UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 217 (LC)

UTLC No: LC-2021-492

Manchester Civil Justice Centre

19 September 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF A NOTICE OF REFERENCE

COMPENSATION – COMPULSORY PURCHASE – access to development site rerouted to facilitate highway improvement scheme – acquiring authority leaving claimant to negotiate terms of replacement access with adjoining owner – negotiations unsuccessful by date of hearing – injurious affection of retained land – other heads of compensation unrelated to value of land taken

BETWEEN

CASTLEFIELD PROPERTY LIMITED

Claimant

-and-

NATIONAL HIGHWAYS LTD

Acquiring Authority

Re: The Cheshire Lounge Public House,
Chester Road, Millington,
Cheshire

Martin Rodger KC, Deputy Chamber President and Mr Mark Higgin FRICS FIRRV

16-19, 23 May 2023

James Pereira KC, instructed by TLT LLP, for the claimant
Alexander Booth KC, instructed by Gowling WLG, for the acquiring authority

The following cases are referred to in this decision:

Dawson v Great Northern and City Railway Company [1905] 1 KB 260

Garner v Stockport MBC [2022] UKUT 28 (LC)

Waterworth v Bolton MBC (1979) 37 P&CR 104

Introduction

1. This reference arises out of the compulsory acquisition of a parcel of land which previously provided the sole access from the A566 to the Cheshire Lounge, a now derelict public house in the green belt adjoining junction 7 of the M56 on the southern outskirts of Manchester. The acquiring authority and respondent to the reference is National Highways which acted pursuant to the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014 ('the Order').

2. The claimant, Castlefield Property Ltd, was not the owner of the Cheshire Lounge on 10 November 2014 when the respondent entered and took possession of the reference land. It acquired its interest only later, pursuant to a conditional purchase contract which it entered into with the previous owner on 10 August 2016. It was a term of that contract that the claimant would also acquire the benefit of the former owner's remaining statutory rights to compensation.

3. The claimant completed its acquisition of the Cheshire Lounge on 2 June 2017, paying a price of £1,232,500 for the public house, including its car park and gardens and an adjoining field previously used for car boot sales. By that time two important events had already occurred (both in March 2017). The first was the opening of a replacement access to the Cheshire Lounge site and the stopping up of the original access over the reference land. The original access was over a short stretch of public highway. The new access is by a significantly longer and less prominent route over the land of a neighbouring owner, the Tatton Estate, which National Highways was also entitled to acquire pursuant to the Order. The second event of significance was the grant of planning permission for the redevelopment of the Cheshire Lounge site as a destination bar and restaurant. The claimant purchased the site intending to build and operate a new 262 cover restaurant as part of its successful 'Albert's' brand; the grant of planning permission caused the purchase contract to become unconditional.

4. In 2014, before taking possession of the reference land, National Highways had informed the original owner, DT Property Investments LLP ('DT'), that it intended to complete the acquisition of the land required for the replacement access from the Tatton Estate and to execute a deed of easement granting legal rights of way over the new access for the benefit of the owner of the Cheshire Lounge site. In the event that has not happened; in July 2015 National Highways instead entered into a confidential agreement with the Estate that it would do its best to avoid acquiring any of the Estate's land, leaving the terms of any easement over the new access to be negotiated between the owner of the Cheshire Lounge and the Estate. We were told that the claimant was aware of this agreement before it completed its purchase of the site, but that it was reassured when it was informed that it was National Highways' policy not to allow such negotiations to become unreasonably prolonged before it would exercise its own power to acquire the land, or the necessary rights over it, by compulsion.

5. National Highways initially insisted to the claimant that no further grant of rights was necessary and that it could rely on the Order as providing the only legal right of way it needed. It then left the claimant to negotiate unsuccessfully with the Tatton Estate for rights of way and other easements over the new access. Eventually, in July 2022, National

Highways agreed terms with the Estate for a tripartite deed of easement conferring rights over the new access on both it and the claimant on the basis that the route would remain in the ownership of the Estate; unfortunately those terms were not agreed with the claimant which considered them unsatisfactory and no deed in the form offered by the Estate has ever been executed.

6. In anticipation of the hearing of this reference, negotiations took place between the parties and on 12 May 2023, two working days before the hearing was due to commence, the terms of a draft deed of easement satisfactory to the claimant were agreed between it and National Highways. National Highways also gave a written undertaking to acquire the Estate's land over which the new access passes and to grant rights in the agreed terms to the claimant once it has vested that land in itself.

7. Thus, when the hearing opened on 16 May 2023, more than nine years after the reference land was taken by National Highways and almost six years after the claimant had acquired the Cheshire Lounge, the claimant still had no documented right of way over the new access. That has not meant that it has been unable to make use of the access, which has been open and available for use since 2017, but it is now accepted by National Highways that it would not have been reasonable to expect the claimant to proceed with its intended development of the site without the certainty of an executed document recording its rights and obligations over the new access. It is also accepted by the claimant that if the undertaking now offered by National Highways is recorded in an order of the Tribunal there is sufficient certainty about its rights over the access to remove that obstacle to development.

The claim

8. All the statutory rights to compensation enjoyed by DT after 10 November 2014 were expressly assigned to the claimant when the sale of the Cheshire Lounge was completed on 2 June 2017. It is common ground that DT was free to sell its own interest, including in the reference land, and that its right to compensation has validly been assigned and can be pursued by the claimant. As the Court of Appeal explained in *Dawson v Great Northern and City Railway Company* [1905] 1 KB 260, DT could not deal with its land so as to increase the burden of compensation on National Highways, and the claimant cannot recover more in compensation than DT could have done, but it has not been suggested that its claim is any different from a claim which DT could have advanced.

9. The parties agree that the open market value of the reference land itself was £25,000. The claimant is entitled to that sum pursuant to section 5(2), Land Compensation Act 1961, together with a statutory loss payment of £1,875 pursuant to section 33A, Land Compensation Act 1973.

10. The parties also agree that National Highways should pay £90,000 towards the claimant's pre-reference costs as compensation for disturbance under section 5(6), 1961 Act.

11. The main issue in the reference is the claimant's claim under section 7, Compulsory Purchase Act 1965 for compensation for the injurious affection caused to the Cheshire Lounge at the valuation date in November 2014. It also seeks compensation for other

losses unrelated to the value of the land (principally holding costs while the site has remained undeveloped, and the cost of works to the new access said to be required to make it suitable for the claimant's use and equivalent to the original access over the reference land).

12. The claimant's expert witnesses assessed the injurious affection claim as being equal to 90% of the open market value of the site at the valuation date, which would produce a compensation figure of £1,109,250. They put the claim for works to the new access at £268,000 and the claim for holding costs at £479,147. Taking account of the items which were agreed, at the commencement of the final hearing the total value of the claimant's claim was a little over £2.1 million (plus interest). Earlier claims for loss of notional profits as a result of the delay in establishing a business from the site, and for the supposedly "abortive" costs of acquisition, were not pursued.

13. National Highways' experts valued the claimant's injurious affection claim at £210,000, that being 20% of the open market value of the site; they valued the disputed components of the rule 6 head of claim at £250,500 and valued the total claim at £577,250 (plus interest).

Representation and witnesses

14. At the hearing of the reference the claimant was represented by James Pereira KC and the respondent by Alexander Booth KC.

15. Evidence was given on behalf of the claimant by Mrs. Sarah Ramsbottom, Managing Director of Castlefield Estates Ltd (the claimant's parent company), and on behalf of the respondent by Mr. Khalid El-Rayes, a Project Manager for the scheme since 2015. Expert evidence on highways and road safety matters was given by Mr. Richard Jones, BEng, MSc, CEng, FCIHT, Director of Arcadis for the claimant, and by Mr. Andy Cooper, BSc, Meng, CIHT, an Associate Consultant Engineer at WSP for the respondent. Expert evidence on the leisure and hospitality market was given by Mr. Tony Hunter, BSc (Hons) MRICS, a Director of Savills, for the claimant, and Mr. Stephen Owens, FRICS MCIArb, Managing Director of Christie and Co for the respondent. Expert evidence on compensation valuation was given on behalf of the claimant by Mr. Simon Cook, BSc, MRICS, Managing Director of Roger Hannah; and on behalf of the respondent by Mr. Scott Kershaw, BLE (Hons), MRICS, Principal Surveyor at the Valuation Office Agency. We are grateful to them all for their assistance.

The legal basis of the claim for injurious affection

16. At the commencement of the hearing it appeared that the parties might disagree significantly on the interpretation of section 7, Compulsory Purchase Act 1965 and therefore on the proper approach to the assessment of the claim for injurious affection. From their opening statements, Mr Pereira KC and Mr Booth KC were at odds on the relevance of events which had occurred after the valuation date, and specifically the consequences of the delay in giving effect to the claimant's entitlement to rights over the new access to replace those it had lost when the original access was closed. By the conclusion of the hearing, however, these issues of principle had all but disappeared.

17. Section 7 of the Compulsory Purchase Act 1965 confers a right to compensation where land which has not been taken by an acquiring authority has nevertheless been adversely (or "injuriously") affected by being severed from other land which has been taken. Section 7 provides:

> "In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act."

18. The assessment of this form of compensation is generally achieved by determining the value of the retained land before severance, i.e. on the valuation date but disregarding the effect of the acquiring authority's scheme, and deducting from it the value of the retained land after severance, i.e. on the same date but taking into account the effect of the scheme and of the severance of the retained land from the land taken. The necessary assessment must be carried out as at the date of entry, in this case, 10 November 2014.

19. It had originally been suggested by Mr Pereira KC that the direction to provide compensation for "damage, if any, *to be sustained*" by the owner of the land required that the "after" valuation of the severed land at the valuation date must take account of all matters arising out of the exercise of the relevant compulsory powers which affect the value of the land and which are known to have occurred by the date of the hearing, notwithstanding the fact that they could not have been known at the valuation date. That required that the notional purchaser of the land at the valuation date must be assumed to know, not only that the original access would be closed and replaced by the new access, but that the owner would still be waiting for the grant of rights over the replacement access more than eight years later and that, for a period of time, it would effectively be abandoned by National Highways and left to negotiate unsuccessfully with the Tatton Estate to secure the rights which it was entitled to under the Order.

20. By the end of the hearing the claimant's position was that a purchaser of the Cheshire Lounge site in November 2014, having made appropriate enquiries and having become aware that the formalisation of a grant of legal easements over the route of the new access would depend on agreement on compensation first being reached between National Highways and the Tatton Estate to allow the route to be vested in National Highways, would assume that certainty over its new rights would not be achieved for a period of at least seven years and possibly as long as nine years. The logic of that proposition was that it would be assumed that agreement would only be reached after the commencement of a reference to the Tribunal, at the end of the six-year statutory limitation period. That was not the impression the claimant itself had been given by Mr El-Rayes on behalf of National Highways, but it allowed the claimant to suggest that a purchaser would discount the value of the site much more heavily than the claimant itself had done. The claimant had agreed the price of the site on the basis that the contract was conditional on it being satisfied with the access arrangements; it proceeded with the acquisition on the basis of representations by Mr El-Rayes that the policy of National Highways, where it was responsible for acquiring a replacement access over land belonging to a third party, was to allow a period of up to two years for private negotiations between the displaced landowner

and the third party before it would be prepared to "force the issue" by exercising its compulsory powers. The claimant therefore assumed that the necessary rights would be achieved with National Highways' assistance in a period of not much more than two years.

21. In his closing submissions Mr Pereira KC accepted that the correct way to undertake the valuation was to have regard to all matters that were known or anticipated at the valuation date, or which would have been known or anticipated by a reasonably prudent and properly advised purchaser. Mr Booth KC accepted that proposition, as do we. As a general rule, without an express contractual or statutory instruction to do so (and there is none in section 7) it would always be wrong to value land as if with knowledge of matters which were not known, and could not have been known, at the valuation date. The suggestion made by the Lands Tribunal in *Waterworth v Bolton MBC* (1979) 37 P&CR 104 that a different approach is permissible in cases of injurious affection has been the subject of criticism by learned commentators and seems to us to be wrong in principle (see *Barnes, The Law of Compulsory Purchase and Compensation,* at para 9.57, and *Tottel's Compulsory Purchase and Compensation Service,* at para 2521). Mr Pereira KC did not rely on *Waterworth*.

22. The guiding principle in the assessment of compensation is the principle of equivalence. The landowner whose land is taken in the public interest should receive compensation which fully and fairly reflects the loss which the owner has actually suffered, no more and no less. National Highways acknowledged that principle and invited the Tribunal to give effect to it. It accepted that a valuable development of the Cheshire Lounge site could not sensibly have been undertaken by the claimant until it had certainty over the rights of access to which it was entitled (including access for the installation of new services). The new access was in place and available to be used, but the Estate had continued to maintain that such use was with its permission, which could be revoked; nor was there clarity about what rights to lay or connect to services the claimant would enjoy. National Highways' position was that the required certainty was achieved by July 2022, when it reached agreement with the Tatton Estate on the terms of a deed which would confer rights on the claimant over the new access while it remained in the Estate's ownership. It proposed that equivalence should be achieved by compensating the claimant for its holding costs while the site remained undeveloped, ceasing on 30 June 2022 when the terms of access it had negotiated were available to the claimant, rather than by valuing the claim for injurious affection with the benefit of hindsight.

23. Mr Pereira KC warned against eliding the claim for injurious affection and the claim for holding costs. The first was to compensate the claimant because the Cheshire Lounge site was less valuable as a development site than it would have been with the original access, while the second was to reflect the cost to the claimant of being unable to secure a return on its investment while uncertainty persisted over the final resolution of its rights of access. We agree that the two heads of claim are conceptually and legally distinct, but that does not mean that in an appropriate case they could not be alternatives or that the assessment of one could not have regard to compensation provided under the other. What matters is that the claimant is put in an equivalent position, so far as money can achieve it, to the position it would have been in if the reference land had not been taken.

The claimant's acquisition of the site

24. There has been a public house on the site since the mid-19th century. What became the Cheshire Lounge was originally known as the Nag's Head Inn and was operated by Bass brewery. It was sold to Whitbread and had been run as a pub/restaurant under the 'Brewers Fayre' trading style. Mr Hunter had worked for Whitbread between 1989 and 2004, initially with responsibility for pubs in the North of England, including this one. He referred to a period of successful trading but explained that after 2005/2006 Whitbread had divested itself of its standalone estate to concentrate on its hotel business. The Brewer's Fayre portfolio was sold to Mitchells and Butler in 2008.

25. In all, the Cheshire Lounge appears to have changed hands seven times since 1993 (although some transactions may have been between related companies). Notable sales were from Nobel House Inns and Taverns to Stanford Pubs Limited in May 2004 when the price achieved was £822,500 and the 2009 acquisition by DT Investments from Punch Partners where the price was £600,000. It had last been operated by a tenant, Cheshire Lounge Ltd, under a lease for a term of 21 years from 2005 at an annual passing rent of £84,000. By 2014 it had ceased to trade as the Cheshire Lounge Wine Bar and its operating company had been placed into voluntary liquidation in July 2014. The building later became derelict, and in 2015 it suffered from flooding and water ingress, but it was agreed that in November 2014 it was capable of being re-opened and operated.

26. In October 2014 Mr and Mrs Ramsbottom were alerted by a property developer contact that DT might be seeking a purchaser for the site. DT was represented by Peter Vinden of the Vinden Partnership.

27. Negotiations for the acquisition of the site were held in March 2015. Meetings were attended for the claimant by Mrs. Ramsbottom and her husband James Ramsbottom, the managing director of Elle R Leisure Ltd, the group's operating company, and by David Knowles of DT and Peter Vinden. Agreement in principle was reached for the acquisition of the site at a figure of £1,332,500. Over the next six months detailed planning inquiries were made as the claimant sought comfort about the scale of development which would be permitted and whether the planners would insist that the profile of the proposed building should be lowered so that a basement would be required.

28. In September 2015 Mr Vinden wrote to Mr Ramsbottom to explain that his client would be seeking other options if the claimant was not in a position to formalise the agreement. Mr Knowles also disclosed to Mr. Ramsbottom that he was in discussion with other potential purchasers and that one option being explored was to obtain planning permission for a hotel on the site. Nevertheless, by February 2016 a compromise had been agreed so that the purchase price of the site would be reduced by £100,000 if the planning authority required a basement. Solicitors were then instructed to prepare a conditional contract.

29. A further six months elapsed before contracts were exchanged between the claimant and DT. The contract was conditional on a satisfactory planning permission. It was also agreed that if National Highways' proposals for the new access would materially affect the use and enjoyment of the site the claimant could withdraw from the transaction.

The leisure and hospitality industry at the valuation date

30. The leisure industry experts, Mr Hunter and Mr Owens, were in agreement that the leisure market in 2014 was relatively buoyant. Activity was characterised by a number of large scale corporate transactions in both the pub and restaurant sectors with pub companies exhibiting a new-found optimism after the large-scale disposals which followed the financial crisis of 2008. Mitchells and Butlers, a managed pub restaurant operator with 1,600 sites, acquired 173 Orchid group sites for £266m in June 2014. Greene King and Marston's also had requirements for new premises and an increasing interest in greenfield development sites. In the year before and after the valuation date, growth was largely driven by the success of food-led managed houses as the consumer trend for eating out continued.

31. The experts took different views of the attractiveness of the Cheshire Lounge site to the market. Mr Hunter considered that it fitted the criteria for a food-led managed house of the type the market was looking for. Mr Owens disagreed.

32. Mr Hunter described the acquisition activity of seven pub operators who were expanding at the valuation date. He was unable to say which of these operators would have looked seriously at the Cheshire Lounge in 2014 because the sale of took place 'off market'. We fail to see why the level of marketing should prevent him from expressing a view as to who had a requirement and might have been interested, but his evidence was at a more general level.

33. Greene King had acquired Cloverleaf Restaurants in 2011 and by 2017 had expanded its operations from 12 units to 67 units. In 2016 Greene King had opened one restaurant a month under the renamed Farmhouse Inns brand, having developed greenfield sites. Its 2015 Annual Report of 2015 spoke of 'growing our branded retail presence in the eating and drinking out markets' and noted that the total number of sites with a retail brand or format had increased by 53, with Hungry Horse and Farmhouse Inns receiving the most expansion investment. Without revealing what Greene King's locational criteria were Mr Hunter suggested that the Cheshire Lounge was a match for them.

34. Marston's was also developing 20 to 25 new build sites each year. Again, Mr Hunter did not say what Marston's site requirements were and how they might be met by the Cheshire Lounge but referred instead to its 2014 Annual Report which mentioned its intention to spend about £80 million on the construction of at least 25 new pub-restaurants. The Report did not say whether the sites had already been purchased or whether they were actively acquiring new opportunities.

35. Mr Hunter also identified a number of well-funded regional and local operators whom he considered very acquisitive in around 2014. J W Lees is a brewery and pub operator which had around 140 sites. It made two acquisitions in 2014 in a transaction worth in excess of £5 million and reported having amassed a £20 million 'war chest' to open 15 new restaurants. Mr Hunter had written to the company seeking confirmation that they would have been interested in the Cheshire Lounge in 2014 had they known about it, and Mrs Ramsbottom also contacted them. They replied in the affirmative, but we place no real weight on that nine year old hindsight.

36. Hydes was a local pub operator with around 50 sites and was said by Mr Hunter to have been acquisitive. In 2014 it purchased pubs in Chester and Helsby and a former clothes shop in Manchester to develop into a pub, restaurant and hotel. In 2015 it purchased a small chain of six food-led pubs. Holts was another local brewery and pub operator with around 125 sites. In 2014 it was focusing on its food-led business by purchasing greenfield sites and had secured two in Warrington and Lytham St Annes.

37. Two smaller operators, Hickory's Smokehouse and Cheshire Cat Pubs & Bars Ltd were also included in Mr Hunter's list of possible suitors. The former opened its first restaurant in 2010 and began expanding rapidly in 2014 eventually opening 10 additional restaurants. The latter acquired the Church Inn in Mobberley in August 2013, increasing the number of pubs in its portfolio to five.

38. Mr Hunter thought the most likely purchaser of the Cheshire Lounge on the open market in 2014 would have been one of these local or national operators looking to develop the site to its own specification, possibly as part of a joint venture with a developer. The site was extensive and would support a destination food-led venue with external trading areas and car parking. There was enough space for future expansion into letting accommodation which he thought would be popular given the proximity of Manchester Airport.

39. Mr Owens did not agree that the Cheshire Lounge would have appealed to either of the national operators Mr Hunter had identified. His firm acted for both Greene King and Marston's and Mr Owens analysed 17 sites selected on a random basis which had been developed by those operators at around the valuation date. The majority of the sites were within a short distance of arterial roads, usually close to a roundabout in what he described as an "established area of density". They were often in mixed use locations such as retail/leisure parks and in the vicinity of residential areas. Mr Owens contrasted those sites with the Cheshire Lounge. Although it adjoined a motorway and an A road, the situation was rural and some distance from densely populated areas.

40. Mr Owens also took issue with Mr Hunter's reference to the regional operators, J W Lees and Hydes, each of which had acquired a number of pubs in 2015. Those were examples of regional brewers acquiring existing pubs to operate in their existing format and not for redevelopment. As for the smaller local operators, Mr Owens said that both Hickory's Smokehouses and Holts preferred sites in densely populated urban areas. Cheshire Cat Pubs and Bars and Brunning and Price favoured destination locations in attractive, countryside areas and operated from character buildings often alongside rivers or canals. Mr Owens' conclusion was that the most likely purchaser of the Cheshire Lounge in an open market transaction in 2014 would have been a smaller or more local business, such as the claimant.

41. Despite the detailed evidence provided about the leisure and hospitality market, and the strongly held views of the experts, it was not suggested that the identity of the assumed purchaser of the Cheshire Lounge was critical to the value of the site in 2014. It was broadly agreed that the market was in good heart and that development sites were in demand. It was not suggested either that the site would attract intense competition or that it would be difficult to dispose of. Those conclusions are sufficient to enable us to consider the rival valuations.

The expert evidence on the value of the Cheshire Lounge

42. The leisure property experts did not agree on the value of the Cheshire Lounge to the hospitality market on 10 November 2014. Mr Hunter considered that with the original access over the reference land the whole site was worth £1.34 million. With a legal right of access over the new route over land belonging to the Tatton Estate it would be worth the same. Without a legal right of access it was of no value, except to the adjoining owner. Mr Hunter left the assessment of compensation to Mr Cook. Mr Owens valued the site at £1.05 million with the original access and at £945,000 with the new access (assuming that the site had the benefit of the easement negotiated between National Highways and the Tatton Estate and offered to the claimant on 30 June 2022).

Mr Hunter's approach

43. Somewhat surprisingly Mr Hunter adopted a comparative approach to his valuation, eschewing the usual residual method which might have been thought appropriate for a site which is known to have been purchased for development. He relied on his previous involvement with Marston's which had been very acquisitive in 2014, purchasing sites, developing them to its own specifications and then arranging sale and leaseback transactions to release funds for further acquisitions and developments.

44. Mr Hunter analysed the purchase prices paid by Marston's on its acquisition of nine different sites. It was not clear whether he had been personally involved in these transactions. He had not sought his former client's permission to provide details and commercial confidentiality limited the information he was prepared to disclose, notwithstanding that the transactions were historic. The information he did make available was very limited, and the usefulness as comparables was negligible. Nevertheless, we set out all the information he provided in the following table:

Site number	Purchase price (£)	Site size (acres)	Analysis (£ per acre)
1	700,000	0.99	707,071
2	1,025,000	0.66	1,553,030
3	800,000	2.60	307,692
4	800,000	1.12	714,286
5	700,000	1.00	700,000
6	600,000	0.97	618,557
7	1,025,000	1.26	813,492
8	600,000	0.77	779,221
9	800,000	0.97	824,742

45. Details of the individual locations were not provided but we were told they included, amongst others, Hertfordshire and Devon as well as sites closer to the northwest. We were given no information about access, topography or the planning status of the sites. It would have been helpful to have known about the ownership, tenure and restrictions on the use of the sites but these particulars were also withheld.

46. Mr Hunter acknowledged that all of these sites were much smaller than the Cheshire Lounge site, with even the largest being over an acre smaller. He had not applied any weighting to the transactions or made any adjustments for factors that might influence value. He simply averaged the purchase price per acre to arrive at a figure of £780,000 per acre. He then excluded the lowest and highest results which produced a figure of £740,000 per acre. It was not apparent why this second analysis had been carried out and he did not make any use of it.

47. Mr Hunter considered that the proposed restaurant on the Cheshire Lounge site would occupy about 1.5 acres which would leave an area of 2.13 acres for future expansion (which he valued at 10% of the rate for the area earmarked for initial developed). Adopting his average rate per acre from all nine anonymised transactions his valuation of the site was as follows:

Site area for restaurant:	1.50 acres @ £780,000 per acre =	£1,177,000
Expansion land:	2.13 acres @ £ 78,000 per acre =	£ 166,140
	TOTAL	£1,336,140
	SAY	£1,340,000

48. Mr Hunter offered no justification for valuing more than half of the site at 10% of the value of the remainder other than he considered that it had greater potential for development than the surrounding agricultural land. He adduced no planning evidence to support this view but thought that a developer would consider the site as a whole rather than just the northern end which now has planning permission for development (although it did not at the valuation date).

49. Mr Hunter referred in a number of places to the fact that the site had not been offered in the open market. This seemed to imply that the deal struck between the claimant and DT did not achieve market value and that the purchase price would have been higher if there had been increased competition. Notwithstanding this impression Mr Hunter valued the site at only £7,500 more than the price agreed in principle in 2015 (although the price was renegotiated to account for the risk that a basement might be required). As the price paid by the claimant was agreed in principle within six months of the valuation date, and it was not suggested that the market had moved significantly by the time contracts were exchanged, this might appear to cast some doubt on the suggestion that market value was not achieved.

50. Mr Hunter also considered whether the development envisaged by the claimant would be viable, presumably as a sense check on his valuation, although he did not explain why this step was required. He considered the question of viability from two perspectives: first, assuming the intended operation of the claimant, and then as a food-led pub operation.

51. Having looked at other Albert's restaurants Mr Hunter estimated that the development would provide 200 internal covers and 230 external covers. He made assumptions about cover turns, spend per head and function income to arrive at a food turnover of £2,820,000 per annum. Food sales would represent about 60% of turnover, so he anticipated that wet trade would be approximately £1,900,000, resulting in a total annual turnover of £4,720,000. He expected gross profit margins on the wet trade of about 71% and 64% on food. Taken together he calculated a gross profit of £3,150,000 per annum. He estimated costs at £2,150,000 per annum but gave no indication of how he arrived at this figure other than mentioning that labour costs would be £1,670,000 per annum. The Albert's operation relied on excellent service and standards which would result in a lower fair maintainable operating profit (FMOP) to turnover ratio than most corporate operators. The profit (FMOP) in this particular instance was put by Mr Hunter at £1 million per annum.

52. Mr Hunter then considered the venue in the hands of a food-led national operator. Such an enterprise would be based on a smaller footprint of 150–180 covers and would be aimed at a more price conscious consumer resulting in a lower turnover. He assumed 180 internal covers and 120 external covers and arrived at an annual turnover of £650,000 for the wet trade and £950,000 for food. In this relatively affluent part of the country he would expect gross profit margins of 72% on wet turnover and 68% on food producing a gross profit of £1,120,000 per annum. The operation would be less labour-intensive than Albert's and Mr Hunter allowed £460,000 for wages and total costs of £625,000. The annual FMOP would be £495,000. Assuming a multiplier of 8 times the FMOP, once established the business would be worth £3,960,000.

53. We assume that costs excluding labour were estimated to be £480,000 for the Albert's scenario and £165,000 for the food-led pub. Mr Hunter did not explain how property costs had been accounted for and made no reference to the assumed tenure. We assume he envisaged that the operator in both scenarios would have the benefit of the freehold, but we would have been assisted by an explanation how the purchase and development would have been funded, and how such costs would have been reflected in the annual operating cost. Such lack of detail was a recurring theme in Mr Hunter's evidence which left the Tribunal less than confident in the conclusions that he had reached.

54. Mr Hunter also considered the costs of development, and looked at the build costs of 14 projects that he had been involved in. The buildings ranged in size from 641.7m^2 to 793.3m^2 and the costs were in the range of £2,569 per m^2 to £4,029 per m^2. He took the average of the costs at £3,195 per m^2 and applied it to a unit of 660m^2 suitable for a branded pub operator. There is an obvious flaw in using an average build cost derived from a sample where there is a 23.6% difference in size between the smallest and largest and a 56.9% difference in costs and applying it to a building at the lower end of the size range. Additionally, once again, too little detail was provided to make this exercise worthwhile. The sites were not identified and there was no information on ground conditions, building types, or fitting out. It was unclear whether the costs included the external areas and whether such areas were proportionately similar in all cases. The most we could discern was that there appeared to be a broad, inverse relationship between size and cost, but beyond that we found the information of no assistance.

55. In June 2021, in a report for the claimant, Mr Hunter calculated that the building costs for their proposed restaurant would be £5,380,000 including £230,000 (5%) for site clearance

and £580,000 (12%) for professional fees. The same report included his opinion of the rental value of the proposed restaurant and of a smaller food-led pub. He thought the property would not be let on the open market as a managed pub. If a letting was assumed, he considered that the tenant's rental bid would lie between 45% and 55% of the FMOP at the valuation date. He arrived at a figure of £250,000 per annum as the headline rent (50.5% of FMOP) with a six month rent free and a stepped rent until year three.

56. He also assessed the rent for the proposed restaurant at £300,000 per annum with the same incentives. This equated to 30% of FMOP for a restaurant that would be more than twice the size of the food-led pub operation. He explained this disparity by commenting that there is a limit to the rent that an operator would be prepared to pay irrespective of the size of the restaurant. Putting it another way, there is a quantum effect with larger restaurants although we note that the estimated FMOP for the larger operation is greater in absolute terms but lower on a unit basis in comparison to the food-led pub. The former is £680 per m^2 and the latter £750 per m^2.

57. Mr Hunter's conclusion from his viability exercise was that the value of the completed, trading operation exceeded the costs of creating it, including the site acquisition and building costs. However, this conclusion applies solely to the food-led pub operation, since he did not test the viability of a local or regional operator with a bespoke offering, beyond noting that such an operator would expect an EBITDA of 25 to 28% of turnover.

Mr Owens' approach

58. Mr Owens explained that unlike other generic classes such as office, industrial or retail the value of leisure property depended on trading potential. To undertake a profit based valuation the valuer needs to consider the business in detail and assess the level of trade that a reasonably efficient operator would expect to achieve assuming that the property is fully equipped, properly maintained and decorated (the fair maintainable trade, or FMT).

59. The next stage in the valuation process is to ascertain the FMOP (Fair Maintainable Operating Profit) which is the profit excluding depreciation and finance costs that the reasonably efficient operator would expect to derive from the FMT. This should take account of all costs and outgoings as well as an appropriate annual allowance for periodic expenditure such as decoration, refurbishment and renewal of the trade inventory. These costs and allowances should reflect those of the type of operator who would be most likely to acquire the property were it to be offered on the market.

60. The final step in the valuation is to capitalise the FMOP at an appropriate rate of return reflecting the risk and reward profile of the property and its trading potential. This is usually achieved by reference to evidence of relevant market transactions.

61. Having described how one would usually value a leisure business, Mr Owens noted that the Cheshire Lounge had closed before the valuation date. We assume (though he did not say so) that he had in mind the difficulty there would be in assessing the FMT for the site without any evidence of the trade which had been achieved from it. But, for whatever reason, Mr Owens said that he had agreed with Mr Hunter that the Cheshire Lounge should be valued as a development site. He considered that the hypothetical purchaser would use a

residual valuation approach but in place of the gross development value of the completed site, a figure derived from the application of an appropriate multiplier to the FMOP would be used. The site value could then be arrived at by deducting the cost of development and making an allowance for risk and return.

62. Mr Owens also reflected that trading premises can be owned as investments and let on a tied or free of tie basis. In most cases where that situation arose the landlord was a pub operating company. In such circumstances it was appropriate to arrive at a value for the premises by utilising a traditional investment approach, capitalising the rent, having regard to the fact that the property is a trading entity.

63. Despite apparently having agreed that the property should be valued as a development site and stating in his evidence that a residual valuation would be appropriate, Mr Owens valuation with the original access arrangements was based on a capitalisation of the last passing rent of the 2014 Cheshire Lounge building. No explanation was given for this departure from what was said to have been agreed.

64. Mr Owens placed particular weight on a letting of Worsley Old Hall to Brunning and Price in mid-2013 (ironically, Brunning and Price were one of the operators Mr Owens thought would not have been in the market for the Cheshire Lounge). The initial rent was £81,000 per annum with a 9 month rent free and a contribution towards dilapidations. Mr Owens regarded Worsley Old Hall as a superior site to the Cheshire Lounge, and a photograph in his report showed it to be an imposing building set in sizable grounds, adjacent to a large hotel and a golf course.

65. Mr Owens pointed out that the rent agreed for Worsley Old Hall was not dissimilar to the passing rent at the Cheshire Lounge before its closure (understood to have been £84,000). His valuation was based on the assumption that the Cheshire Lounge could have been relet at the rent of £84,000 passing before its closure without any further adjustment. He offered us no detail about the terms on which this rent was assumed to be achievable or even the date on which it was expected to take effect. In selecting that rent, Mr Owens said he had used his market knowledge, but he had no access to trading information and the Cheshire Lounge was not let on the valuation date. It had also changed hands several times over a relatively short period of years while it transitioned from a managed operation to a tenanted pub. This direction of travel was said by Mr Owens to suggest that its trading fortunes had diminished over time but he did not comment on the liquidation of the last business to trade there or consider whether the level of rent might have been a contributory factor in its demise. Without information about when, and based on what level of trade, the last rent was agreed and given the differences in style and location between the pubs, it can only be assumed to be a coincidence that the rents for the Cheshire Lounge and Worsley Old Hall were so close.

66. Mr Owens considered that the covenant strength of a tenant likely to take a tenancy of the Cheshire Lounge would be weak and that was reflected in the gross yield of 8% he used to arrive at his valuation. This yield was again based on his market knowledge, and we were provided with no transactional evidence to support it. The result was a valuation as follows:

Rent:	£84,000 pa

Gross Yield:	8%
Valuation	£1,050,000

67. We were surprised by the lack of detail in this valuation and although the Tribunal is more than capable of deducing the years purchase deployed it would have been helpful if the valuation could have been set out in a more conventional format. No account was taken of purchase costs, letting costs to achieve the assumed letting which did not yet exist, nor any void or rent free period, contribution to refurbishment or other inducement.

68. Having valued the Cheshire Lounge by means of an income based approach Mr Owens made the curious observation that 'as a potential development site there is a wider range than normal in the valuation'.

69. Unlike Mr Hunter, Mr Owens considered that the change in access arrangements had resulted in a diminution in the value of the Cheshire Lounge. He did not think the maintenance costs of the new access would be taken into account by a prospective purchaser, and he had been instructed to assume the benefit of a completed deed of easement, but he did consider that the longer and narrower route would have a limited depressing effect on value. Most operators anticipating a significant investment in such a redevelopment project would prefer a shorter access with lighting, lined carriageways and kerb edging. He acknowledged that evidence to support a discount would be hard to come by and therefore relied on his 'extensive experience' to arrive at a figure of 10%. His valuation with the new access in place was therefore £945,000.

The expert evidence on compensation for injurious affection

70. Rather than relying on the evidence of their experts in property valuation both parties looked to specialists in the assessment of compensation to assist the Tribunal in quantifying the claim. We question why this is thought to be a helpful approach. It almost invariably means that those who have been involved in negotiating on behalf of one side or the other (often for many years) are asked at the eleventh hour to clear their minds of the interests of their client and acquire qualities of objectivity and impartiality which, in practice, are beyond them. Rather than providing expert evidence on issues of fact or judgment they are expected to be the mouthpieces through whom factual evidence of which they have no first-hand knowledge is presented and arguments on one side or the other are developed. We do not single out the witnesses in this case for criticism. They have done their best to be objective, but to a greater or lesser extent that state of mind has proved to be unachievable, as it almost always proves to be unachievable by experts in their situation.

Mr Cook

71. Mr Cook reviewed much of the factual detail in the case and the principles of compulsory purchase compensation; Mr Kershaw did the same. In neither case was it necessary.

72. Mr Cook presented the claimant's case on the 'before' and 'after' valuations of the Cheshire Lounge. He immediately shed his veil of impartiality by adopting Mr Hunter's valuation of the site with the original access at £1,340,000. He implied that this was partly an exercise of

his own judgment having regard to the sale price, and partly because Mr Hunter had assessed the development value of the land and had supported his opinions with comparable evidence. But Mr Cook is not an expert in the valuation of leisure property and it was not a legitimate part of his function to express his own opinion on matters on which he lacks expertise, or to seek to persuade the Tribunal that Mr Hunter was right and Mr Owens wrong. He could have assisted us by providing alternative assessments of compensation first assuming Mr Hunter's evidence was accepted, and then Mr Owens, but he did not do so.

73. Mr Cook's appraisal of the 'after' value was based on the premise that it was the price to be paid by a hypothetical purchaser with no lawful access at the valuation date but with the expectation of an easement being granted at an unknown future date. The grant was out of the hands of the buyer and was the prerogative of the Tatton Estate who would be expected to maximise the benefit of the opportunity. Mr Cook thought that the purchaser would assume a worst case scenario in which no agreement would be reached until after the route of the new access was eventually acquired by National Highways, a period which he put at seven years, allowing six years before the expiry of the statutory limitation period forced a reference to the Tribunal and a further year for that reference to be determined.

74. Mr Cook thought that a pub company or an independent operator, whom Mr Hunter thought the most likely purchaser but for the Order, would not be interested in a speculative property transaction. They were driven by a return on capital as their business model is to trade as operational businesses. The only sort of purchaser who would be interested in the property without a confirmed access would be a speculator who would be prepared to invest money for a long term potential upside.

75. Mr. Cook said he regularly acts for such speculators who are usually individuals or smaller property companies operating in the regional market. They would rarely entertain an opportunity unless they could double their money within a relatively short time. In his experience most speculators acquiring land unconditionally would expect to resolve issues such as planning, title, access, rights of light and so on over a period of two to three years. For longer term opportunities the level of return sought would be significantly higher. In the case of the Cheshire Lounge he thought that a speculator would appreciate that they would be entirely ransomed by the Tatton Estate and would effectively have no control over the resolution process.

76. He gave three current examples of what were said to be speculators paying a low proportion of market value for sites with issues over planning or title, and six historic instances. None was concerned with the negotiation of rights of access in the shadow of powers of compulsory acquisition, and we found them of little assistance. Some were simply examples of a price being paid for an option to acquire land at a valuation at a later date, another was a negotiated hope value on compulsory purchase, and some were examples of land being acquired at a discount but with some confidence that a planning permission would eventually be obtained.

77. Mr Cook concluded from the transactions he referred to that if a proposed development faces delay and uncertainty, but is offered for sale nonetheless, those in the market for the opportunity will insist on a substantial discount. We accept that proposition. If the delay was for as long as 5 to 10 years Mr Cooke considered the discount would be in the range of

90 to 95% from the market value of the unimpeded site. We accept that the greater the uncertainty and the longer the anticipated delay, the greater the discount a purchaser is likely to insist on. But nothing in the examples Mr Cooke produced assisted in quantifying an appropriate allowance in a case such as this.

78. Mr Cook had been unable to find any direct parallels to sale of the Cheshire Lounge. He assumed that the buyer in 2014 would consider that the easement could be secured within 7 years and would be a speculator rather than an operator like the claimant. He took the access to be dependent on the commercial decisions of a third party which he assumed was not accountable and could not be obliged to grant an easement. He thought the situation was less certain for a purchaser than where the issue was over the availability of a planning permission which was subject to a third party determination within a predictable period. Despite these differences he said he based his assessment on the transactions he had referred to and considered that the property would change hands at a discount of 90% of its value without any difficulty or uncertainty over access. His assessment of compensation was therefore based on the following simple calculation:

"Before" Market Value as at Nov 2014	£1,340,000
% of Market Value payable in Nov 2014 with no access rights	10%
"After" Market Value as at Nov 2014	£134,000

Injurious Affection
£1,206,000

79. Mr Cook also addressed the issue of the effect on value of the condition of the new access. The parties approached this issue differently. Mr Hunter had made the assumption that the new road had been built to a standard where no improvements were required and consequently thought that there was no requirement for an adjustment in value, whereas Mr Owens thought that no improvements were required but that a purchaser would nevertheless regard the access as less attractive than the original, which he reflected by a reduction in the "after" value. Mr Cook agreed with Mr Owens that it would be appropriate to make an allowance for the replacement of the original access with the new road, but while Mr Owens had made an allowance of 10% of his valuation (£105,000) Mr Cook preferred to rely on costs of works supplied by Cinns Quantity Surveyors based on a specification prepared by Mr Jones, the claimant's highways expert. These amounted to £263,466.

80. Mr Cook said that the cost of £263,466 represented 19.66% of Mr Hunter's valuation of £1,340,000. He therefore used 20% of the market value as being his assessment of the impact on value caused by what he took to be deficiencies in the new access arrangements. This equated to £268,000. He also suggested that the 'after' value was adversely impacted both by the access rights position and by the deficiencies in the route itself. Taking both these factors into account he concluded that the Cheshire Lounge had a negative value in November 2014 as a result of the acquisition of the reference land.

Mr Kershaw

81. Mr Kershaw presented National Highways' case on the 'before' and 'after' valuations, comparing the 'before' market value with the market value with the new access in place. In his initial appraisal he adopted Mr Owens' 'before' value of £1,050,000 and compared it to the value of £1,232,500 realised by sale of the property by DT to the claimant. Having deducted £25,000 as the value of the land taken, he concluded that the Cheshire Lounge had increased in value by £207,500. He attributed this to the sale having taken place 'off market deal' and suggested that there had been no injurious affection. This proposition (which was contradicted by Mr Owens' own evidence) was not relied on by Mr Booth KC and we say no more about it.

82. Mr Kershaw put forward two alternative bases of assessing injurious affection. The first had no regard to events after the valuation date, whilst the second took them into account up to the date of his report.

83. In the first scenario Mr Kershaw examined the value of the Cheshire Lounge with the original access (as it remained available), then with the new access taking into account the commitment in the Order that it be made available. He took no account of any matters after the valuation date. He noted, but did not rely on, the fact that at the valuation date negotiations had begun between DT and the claimant which subsequently bought the site without any reduction in price to reflect the absence of a formal easement.

84. Mr Kershaw adopted Mr Owens' deduction of 10% for the effect of the new access on the value of the site notwithstanding Mr Cooper's view that the route was not a material disbenefit. He thought the purchaser would have anticipated that the easement would be granted within twelve months, but as a back stop would have had in mind that there was a statutory limitation period for compensation claims of six years, with the vast majority of claims settled within this timeframe.

85. Mr Kershaw provided two examples of road improvements schemes where a sole means of access has been stopped up, and where new access was to be provided over third-party land. In both cases, National Highways secured the access by compulsory acquisition powers. Mr Kershaw acknowledged that these situations were not directly comparable to the Cheshire Lounge but said they had informed his assessment that a 10% adjustment was appropriate to reflect the fact that at the valuation date, an easement had not yet been granted.

86. The first of Mr Kershaw's comparables was Woodland View Farm, which, prior to an A5 improvement scheme had benefitted from direct access off the A38. A new access was to be provided off the A38 slip road, with egress on to the A5 adjacent to a roundabout. Compensation for the diminution in value of the property was agreed at £50,000 or 10% of its market value. The new access was longer and less convenient, but the claimants had been satisfied that it would ultimately be conveyed to them as a freehold.

87. The second comparison was Hillside Cottage which was affected by the A453 Birmingham to Nottingham Trunk Road Improvement Scheme. The cottage had enjoyed direct access from the A453 but this was stopped up in July 2012 and replaced with a separate shared access over third party land. The property was a large, detached house with 13 acres of gardens and amenity land and Mr Kershaw thought it was used as a bed and breakfast. Compensation for injurious affection was agreed at £67,500, being 10% of the unaffected

value, on the basis that National Highways would use reasonable endeavours to obtain rights from the third party and would itself grant a deed of easement once all the necessary acquisitions under the CPO were completed. Mr Kershaw said that formal easements were yet to be granted.

88. Occupation of both of the properties Mr Kershaw referred to had continued uninterrupted and the new access routes were used by the owners despite the absence of formal easements.

89. Relying on these examples and on his general experience from other road schemes Mr Kershaw adjudged that a 10% adjustment on the 'before' valuation was appropriate to reflect the fact that easements over the new access for the benefit of the Cheshire Lounge were not available at the valuation date. In summary the result of his first approach was as follows:

'Before' value	£1,050,000
Less value of reference land acquired	-£25,000
	£1,025,000
Allowance for physical change in access -10%	-£105,000
Allowance for lack of deed of easement -10%	-£105,000
'After' value	£815,000
Injurious affection	£210,000

90. Mr Kershaw's second scenario took into account all relevant matters that occurred after the valuation date. In particular he had regard to the fact that the premises were sold to a purchaser which intended to develop them yet was content to do so based on the access arrangements in the Order. As at June 2022 the claimant had been provided with a draft deed of easement which, had it been signed, would have conferred the rights agreed between National Highways and the Estate. As the deed of easement was available Mr Kershaw proposed that there was no need to make any allowance for the absence of formal rights. The only allowance he made was therefore the 10% proposed by Mr Owens which left an "after" value of £920,000 and a compensation figure of £105,000.

The Tribunal's valuation of injurious affection

91. The evidence of both hospitality experts was inconsistent and unsatisfactory. Having identified the site as a development opportunity neither produced a residual valuation and Mr Hunter relied on evidence of unidentified sites and unverifiable transactions which was of no assistance to us at all. Inexplicably, despite agreeing that the site should be valued as a development prospect, Mr Owens ignored development value altogether and adopted a speculative income based valuation for the existing buildings. He did not know when the last rent payable at the Cheshire Lounge was agreed, and he had no knowledge of how it had traded before it closed. The comparables on which he based his conclusion that the last passing rent was at a market level for the valuation date were not convincing. He provided no evidence of investment yields in his capitalisation of the rent.

92. In short, neither the approach of Mr Hunter nor that of Mr Owens seems to us to be a reliable guide to the "before" value of the Cheshire Lounge and we reject them both.

93. The material available to enable the Tribunal to carry out our own valuation is extremely limited.

94. Neither expert placed any weight on the claimant's acquisition of the site despite the fact that the deal was under discussion prior to the service of the notice to treat and contracts were exchanged only five months after the valuation date. Mr Hunter's valuation before rounding was £1,340,000 compared to the price of £1,332,500 originally agreed between the claimant and DT.

95. Mr Hunter's unwillingness to place weight on the sale price appeared to be based on his understanding that the Cheshire Lounge had not been properly marketed and his assumption that a lack of exposure had negatively impacted the price achieved so that it did not represent market value. But we know that DT were receiving advice from an agent and during the course of the negotiations they claimed to be exploring options for the site with other interested parties. Such activity could not have come about without some kind of marketing, but the exact nature of that activity was not in evidence. Market value is defined in the International Valuation Standards as:

> 'The estimated amount for which property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably prudently and without compulsion.'

Guidance notes published with the Standards explain what 'after proper marketing' means, namely:

> 'that the property would be exposed to the market in the most appropriate manner to affect its disposal at the best price reasonably obtainable in accordance with the Market Value definition. The length of exposure time may vary with market conditions, must be sufficient to allow the property to be brought to the attention of an adequate number of potential purchasers. The exposure period occurs prior to the valuation date.'

96. Different types of properties require marketing strategies appropriate to the market they wished to be exposed to. A hospitality development site in rural Cheshire may require a different style of marketing from an office tower in central Manchester. Not every property for sale is advertised in the property press or posted on-line. The Cheshire Lounge was no longer income producing, as the operating company was in liquidation, and the seller, DT, may not have had the resources for a high-profile campaign or it may have considered it unnecessary. It took advice and is unlikely to have adopted a marketing strategy which it considered would lead to the property being undersold. The claimant became aware of the opportunity by word of mouth and the seller may have targeted others in the Cheshire market and commercial agency community who were known to be active locally, whom they thought might be interested. Unless the claims made to the claimant that DT was in discussions with other potential buyers were simply untrue, the approach to marketing

adopted by DT appears to have been successful as the property came to the attention of the claimant and others.

97. We are not prepared to assume that the Cheshire Lounge was not properly marketed or that the price agreed for it offers no guidance as to its market value. We accept Mr Owens' evidence that the likely purchaser of the site would be a local operator and of course that turned out to be the case. In our judgment an appropriate level of marketing of the site is likely to have taken place. However, we have concluded that the sale price achieved cannot be a reliable guide to either the 'before' or the 'after' value of the site because it was agreed in anticipation of the new access arrangements and in return for the assignment of the right to receive the statutory compensation. In view of the limitations of the evidence provided by the valuation experts we considered whether it was possible to adjust this complicated piece of evidence so that it could be taken into account, but we have concluded that it cannot reliably be done.

98. Mr Owens argued that a potential purchaser looking to redevelop the site would merely need to outbid a purchaser seeking to reuse the existing building as a public house. This argument is flawed, since it assumes only one potential purchaser would view the site as a development prospect, which is contrary to the evidence about the general state of the market and what little we know about what actually happened.

99. Mr Hunter and Mr Owens both avoided a conventional residual valuation, despite having agreed that there were a number of pub companies and hospitality operators of different sizes in the market for development sites, and despite having agreed (according to Mr Owens) that "the approach to valuation is as a development site". We agree with that proposition and would have been greatly assisted if the experts had adopted it. In the circumstances we consider it is necessary to explore the methodology explained by Mr Owens but not actually deployed in his valuation. It involved a substitution of the usual gross development value with a multiple of the FMOP, followed by the deduction of the build costs and a sum to represent risk and return. We noted that Mr Owens' method appeared to have accounted for risk and return twice, firstly as part of the multiplier and secondly as a separate deduction.

100. Ironically, to undertake this assessment we need to return to figures provided by Mr Hunter. He thought that the proposed restaurant would generate a FMOP of £1,000,000 per annum. In his investigation of the viability of a food-led pub on the site he adopted a multiplier of eight times FMOP to arrive at a capital value, but this figure was based on a business operated by one of the market leaders such as Greene King or Marston's. In our judgment it would be more appropriate to use a lower multiplier for a quirky site which seems more likely to appeal to a smaller local or regional operator and we have therefore adopted a factor of seven.

101. Mr Hunter identified a build cost of £5,380,000 in his report to the claimant in June 2021 and in the absence of any other evidence we will employ that figure. Deducting this from the £7 million taken to represent the value of the business, we are left with a residual sum of £1,620,000 covering site acquisition costs and an allowance for risk and return. Taking a rate of 7.5% for the return on capital and applying it to the build costs results in a site value of £1,216,500.

102. If we were to adopt Mr Hunter's approach of valuing 1.5 acres of the site at £780,000 per acre but valuing the excess land at a nominal rate of £10,000 per acre, the result would be a figure of £1,191,300. Taking the excess land at £20,000 per acre produces a value of £1,233,900. In this regard we note that the Tribunal has recently valued greenbelt grazing land within 13 miles of the Cheshire Lounge at £20,000 per acre to reflect a slender possibility of development in the medium to long term (see *Garner v Stockport MBC* [2022] UKUT 28 (LC), at [79]).

103. A valuation based on Mr Owens' residual methodology and individual components of Mr Hunter's valuation appropriately adjusted suggests that the value of the Cheshire Lounge assuming no change to the original access (and including the land taken) lay a little over halfway between their respective valuations. We have concluded that the open market value of the site disregarding the Order was £1,225,000.

104. The value of the land taken is agreed to have been £25,000. This must be deducted from the open market value to arrive at the "before" value of the retained land which is subject to injurious affection. That "before" value is therefore £1,200,000.

105. In arriving at an "after" valuation the first factor which must be taken into consideration is the effect on the value of the Cheshire Lounge of exchanging a short access immediately adjacent to the dual carriageway for a much longer access in a less prominent location. We are not concerned at this stage with the separate issue of whether the specification of the new access was appropriate or whether money would have to be spent to make it safe to use. That issue was dealt with in the evidence by the highways experts and it is accounted for in the rule 6 claim for disturbance compensation. At this stage we assume that the new access is of an appropriate standard and focus instead on whether it has nevertheless caused the site to be less valuable.

106. Neither Mr Hunter nor Mr Cook made any adjustment for this factor, having concluded that the open market value with either the original or replacement access was the same, and Mr Cook being of the view that the uncertainty over the right to use the access and the cost of remedying suggested defects in it pushed the open market value into negative figures. But Mr Owens did make an adjustment of 10% and his figure was endorsed by Mr Kershaw.

107. The new access arrangements are longer, more convoluted, and less visible than before notwithstanding that the original approach from the north was less than optimal. Whether it was operated as a pub or a restaurant, a leisure or hospitality business on the site would be unlikely to generate as much passing trade as it would have done had the original access still been in use because visibility and convenience would both be reduced. When approached from the A55 Lymm Road the site will be at a considerable distance from the main carriageway and without an obvious connecting route. Even if a significant proportion of customers were drawn from the immediate locality and were familiar with the access, others would be likely to have difficulty in finding their way there. We have come to the conclusion that a 10% adjustment for this factor is reasonable.

108. We next take account of the fact that, although the Order requires the provision of a replacement access and empowers National Highways to take the land necessary to make it available, it was National Highways' policy at the time to leave adjoining landowners to

negotiate suitable private arrangements (at National Highways' cost). Only if they were unable to do so would National Highways take possession of the required third party land, complete its acquisition, and then grant rights in replacement for those which had been lost. Both parties agreed that the uncertainty which resulted required to be compensated, with Mr Kershaw considering that an allowance of 10% of market value was appropriate and Mr Cook arguing for 90%.

109. Mr Cook's assessment was based on what he considered a speculator would pay for a site with uncertainty over the time required to resolve any outstanding obstacles to development. The intention would be to sell the site on to a developer. Despite his diligence he was unable to find useful examples to support his view. None of the transactions and arrangements he referred to were directly comparable to the situation at the property, because none of them involved a statutory entitlement to a favourable outcome so that the only real uncertainty was over timing. Additionally, we are not convinced that a speculator would entertain a proposition involving a site for a restaurant. Mr Cook's examples were all based on residential sites with greater or lesser uncertainty about the availability of planning permission. In this case initial uncertainty over the planning potential of the Cheshire Lounge was accounted for by the use of a conditional contract, and we do not think a purchaser would have entertained doubts that a right of access would eventually be obtained. That is a very different context to the examples of uncertainty Mr Cook was able to find, and we do not find them of assistance.

110. In rejecting Mr Cook's allowance of as much as 90% of open market value we take account of the willingness of the claimant to complete the purchase of the Cheshire Lounge site, when it could have walked away. Completion of the purchase contract was conditional not only on planning permission but also on the claimant being satisfied that the new access arrangements would not materially affect its use and enjoyment of the site. It was aware before it completed its purchase that National Highways had agreed with the Tatton Estate that it would use its best endeavours not to acquire the Estate's land. The claimant was therefore aware its negotiations would initially have to be with the Estate but it was reassured by National Highways' policy not to allow such negotiations to become unreasonably prolonged. We appreciate that the claimant had also spent a considerable sum in securing planning permission, which is likely to have discouraged it from walking away. Nevertheless, the fact that the claimant was prepared to complete its acquisition suggests to us that the market for the site would not have been limited to speculators as Mr Cook contended.

111. The parties ultimately agreed that the assessment of the 'after' value should take account of what was known or anticipated at the valuation date, and not what might occur thereafter. The claimant's acquisition was concluded on the basis that the uncertainty over the grant of easements would be resolved in a timeframe that would not interfere with the development and opening of the restaurant.

112. Mr Owens had been instructed to assume that the purchaser of the property would have the benefit of the easement later negotiated between National Highways and the Tatton Estate, so his original valuation did not consider the effect uncertainty might have on market value. In his second report he expressed the opinion that a purchaser would be satisfied with the existence of the replacement access and National Highways' obligations under the Order and would not reduce their bid for the Cheshire Lounge at all. We acknowledge his many years

of market experience but do not regard this conclusion as realistic, especially if it is assumed, as we do, that the most likely purchaser of the site would intend to redevelop it (Mr Owens' valuation assumed that the existing building would be reopened and he made no allowance for significant expenditure before reletting).

113. Mr Kershaw did not share Mr Owens' confidence that the market would be untroubled by the uncertainty over the access and he opted to make an allowance of 10%. He based this on two residential comparables which did not involve market transactions and had no development aspect. They were similar to the Cheshire Lounge in that in each case a new means of access over third party land had been created but no easement had been granted at the valuation date. Although other details were very different, we found Mr Kershaw's comparables of assistance in providing a baseline from which to assess an appropriate allowance.

114. The Cheshire Lounge was a commercial development project which, it is agreed, could not sensibly be expected to proceed until terms for access had been finalised. The third party over whose land the new access would pass was also known to be commercially minded and perhaps even opportunistic. In this situation risk would be priced into the transaction. If the delay was prolonged for more than the period it would take to obtain planning permission building costs might need to be adjusted or a competitor might open nearby, affecting viability. These considerations justify a much greater allowance than Mr Kershaw allowed and, in our judgment, would result in the market value of the property being reduced by 20%.

115. Our assessment of the compensation required for injurious affection is therefore as follows:

'Before' value (excluding land acquired)		£1,200,000
Allowance for less convenient access	10%	£120,000
Allowance for lack of deed of easement	20%	£240,000
Total allowance		£360,000
'After' value		£840,000
Injurious affection		£360,000

116. The remaining heads of compensation are claimed under rule 6. Once professional fees were agreed three items remained in issue.

Costs of works required to render new access of equivalent quality to original access

117. The parties did not agree whether the original access to the Cheshire Lounge was superior or inferior to the new access and each relied on the evidence of an expert in highways and road safety matters. The claimants' case was that, quite apart from issues related to their rights over the new access, it is inferior to the access previously enjoyed and, in some respects, positively unsafe so that compensation should be paid to reflect the cost of improvements

which are required to ensure that they are put in an equivalent position, after the acquisition of the land taken, to the position enjoyed by their predecessors before the acquisition.

118. The claimant relied on the evidence of Mr Richard Jones, a director of Arcadis, a development consultancy in Manchester. He is a chartered engineer and a fellow of the chartered institution of highways and transportation with 25 years' experience in the traffic and transportation aspects of development. National Highways relied on the evidence of Mr Andy Cooper, an associate consultant engineer with the professional services company WSP UK Limited. He is a member of the chartered institute of highways and transportation.

119. Mr Jones and Mr Cooper were well placed by reason of their experience in highways and transportation matters to assist the tribunal and both were knowledgeable and experienced witnesses. Unfortunately, in both their written and oral contributions each tended to promote the interests of the party paying his fee. Fortunately they were able to reach agreement on most matters of significance and on those where they disagreed, it was nearly always obvious whose position was untenable.

120. The experts explained that the A556 Knutsford to Bowdon Improvement scheme was promoted by National Highways to improve a 7.5km stretch of the A556 trunk road between junction 19 of the M6 near Knutsford and junction 7 of the M56 near Bowdon. The Cheshire Lounge site is at the northern end of the A556 affected by the scheme and works in the vicinity involved the provision of a pre-flow link from the northbound A556 to the M56 eastbound and from the M56 westbound to the A556 southbound. This arrangement required junctions 7 and 8 of the M56 to be substantially improved. Part of the related improvement included closing the original access from the A556 to the Cheshire Lounge site and providing a new access which is reached from a new slip road and roundabout to the south of the free-flow link.

121. The original access was by means of a T-junction arrangement on the A556 with an acceleration and deceleration lane on the northbound carriageway. Vehicles travelling south could make a right turn onto the access by way of a break in the central reserve and a right turning lane but this manoeuvre required drivers to cross the northbound dual carriageway. The same deceleration and acceleration lane also provided access to a DVSA check point just beyond the Cheshire Lounge access. There was evidence that this arrangement sometimes resulted in vehicles parking temporarily in the deceleration lane where they would present an obstruction to vehicles wishing to turn left onto the Cheshire Lounge access. The speed limit on the approach to the access from the A556 was 50mph.

122. The replacement access is reached by leaving the A556 on a newly constructed slip road leading to the Bowdon roundabout. The first turn off that roundabout is the A56, Lymm Road, and the new access is on the left shortly after exiting the roundabout. The new route runs for approximately 750m, initially travelling east before turning through 90^0 and continuing south parallel to the A556 slip road. The first part of the new access, immediately after leaving Lymm Road, is shared by the Cheshire Lounge with a works compound initially established to support the highway improvement scheme but latterly used in connection with HS2. The compound had planning permission to operate until the end of 2022 when its use was to have been discontinued and the land returned to agriculture. An application to extend that permission for a further 5 years until 31 December 2027 is currently being considered by the local planning authority and the compound remains in the

use. Construction traffic using the compound is limited to 10mph, but no speed limit is indicated on the remainder of the new access.

123. The experts agreed that for most of its length the old access was between 5.5 and 6m wide but that at its southern end, closest to the Cheshire Lounge, it widened to between 8 and 12m. This area was used for overspill parking when the Cheshire Lounge was in operation. The new access is between 5.0m and 5.5m wide but again increases at the southern end to approximately 12m. It also has grass verges on each side which are never narrower than 1m wide but for the most part are about 4m wide.

124. At its southern end the new access runs into the original road surface which, it is agreed, was damaged in the course of the construction works and is required to be improved in order to restore it to its original condition and to make it consistent with the remainder of the new access. The cost of this work was agreed to be £42,000.

125. The original access was 179m long in total from the junction with the A556 to the entrance to the Cheshire Lounge carpark. The new access is 750m in length from the junction with the A56 to the same point. Since it is intended that the new restaurant will be developed a little to the north of the Cheshire Lounge site, visitors will not need to travel the whole of the new access to reach the restaurant car park. From the 90° bend at the northern end of the access the point of entry to the proposed new carpark is a distance of 420m along a single straight section of the newly constructed route. On leaving the same carpark by its more southerly exit the straight stretch of road runs for 485m before reaching the bend. Whether any traffic calming is required on this stretch of road was one of the issues which divided the highways experts.

126. The original access was lit by a single streetlight located at the junction with the A556 and by a further streetlight at the end of a downward slope where the road levelled out as it approached the pub's carpark. Based on personal injury collision data the experts agreed that the original access presented no underlying safety issues, although Mr Cooper had some concerns about the arrangements for entering and leaving the site, especially for traffic coming from the north which was required to cross the opposite carriageway. The new access has been provided with a single streetlight at the new junction with the A56 after the Bowdon roundabout but no other lighting for the remainder of the route to the site. The need for additional lighting was a further point of contention between the experts.

127. The original access had signs indicating the left turn and private signage advertising the presence of the Cheshire Lounge, probably on both sides of the carriageway. No signage has yet been provided to the site although private signage directs traffic to the construction compound. The experts disagreed on the extent to which signage would be required to accommodate the new restaurant.

128. The experts did agree that the original access would have been capable of safely supporting the proposed re-development of the Cheshire Lounge site. The lay out for traffic travelling from the north may not have been ideal, but the absence of any data indicating that accidents had occurred (notwithstanding that on occasion the site was heavily used, as when car boot sales took place) seems to us to justify the expert's assessment that the original access was

both safe and sufficient. It did not materially reduce the value of the site as a development site and nor has the provision of the new access materially enhanced it.

129. The principal disagreement between the experts was the extent to which the new access represented a safety hazard because some vehicles would be likely to travel at unsafe speeds over the long, straight stretch of road to and from the site. Mr Jones believed that in the absence of some form of traffic calming, drivers would exceed the 20mph design speed of the new route (possibly by a considerable amount) and that this presented a hazard to pedestrians, cyclists and contractors undertaking maintenance or inspection of the various barriers, gantries, ducts and other installations serving the adjoining A556.

130. Mr Cooper's view was that aspects of the current design could be relied on to maintain safe traffic speeds. The two 90° bends at the northern end of the access would restrict speeds as vehicles entered and left that area. The absence of defined kerbs, the absence of a central white line or other formal road markings and the presence of vehicles coming in the opposite direction and pedestrians on the carriageway would all be likely to cause drivers to proceed with caution. Finally, Mr Cooper thought that it was reasonably to be expected that drivers would comply with the Highway Code and would not travel at inappropriate speeds.

131. Having visited the site we found Mr Cooper's evidence on this point impossible to accept. The proposition that drivers could reasonably be expected to comply with the Highway Code seemed to us to be a surprising starting point when considering what safety measures were appropriate to protect other road users. In his oral evidence Mr Cooper acknowledged that risks to the safety of pedestrians from those who might be tempted by the layout of a road to drive too fast was a legitimate concern. We have no doubt that some drivers arriving at or leaving the site and finding a straight stretch of relatively wide and relatively well-maintained carriageway in front of them for almost 500m would find the temptation to drive at speeds in excess of 20mph irresistible.

132. On the other hand, we think the level of pedestrian traffic on the new access is likely to be very low. Although the route is also a public footpath, the site is a significant distance from the nearest settlement, Bowdon, and its proximity to the A556 and M56 are likely to make it an unattractive choice for recreational walkers. It is also unlikely that many staff employed at the new Cheshire Lounge would arrive or depart on foot (although a few might and others might cycle); the traffic report supporting the claimant's application for planning permission suggested that staff would be brought to the site by minibus.

133. The new access is wide enough for two vehicles to pass each other, but to do so they would need to slow down to a safe speed. Pedestrians or contactors working beside the road would be visible in daylight from a sufficient distance to enable drivers to take account of their presence, and ample verges on both sides would enable pedestrians to step off the carriageway temporarily to avoid any risk of being struck by a fast-moving vehicle. It is possible that highway maintenance contractors might park on the carriageway and create a localised obstruction, but we think it more likely that they would pull over onto the verges, in part at least. In any event, the presence of a parked vehicle would be obvious to an approaching motorist from a significant distance.

134. In short, therefore, while we agree with Mr Jones that it is likely that without some form of traffic calming some motorists will drive at excessive speeds along the new access, the risk which that behaviour will present is a relatively low one and that the appropriate remedial response is correspondingly modest.

135. Mr Jones suggested a traffic calming scheme which it was agreed would cost in the order of £160,000, including lighting. It involved the creation of regular chicanes formed by built out landscape features at intervals of no more than 70m along the full length of the straight section of the new access. Mr Cooper did not accept that this elaborate and expensive scheme was necessary nor that additional measures including the installation of kerbs and road markings was necessary or appropriate. If any measures were necessary Mr Cooper considered that simple speed bumps (pvc flat top ramps or a more permanent "raised table" design) which could be provided at six locations for a cost of either £4,000 or £5,500 depending on the style chosen.

136. Mr Jones' proposed speed attenuation scheme appeared to us to be designed simply to justify the highest possible price tag. There is a distinct possibility, as Mr Cooper pointed out, that the "build-outs" he proposed are too close together to be passable by even a standard 7m delivery lorry. We think it very unlikely that they would be capable of being negotiated by coaches of the length that could be expected to arrive at the site if, as we understand is the claimant's intention, it is developed as a function venue. Mr Jones acknowledged that the alternative scheme suggested by Mr Cooper, involving six speed bumps, would be sufficient to render the new access safe for pedestrians and other vulnerable road users and in those circumstances, we do not think any sensible developer would countenance his over specified alternative.

137. The one point which Mr Jones did make which appeared to us to be worthy of further consideration was in relation to the need for lighting of the new access. He suggested that even if the only form of speed attenuation was a series of speed bumps, these would require artificial lighting. Mr Cooper disagreed and suggested that reflective markings on the obstacles themselves would be sufficient to highlight them to drivers arriving after dark. An extract from the Manual for Streets appeared to support Mr Jones' suggestion that the provision of artificial lighting would be good practice in areas where traffic was expected to exceed 20mph, but there was disagreement about the application of this guidance in semi-rural, rather than residential, environments.

138. We doubt that a developer would envisage the need to provide artificial lighting along the whole length of the new access, but no less ambitious lighting arrangement was costed in the evidence. National Highways has undertaken to impose a speed limit of 20mph, and we are therefore minded to prefer Mr Cooper's evidence on this issue. The cost of additional lighting and the cost of construction of speed bumps were treated as separate issues, but we determine that appropriate traffic calming, including reflective markings, could be provided at the higher of Mr Cooper's alternative figures, namely, £5,500.

139. The only other matter of substance on which Mr Jones and Mr Cooper disagreed was the provision of additional signage to the site to take account of the new access. The site can now only be reached by following a comparatively complex route involving two roundabouts (when approaching from the north) and it would undoubtedly require more signs than the two formerly provided on either side of the A556 to indicate the original

access. Mr Jones' suggestion that 15 new signs would be required, at a cost of £36,000, is excessive and it is also likely that the new restaurant business would have wished to provide additional signage in any event. For these reasons we again prefer Mr Cooper's allowance of £7,500.

140. Finally on this aspect of the claim we should add that during submissions Mr Booth clarified that the allowance of 10% made by Mr Kershaw when assessing the effect of the new access on the value of the site for a public house or restaurant was not intended to take account of the need for any improvements but was on account of the length of the new route and its lack of prominence, which would be seen as disadvantageous by the market. There is therefore no overlap between the injurious affection claim and the cost of works to the access itself.

Business rates

141. The claimant claimed the net amount of the business rates which it had been required to pay as owner of the Cheshire Lounge between June 2017 and the end of March 2022. The total sum claimed was £24,147.

142. The way in which this claim was originally put was that the claimant had been prevented by difficulties over access from adopting its normal course which would have been to demolish a property which it had acquired for redevelopment as soon as it completed the acquisition. Had it been able to do so it would have avoided paying business rates on the Cheshire Lounge. Instead, in September 2017 the claimant appointed a rating surveyor to advise it on rates mitigation measures and to negotiate with Cheshire East Council. This eventually achieved the desired result when the property fell into such a dilapidated condition that it was removed from the rating list altogether in December 2019.

143. There was no contemporaneous evidence of how the claimant might have gone about redeveloping the Cheshire Lounge site and Mrs Ramsbottom did not refer to its intentions in her written evidence. Reliance was instead placed by Mr Cook on an email and a letter Mrs Ramsbottom had written to him when he was preparing his evidence in December 2022 and again in March 2023 when she responded to a number of points made by Mr Kershaw in his first report. At that time the claimant's case was that it and its contractors had been physically prevented from getting to the site (Mrs Ramsbottom informed Mr Cook that "[w]e could not undertake the demolition works in isolation as we were not able to gain access to the site for works"). We are satisfied on the evidence we heard that there was never any physical impediment to the claimants having access over the new road and that temporary barriers erected by National Highways' contractors to discourage trespass (the site was used for a period by travellers) were removed on the infrequent occasions when access was requested.

144. In her oral evidence Mrs Ramsbottom explained that the claimant's preference would have been to demolish the building as part of a single construction contract. But she had also been concerned that if the site was demolished and there was a delay in redevelopment the planning permission might lapse and might be difficult to obtain again because the site was in the green belt. No contractors had been lined up ready to begin the development when the

acquisition was completed in June 2017, and at the only other site which the claimant had acquired and then demolished it had taken 12 months for work to begin.

145. The claimant was free to demolish the Cheshire Lounge in June 2017 if it had wanted to. We do not accept that greater certainty over the grant of easements would have led to a different outcome. Initially at least, as Mrs Ramsbottom explained, the claimant completed the acquisition in the expectation of taking two years to resolve the access issue and it was relaxed because it still needed to engage in the detailed design of the proposed development and select a contractor and professional team. There was no settled practice about how a development would proceed, and in this case a choice must have been made not to demolish the building while the necessary preliminary work was being undertaken. We accept that there would have been a legitimate concern about losing the benefit of planning permission until eventually in March 2020 sufficient works were undertaken on the site (by forming the bell-mouth entrance to the intended car park) to implement the consent. But that work was done without any formal arrangement with the Tatton Estate or National Highways being required, or Mrs Ramsbottom herself being involved, and we can see no reason why a demolition contractor could not have had the same free access to the site at an earlier date if required.

146. We therefore reject the claimant's case that it should be compensated for an inability to demolish the Cheshire Lounge and mitigate its liability for rates.

Costs of money

147. The parties agree that the claimant has been prevented from making the same profitable use of its investment in the site as would have been possible if the reference land had not been acquired and there had been no doubt over the extent and terms of its rights of access. They also agreed that compensation should be paid equivalent to the lost return on its investment while development was delayed (which they referred to as the "cost of money").

148. Initially it was suggested that a simple rate of interest, pleaded by the claimant in its statement of case as 3%, should be applied to the aggregate of the purchase price (£1,232,500) and the stamp duty and other transaction costs incurred by the claimant when it acquired the site (£71,158). In his written evidence Mr Cook departed from this pleaded case and suggested that interest should be applied to the total expenditure on a compound basis at a rate of 5% from the date of acquisition in June 2017 until the date of the decision in 2023 (which he took as six years). Interest calculated in that way totalled £455,000.

149. Mr Kershaw agreed that an allowance for the cost of money was appropriate but suggested that a rate of 3% should be applied to the purchase price only, and for a period terminating when the claimant was informed that a deed of easement was available in the form negotiated between National Highways and the Tatton Estate (30 June 2022).

150. In closing the claimant's case, Mr Pereira KC abandoned that part of the cost of money claim which related to the claimant's acquisition costs. He explained that those costs would not have been recoverable by the claimant's vendor, DT, and were the direct result of the sale of the retained land after the reference land had been taken. Although the claimant was entitled to take the benefit of DT's right to compensation, as a matter of principle it could

not assert any greater claim than DT itself could have done. For that reason, Mr Pereira explained, it was accepted that the claim to recover the cost of money on the acquisition costs could not be sustained. (The claim relating to the cost of the purchase price is not affected by that concession, since the cost of money claim is a measure of the sterilisation of the land for the purpose of development, which would have been experienced by DT if it had retained the land rather than selling it to the claimant.)

151. That left only two issues concerning the cost of money claim. The rate to be applied to the purchase price, and the period.

Rate

152. Mr Cook had based his rate of 5% on a blended figure which reflected the recent higher interest rates, savings rates historically and how the claimant maximises the use of its money at far higher rates of return in its business activities. He considered that the 2021 accounts for Castlefield Estates Ltd (the claimant's parent company) showed that a return of 46% had been achieved (although not by the special purpose vehicle set up to undertake the development of the Cheshire Lounge). Mr Cook suggested his rate was conservative and fair. Mr Kershaw explained that the 3% rate of he had used was based on bank interest rate returns. Both had used compound rates of interest.

153. Mr Kershaw also relied on a report commissioned by National Highways from Quantuma, a business and financial consultancy. It explained that the accounts showed that the high margins referred to by Mr Cook were based on the rental income received from investment properties owned by Castlefield Estates, less the cost of holding them. Rental income was recorded as being 7.7% of the value of the properties, which are themselves occupied by other group companies. In 2021, a year impacted by the Covid-19 pandemic, Castlefield Holdings Ltd (the parent company of the group) experienced a negative return of -1.8%. Expressing the rate of return as the operating profit divided by the fixed assets produced figures of 3.9% and 3.5% for 2019 and 2020 respectively.

154. Funds on deposit in 2019 and 2020 would not have earned the 3% used by Mr Kershaw, but it seems to us that a company developing and running restaurants would not have expected a return only 2 or 3% above base rates as adequate compensation, given the level of risk involved in its activities. Mr Hunter estimated that the completed restaurant would produce an annual operating profit of £1.0m against total costs in excess of £5.0m. The ratio of those two figures appears to us to present a more realistic measure of the return the claimant could reasonably have expected to achieve on its investment if it had not been delayed in developing the site. In the circumstances we will adopt 5% as the rate to be applied to the purchase price of £1,232,500.

Period

155. The other disputed part of the cost of money claim was whether the period for which compensation should be paid should end on 30 June 2022 when the claimant was offered the draft deed of easement agreed between National Highways and the Tatton Estate or should continue to a later date. We take that later date to be the date on which the final hearing of the reference commenced, 16 May 2023, since it was only then that Mr Booth KC offered an

undertaking to the Tribunal that, if the Tatton Estate was not willing voluntarily to grant easements to the claimant in terms which were now agreed between National Highways and the claimant, National Highways would make use of its compulsory powers to acquire the new access and would itself grant enter into the necessary deed in the agreed form. Subject to finalising the terms of that undertaking, it was agreed between the parties, that it gave the claimant all the certainty about access and other easements it would have had if the reference land had never been taken.

156. The undertaking offered on behalf of National Highways by Mr Booth KC did not resolve the disagreement over the period for which the cost of money claim should run because National Highways continued to maintain that the term agreed between it and the Tatton Estate in June 2022 were reasonable and should have been accepted by the claimant.

157. The claimant began negotiating with the Tatton Estate shortly after it acquired the land in June 2017, but as early as 31 August 2017 Mr Cook wrote to Mr El Rayes, informing him negotiations had broken down over the Estate's demands, which were said to include a requirement that the claimant transfer the freehold of the Cheshire Lounge to the Estate (presumably in return for a leasehold interest). The suggestion that National Highways should step in and secure the required rights for the claimant was rebuffed by Mr El Rayes on the basis that the claimant could simply rely on the terms of the Order. That position has not been defended by National Highways in this reference and it has instead been accepted that the claimant could not reasonably have been expected to proceed with its development until it had the certainty of a deed of easement.

158. Such negotiations as there then were between the claimant and the Tatton Estate, before or after the commencement of the reference in September 2021, did not result in progress.

159. In July 2022 National Highways presented the Claimant with the draft deed which it had negotiated with Tatton and which Tatton was said to be prepared to enter into with the claimant. The claimant was dissatisfied with its terms, but it was informed by National Highways solicitors that this was the most that it could expect.

160. The claimant raised a number of issues over the form of the deed offered to it. Some were rather technical conveyancing points (a title guarantee which the claimant did not feel able to provide, and a query over the consent of the Estate's mortgagee) which we are sure would have been capable of being resolved without difficulty. Two other points were of more substance. The first concerned the claimant's right to carry out work to maintain the access, rather than paying for it to be maintained by the Estate and contributing regularly to a fund for that purpose. The second concerned rights of access to adjoining land in connection with services.

161. Mrs Ramsbottom explained why the claimant was not content to allow the Estate to undertake repairs to the new access and pass a proportion of the cost on to it. Fundamentally, as a result of its experience in negotiating with the Estate over access, the claimant did not trust the Estate not to exploit the proposed terms to its own advantage, and anticipated disputes over the timing, cost and quality of works. The negotiating tactics adopted by the Estate described in Mr Cook's letter to Mr El Rayes of 31 August 2017 were substantially confirmed by Mrs Ramsbottom and on that basis her fears do not seem to us to

have been groundless. The burden of proving that the claimant's acted unreasonably in refusing what was offered to it in June 2022 falls on National Highways, and we are not prepared to say that the claimant's strong preference to control expenditure on the maintenance of its sole access to the site was unreasonable.

162. National Highway's position regarding ancillary rights to lay or connect to services was that it is only responsible for granting a "bare right of access". It has always accepted that the principle of equivalence requires that the claimant must have the same rights of access to lay services as had been enjoyed by the owner of the Cheshire Lounge before the acquisition of the reference land. The claimant had always asserted that, as the owners of land adjoining the public highway, the owner of the reference land would have been entitled to connect to services running within the verges of the highway itself. National Highways' position, reiterated in a letter sent as recently as 4 May 2023, had always been that the Cheshire Lounge had never enjoyed a "specific right" to lay service media over any adjoining land. It proposed that the claimant should therefore negotiate with the Tatton Estate for such service rights as were required to facilitate the development of the site. The Estate indicated that it was prepared to offer all necessary rights, but at a price. The claimant considered that as a result of National Highways stance it was being held to ransom by the Estate.

163. In a letter written only a week before the start of the hearing, on 9 May 2023, National Highways confirmed for the first time that it would permit the claimant to cross its land (including the reference land, which is no longer adopted highway) to reach the A556, thereby placing it in the same position as was enjoyed by its predecessor before the reference land was taken. No such right had previously been offered.

164. It was said by Mr Booth KC that no rights had ever been requested by the claimant over the reference land, and that until shortly before the hearing all of the focus had been on the extent of the rights which the claimant wished to secure over the Estate's land. We find that an unattractive position for National Highways to adopt, in view of the "take it or leave it" label which it attached to the terms it had agreed when they were presented to the claimant in June 2022. It knew that the claimant was concerned about service rights and its proposal was that it should pay the Estate to grant them; it could have offered its own land as an alternative but did not do so.

165. The claimant did not adopt a passive attitude to the terms it was offered. It sought changes to the June draft, and negotiated further with the Estate, which responded by adding further changes of its own (vindicating the claimant's view that National Highways was in a much better position to negotiate terms than they were). By April 2023 the claimant concluded that agreement would not be reached and on 27 April 2023 it sent a draft deed to National Highways and to the Estate containing the minimum terms it was prepared to accept. Those terms included the right to lay services.

166. In view of the fact that National Highways has now undertaken, in effect, that it will compel the acceptance by the Estate of what we understand to be substantially the terms proposed by the claimant on 27 April, we do not see how it can be said to have been unreasonable for the claimant to have refused the terms negotiated by National Highways ten months earlier. It has significantly improved its position and reduced its dependence on further uncertain negotiations with the Estate.

167. In summary, National Highways has not persuaded us that the claimant failed to mitigate its loss when it rejected the June 2022 deed. There is therefore no basis on which that event can be treated as bringing an end to the claimant's entitlement to compensation for its inability to proceed with the development of the site. The period over which the cost of money claim should be calculated is therefore from 2 June 2017 to 16 May 2023.

168. An advance payment of £54,360 was made to DT at an early stage but it is not appropriate to take that into account when calculating the compensation payable under the cost of money claim. It was agreed that the claimant could not make profitable use of its investment while its rights were uncertain, and it was not suggested that the receipt of a relatively modest sum on account made any difference. The cost of money claim is a claim for compensation, not a claim for interest, and there is no more reason to treat the advance payment as extinguishing part of that head of compensation than there is to regard it as reducing the amount payable in respect of pre-reference costs or the cost of work to the carriageway. On that basis the parties agreed that the cost of money claim was worth £415,626.

169. The total value of the rule 6 claim therefore comprises the following:

Repairs to carriageway	42,000
Speed bumps	5,500
Additional signage	7,500
Pre reference costs	90,000
Cost of money	415,626
Total	£560,626

Disposal

170. The rule 6 compensation should be added to the sum of £360,000 we have assessed as compensation for injurious affection, and the agreed sums of £25,000 for the land taken and £1,875 in respect of statutory loss. The aggregate value of the claim is therefore £947,501.

171. To calculate the sum payable to the claimant statutory interest and the advance payment of £54,360 made to DT must both be taken into account. The parties should now agree the appropriate calculation and submit an agreed form of draft order including the undertakings which National Highways has agreed to give. They may also make any claims for costs within 14 days of this decision.

Martin Rodger KC
Deputy Chamber President

Mr Mark Higgin FRICS FIRRV

19 September 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.