UPPER TRIBUNAL (LANDS CHAMBER)

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LT Case Number: ACQ/484/2007

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase of shop premises – valuation of occupier's interest – disturbance – Land Compensation Act 1961 Section 5, rules (2), (5) and (6). Compensation determined at £50,282.82

IN THE MATTER of a NOTICE OF REFERENCE

BETWEEN

ANDREW CHRISTIAN AZZOPARDI t/a Express Homes (1)
EXPRESS HOMES LIMITED (2) **Claimants**

and

LONDON DEVELOPMENT AGENCY **Acquiring Authority**

Re: 9 Chequers Corner, New Road, Dagenham, Essex RM9 6LA

Before: P R Francis FRICS

Sitting at: Procession House, 110 New Bridge Street, London EC4V 6JL
on
3 – 5 March 2009

Richard Wald, instructed by Charles Russell, solicitors of Guildford for the claimants
Alexander Booth, instructed by Hammonds, solicitors of Leeds for the acquiring authority

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The following cases are referred to in this decision:

Sparks (Trustees of Hunslet Liberal Club) v Leeds City Council (1977) 34 P & CR 234
Harrison & Hetherington Ltd v Cumbria County Council (1985) 50 P & CR 396

DECISION

1. This is a reference to determine the compensation payable to Mr Andrew Azzopardi by London Development Agency (the LDA or the acquiring authority) under the London Development Agency (Chequers Corner) Compulsory Purchase Order 2003 (the CPO) in respect of the compulsory acquisition of premises at 9 Chequers Corner, New Road, Dagenham (the subject premises). The CPO was confirmed by the Secretary of State on 22 July 2005, a General Vesting Declaration was made on 12 December 2005 and the premises vested in the acquiring authority on 17 January 2006 (the valuation date for the purposes of this reference).

2. Mr Richard Wald of counsel appeared for the claimants and called Mr Andrew Christian Azzopardi, and his mother, Mrs Eleanor Azzopardi who gave evidence of fact, Mr Norman Jack Winbourne FRICS of Winbourne Martin French, Chartered Surveyors of London EC4 who gave expert valuation evidence and Mr Christopher Michael St John Clements FCA BA MEWI of Grant Thornton LLP, who gave expert accountancy evidence.

3. Mr Alexander Booth of counsel appeared for the acquiring authority and called Mr Colin Michael David Cottage BSc (Hons) MRICS IRRV of Glenny, Chartered Surveyors of Barking and Mr David Epstein FCA MAE MEWI of Haslers, Chartered Accountants of London EC2 who gave valuation and accountancy evidence respectively.

Facts

4. From the evidence, an agreed case summary, Scott Schedule, written closing submissions, which were received by 25 March 2009, and an agreed joint statement prepared by the accountancy experts, I find the following facts.

5. The subject premises comprised the front part of a lock up shop within a corner terrace of shops with flats over to the south of New Road (A1306) at its junction with Chequers Lane, about 1 mile south of Dagenham's main retail area. Chequers Corner was constructed in the early 1900s, whereas the majority of the other nearby retail parades (referred to for comparability purposes by the valuation experts) were built in the 1930s. The subject premises fronted Chequers Lane, which leads southwards to the Ford Motor Works, with the Dagenham Docks area beyond. Merrieland Retail Park is to the east, whilst the area to the north of New Road (which is a four-lane highway that was formerly the main A13 trunk road) is predominantly residential in nature.

6. The shop, which had a glazed façade and single entrance door, had an internal width of 5.10 m (16'9") and a depth of 6.12 m (20' 1") giving it a net internal area of 31.21 sq m (332 sq ft). There was no wc within the premises, but there was a partitioned off tea point to the rear of the shop. In comparison with most of the adjacent shops, the subject was a "half unit", the former rear part having been extended and converted to provide separate self-contained residential accommodation.

7. The freehold of the subject premises together with a number of the adjacent units and flats above belonged to Mrs Eleanor Azzopardi, the claimant's mother. In 1998, Mr Azzopardi commenced business as an estate agent and property manager (trading as Express Homes) from the offices of his mother's travel agency business which operated from nearby premises. In 1999 he moved to the subject premises under the terms of what he described as a "formal unwritten tenancy at a peppercorn rent". He was responsible for all outgoings and maintenance. It was agreed that, whilst no formal tenancy documentation existed, Mr Azzopardi enjoyed security under the provisions of Part II of the Landlord and Tenant Act 1954. In June 2003, he separated the property management and estate agency businesses, the former continuing to be run by him as Express Homes, and the latter incorporated as a company, Express Homes Limited, with his mother as Company Secretary (although having no other involvement). Both businesses continued to run from the premises until February 2005 when, due to the impending CPO, Mr Azzopardi relocated to 1 Chequers Parade, Ripple Road, Dagenham (which lies to the north of New Road) and is close to the subject premises.

8. It was agreed that a significant proportion of the claimant's property management business had been lost prior to the date of entry as a result of the impending CPO, and that that particular revenue stream could not be directly replaced due to the fact that the properties under management were also the subject of compulsory acquisition under the same scheme. It was also agreed that an allowance should be made for loss of future profits or partial business extinguishment for a period of time following the valuation date.

Issues

9. The issues remaining to be determined at the hearing were:

1. Whether, assessed under rule (2) or rule (5) of section 5 of the Land Compensation Act 1961 (the 1961 Act), there was any value relating to the claimant's occupation of the subject premises, and if so how much.

2. Whether or not the rent payable by the claimant for his alternative premises at 1 Chequers Parade between when he took occupation of them and the valuation date can be claimed, effectively as double-overheads, and if so, under rule (6), how much.

3. The extent of lost profits prior to the date of entry occasioned by the CPO, and any post valuation date temporary loss of profits and/or partial extinguishment of the business (business loss).

4. Whether or not the claim, under rule (6), for a redundancy payment is sustainable or substantiated and, if it is, the extent of compensation due.

A number of other heads of claim set out in the Scott Schedule were agreed either prior to or during the hearing, and will form part of the compensation to be paid. For the purposes of this decision, references to the claimant are to Mr Andrew Azzopardi T/A Express Homes. Although the second claimant, Express Homes Ltd, is admitted, there was no evidence to suggest that any of the alleged losses claimed were directly incurred by it. It was agreed that, to all intents and purposes the two businesses were being run as one operation.

10. I deal firstly with the claimant's evidence of fact, followed by the expert evidence from both parties relating to issues (1) and my conclusions thereon. I then turn to the accountancy evidence and, finally, the issue of redundancy.

The claimant's case

11. Mr Azzopardi explained the circumstances under which he became the occupier of the subject premises (the relevant facts being set out above). He said that although the immediate locality had been under threat from the proposed CPO since 1999, and some of the businesses in the vicinity had suffered as a result, his own claim for business losses was from September 2003, after the first property management client was lost. As to the terms of his occupation, he said that whilst he accepted the rent payable only amounted to a peppercorn, and there was no formal lease or agreement in place, he had been responsible for all outgoings, repairs, utilities payments and business rates. It was to all intents and purposes, therefore, a formal tenancy. The move to 1 Chequers Parade in February 2005 was undertaken in an attempt to mitigate losses, and that fact, he said, had been accepted by the acquiring authority. Mr Azzopardi said that he occupied the replacement premises under the terms of a formal lease that commenced on 1 November 2004 at £8,000 pa (payable from 1 January 2005 after a 2 month rent-free period), that rent increasing to £8,800 pa on review on 1 November 2007. During the period from the relocation to the date of entry, he said his tenancy of the subject premises continued and there was thus a period where double overheads were incurred.

12. Whilst the estate agency business had not been materially affected by the impending scheme, it was the property management business that suffered as a direct result. Mr Azzopardi said that as most of the properties he managed were also to be affected by the scheme, there was no opportunity to directly replace that lost business from his new premises. Even if he had been able to attract new property management clients, he said, the fees he could earn from them would be less than those he received from his mother. The enhanced fees (at 20% of rental income) that he had enjoyed from his mother's properties were, he said, due to the special service that he undertook on her behalf – for instance, being on call 24 hours per day and dealing with all matters relating to the properties both whilst let and whilst empty rather than just a tenant finding/rent collection exercise. The property management business eventually became unsustainable and closed in April 2007. The estate agency continued until January 2009, its demise being principally due to the by now parlous state of the property market.

13. In order, therefore, to replace the lost income he said he put a business proposition to his mother relating to a property she owned at 2 Approach Road, London E2. That was to establish, alongside the then continuing estate agency business, a mental health rehabilitation centre. Terms for a lease at a market rent were agreed and significant renovation and refurbishment works were commenced (at Mrs Azzopardi's expense), and which he oversaw. He said that other than the fact that she owned the freehold and was paying for the majority of the work, his mother had no involvement with that business. She did however lend him £50,000, which he used for "finishing touches", and getting the business off the ground. However, due to the amount of work that was needed, whilst that business was now up and running, it was not expected to break even until 2009 at the earliest.

14. Separately, and with the assistance of a formal loan from his mother (upon which market rates of interest were payable), Mr Azzopardi said he acquired the freehold of a second care home at Sunnyside House in late 2006/early 2007. That was an approximately £900,000 project of which he received £740,000 in late 2007. He accepted that returns on both of these care home ventures were likely to be longer term than might have been the case if he had invested in replacement property management business.

15. As to the premises at 1 Chequers Parade, Mr Azzopardi said they were only marginally larger than the subject premises, but did have wc facilities. He did not agree with the acquiring authority that they were in a better location. It was his view that the subject premises were, had it not been due to the blight caused by the scheme and the fact that the pedestrian subway beneath the main A13 had now been closed off (there being an at-grade pedestrian crossing at the traffic lights), the redevelopment hoardings and the general malaise in the area, in a better trading position. However, he accepted in cross-examination that at the time he took occupation of the subject premises in 1999, a number of the banks and other shops on the corner had already closed and the area was somewhat down at heel, but he reiterated that he was not claiming business losses prior to September 2003. He also accepted that evidence relating to the rating assessments showed reductions for Chequers Corner between 1995 and 2000, but said the CPO was first publicised in late 1999.

16. Regarding the redundancy payment claimed in the sum of £1,800, Mr Azzopardi confirmed that it had not, as yet, been paid but hoped to do so from the outcome of this decision. He said that the former employee was a Mr Kevin Willis, his brother in law, who had acted as a maintenance man and general factotum to the property management business. He produced no supporting documentation or any evidence that a claim had been made by Mr Willis.

17. Mrs Azzopardi confirmed that she was the freehold owner of the subject premises, and that they were "let on a tenancy" to her son from 1999 until the date of entry, but that no formal documentation existed. She said that she formerly looked after the management of the flats and premises she owned, but in 1999 had asked her son (who was then working for a bank) if he would be interested in taking it over. He had agreed, subject to having complete control and, she said, the rental income had subsequently increased to a significant degree. She also confirmed that she had no direct involvement with the day to day running of either the property management or the estate agency sides of the business, and that she had no intention of terminating the tenancy over the medium term.

Value of lease

18. Mr Winbourne is a chartered surveyor and a consultant to his former family firm of Winbourne Martin French. He has over 50 years experience of compulsory purchase and compensation matters. He explained that although there was no formal lease arrangement for 9 Chequers Corner between the claimant and his mother, it was a formal tenancy. It was, he said, a similar arrangement that would prevail in respect of the occupier of a tied cottage. In his view the lack of payment of rent (which he initially assessed at a value of £10,000 pa but subsequently revised to £8,000 pa) should be taken as a valuable benefit in kind and in

assessing the loss under rule (2) should have a multiplier applied in the normal way. That multiplier, in his view, should be 5.5, giving an entitlement to compensation under rule (2) of £44,000. However, in cross-examination, Mr Winbourne accepted that the 6 months protection afforded under the 1954 Act would be insufficient to attract any market demand, and acknowledged that, realistically, compensation could not be claimed under this head. He also accepted that he had produced no evidence to support his chosen multiplier, but had relied upon *Parry's Valuation Tables* and an assumption that the rental value should have a multiplier applied based upon a 10-year continuance. Having said that he was "torn" as which was the correct head under which compensation for the value of the premises should be claimed, he then turned to rule (5), and suggested that under the principle of equivalence, if no compensation could be claimed under rule (2), then it could be so under this rule, or rule (6) in the alternative as a "benefit in kind". It was inconceivable, indeed monstrous, he said, to suggest that the claimant should not be entitled to any compensation under the rules for the value of his occupation of the subject premises.

19. As to rule (5) it was submitted that all the 4 tests set out in *Sparks (Trustees of Hunslet Liberal Club) v Leeds City Council* (1977) 34 P & CR 234 were satisfied. There was no dispute that the subject land was devoted a purpose which, but for the CPO, would continue to be so devoted, and there was a bona fide intention to reinstate on another site (which he in fact did – to 1 Chequers Parade). As to whether the purpose was one for which there was no general demand or market, the "special arrangement" that existed between Mr Azzopardi and his main client (his mother), meant there would be no general market for this. In all the circumstances, therefore, it was submitted that the Tribunal should exercise its discretion in the claimant's favour. Regarding rule (6), Mr Winbourne said the fact that he did not have to pay rent was a benefit to him for which compensation for its loss should be paid, and if it could not be claimed under any of the other rules, then disturbance was an appropriate head. He said: "it appears to me that the [value of] rent-free premises would be added to the AA's recorded income, as a valuable benefit in kind amounting to the rental value, and to be multiplied accordingly."

20. In his view, the rental value of the subject premises was the same as that initially paid by the claimant for 1 Chequers Parade - £8,000 pa. In the no-scheme world, he said, the evidence showed that values of units in the two locations would have been much the same, and in his initial report he said that the premises were of similar size. However, he accepted in cross-examination that there was a difference in size between 1 Chequers Parade and the subject property, although he was not prepared to agree Mr Cottage's measurements giving a net internal area of 506 sq ft against 332 sq ft for 9 Chequers corner. He also acknowledged that 1 Chequers Parade had toilet facilities and central heating, whereas the subject premises did not, but said that a wc was available close by, within another of his mother's properties in the same block. Mr Winbourne also said that he agreed with Mr Cottage that the rent that Mr Azzopardi had been forced to pay for 1 Chequers Parade was rather too high, but that reflected the need for him to relocate to somewhere close to the subject premises, and the non-availability at the relevant time of any suitable alternative may have meant he had to pay what was being asked. As to his reference to rating assessment comparisons between Chequers Corner and Chequers Parade, Mr Winbourne accepted Mr Cottage's evidence that the tone at the former was some 30% less than the latter in both the 2000 and 2005 Rating Lists, but said that this difference would, to some extent, have reflected the blight caused by the impending scheme. In his view

whilst he acknowledged that Chequers Parade had a larger residential catchment area, it was no better in terms of trading than Chequers Corner.

21. Mr Winbourne also relied upon 13A Chequers Corner, another half-shop without wc facilities, and only 4 doors away from the subject property, that had been let to a barber at £7,540 pa, and 9 Chequers Parade, a slightly larger unit let at £9,600 pa as at the vesting date. In his view the comparables relied upon by Mr Cottage were mostly too far away, and sufficiently different in terms of location and, in some cases, type of use/occupation, to be of any assistance.

22. The claim under the heading of dual overheads (para 11.2 of the Scott Schedule) was £8,315.68 being one year and 16 days at the initial rent of £8,000 pa.

23. Mr Cottage is a chartered surveyor, and a partner in Glenny LLP, an independent firm of chartered surveyors and property consultants practising in east, north and southeast London, Essex, Hertfordshire and Kent. He manages their professional division, having responsibility for the firm's valuation, landlord & tenant, and rating work, and also heads their compulsory purchase team. He said that, on the basis of the information relating to the claimant's terms of occupation of the subject premises, it was his opinion that the open market value of his interest was nil. It was common ground that, due to Mr Azzopardi's uninterrupted occupation of the premises since 1999, he would have gained security of tenure rights as provided by sections 24 to 28 of the Landlord and Tenant Act 1954. However, it could have been brought to an end at any time within a period of 6-12 months following service of a notice under section 25, with any renewal to be on terms that imposed a market rent. As there was no formal lease, and his was a periodic tenancy, nobody in the market would pay a premium for the right to occupy at a profit rent for such a potentially short term. Also, the fact that, as the claimant had confirmed, he was responsible for all repairs and outgoings was a further deterrent as a prospective assignee could inherit a dilapidations liability.

24. He said that notwithstanding that there was no value in the claimant's occupation of the subject premises for the purposes of Rule (2), in relocating when he did it was accepted that he was attempting to mitigate his losses. It would be unreasonable, therefore, to suggest that the loss of the benefit of his rent-free occupation between when he vacated and the vesting date should not be reflected in compensation in some way. Accepting that the rent paid by Mr Azzopardi for his new premises at 1 Chequers Parade, starting at £8,000 pa and rising to £8,800 pa could be effectively stated at £8,400 pa, and applying discounts from that to allow for the fact that the new premises were in a better location (per the VO's adjustments to the Rating List) of 35% with a further 10% for no heating or wc, resulted in an equivalent rental value for 9 Chequers Parade of £3,407 – say £3,400 pa. That figure more or less accorded with his opinion of the rental value of the subject premises, assessed on the basis of comparables that he produced, at £3,350 pa. Mr Cottage said £3,400 pa for 1 year and 16 days (the agreed period of dual-occupation) was £3,506 [it was actually £3,549], and that that figure was the only sum that could realistically be justified as compensation relating to the value of the former premises, and would be a disturbance payment under rule (6).

25. Mr Cottage said that, in arriving at his opinion of rental value in the sum of £3,350 (which equated to £10 per sq ft based on his measured area of 336 sq ft), he took into consideration the fact that Chequers Parade had been one of the poorest trading locations in Dagenham, and had been so since long before the threat of the CPO became apparent. Chequers Corner had never been a location that particularly serviced a large residential area, as it was separated from it by the A13 trunk road. It had historically served thousands of employees going to and from the Ford factory, but when production there was drastically reduced in the late 1980s, and all production of cars ceased early in the new century (only engines subsequently being produced), there had been a marked affect upon trading potential. Many of the occupiers of the shops in that parade vacated in the late 1980s and 1990s and hence there was little comparable evidence available from that particular location. Thus, he said, he had to look much farther afield to establish prevailing rent levels in the area.

26. The best secondary retail parades attracted rents of £15 - £20 per sq ft ITZA, whilst the poorest commanded no more than £7 - £9 ITZA at around the vesting date. He referred to 6 New Road, not far from the subject property, 38 New Road, 19 Althorne Way, 27 Stansgate Road and 433-437 Goresbrook Road, all in Dagenham, and having rents in the range £7 - £9 per sq ft. He also mentioned properties in Barking, and when criticised in cross-examination for not using nearer comparables, he pointed out that his firm managed over 400 commercial properties in the area, and the available statistics, therefore, allowed him to form a clear picture of what appropriate levels were. Mr Cottage said that the letting of the half unit at 13a Chequers Corner to the barber was clearly at a rent that could not be justified in terms of comparable transactions, as it analysed to an amount that compared with the rents being achieved in the best trading areas of Dagenham. The rent applying on 9 Chequers Parade was considerably out of line with levels otherwise achieved in the area. As to Mr Winbourne's reference to 4 Chequers Parade where the rent was £9,000 pa, he said he had no details of areas or lease terms, and was unable therefore to make a realistic analysis.

27. In cross-examination, Mr Cottage said that he had not even considered the alternative claim promulgated by Mr Winbourne under rule (5). It had only been raised by the claimant's expert at the very last minute, and the argument that the claimant's special business relationship with his mother would satisfy the question of whether the premises were those for which there would be no market demand was unsustainable. Any claim under this rule therefore must fail

Conclusions – Value of lease

28. Firstly, the claim under rule (2). Mr Winbourne's arguments that a multiplier of 5.5 should be applied to an effective profit rent of £8,000 pa to give an open market value of Mr Azzopardi's interest at £44,000 were clearly speculative, and in cross-examination he eventually accepted Mr Cottage's opinion that there would be no open market value in such circumstances. He then attempted to justify a claim under rule (5) as his fallback position. I concur with the acquiring authority's views expressed in its closing submissions that reliance on this rule was at best half-hearted, and at worst entirely misconceived. The three criteria (as set out in the *Sparks* case) need to be satisfied before the Tribunal can consider exercising its discretion in the applicant's favour. There was no issue that the land was devoted to the purpose for which it was used and, but for the CPO, would continue to have been so devoted.

There was also a bona fide intention to relocate and, indeed, that is precisely what the claimant did. However, the argument that the purpose for which the land was devoted is one for which there is no general demand or market because the particular type of business carried on, due to Mr Azzopardi's special relationship with his mother (his principal client), was, to my mind, far fetched and wholly unsustainable. The fact that Mr Azzopardi provided a more comprehensive property management service than that normally undertaken by managing agents, and for which he received fees that were in excess of the norm, is completely irrelevant. There is, of course, a general demand for land for the purposes of carrying out the business of property management (and estate agency) – see the House of Lords judgment in *Harrison & Hetherington Ltd v Cumbria County Council* (1985) 50 P & CR 396 where Lord Fraser said, at 399:

> "Secondly, the purpose must be of 'such a nature' that there is no general demand or market for land for that purpose'. The word 'land' in that phrase (the second place where it appears in rule (5)) means land in general, and not the subject land."

It is clear, therefore, that the claimant's case under rule (5) must also fail.

29. This leaves the claim under para 11.2 of the Scott Schedule, for which compensation would be paid as part of the disturbance item under rule (6). Mr Winbourne says that the whole of the rent paid by the claimant for the new premises at 1 Chequers Parade during the period of dual occupation should be recoverable. Mr Cottage, rightly in my view, makes adjustments to reflect the difference between the two premises and locations, so that the compensation payable amounts to the rent that, were it not for the particular circumstances of his occupation of the subject premises, would have actually been paid for them. He effectively approached the question of rental value from two directions and came to more-or-less the same conclusion. I am entirely satisfied that the comprehensive exercises he undertook to consider both the comparables and the approach adopted by the VO in compiling the 2000 and 2005 Rating Lists (which Mr Winbourne accepted as an appropriate yardstick), supports his valuations. On the other hand, Mr Winbourne did produce some evidence of higher rents (including the barber's shop), but precious little background as to the circumstances under which they were achieved.

30. It seems to me that the biggest drawback for the subject premises was its lack of wc facilities and, in my view, that fact alone would have made the premises virtually unlettable in the open market. In the light of this, and the evidence produced, I determine the loss under this head at £3,550.

Business losses

31. Mr Clements is a chartered accountant and a partner in Grant Thornton's Forensic and Investigation Services team. He has specialised in forensic accounting since 1996 and has given expert witness evidence in respect of claims involving up to £500m. He said, in the introduction to his initial report, that he had been instructed to calculate Mr Azzopardi's claim for "partial business extinguishment" and had assumed a cut off point between past and future losses at a "notional hearing date" of 5 April 2008. He assessed past losses on two bases: basis 1, assuming loss of turnover commenced on 1 September 2003 (when Mr Azzopardi's

first management client/property was lost), and basis 2, from 1 August 2005, the first full month after the CPO was confirmed. There had been a total of 24 properties under management at the first of these dates, and 19 were in the area directly affected by the CPO.

32. As to future losses post 5 April 2008, referred to as temporary loss of profits, he calculated these for a period up to 30 June 2009, having been instructed that that was the earliest date by which it could be expected that the lost income would be replaced following the claimant's investment in the care home projects. He then applied a multiplier of 1.23 derived from The Ogden Tables (*Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident cases (sixth edition)*). He said (in para 2.10 of his supplemental report of 30 July 2008) that he had chosen to use this principle of assessing future loss because, although one may in normal market circumstances be able to purchase the value of agency/landlord relationships for a multiple of turnover, that methodology would not reflect the value to Mr Azzopardi that existed because of the special relationship he enjoyed in terms of the contract between himself and his mother. The greater security meant that he would not be able to replace the value of the lost turnover by simply purchasing comparable agency agreements in the open market. Hence, the compensation was assessed as loss to the owner rather than loss in the value of the business. By the date of the hearing, Mr Clements had re-calculated the past and future losses with reference to the valuation date (17 January 2006), which was agreed to be the appropriate date for the purposes of assessing compensation under the relevant legislation, and he also abandoned his reliance upon the Ogden tables, accepting that that was not an appropriate methodology for calculating compensation claims.

33. As to the relevant or correct methodology for calculating both the past and future losses that the claimant had suffered, although the accountancy experts had produced and signed an agreed statement, it transpired that Mr Clements had undertaken his calculations in a way that did not accord with how the wording of a key section read and how it was understood by Mr Epstein. The relevant paragraphs stated:

> "2(a) The experts agreed that a reasonable measure of loss in relation to lost commission income during whatever period of loss existed by reason of disruption to the claimant's business, by reason of the Compulsory Purchase Order, amounted to 48% of the amount of turnover ultimately agreed to be lost exclusive of VAT.
>
> (b) The amount of lost commission should be calculated from the date each individual contract was lost until the valuation date.
>
> (c) In the event that it is agreed that there was a continuing loss of profits after the valuation date, necessary to be calculated on the same basis as losses prior to the valuation date, then the measure of loss should apply to any subsequent period also."

34. Mr Clements explained during his evidence in chief that his assessment of loss was not simply 48% of the management income that had been lost. It had been agreed that the property management and estate agency businesses should be considered as one operation, so whilst it was only the former that suffered loss of turnover as a direct result of the CPO, it was necessary to examine and reconcile the accounts of both businesses together. What he did, therefore, was to calculate the lost turnover for the whole business (from the date that each of

the management clients was lost) and add it to the actual turnover that was achieved in order to estimate what the total turnover should have been. He then applied 48% (which was the average actual net profits over the years 2003 to 2006) to that total to establish what the net profit would have been. That was then compared with the actual net profit that Mr Azzopardi achieved, the difference being the actual loss. Following a number of adjustments made subsequent to his initial and rebuttal reports, and a revised analysis produced during the hearing, the claim for losses from 1 September 2003 to 30 June 2009 (his basis 1 which I adopt for the purposes of this decision as regards starting date, but see later comments regarding the end-date for future losses), became:

Actual turnover	£281,169
Estimated lost turnover	£ 67,450
Total turnover	£348,619
Net profit margin	48%
Estimated net profit	£156,168
Actual net profit	£112,433
Lost net profit	**£ 67,004**

Broken down to pre and post acquisition losses, past loss of profit to 17 January 2006 was £4,366 and future losses from that date to 30 June 2009 were £62,638, by his reckoning. Mr Clements agreed in cross-examination that, according to his figures, the estimated loss of turnover (line 2 of his revised appendix 9) for the post valuation period was £61,950 and, therefore, what was being claimed for this period as loss of profit (line 7) was more than 100% of turnover. Mr Epstein's calculation on this basis (although not accepted as the correct or agreed methodology) was £29,736. Mr Clements said that if it were not for the fact that actual accounts were available (up to 31 March 2008) then Mr Epstein's overall approach would be appropriate. However, the benefit of being able to study the accounts meant that he was able to more accurately establish what the losses actually were, and from that to predict what they would have been. As it was the property management business that had suffered as a result of the CPO, and not the estate agency side, it was reasonable, in his view, to assess post valuation date losses at 100% of turnover. That was the side of the business where the profit element was highest.

35. As to claiming for losses up to June 2009, Mr Clements said that was the time that the new ventures were projected to start producing profits, although he accepted that those projects would have a longer gestation period than would have been the case had Mr Azzopardi re-invested in the same type of business ie, property management. In cross-examination Mr Clements acknowledged that paragraph 2a of the agreed statement read as Mr Epstein had understood it, but he had come to the conclusion that he was not happy with it, and that it was misleading.

36. Mr Epstein is a chartered accountant, and a director of forensic accounting at Haslers. He has over 40 years practice experience in the profession, and over 18 years in the areas of forensic accounting and dispute resolution. In his first report, he had analysed the accounts information that had been made available to him, and noted that the two businesses actually

increased turnover between 2005 and 2007, reductions only occurring thereafter. However, profits had reduced, this being due to increased costs and not, it appeared, lost commissions. He said therefore, that unless it could be clearly demonstrated that specific commission income had been lost as a direct result of the CPO, there was no basis for a claim.

37. Nevertheless, Mr Epstein produced a calculation on the basis that if it were proven that losses occurred, the correct way to approach the matter was to apply a multiplier to whatever that sum was, as if that part of the business had been extinguished. That multiplier, he said, should be 0.75 (based upon the average asking price of property management businesses offered for sale) and, if the lost income was as had been claimed in the claimant's statement of case (£13,218.57) the loss would be £9,913.93.

38. Following the submission of his first report, which had necessarily contained a large number of caveats due to the lack, at that stage, of sufficient information upon which he felt he could form a definitive assessment, he met Mr Clements in an attempt to discuss and narrow the differences between them. This resulted in the production of the agreed joint statement, the relevant sections relating to agreed matters having been referred to above. In Mr Epstein's view, the contents of paragraph 2a of the statement of matters agreed were clear and unambiguous, and in his revised calculations he had simply taken 48% of the loss of property management turnover agreed to be attributable to the CPO as the loss of profits up to the valuation date. By his calculation, on basis 1, that was £4,240 (48% of £8,834), which was only £126 different to Mr Clements' calculation. On basis 2, the loss would be just £388.

39. Regarding post acquisition losses, paragraph (a) of the "matters not agreed" section of the joint statement read:

> "Whereas it had been agreed as to the method of calculating the lost income by reason of the CPO prior to the valuation date, with effect from the valuation date, Mr Epstein was of the view that whatever contract had been lost by that date could not be resurrected so that the business returned to normal, and [as] the properties being the subject matter of the lettings commission had been acquired under the CPO. Consequently, Mr Epstein's opinion of the appropriate measure of loss from the valuation date was the value to the owner at the valuation date of the benefit of the contracts that would have continued, on the basis of a hypothetical willing buyer and a hypothetical willing seller, as set out in his [initial] report."

Thus, on the basis of the loss of £18,616 referred to in later correspondence, and in Mr Clements' revised Appendix 9 (produced at the hearing), at a revised multiplier of 0.85 (a 14% increase to allow for any additional value that the Tribunal might find in respect of the additional security that the claimant's relationship with his mother provided), the loss would be £15,824. On basis 2, that would be £11,235.78. Mr Epstein explained that 0.85% applied to the lost turnover was equivalent to a multiplier of 2.5 times true net profit, and was thus a robust figure to adopt.

40. He said that whilst the loss of profits basis method had now been agreed between them for the period up to the valuation date (although the basis of the application of the 48% was still in question), he thought the 'value to owner' basis was preferable for the calculation of the

post acquisition losses. It was submitted that his methodology was the correct way of calculating what was, in effect, partial business extinguishment, and that Mr Clements had acknowledged that in cross-examination. That methodology was uncomplicated and simple to calculate. It also obviated any need to determine what was an appropriate period to allow those post-acquisition losses for, there being a question over the application of monies provided to the claimant by his mother, and whether the acquiring authority should be responsible for post acquisition losses incurred because the investment in the care home took longer to bear fruit. The question over the application of the 48% profit (in terms of the area where the difference between them was greatest) would also not need to be considered.

41. Mr Epstein said that in the event that the Tribunal found for the claimant, in that loss of profits should be taken up until June 2009, and that that lost income was £61,950, using his (and the correct) interpretation of paragraph 2a of the agreed joint statement would produce £29,736 (paragraph 2c).

Conclusions – business losses

42. In respect of Mr Clements' methodology, it was submitted by the acquiring authority that it was wholly unorthodox, and finds no precedent in any previous decision of the Tribunal. I agree. It was absolutely clear from the agreed statement that was prepared and signed by both of the forensic accountancy experts, that the losses were to be calculated as 48% of the turnover of the property management business that was lost as a result of the scheme. That basis had the attraction of being simple and straightforward. Mr Clements, in attempting to justify compensation that, as was rightly pointed out, amounted (in respect of post acquisition losses) to more than the whole of the actual lost turnover up to the proposed cut-off date, adopted a complicated and confusing methodology that somehow sought to relate to the whole of Mr Azzopardi's business including the estate agency side which, it had been agreed, was unaffected in terms of losses.

43. It was agreed that as far as the pre-acquisition losses were concerned, there was little between the parties – a matter of a few hundred pounds. I prefer Mr Epstein's revised approach and arguments, which were clearly in accordance with the provisions of the agreed statement. Accepting, as I have said, basis 1, as I am satisfied that 2003 is the point at which the first business was lost due to the scheme, I therefore determine the pre-acquisition losses at £4,240. It is the post acquisition losses where the error in Mr Clements' methodology (if it were to be considered appropriate to continue to take loss of profits as the benchmark) becomes apparent, in that the amount claimed actually adds up to more than the total lost turnover. In my view a very substantial amount of the Tribunal's (and the parties') time was wasted by Mr Clements' efforts to justify an approach that was, as I have said, confusing, unconventional and clearly not in accordance with the agreed statement. I prefer Mr Epstein's approach and accept his arguments that, for assessing compensation post-acquisition, where the business that has been lost cannot and will not be replaced (as the properties under management were lost to the scheme), that part of the business has effectively been extinguished. I am satisfied that the revised multiplier of 0.85 Mr Epstein used was appropriate for this very small business, and that it reflects the value (if any) in the "special relationship" the claimant had with his principal client. The post-acquisition losses are thus determined at £15,824.

Redundancy payment

44. Mr Azzopardi claims he is obliged to pay Mr Willis £1,800 and will do so if he "wins this part of the claim." The acquiring authority pointed out section 164(1) of the Employment Rights Act 1996 provides:

> "(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date----
>
> (a) the payment has been agreed and paid,
> (b) the employee has made a claim for the payment by notice in writing given to the employer,
> (c) a question as to the employee's right to, or the amount of, the payment has been referred to an [employment tribunal], or
> (d) a complaint relating to his dismissal has been presented by the employee under section 111."

They said that none of the criteria set out in that provision has been satisfied, and that on the facts of this case, section 164(2) which sets out circumstances under which an employees is not deprived of his right to a payment, takes the matter no further. No documentary evidence has been provided to prove either the employee's entitlement, or that any payment has been made. Further, there is no mechanism whereby the Tribunal can be sure that, even if compensation is paid under this head, the money will actually be paid to Mr Willis. Since the claimant is under no legal liability to pay the money, there is nothing to force him to do so.

45. There was indeed no evidence before me to substantiate this element of the disturbance claim and, accepting the acquiring authority's submissions on the law, I refuse it.

46. This decision deals with the substantive issues in this reference, and I determine that the acquiring authority shall pay the claimant compensation under the heads that were before me as follows:

Value of lease	Nil
Rent on new premises	£ 3,550.00
Pre-acquisition loss of profits	£ 4,240.00
Partial extinguishment	£15,824.00
Redundancy	Nil
Sub-Total	£19,798.00

The above shall be added to the agreed items on the Scott Schedule of £16,918.82 to produce a total of £36.716.82.

47. This decision will become final when the question of costs is determined, and not before. The parties are invited to make written submissions on costs in accordance with the details set out in the attached letter.

DATED 17 June 2009

P R Francis FRICS

ADDENDUM ON COSTS

48. Submissions on costs have been received from the parties. The claimants, in their submissions dated 1 July 2009, pointed out that there had been a mathematical error in the calculation of the compensation payable (para 46) in that the sub-total should have been £23,614, making a total of £40,532.82. This, they said, had been agreed with the acquiring authority.

49. As part of the claimants' costs submissions, pre-reference costs were sought in the sum of £14,682.81. The acquiring authority challenged the claimants' ability to make such submissions at this stage of the proceedings, and required them to make an interlocutory application under rule 38 of the Lands Tribunal Rules 1996 for permission to do so (see *Shraff Tip Limited v Highways Agency (No2)* [1999] RVR 322). This they did, on 9 July 2009, followed by subsequent letters and enclosures.

50. Pursuant to that application, and having considered the response of, and further correspondence from the acquiring authority, I issued an Order dated 23 July 2009 in these terms:

> "IT IS ORDERED that:
>
> 1. The question of the Pre-Reference Costs be determined by the Tribunal at an oral hearing to be held in London at the earliest convenient date following a period of 21 days from the date of this order, during which time the parties are directed to attempt to agree such costs by negotiation
>
> 2. The Tribunal's determination of the question of costs in the Reference (actual submission on which have already been received) will be deferred until the question of Pre-Reference Costs is either agreed or determined
>
> 3. Following the agreement upon, or determination of the Pre-Reference Costs, the parties shall be permitted to adduce supplemental/rebuttal submissions on reference costs within 14 days of any such agreement/determination
>
> 4. Costs of this application to be in the Reference
>
> 5. Liberty to apply"

The pre-reference costs were subsequently agreed by the parties at £9,750 (inc VAT) bringing the total compensation to £50,282.82, which is significant in terms of the first of two sealed offers made by the acquiring authority. Supplemental and rebuttal submissions on costs have now been received.

51. The claimants say that the compensation determined exceeded the first unconditional offer made by the acquiring authority on 9 May 2008 (in the sum of £45,000) but failed to exceed the second offer made in a letter of 6 February 2009 (in the sum of £60,000 inclusive of pre-reference costs). It follows that, if the Tribunal considers that any of the costs should be

borne by the claimants, they should be limited only to those incurred after 27 February 2009 which was the date of expiry of the time given for acceptance of that offer.

52. However, it was the claimants' primary submission that by virtue of section 4(1)(b) of the Land Compensation Act 1961 (the 1961 Act), there are special reasons why they should not be burdened with any of the costs incurred in pursuing their claim. These are that, as outlined in Mr Azzopardi's witness statement and his, unopposed, evidence in chief, the acquiring authority's refusal to admit that an advance payment was due (contrary to the statutory duty imposed by section 52 of the 1961 Act) until over two years after the vesting date, or to make a payment until over three years had elapsed, had put the claimants under significant financial pressure. Not only had it led to an increase in professional fees incurred, but the delays had driven them to litigation that might otherwise have been avoided.

53. The acquiring authority submitted that, whilst it was regretted that there was a delay in making the advance payment, the claimants' suggestion that that constituted a special reason for the Tribunal to exercise its discretion should be rejected. Firstly, the rules relating to the making of advance payments are entirely separate from those relating to costs, and the acquiring authority should not be punished by matters relating to different parts of the compensation process. The purpose of such a payment is to provide capital and avoid the risk of incurring bank and interest charges in carrying out the required relocation. The penalty that that the acquiring authority will suffer if it fails to make a timely payment will be reflected in an increased claim for compensation that can be directly attributed to this failure. In any event, the first payment made amounted to £21,600 plus interest against a total claim of £164,838.58, so any suggestion that a prompt payment may have avoided litigation and lead to a settlement seems unlikely.

54. In its original submissions, the acquiring authority said that as the first offer had not been exceeded by the Tribunal's determination, under section 4(1)(a) of the 1961 Act (the operation of which was clearly explained in *Colneway Limited v Environment Agency* [2004] RVR 37), and there being no special reasons for departing from that provision, the claimants should be ordered to pay their own costs of the reference, and to pay the acquiring authority's from the date of the first sealed offer (9 May 2008). Also, they said that section 4(1)(b) was engaged because the claimants did not give notice in writing of the amount of compensation claimed, supported by particulars (per section 4(2)) until the exchange of rebuttal statements which post dated the first sealed offer. Further, parts of the claimants' case were not communicated to the acquiring authority until, or just before, the hearing, such as the issue of the claim for the lease under Rule (5), Mr Winbourne's late acceptance that there was no value under Rule (2) and his 'alternative' approach under Rule (6). Much of the claimants' case was unsubstantiated or unsupported by evidence to any reasonable extent, as confirmed by the Tribunal in a number of places in its conclusions. The hearing had also been extended, and a considerable amount of time had been wasted, due to Mr Clements' attempts to justify an approach which, as the Tribunal said, "was…confusing, unconventional and clearly not in accordance with the joint statement [of facts and issues agreed and disagreed]." There had also been no evidence to support the claim for a redundancy payment. In those circumstances, it was submitted that the claimants should be ordered to pay the acquiring authority's costs from the date of the reference up to the date of the first sealed offer as well.

55. In their supplementary submissions, the acquiring authority said that the fact that the determination now exceeds the first sealed offer does not undermine or alter their earlier arguments, and section 4(1)(b) is still engaged. It follows, they said, that the acquiring authority should still at least be awarded its costs up to the date of the second sealed offer (6 February 2009) and not 21 days later (see *Chapter Group plc v London Regional Transport* (2006) RVR 242.

56. Furthermore, whilst it was acknowledged that the total compensation is now £50,282.82, it is still very significantly less than the amount claimed of £164,838.58. As such, it was argued that even if the Tribunal does not accept the acquiring authority's submissions as to the operation of sections 4(1)(a) and (b), special reasons still apply for departing from the general rule that the successful party ought to receive its costs (per para 23.3 Lands Tribunal Practice Directions). Due to the claim being exaggerated to the extent that it was, substantial and unnecessary costs have been incurred throughout the reference, and it would have been unrealistic to expect that the matter might be settled by negotiation. It was also a fact that the acquiring authority has been wholly successful in every aspect of the claim. In summary, therefore, in the light of the amended award that includes the pre-reference costs, the claimants should pay all of the acquiring authority's costs in the reference and bear its own from, at the very least, 6 February 2009. Alternatively, on the basis of these submissions particularly in terms of the exaggerated claim, the claimants should be ordered to pay a proportion of the authority's costs, and the authority to pay a proportion of the claimants' costs, to be decided by the Tribunal having regard to the Court of Appeal's decision in *Purfleet Farms Limited v Secretary of State for Transport, Local Government and the Regions* [2002] RVR 368.

57. Finally, it was submitted that whatever the Tribunal decided on costs in the reference generally, the acquiring authority should in any event have its costs of dealing with the subject of pre-reference costs. The claimants had failed to give details of those costs until they made their reference costs submissions after the hearing.

58. In response to the acquiring authority's assertions, the claimants in their supplemental submissions set out the details of the documentary evidence that had been made available relating to the particularisation of the claim both to the acquiring authority and to the Tribunal. They also said that full access to the books and records of the businesses had been given to a representative of the acquiring authority's accountancy expert when it had been sought. No further application for discovery had been made, and it was noted that as a result of that material being produced, no amendments were made to the expert's report. As to the claimants' experts' reports and evidence generally, it was submitted that the criticism of Mr Winbourne was totally unfounded and, as to Mr Clements' reliance upon the Ogden Tables, it had not been abandoned and the alternative calculation he produced had made only a marginal difference to the sums in issue.

59. The claimants said that there was no good reason for departing from the general rule that that costs incurred by them are properly to be seen as part of the expenses, and in particular, the claim had not been overstated. They had sought and relied upon expert evidence from experienced professionals, who were expressing their genuine opinions; there had been no suggestion that they had not complied with their duty to the Tribunal and never, in cross examination, was it alleged that the claim had been exaggerated. The acquiring authority's

reliance upon *Purfleet Farms* was, they said, misconceived, and it would thus be wrong for the Tribunal to make an award that reflected that case in this instance. If it did, it would leave the way open for acquiring authorities generally to allege unreasonable conduct every time a claimant did not succeed in being awarded the amount it had sought.

60. As to the costs relating to the subject of pre-acquisition costs, the claimants said that the acquiring authority had made a sealed offer prior to the hearing that was said to be inclusive of pre-reference costs, notwithstanding that details of them had not been provided at that stage, and no request had been made for them to be quantified.

Conclusions on costs

61. Section 4 of the 1961 act provides:

> "4 – (1) Where either –
>
> (a) the acquiring authority have made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Lands Tribunal to that claimant does not exceed the sum offered; or
>
> (b) the Lands Tribunal is satisfied that a claimant has failed to deliver to the acquiring authority, in time to enable them to make a proper offer, a notice in writing of the amount claimed by him, containing the particulars mentioned in subsection (2) of this section;
>
> The Lands Tribunal shall, unless for special reasons it thinks it proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Lands tribunal the notice should have been delivered.
>
> (2) The notice mentioned in subsection (1) of this section must state the exact nature of the interest in respect of which compensation is claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated.
>
> (3) …
>
> (4) …
>
> (5) Where the Lands Tribunal orders the claimant to pay the costs, or any part of the costs, of the acquiring authority, the acquiring authority may deduct the amount so payable by the claimant from the amount of the compensation payable to him.
>
> (6) …"

62. The parties agree that with the correction to the calculation set out in para 46 above, and the addition of pre-reference costs, my determination now exceeds the first sealed offer, but does not beat the second. There is no question, therefore, that were it not for the issues raised in the costs submissions, the claimants should have their costs up to the date of the second sealed offer, 6 February 2009, it being right that where an offer is either rejected or not accepted the period

given for acceptance (in this case 21 days) should not be allowed (per *Chapter Group*). The acquiring authority would have its costs paid by the claimant from that date.

63. In terms of the suggestion that the claim was exaggerated, the proper approach is set out in *Purfleet Farms,* which dismissed an appeal on costs by the claimants where the Tribunal had determined that the claimants' entitlement to the recovery of costs should be reduced. Potter LJ (with whom Chadwick and Wall JJ concurred) said at para 36:

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

64. It is clear that, in respect of the outstanding issues that fell for me to determine, the sums claimed relating to the value of Mr Azzopardi's occupation of the subject property (under whichever rule was adopted), and the alleged losses promulgated by Mr Clements, were significantly more than the figures I determined. However, in respect of both the claimants' experts, it was, in my judgment, their adopted methodology that led to the opinions they expressed, rather than a deliberate overstatement or exaggeration. I do not intend here to restate the criticisms of their methods that I made in the body of the decision, but the question for me to determine is whether their approaches added significantly to the costs that the acquiring authority incurred, to the extent that the claimants should be penalised as to a proportion of their costs prior to 9 February 2009. In my view, whilst some additional time at the hearing was spent on dealing, in particular, with Mr Clements' arguments over the interpretation of the agreed statement, and with his revised calculations, it was not significant. Furthermore, as noted in the substantive decision, Mr Epstein did not deem it necessary to file a supplementary or rebuttal report to deal with Mr Clements' divergence from that agreement. The hearing was set down for 3 days, and it was completed well within that timescale.

65. It is true that the redundancy claim had no merit in law, but in the overall scheme of things, I think it would be wrong to penalise the claimant in terms of costs over that aspect which, in any event, formed only a small part of the overall claim. Whilst the conduct of the claim was, and the arguments of the experts were far from straightforward, I do not think that the conduct of the parties could in any way be described as "manifestly unreasonable". This leaves the question of advance payments and whilst, as the acquiring authority admitted, it was regrettable that delays had occurred, there was no evidence before me that could lead to a conclusion being reached that that was sufficient special reason to depart from the normal rules relating to the award of costs. In particular, I accept the acquiring authority's submissions that, despite the claimants' suggestion that early payment might have compromised the litigation, that was most unlikely due to the considerable disparity between the payments made, and the overall value of the claim.

66. I determine, therefore, that the claimants shall have their costs up to the date of the second sealed offer (6 February 2009), but shall bear their own and pay those of the acquiring authority subsequently. For the reasons given by the acquiring authority, which I accept, the claimants shall also pay the authority's post-hearing costs for dealing with the matter of the pre-reference costs.

DATED 23 September 2009

P R Francis FRICS