquired". It was said that since DCC had taken possession of Clemdell's land, it was an "acquiring authority" and so was obliged by the words of section 52(4A) "they shall, if a request in that behalf is made in accordance with subsection (2) above, pay to the claimant the balance of the amount of the advance payment calculated as at that time." In our view, whist the statutory provisions may legitimately be called in aid in construing the agreement into which the parties have entered, there is nothing in the scheme of the compulsory purchase legislation which imposes any such obligation where the terms of the contract have not provided for a further advance payment.

50. Thus, in *BP Oil UK Ltd v Kent C C* [2003] 3 EGLR 1, the Court of Appeal decided that the liability of the Council was a contractual liability. The Council had entered the land pursuant to a notice of entry. The contract entered into exactly six months later provided for the consideration for the vendor's loss of the land to "be agreed but assessed in accordance with the statutory Compulsory Purchase Code". This meant that the right to compensation was a contractual right though it was to be calculated in a particular way: the fact that the way chosen replicated the method under the statutory code did not mean it was not a contractual right. In that case a point arose as to interest, and Carnwath and Mummery LJJ preferred the view (without having to decide the point) that interest as provided by section 11(1) of the Compulsory Purchase Act 1965 fell to be paid from the date of entry even though the contract

made no reference to interest. This was because section 3 of the Act specifically provides for an authorised acquisition to proceed by way of agreement for monetary consideration, and section 11 provides for interest to run on "any compensation agreed or awarded", which is sufficiently flexible to include consideration on an agreed sale under section 3. In that case there was a relationship governed by contract, but under the contract interest was governed by the applicable statutory provision. It was in this context that Carnwath LJ observed that "It is unnecessary and artificial to draw a precise dividing line between the statutory and contractual aspects in this process." That is a very different thing from saying that the statutory provisions override the terms of any contract or that the terms of the contract have to be read subject to the statutory code.

51. In the course of the Chancery proceedings before Deputy Master Bartlett the question was raised, but the Deputy Master correctly took the view that it was not his task to decide between the competing arguments. He did however express his views in passing. He said at para 16 of his judgment:

> "If the statutory right to interest can continue to exist when the parties have entered into an agreement for the acquiring authority to acquire the land that seems to me to suggest that it is possible for the statutory right to an advance payment to continue to exist also. If one had a case where the agreement was completely silent on the subject of any advance payment it would seem equally improbable that the claimant would be held to have intended to forego any right to such a payment. If compensation can be read as referring to the consideration payable on an agreed sale in connection with interest I do not see why it should not be read in the same way in Section 52 of the 1973 Act. None of this is conclusive in view of the tentative statements on the point by Carnwath LJ and the factual differences between that case and the present but it is helpful."

52. In this case the arrangement was contractual. The question is whether the contract on its true construction (which of course must be determined against the facts known to the parties at the time, including the threat of compulsory purchase and the code of the compulsory purchase legislation) provided, either expressly or by importing the statutory provisions, for more than one payment in advance to be made.

53. SC 14.1.1 required the Purchase Price to be assessed as if the Property had been acquired compulsorily. SC 14.2 provided for entry upon the Property 28 days from the date of the Agreement (to be the valuation date) and for the payment of the Purchase Price to the Claimant or if not agreed for the payment of 90% of DCC's valuation. Those clauses of the Agreement made express provision as to how the price was to be calculated and when it was to be paid. Amongst other things it provided for a single advance payment. Unless it can be said that there is some special rule of construction in cases where a party is selling in anticipation of a compulsory purchase to the effect that the entirety of the statutory code is imported into the agreement unless the contrary is specifically provided, it is impossible to see how a term for a further payment on account can be implied when the parties have chosen to provide for a single payment on account. We regard Mr Crowther's response in correspondence that he agreed that Clemdell was entitled to a further advance payment as an error (as he himself said in the course of his oral evidence). We can see no basis for implying any special rule of construction, nor in our view did Carnwath LJ suggest that there was one.

54. It is worth noting that in the *BP Oil* case the agreement (set out in a letter) was in far less formal terms than the agreement in the present case, and did not purport to deal with either the question of interest or the question of any payment on account. By contrast, in the present case, there was a contract drafted in meticulous detail, incorporating the Standard Conditions of Sale (Third Edition), and including eighteen special conditions. Where it was intended to include statutory provisions express reference was made to them: thus in SC4 there is reference to payment by DCC of "any other fees payable under the Land Compensation Act 1961", in SC5 it is provided that "section 23 of the Land Compensation Act 1961 shall apply to this Agreement". At SC14.1.2 the parties agreed that: "sections 6 to 10 of the Compulsory Purchase Act 1965 shall apply to the assessment of the Purchase Price and/or compensation." When it came to taking possession at SC14.2 it was provided that DCC should "enter the Property and take possession of the land comprising the same … and will pay the Purchase Price to [Clemdell] or if the Purchase Price has not been agreed before hand DCC shall pay to [Clemdell] 90% of DCC's valuation….". This was a clear departure from the scheme for advance payment provided by section 52 of the Land Compensation Act 1973, which provides for advance payment following a request in writing. SC14.3 then continues, providing that DCC should pay Clemdell "the amounts assessed by the Lands Tribunal … or agreed between the Parties within 14 days of receipt of written notice of the assessment by the Lands Tribunal … or agreement between the parties whichever shall be the earlier." In our view, unlike the *BP Oil* case there is no room in these provisions for any inference that there would be further payments on account.

Issue (i): Initial underpayment

55. The determination of the issue of construction against Clemdell does not dispose of its argument that in any event the amount paid in advance was less than it should have been. It was submitted that DCC had already adopted a valuation of £1.7 million for the same land, this being the sum which it offered the Claimant to acquire the same land on 17 July 2000; that DCC had no basis for considering the value of the land to have fallen between 2000 and 2003 (if anything DCC's view was that the land value had if anything risen), so it was worth at least £1.7 million in February 2003. Thus DCC, it was argued, should have made a 90% advance payment of at least £1,530,000 on entry and the Claimant was underpaid by some £423,900 in February 2003.

56. The issue was essentially one of fact. As a matter of fact we are satisfied, having heard Mr Stirgess giving evidence, that DCC had not adopted a figure of £1.7 million in respect of the Property. It had been prepared to pay £1.7 million for the land "as identified as the extent of works as shown in the Dorset County Council drawing number DC2140/8 dated 2/97" which was the subject of the meeting on 27 April. At that meeting Mr Stirgess discussed with Humberts "areas regarding possible acquisition". The area of that land was 2.45 acres and when Mr Stirgess indicated that DCC was prepared to pay £1.7 million it was on the basis that the extent of the land being acquired was 2.45 acres. If Thornes had been able to meet certain conditions required by DCC, that area would have been acquired at that stage at that price. It included adjacent embankments and was a greater area than was required for the road scheme, but DCC would have been prepared to pay that sum if the conditions could have been met. They were not, so the purchase did not proceed. However the sum of £1.7 million was retained in the budget for the project "to ensure the outturn costs for the land could be met and to assist

the overall resourcing of the project" as Mr Gibb, who was then the Capital Works manager within DCC's Environmental Services Directorate, put it.

57. Mr Gregory, the forensic accountant who gave evidence on behalf of Clemdell, embarked on an elaborate analysis of what he saw to be the relevant facts and engaged in a lengthy criticism of DCC's procedures. That criticism appears to have been largely justified but it does not follow that because there was "considerable room for improvement" with regard to "the internal controls in relation to the monitoring of the VDR project" that the figure of £1.7 million can be fixed on as "the compensation as estimated by the acquiring authority" for the purposes of section 52(3) of the Lands Compensation Act 1973.

58. After an analysis of the documentation, Mr Gregory concluded that: "in my opinion as a Forensic Accountant from considering the various documents that are available the inferences that can be drawn from those documents regarding the £1.7m is that it relates to the assets that are described in the Agreement of 24 January 2003." He went on to conclude that from the DCC documents "the £1.7m offer was only for the land required for the VDR". Whilst this might have been an inference which a forensic accountant may have drawn, it was a conclusion without the benefit of having heard the oral evidence. Having heard the oral evidence of Mr Stirgess and considered the documents, we are satisfied that there was no estimate of the compensation payable for the Property at £1.7million before or at the date of the Agreement. The valuation (or estimate) of the compensation payable for the Property at the material time was the valuation made by Mr Stirgess in on 24 February 2003. There was no further valuation until the further valuation prepared in March 2006. It is simply inaccurate to suggest that the area of land being discussed with Thornes in 2000 was the Property comprised in the Agreement or that the figure of £1.7 million related to the "assets that are described in the Agreement of 24 January 2003".

Issue (i): underpayment of further advances

59. In the light of our view as to the proper construction of the Agreement it is not necessary to deal in great detail with Clemdell's further submission that there were a number of other estimates or valuations after Mr Sturgiss's valuation of 24 February 2003.

60. In seeking to demonstrate that there were other estimates by reference to which the advance payment should have been made, Mr Gregory relied upon three sets of capital reporting schedules prepared by DCC. These were: (1) the Major Capital Project Monitoring Sheets ("PMS"); (2) Capital Project Summary of Approved Projects Schedules ("CPSS") and (3) Environmental Services Capital Estimates ("ESCE"). Mr Miller, who was Chief Accountant for DCC from 1999 until his retirement in 2007, and Mr Gibb who was Capital Works Manager in the Environmental Services Directorate of DCC from 1997 until his retirement at the end of March 2005, gave evidence which explained the processes and figures involved.

61. In DCC's budgetary process each individual committee of DCC put forward capital programme bids for approval by the DCC Cabinet and then the Council. The PMS for

September 2001 showed a projected land cost for the VDRS project as £2,147,000. Of this, £1,815,000 was forecast expenditure for the years 2001 and 2002. There had been an actual expenditure of £332,000 up to 1 April 2000, making a total of £2,147,000.

62. Mr Gibb continued to supply project monitoring sheets to the DCC Cabinet approximately quarterly, and after discussion with his colleagues he maintained the projected outturn land costs at £2,147,000 until it was increased to £2.3 million in the November 2002 PMS as a result of his discussions with colleagues. This comparatively modest increase reflected discussions about general increases in land costs, possible acquisition costs and in particular a growing awareness of possible Part 1 compensation payments to adjacent property owners in respect of increased traffic noise levels and the like.

63. Following Mr Sturgiss's February 2003 valuation, Mr Gibb continued to seek updated figures, but Mr Sturgiss's view was that until the section 17 appeals had been determined the position remained uncertain, and there was no basis for a revised valuation. However Mr Gibb was concerned as to the possible increase in outturn costs and in October 2003 met with representatives of DCC's Legal Services and the Valuation and Estates Manager to discuss the project, and particularly a "worst case scenario" risk assessment. He then met the Head of Financial Services. Following this, on 3 December 2003, the DCC Cabinet discussed the matter, and a budgetary increase was agreed for the VDRS project, bearing in mind that Clemdell was claiming compensation of £3.5 million. These considerations showed up in an increase of £1.4 million in the PMS in early 2004. This was a figure decided upon by the DCC cabinet after considering all the identified risks and was anticipated as being payable in 2004-2005. It was, Mr Gibb said (and we accept), wrong to suggest that the £1.4 million increase reflected additional costs in relation to the Property.

64. So far as the DCC budget was concerned, Mr Miller's evidence was that as chief financial officer he was obliged to make a report stating whether or not the budget is sufficient to provide the local authority services and as to whether the estimates provide a robust and accurate basis upon which to calculate the county precept. The report does not signify that every amount in the budget will be spent or received. The financial statements of the DCC's accounts included costs in respect of land for the VDR. Provision was made for the 90 per cent paid in 2003 and for the balance of 10 per cent remaining to be paid. Following the further valuation in 2006, that valuation was used in making the relevant entries in the accounts.

65. His evidence was that in the 2003 and 2004 Accounts the VDR scheme was listed along with other schemes as a contract relating to a capital scheme where estimates of major commitments of expenditure (over £250,000) in future financial years had been made with amounts of £2.745m and £2,345m respectively. This was in error, in his view, as the amounts published as outstanding commitments in each of those years were incorrectly calculated by taking the difference between the total approved budget provision and the total expenditure to 31 March of the relevant year, including accruals, on construction of the road and land purchases amongst other items. The inclusion of this scheme in the schedules and the quoted amounts did not accord with the statement included in the accounts concerning major contracts with commitments of greater than £250,000 outstanding, as the published figures also included estimated remaining costs relating to the construction of the road scheme and associated fees, injurious affection claims as well as estimated potential additional costs of land purchase (with

associated interest), including those associated with the reference to the Lands Tribunal. Therefore, the sums quoted could not be construed as meaning that the amount due to the Clemdell was of the order of £2.5 million.

66. Mr Gregory disagreed with Mr Miller's view that there was an error. He believed it was possible to identify the figures that are shown in the notes to the accounts for future capital commitments with the PMS and also the summary of approved projects in the CPSS. From these it was possible to identify how the individual project figures were made up, and to compare the figures as extracted from these documents at 31 March 2004 and at 31 March 2006. In both years it was evident to him that there was a selection process from the totals that were shown within the overall future capital budgetary capital expenditure; the selection process picked the gross figures exclusive of contributions whether from local or central government or third parties; and in both 31 March 2004 and 2006 the figures included were based on the same rationale, which was budgeted cost less actual spend to date. The whole of the budgeted cost was included irrespective of the make up of that cost.

67. Mr Gregory went on to express the view that the documentary evidence showed that the £1.4m was for Clemdell's land, and that it was reasonable to conclude that all of the costs were land costs and not to do with any litigation costs. It was in his view evident that substantial costs had been allocated to the capital budget for the VDR that were not to do with the construction of the road (as they post-dated the opening of the road), or acquisitions of land (because there were no further acquisitions or payments to third parties). This suggested to him that DCC had been allocating against its capital budget the costs of defending Clemdell's claim. In his view, if DCC was complying with its internal control statement there must have been further capital provisions being made, but no such provisions were identified. He went on from this to conclude that both the £1.7 million figure and the £1.4 million figure must derive from estimates of value drawn from advice from the Estates and Valuation Department (i.e. Mr Sturgiss until his retirement), and must reflect estimates of value which should have given rise to reconsideration of the payments to Clemdell.

68. In our view Mr Gregory's analysis is incorrect. We accepted Mr Sturgiss's evidence that he had not made any other valuation apart from the 2003 valuation. The figure of £1.7 million was not a valuation or estimate in relation to the Property. It was a conditional and "subject to contract" offer in relation to a larger area of land. Even if it had been a valuation, there was no attack made on Mr Sturgiss's good faith, and no suggestion that his 2003 valuation was not a genuine valuation on the basis of which DCC acted. There was no evidence of any valuation after his retirement until the 2006 valuation. The £1.4 million figure was not a valuation or estimate but an allowance for budgeting purposes reflecting a prudent increase in the overall projected worst-case outturn costs. It cannot be said that a budgetary allowance for the possibility that Clemdell might achieve a far better result than DCC anticipated amounts to an estimate or valuation of the compensation payable.

69. It follows that even if we had taken the view that Clemdell could have been entitled to further advance payment under the Agreement, we would have held that it had not shown that it had appeared to DCC that its estimate of compensation was too low.

Issue (ii): Mortgage

70. The second preliminary issue is "whether the claim made in respect of the mortgage gives rise to any separate head of loss which falls to be compensated in addition to other compensation."

71. On this issue Clemdell sought to re-formulate the question as: "Does failure to agree to a mortgage following entry upon the land, and/or failure to make the advance payment(s) to which the Claimant was properly entitled, give rise to a head of loss within the scope of compensation (separate from and in addition to the payment of interest)?" DCC suggested the real question was: "Whether a failure to agree to a mortgage following entry upon the land gives rise to a head of loss within the scope of compensation (separate from and in addition to the payment of interest)." In argument Clemdell sought to expand the ambit of the issue, but the question for decision is limited to the "claim in respect of the mortgage".

72. Dealing with the issue, Clemdell submitted that the losses sustained by the failure to satisfy its entitlement to advance payment and refusal to consent to a mortgage are essentially elements of the disturbance claim. They represent "loss sustained by a dispossessed owner... which flows from a compulsory acquisition" and are "the natural and reasonable consequence of the dispossession of the owner" see *Harvey v. Crawley Development Corporation* [1957] 1 QB 485 (per Romer LJ at 494). DCC deprived Clemdell of the opportunity to make profits which it would otherwise have achieved, because insufficient funding was available to it in relation to a loan secured by a mortgage on the Property (and indeed in relation to a lack of a further advance payment).

73. The argument ran that if DCC had not acquired the Property, that land would have been available as an asset enabling Clemdell to pursue other profitable projects, since it could have been sold on at its market value for (or following) development, releasing funds that could and would have been applied as working capital towards other schemes, or (and in any event, pending any sale) used as security for lending to provide that capital. The effect of DCC's acquisition under the Agreement was to deprive the claimant of an asset, subject to (a) the right to advance payments of compensation paid promptly at 90% of DCC's true estimates of value, and (b) the right to deal with the land in the ordinary way pending vesting of title, subject to such consent by DCC as the law requires.

74. Since there was a "sizeable underpayment of advance compensation, it was submitted that Clemdell was kept out of both its asset and funds which would have provided an alternative source of working capital for other projects. So it was reasonable for Clemdell to attempt to mitigate that impact by seeking to borrow on the security of the Property (which, unlike its other land holdings, it could no longer sell on at developed or development value). DCC's refusal to consent to the registration of a charge, it was said, prevented the claimant from doing so. It followed, in Clemdell's submission, that it was entitled to recover compensation for the loss flowing from DCC's refusal to allow it to mortgage the Property.

75. DCC responded that Clemdell was not in occupation of the Property at the date when possession was taken, and did not therefore have a disturbance claim as such under the first

limb of Rule 6. The legal basis of Clemdell's claim appeared to be the second limb of Rule 6, namely "any other matter not directly based on the value of land". The preliminary issue as to whether there is a separate head of loss only fell to be decided in relation to the possibility of a mortgage; in relation to the advance payment, it is an issue for the substantive hearing, if at all. The claim, in DCC's submission, appeared to be that based on the proposition that Clemdell could claim any costs incurred as a result of its dealings with DCC over the purchase, including those said to arise from DCC's objection to the mortgage. It appeared to rely on Mr Gregory's reports that the alleged failures in relation to advance payments could not be mitigated by a mortgage to obtain funding to progress developments.

76. DCC submitted that the issue was concluded against Clemdell by authority. It referred to *Ryde International plc v London Regional Transport* [2004] 2 EGLR 1 and *Mallick v Liverpool City Council* [1999] 2 EGLR 7. The basis of compensation for disturbance is that it is for a loss "beyond the loss for which he is to be reimbursed in respect of the land taken": *Horn v Sunderland Corporation* [1941] 2 KB 26 at 45. To allow any compensation for lost profits or similar would lead to double counting of compensation by way of interest: a claimant would receive compensation both for the cost of borrowing money and the profits it would have made if it had had the money earlier. Whilst a claimant is to receive fair compensation, he is not entitled to more than fair compensation, and not more than his losses: *Director of Buildings & Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 125C-D; and *Horn* at p49.

77. In our judgment DCC's submissions are correct. Once Clemdell had contracted to sell the land to DCC the nature of its rights had changed. It received a substantial proportion of the purchase price upfront, and was entitled to the balance plus interest in respect of the delayed remainder. Insofar as it had an interest in the land, that interest was no more than an unpaid vendor's lien. It had no right to expect DCC to allow it to charge the land elsewhere, to the possible detriment of DCC, which might then find itself having to pay off the new mortgagee in the event of default by Clemdell.

78. The position as to compensation is governed by the contract, and the contract imports the statutory scheme as to the calculation of the amount to be paid. In *Mallick* (where there had been both an underpayment and a late payment of an advance payment of compensation), the claim was for compensation to redress the lost opportunity and financial return arising from the ability to reinvest in a similar property had there been an earlier payment of the compensation. The Court of Appeal held that any delay in the payment of compensation could only be compensated for by the payment of interest at the prescribed rates. The Court noted that delay was an unavoidable part of acquisitions of this sort, and that the inevitable cost of delay was addressed by the provision for the payment of an advance payment and interest.

79. The Tribunal's conclusion (upheld by the Court of Appeal) in *Ryde*, which followed *Mallick*, was that a claimant receives as compensation a sum representing the value of the land which it can invest elsewhere in order to make a profit, and to the extent that it is kept out of its money for a period after the date of possession it will receive interest, to reflect what that money would have been worth if paid at the date of entry. The combination of the compensation for the value of the land which reflects its potentiality for profit making, and interest that reflects the cost of borrowing money to invest in another venture, meant that a claimant was fully compensated.

80. In *Ryde*, Carnwath LJ said at paras 23-24:

> "It is true that the acquisition deprived Ryde of their expected profit, but it also relieved them of the corresponding risk. Therefore, there was no reason for the loss of profit to be the subject of separate compensation, and no departure from the principle of equivalence. At the date of entry, a different asset, as a source of expected future profit, replaced Ryde's interest in the land, and the right to statutory interest at the prescribed rate compensated its realisation.
>
> It follows, in my view, that there was no separate head of loss which fell to be compensated under rule (6)."

81. In our judgment, this concludes the point against Clemdell. It cannot be entitled to any separate head of loss, which falls to be compensated in addition to other compensation in relation to the mortgage issue.

82. In any event, it seems to us that the claim in respect of this alleged loss was at best highly speculative. On the making of the Agreement, DCC became the owner of the Property in equity. Clemdell's rights were thereafter those of an unpaid vendor to the extent that it had not been paid. Whilst it could no doubt have charged its interest under its unpaid vendor's lien, it had no right to charge the Property itself. Since it had already received 90 per cent of DCC's estimate of the value of the Property, effectively the value of what it had left to charge was the balance of the value of the Property (i.e. 10 per cent of DCC's estimate of value plus whatever was found the difference between DCC's estimate and the value as determined under the Act).

Conclusion

83. We therefore determine the preliminary issues: (i) No. (ii) No.

DATED 13 May 2009

HH Judge Reid QC P R Francis FRICS