UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: ACQ/452/2009
ACQ/454/2009
ACQ/460/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – interim decision – issues of fact – credibility of claimants' evidence – whether leases genuine – whether multiple businesses – accounting evidence and tax returns – nature and extent of scheme – base year for claim – shadow period losses – injurious affection – disturbance – whether second relocation too remote – cost of works – personal time

IN THE MATTER OF FIVE NOTICES OF REFERENCE

BETWEEN	**(1) THARIQ MAHMOOD MOHAMMED** **(2) SAJIT PERVAIS MOHAMMED** **(3) KISHWAR MOHAMMED**	**Claimants in ACQ/452/2009 (Consolidated)**
	(4) SHABREEN ZAHIRE MOHAMMED	**Claimant in ACQ/454/2009**
	(5) MASRIQ BAL MOHAMMED	**Claimant in ACQ/460/2009**
	and	
	NEWCASTLE CITY COUNCIL	**Acquiring Authority**

Re: 15 Waterloo Street,
1 and 1A Sunderland Street,
Newcastle-upon-Tyne
Tyne & Wear
NE1 4DE

Before: A J Trott FRICS

Sitting at: North Shields IAT, 2nd Floor Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne & Wear NE29 6AR
on
26-30 January and 2-5 February 2015

Barry Denyer-Green and *Toby Boncey*, instructed by C J Thompson, Solicitor, for the Claimants
Vincent Fraser QC, instructed by the Legal Services Department, Newcastle City Council, for the Acquiring Authority.

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The following cases are referred to in this decision:

Snook v West Riding Investments Limited [1967] 2 QB 786
AG Securities v Vaughan and Antoniades v Villiers [1990] 1 AC 417
National Westminster Bank Plc v Jones [2001] 1 BCLC 98
Cobbe v Yeoman's Row Management Limited [2008] 1 WLR 1752
Wrexham Maelor Borough Council v McDougall [1993] 2 EGLR 23
Potter v London Borough of Hillingdon [2010] UKUT 212 (LC)
Transport for London v Spirerose Limited [2009] 1 WLR 1797
Waters v Welsh Development Agency [2004] 1 WLR 1304
Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands [1947] AC 565
Hanbury-Tenison v Monmouthshire County Council [2014] UKUT 0531 (LC)
Davy v Leeds Corporation [1965] 1 WLR 445
Richards v Somerset County Council [2001] RVR 204
Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111
Ramac Holdings Ltd v Kent County Council [2014] UKUT 109 (LC)
Emslie and Simpson Ltd v *Aberdeen City District Council* [1994] 1 EGLR 33
Pattle v Secretary of State for Transport [2009] UKUT 141 (LC)
Optical Express (Southern) Ltd v Birmingham City Council [2005] 2 EGLR 141
Hughes v Doncaster Metropolitan Borough Council [1991] 1 AC 382
Budgen v Secretary of State for Wales [1985] 2 EGLR 203
Welford v Transport for London [2010] UKUT 99 (LC)
Wildtree Hotels v London Borough of Harrow [2000] UKHL 70
Aberdeen City District Council v Sim [1982] 2 EGLR 22
Prasad v Wolverhampton Borough Council [1983] 1 EGLR 10
Horn v Sunderland Co-operation [1941] 2 KB 26
Cowper Essex v Acton Local Board (1889) 14 App Cas 153
Holditch v Canadian Northern Ontario Railway [1916] 1 AC 536 (PC)
Metropolitan Board of Works v McCarthy (1874) LR 7 HL 243
Bede Distributors Ltd v Newcastle - upon -Tyne Corporation (1973) 26 P&CR 298
Lancaster City Council v Thomas Newall Limited [2013] EWCA Civ 802
Thomas Newall Limited v Lancaster City Council [2010] UKUT 2 (LC)

The following further cases were referred to in argument:

Street v Mountford [1985] 1 AC 809
Pyrah (Donnington) Limited v Northampton County Council [1982] 2 EGLR 195
Birmingham Corporation v West Midlands Baptist (Trust) Association [1970] AC 874
Cedar Rapids Manufacturing and Power Co v Lacoste [1914] AC 569
Saglam v Docklands Light Railway [2008] RVR 59
Melwood Units Pty Ltd v Commissioners of Main Roads [1979] 1 All ER 161
Segama v Penny Le Roy Ltd (1984) 269 EG 322
Buccleuch v Metropolitan Board of Works (1872) LR 5 HL 418
Ripley v Great Northern Railway (1875) LR 10 Ch 435

Holliday v Breckland Council [2012] UKUT 193
Colls v Home and Colonial Stores Ltd [1904] AC 179
Carr-Saunders v Dick McNeil Associates [1986] Ch 922
Ough v King [1967] 1 WLR 1547
Deakins v Hookings [1994] 1 EGLR 190
Regan v Paul (2006) EWHC 1941
Hortons Estate Ltd v James Beattie [1927] 1 Ch 75
Midtown Ltd v City of London Real Property Co Ltd [2005] 1 EGLR 65
London, Tilbury & Southend Rly and Gower's Walk School (1889) 24 QBD 326
Harvey v Crawley Development Corporation [1957] 1 QB 485
Commissioner of Highways v Shipp Bros Pty Ltd (1978) 19 SASR 215
Afzal v Rochdale MBC [1980] 1 EGLR 157
Tamplins Brewery Ltd v Brighton CBC (1971) 22 P&CR 746
Dawson v Great Northern & City Railway Co [1905] 1 KB 260
Fishenden v Higgs and Hill Ltd [1935] 153 LT 128
Scott v Scott [2006] FamCA 1379
Trocette Property Co v Greater London Council [1974] 28 P&CR 408
Investors Compensation Scheme Limited v *West Bromwich Building Society (No.1)* [1998] 1 WLR 896
Strachey v Ramage [2008] EWCA Civ 384
Lyle v Richards (1866) LR 1 HL 222
Ali v Lane [2007] 1 EG 71
Haycocks v Neville [2007] 1 EGLR 78
Oppenheimer v Ministry of Transport [1942] 1 KB 242
Hamilton v Clanricarde (Earl) [1762] 1 Bro PC 341, 1 ER 608
Heard v Piley [1868-1869] LR 4 Ch App 548
Worboys v Carter [1987] 2 EGLR 1 (CA)
Lyon v Reed [1844] 13 M&W 285
Holme v Brunskill [1878] 3 QBD 495
Walsh v Lonsdale (1882) LR 21 Ch D9

INTERIM DECISION

Introduction

1. These three references concern the compulsory purchase of the properties known as 15 Waterloo Street, and 1 and 1A Sunderland Street, Newcastle-upon-Tyne NE1 4DE which are referred to collectively as "the reference property" and separately as "15 W St", "1 S St" and "1A S St".

2. The reference property was acquired by Newcastle City Council ("the acquiring authority" or "the council") under the Newcastle-upon-Tyne (St James Boulevard/Waterloo Street) Compulsory Purchase Order 2002. The agreed valuation date is 29 January 2004.

3. This appears to be a straightforward claim for the value of a takeaway fish and chip shop with residential upper parts (purchased in 1996 for £40,000) together with an associated claim for disturbance. The reality is very different and these references are the culmination of a complex, intractable and acrimonious dispute with claims amounting to approximately £8.54m in the claimants' latest re: re: re: amended statements of case. These are the oldest references before the Tribunal and even after a nine day substantive hearing only the evidence of fact has been heard. A further hearing is to be listed to consider the evidence of 10 expert witnesses.

4. The dispute may be summarised as follows:

(i) The claimants are members of a single family. Thariq, Sajit, Masriq and Shabreen Mohammed are siblings (referred to hereafter with the agreement of the parties as "TM", "SM", "MM" and "ShM" respectively). The fifth claimant, Kishwar Mohammed ("KM"), is the wife of SM. Much of the evidence was concerned with the family's arrangements for the occupation and ownership of land and for the running of the business(es) thereon.

(ii) TM, as freeholder of the reference property, claims to have granted three nineteen year leases of different parts of that property on 1 June 2001:

(a) Part of 15 W St, known as Unit A, was leased to SM;

(b) Part of 15 W St, known as Unit B, was leased to ShM; and

(c) 1A S St was leased to MM.

The acquiring authority submit that these leases were not genuine transactions and, even if they were, they would not be effective.

(iii) The three leases said to have been granted by TM correlate to three businesses that the claimants say were conducted from the reference property. The main business, a takeaway fish and chip shop known as the "Happy Chip" and operated by SM and KM, is said to have occupied Unit A at 15 W St. The existence of this business is not disputed. The other two businesses are said to be

the "Convenience Store" operated by MM from 1A S St; and "Especially 4 You", a clothing and jewellery business, operated by ShM and another sibling, Zeibeda Mohammed ("ZM"), from Unit B at 15 W St. (ZM transferred her entitlement to any compensation to ShM under a deed of assignment dated 24 November 2009 and is therefore not a claimant in these proceedings.) The acquiring authority deny that the Convenience Store or Especially 4 You operated as separate businesses, or at all, from the reference property, describing the claims as "wholly implausible."

(iv) As well as claims for the acquisition of the leases, SM and MM claim compensation for disturbance for the relocation of the Happy Chip and the Convenience Store respectively to a nearby property owned by TM at 4 Waterloo Street ("4 W St"). The claimants say that both businesses moved into the part of that property known as Unit 1. Because of the restricted trading hours available at Unit 1, the Happy Chip moved a second time, to another part of 4 W St known as Unit 2. The Convenience Store did not make a further move and MM claims for its total extinguishment. ShM says that she unsuccessfully attempted to relocate Especially 4 You to alternative premises at 18 Leazes Park Road. She is also claiming for total extinguishment of her business.

(v) A lease of the ground and first floors of 4 W St, excluding the front part of what was to become Unit 2, was granted to SM by the previous freeholder, Lally Manufacturing Limited, on 1 February 1999 ("the Lally lease"). TM acquired the freehold of 4 W St on 20 September 2000. On 5 February 2004 TM is said to have granted a lease to SM "of the ground and basement floors of Unit 1" and to MM "of the ground and basement floors which he occupied". The acquiring authority say these leases are of no effect because they were not entered into by TM but by a company, TM & S Limited, that had no interest in the land. Furthermore the ground floor area purportedly leased to SM and MM was already subject to the Lally lease which remained in place and under which SM said that he continued to pay rent. SM was also the joint freehold owner of 4 W St with TM for whom it is said SM held his interest on trust.

(vi) The acquiring authority challenge the claim for construction work undertaken to create and fit out Units 1 and 2 at 4 W St. They say that there was no proper tender for the work which was awarded to TM & S Construction Limited, a company owned by TM, and that there is no evidence to support TM's assertions about the nature and quality of the work or to establish that TM & S Construction Ltd's invoices were paid and the costs actually incurred. Some of the works were grant-funded and are therefore not compensatable. The acquiring authority say that the works to create Unit 1 add value to 4 W St and were undertaken by TM as freeholder and yet the claimants attribute the cost of the works to The Happy Chip business which only had a purported leasehold interest in Unit 1. The acquiring authority argue that it was not reasonable for The Happy Chip to incur further substantial costs in moving a second time to Unit 2 (if indeed such costs were incurred) only for the added value so created to remain with the freeholder. It was wrong for TM to try and get the acquiring authority to pay for re-ordering his property. The claimants point out that their claim is not based upon the actual cost of the works to Units 1 and 2 but upon

the measurement and valuation of those works undertaken by their expert, Mr Huitson, who has yet to give evidence.

(vii) The acquiring authority say that the claimants failed to mitigate their losses by moving to Unit 1 which they knew did not have permission for late night trading. The claimants say extended trading hours were essential for the success of the business(es), although this requirement is disputed by the acquiring authority. The claimants knew that Unit 2 had an unrestricted planning permission which they subsequently relied upon. There is a dispute about whether Unit 2 was available at the valuation date.

(viii) Both TM (Freehold) and SM (Leasehold) are claiming for injurious affection to land (4 W St) said to be held with the land taken (the reference property). The acquiring authority deny that the premises and/or interests were held with each other such that the acquisition of the reference land injuriously affected the value of 4 W St. TM is also claiming separately for injurious affection caused by interference with an admitted right to light to 4 W St to the extent that such injurious affection is not compensated under section 7 of the Compulsory Purchase Act 1965.

(ix) The parties disagree about whether the scheme pursuant to which the reference property was acquired, however defined, affected the number of nightclubs and bars in the vicinity of the reference property and as a result had a substantial deleterious effect upon the trade of The Happy Chip and the other claimed businesses, leading to a claim, in each case, for "shadow period" losses.

(x) The claims for the loss of business profits are based upon the claimants' accounts and tax returns. The acquiring authority consider these to be incomplete, contradictory, seriously deficient and less than candid. The claimants take the year 2000 as the base year for their claim which is challenged by the acquiring authority who say that there is no good evidence that the year 2000 results were affected by the scheme. The claimants belatedly produced two pages from the 1998 accounts but provided no details of the sales and profits for the year ended 1999. The acquiring authority say that the claimants gave no plausible explanation for this omission. The acquiring authority describe the claimants' tax returns as unreliable and incomplete and not providing supporting evidence for the claim.

(xi) Originally the claimants said that they had spent a total of 5,361 hours on resourcing materials for the works to Units 1 and 2 at 4 W St and in relocating to those premises. TM, SM and MM originally valued their time at £25 ph in their pleadings but subsequently revised this to £50 ph. The acquiring authority described this claim as preposterous and grossly inflated. At the hearing the claimants withdrew the claim for personal time spent on resourcing materials since Mr Huitson's estimates, adopted by the claimants, include an allowance for the supervision work said to have been carried out by the claimants. The claim for personal time in respect of relocation to Units 1 and 2 was reduced to 1,208 hours at £50 ph.

(xii) As an overarching point the acquiring authority submit that TM, SM and MM were "wholly unreliable and unsatisfactory witnesses who had at all times sought to exaggerate their claims and who largely advanced claims which were without foundation, illogical, and in many respects defied common sense." The acquiring authority assert that "the claimants were not credible witnesses and their evidence should not be accepted without clear corroborating evidence." In reply the claimants say that allowance should be made for the length of time that TM was cross-examined (five days); that the principal matters in dispute were corroborated by documentary or other evidence; and that the claimants were lay people who were "not very sophisticated business people, and they may have been incompetent in one or more ways. But incompetence does not mean that the claimants are dishonest and nor does it mean that their evidence lacks credibility."

5. At the end of the hearing it was agreed with the parties that I should issue an interim decision on factual matters before hearing the expert evidence.

6. Mr Barry Denyer-Green and Mr Toby Boncey of counsel appeared for the claimants and called Messrs Thariq, Sajit and Masriq Mohammed as witnesses of fact. Mr Thariq Mohammed also gave evidence on behalf of Ms Shabreen Mohammed for whom he holds a power of attorney dated 16 May 2013.

7. Mr Denyer-Green did not act for Ms Kishwar Mohammed who he believed was no longer proceeding with her claim.

8. At the start of the hearing Mr Denyer-Green submitted a letter dated 24 January 2015 from SM's GP stating that "Mr Mohammed is a 42 year old gentleman who …. has been experiencing difficulty remembering things lately. He tends to forget where he places his keys for example and where he has parked his car."

9. Mr Vincent Fraser QC appeared for the acquiring authority and called Mr Philip Scott and Ms Tracy Sweet, both Senior Environmental Health Officers at Newcastle City Council; Mr Michael Mason, a retired chartered surveyor previously employed by Lamb & Edge (GVA); Ms Emma Warneford, Senior Planning Officer in the Planning Policy Team of Newcastle City Council; Mr Jonathan Irvine MRICS, until October 2004 a Senior Surveyor at Newcastle City Council but now employed by the Homes & Communities Agency; Mr Matthew Atkins, chartered town planner at Newcastle City Council responsible for the management of the Development Management - City Centre Team; and Mr Steven Reeve, chartered surveyor, a Senior Surveyor at Newcastle City Council. Ms Catherine Swaddle, Business Rates Manager of Newcastle City Council, and Mr Keith Smith, Senior Licensing Officer of Newcastle City Council, produced witness statements but by agreement were not called to give evidence.

10. I made an accompanied site inspection of 4 W St and the surrounding area on 4 February 2015.

11. Written closing submissions were received from both parties by 26 March 2015.

Issues

12. The issues to be determined in this interim decision are as follows:

(1) Witness credibility

(2) The reference property

(3) 4 Waterloo Street

(4) Tenure

(5) Multiple businesses

(6) Accounts

(7) Tax Returns

(8) Surrounding circumstances

(9) The scheme

(10) The base year for the claims

(11) The claims for the Convenience Store (MM) and Especially 4 You (ShM)

(12) Shadow period losses

(13) Injurious affection

(14) Causal connection and mitigation of loss

(15) Unit 1 works

(16) Unit 2 works

(17) Claimants' personal time.

Issue 1: witness credibility

13. The acquiring authority submit that TM, SM and MM were unreliable and unsatisfactory witnesses whose evidence lacked credibility. In focussing upon the credibility of the claimants' evidence the acquiring authority go beyond questioning whether such evidence can be relied upon. They extend the enquiry to whether such evidence, at least in part, was honestly given and believable.

14. The council's suspicions were aroused by the dramatic difference between the price that MM paid for the reference property in 1996 and the size of the present claim. Allowing for the cost of renovating and maintaining the reference property MM's total outlay was some £100,000. Against that the total amended compensation claim submitted at the hearing was approximately £8.54m. This contrasted with the claimants' view at and around the valuation date that the compensation, on a total extinguishment basis, was in the region of £425,000 to £500,000.

15. Throughout his submissions on this issue Mr Denyer-Green stressed that the claimants were "lay people", "unsophisticated business people" and "may have been incompetent in one or more ways." Mr Denyer-Green said that did not mean their evidence lacked credibility. This portrayal suggests the family Mohammed were rather naïve about business and legal matters. I think this may be true of SM and, to a lesser extent, MM but I do not recognise it as a fair description of TM who, as his brothers acknowledged, is the de facto head of the family in business affairs and who has more business acumen than his siblings. (ShM did not give evidence; TM had power of attorney on her behalf.) TM, who gave evidence over five days, is well acquainted with legal processes and appeals in a variety of jurisdictions. I consider him to be an experienced businessman familiar with the locality, with an eye for an opportunity and who acts knowledgeably and with reason. He takes professional advice as and when required and is generally worldly-wise.

16. There was nothing naïve about TM's conduct when the claimants relocated the Happy Chip from the reference property to Unit 1 at 4 W St. For a time the claimants made out that it was the Convenience Store and not the Happy Chip which had opened there; their solicitors contended as much to the local planning authority in a letter dated 26 March 2004 and TM wrote on 3 July 2004 claiming that the business at Unit 1 "is called the 'Convenience Store' and not 'the Happy Chippy'" and that "it is run and operated by different people". TM was pressed about this correspondence in cross-examination and, to begin with, he said there was a reason for the statement in his letter but he could not remember what it was. Subsequently, and following my intervention, he acknowledged that he had lied. Such a lie was designed to deflect criticism and complaint from local residents about late night trading at the Happy Chip.

17. Mr Fraser said that this was not an isolated incident and referred to TM's conduct of an enforcement notice appeal on Unit 1 in 2005 where he accepted that it would not be appropriate to open a hot food takeaway after midnight but again argued (wrongly) that what was being operated at Unit 1 was a convenience store. TM said that a notice had been put up in Unit 1 making it clear that hot food would not be sold after midnight. The planning inspector saw no such sign when he made a late night unaccompanied visit. Mr Fraser submitted, and I agree, that this was an attempt to mislead the planning inspector.

18. These are actions, not denied by Mr Denyer-Green, that seriously detract from the claimants' credibility in general and that of TM in particular. If TM, who gave the majority of the evidence for the claimants and was recognised by them all as being the leader of the family's business interests, was prepared to lie to the council in their capacity as local planning authority on one matter related to this claim, I consider it possible that he would be prepared to do so again on other such matters.

19. There are also issues about the credibility of SM's evidence. SM says he suffers from memory loss, a claim which is partially supported in a letter from his GP. That letter, dated 14 January 2015, says "Mr Mohammed has been having difficulty remembering things *lately*" (my emphasis). SM said during cross-examination that he had had difficulties with his memory as long ago as 2001. That is not corroborated by his GP's letter which only refers to recent memory loss. SM asked the Tribunal to accept his evidence of past events even though, as he claimed, he could not always remember them. He said he could remember some historic events, for instance paying rent for his occupation of 15 W St before TM granted him a lease in June 2001, but not others. For instance, he could not remember where copies of his tax returns had come from or how he had paid the tax said to have been due of over £101,000 in the tax year ending 5 April 2001 when, by his own admission, he had no bank account and kept no records.

20. In examination in chief SM said that he was dyslexic and found reading confusing. He has, he says, never read a book. And yet SM was the company secretary of several companies (now dissolved). There is a handwritten letter to the billing authority dated 10 October 2003 in the trial bundle which is signed by SM (although the claimants say this was written by TM). (The letter dated 24 October 2004 referred to by Mr Fraser in his closing submissions appears to have been written by MM and not SM.)

21. In the light of these factors I do not consider SM's evidence to be reliable.

22. Mr Fraser gave several other examples of the actions of the claimants which cast doubt upon the credibility of their evidence and I consider these under the individual issue headings below. But I would make some further general observations about the claimants' evidence at this stage.

23. Firstly, I accept Mr Fraser's criticism of the claimants' delay in submitting their final claim. The claimants did not return the claim forms sent to them by the acquiring authority and did not indicate the nature of their claims until they submitted statements of case following the making of the references (which itself was not done until nearly six years after the valuation date). Mr Denyer-Green submits that such delay does not go to the credibility of the claimants. But it is not just the delay that is of concern; the claimants repeatedly amended their claim and their statements of case. At the hearing Mr Denyer-Green submitted re: re: re: amended statements of case for TM and SM and a re: amended statement of case for MM. In order to keep up Mr Denyer-Green had to submit a re: amended skeleton argument on day five of the hearing. There was no consistency in the claims, or in the grounds upon which they were substantiated: for instance the claimants abandoned much of their pleaded claim for personal time spent in connection with the adaptation works to Units 1 and 2 at 4 W St in favour of a figure provided by their costs expert, Mr Huitson. They continued to amend this head of claim during the hearing (see issue 17 below). Nevertheless MM said he was "deeply aggrieved to abandon" this element of his claim. The claimants seemed to treat the claim as a gambit from which they could resile at will. This cavalier approach is exemplified by the piecemeal production of relevant documents as the hearing progressed. All of these should have been produced much earlier following my orders for disclosure made on 21 September 2011, 2 April 2013 and 24 June 2013. I share Mr Fraser's exasperation that these documents were not produced until the hearing had commenced. I do not accept Mr Denyer-Green's explanation that, as lay businessmen, the claimants did not appreciate what was required of them by way of disclosure until it was explained to them at the hearing. The claimants were professionally advised throughout and they

knew, or should have known (it not being suggested that such professional advice was inadequate), that these documents had to be disclosed. In my opinion their failure to disclose them when ordered to do so goes to the credibility of their evidence.

24. Secondly, TM, SM and MM all referred to family loans as a means of funding their business. The source and provenance of such loans and which family members were lending to whom remains unexplained at present. Such loans are shown in SM's accounts for the year ending 31 December 2000, the first year for which full accounts are available, at zero. By the year ending 31 December 2012 they amount to over £2m. These loans appear to be, at least substantially, interest free and I am puzzled why, when SM says he did not have a bank account, his accounts show an entry in the profit and loss account for bank charges and interest.

25. Thirdly, I am surprised that TM identified six versions of his signature during cross-examination for which he gave no reasonable explanation.

26. Throughout the hearing the claimants referred to their grievance that the council had (allegedly) reneged upon promises to ensure that the claimants would have, in their new premises, an equivalency of trading opportunity to that which they had lost at the reference property. It was my firm impression from the claimants' oral testimony that this grievance acted as the backdrop for the preparation of their evidence and influenced its content. In my opinion, the council are right to be sceptical of the credibility of each of the claimants' evidence unless it is independently corroborated.

27. Such corroboration is lacking in some important respects and I deal with these in detail under the separate issues below. To give an example, there is no supporting evidence that the rent payable under the leases said to have been granted by TM to members of his family was actually paid. There are no demands, no receipts, no bank statements or any other document to show that payment was made. Indeed SM said, remarkably, that he paid all of his bills in cash including, presumably, the rent.

28. I also raised the credibility of Mr Mason's evidence since he said that the photographs attached to his witness statement were not those he had been shown at the time they were taken. But the parties agreed that the photographs attached to Mr Mason's witness statement were taken at the time of his inspection and that he was not confused about what they showed. The contents were substantially agreed and the parties agreed that he was a credible witness.

Issue 2: the reference property (15 Waterloo Street and 1 and 1A Sunderland Street)

(i) Facts

29. The reference property was located at the junction of Sunderland Street (as it was at the valuation date) and Waterloo Street. It was some 40 metres north of Westmorland Road which joins St James Boulevard to the west. Newcastle Central Station is a short distance to the south east and the Centre for Life complex in Times Square is approximately 100 metres to the south. On the opposite side of Sunderland Street was Alfred Wilson House ("AWH") which at the valuation date was vacant pending its refurbishment as a mixed residential and commercial development behind the retained art deco frontage but which historically had comprised offices above nightclubs and bars on

the ground and basement floors, e.g. Powerhouse, Rockshots and the Village Bar. Adjoining the reference property to the south was a taxi rank/office at 13 Waterloo Street.

30. The reference property was of traditional brick construction beneath a tiled roof and had single glazed timber windows. It comprised a ground floor takeaway fish and chip shop with basement storage. The entrance was at the corner of Waterloo Street and Sunderland Street. There was a separate entrance at 1 Sunderland Street which led up to a first floor flat which at the valuation date was let on an assured shorthold tenancy at £85 per week. The valuation experts have agreed the basement and ground floor areas of the reference property as follows:

Claimants' reference	**Council's reference**	**Description**	**Area**
Ground Floor Unit A (front)	B1	Shop	20.44m^2 (220ft^2)
Unit A (rear)	B3	Preparation room	11.52m^2 (124 ft^2)
1A	B2	Store/possible sales	14.58m^2 (157 ft^2)
Basement Unit A (rear) Unit B (front)	C1, C2, C3	Basement	30.10m^2 (324 ft^2)

The gross internal area of the first floor flat was measured by the council on 6 February 2004 at 67m^2.

31. To the rear of the property was a pedestrian passageway (described as a "yard") leading from Unit A (rear)/B3 to Westmorland Lane. There was also an outside WC adjoining the building.

32. The freehold interest in the reference property (Title No. TY10018) is shown on the title plan as extending halfway across Sunderland Street. The forecourt outside the Sunderland Street frontage was some 4.5m wide and there was photographic evidence that it was used to accommodate removable customer tables and chairs and also for informal off-street car parking for two, possibly three, cars parked parallel to the road, e.g. as shown on the photograph at I/331. There is no evidence that such car parking was allocated or marked out on the ground.

(ii) Disputed facts

33. There are two issues in dispute concerning the condition of the reference property at the valuation date.

(a) Condition of the reference property

34. The council undertook a condition survey of the reference property on 6 February 2004, after the premises had been stripped and vacated by the claimants. The survey showed the majority of the ground floor and basement accommodation to be in poor condition, i.e. exhibiting major defects

and/or not operating as intended. The external walls and roof were also said to have been in poor condition, apart from that part of the roof covered with concrete tiles which was said to be satisfactory. Both electrical and mechanical services were described as being in bad condition, i.e. life expired and/or at serious risk of imminent failure. The first floor flat was said to be in generally poor condition or, in the case of the living room floor and stairs, in bad condition.

35. In cross-examination Mr Mason, who was instructed by the acquiring authority to negotiate the acquisition of the reference property and had inspected it shortly before it was vacated, said that the condition of the reference property was satisfactory for its purpose. It was "quite clean" and was "maintained to a reasonable standard". It was an old and outdated building "not well planned but in reasonable condition for its age." These comments contrasted with the comment made in his witness statement that "The premises were in a very poor physical condition."

36. In a file note of a site inspection of the reference property dated 23 January 2004 Mr Irvine said the flat at 1 S St was in "fair condition". The exception was the living room which he said was fair/poor and the bathroom/WC which he said was poor.

37. While TM accepted that the council's condition survey was a fair reflection of the condition of the reference property on the valuation date, he said that when it was occupied it was in good condition. The apparent deterioration was due to the fact that the claimants had stripped the building. He said that the council should have surveyed the property while it was still occupied and operational. Mr Mason had done this and had found the property to be fit for purpose.

38. MM did not accept that the council's condition survey was accurate as at the valuation date and said that the condition of the reference property was better than was shown in the exhibited photographs. The survey was done after the claimants had stripped out fixtures and fittings and MM considered that the council were unfairly using their survey against the claimants who were lay people and who had only stripped out the premises in order to mitigate their losses. Had the claimants known that the council would use their survey against them they would have carried out their own survey before removing the fixtures and fittings.

39. In my opinion the council's condition survey reports dated 6 February 2004 are a fair and accurate description of the reference property as it was at the valuation date. Mr Mason's inspection of the property was undertaken before the claimants stripped out the fixtures and fittings, whose removal undoubtedly affected the appearance of the property but not necessarily the condition of the structural elements of the building. The removal of fixtures and fittings did not cause, for instance, the dampness in the basement walls, or the rotten timber casement windows in the flat and the shop front, or the sagging roof. The claimants feel aggrieved that the council waited until they had stripped out the reference property before they conducted their surveys and that the council had not advised them to undertake their own survey. But as MM accepted in cross-examination the council had not altered the property before undertaking their surveys and all the stripping out works were done by the claimants.

(b) External door to 1A S St

40. There is a dispute over the presence or absence of a door giving independent access to 1A S St from Sunderland Street. MM said that TM had converted the ground floor of the reference property into two shops following his acquisition of the freehold in 2001 and had installed a separate door to give access to 1A S St. TM said in his witness statement that it was MM who "constructed a new doorway" in 2001 and that a roller shutter was also installed for security when the entrance door was not in use. In cross-examination MM denied the council's suggestion that there was no door behind the roller shutter saying that it was a "ridiculous insinuation that there was no door." MM said that the exhibited photographs showed the roller shutter covering the doorway with the internal photograph at I/220 showing the doorframe, the door having been removed when the fixtures and fittings were taken out. MM said that the door and shutter were originally installed by "TM & S Builders". These works were "not up to standard" and "could have been better" and required reconfiguration subsequently. These repair works were done by PPM Developments Limited and invoiced in August 2002. MM said that the external door to 1A S St was only used for four months (March to June 2002) at which time MM closed the external door because of the high value of the stock that he carried in 1A S St. Thereafter he said that he completed his sales "from the chip shop".

41. Mr Mason inspected the reference property shortly before the valuation date (he says he visited the ground and basement of 15 W St and 1 S St on 11 December 2003 but this date was challenged by the claimants who said Mr Mason's inspection took place on 15 January 2004). In cross-examination Mr Mason said that at the time of his inspection 1A S St was an "empty shop" and that he thought he "saw a door" which had an external roller shutter to it.

42. Mr Irvine inspected and surveyed the reference property on 6 February 2004 together with colleagues from the council's Asset Management Team. In cross-examination Mr Irvine said he did not remember a doorway onto the street from 1A S St although he did recall a roller shutter on the exterior of the property. He did not remember what was inside the building at that point.

43. The evidence supports the claimant's contention that at the valuation date there was a separate entrance from 1A S St onto Sunderland Street. There are both external and internal photographs showing a roller shutter in place. The internal photograph I/220 (top) shows this shutter as covering a full height entrance and not just a window. But there is no photographic corroboration that there was at the valuation date, or at all, a door in place. MM gave evidence that there was such a door and Mr Mason thought that there was, but he made no note nor exhibited any photograph recording its presence. Mr Irvine did not recall a door but was unable to remember other details about this entrance to 1A S St. There is no invoice in respect of the works that MM said had been done by TM & S Builders to install the door, and the invoice dated 5 August 2002 from PPM Developments Limited refers to the installation of roller shutters and the repair of brickwork but not to a door. If there was such a door then, assuming that the roller shutter just covered its width, it was considerably wider than the adjoining entrance door to the flat at 1 S St as shown in the photograph at I/229 (bottom). The evidence on whether there was a door is inconclusive.

Issue 3: 4 Waterloo Street

44. The following description of 4 W St is not in dispute.

45. 4 W St is located directly opposite (to the east) where the reference property used to be. It is a four-storey former warehouse of reinforced concrete construction under a flat roof with all mains services connected.

46. It is agreed by the valuation experts (Mr Day and Mr King) that 4 W St comprised the following accommodation at the valuation date (unless otherwise stated):

(a) *Basement*

Accessed via a front door and steps down. The basement comprised restaurant space including a trading area with a kitchen to the rear flanked by customer toilets. The GIA of this area was 345.07m^2 (3,714 ft^2).

There was a basement under Unit 1 which was accessed via that Unit. The GIA was 53.01m^2 (570 ft^2).

There was basement storage under Unit 2 which was created in 2005, after the valuation date.

(b) *Ground Floor*

Unit 1 is located at the north west corner of 4 W St. There are three steps up to the entrance from street level. The Unit has an area of 78.64m^2 (846 ft^2).

Unit 2 is located at the south of 4 W St and now comprises accommodation at upper ground level with two mezzanine seating areas and a rear storage and preparation area with a staff toilet. The floor area is 84.22m^2 (906 ft^2).

The Valuation Office has adopted the following areas in terms of zone A:

Unit 1: 48.09m^2 (518 ft^2)

Unit 2: 40.55m^2 (436 ft^2)

Between Units 1 and 2 was an area referred to by the parties as the "mid-section" comprising upper ground floor accommodation measuring 178.07m^2 (1,916 ft^2).

There is also a self-contained entrance lobby to the staircase to the upper floors which was previously used as the entrance to the City Express Hotel but which has subsequently been developed as students' apartment rooms. This lobby is in addition to the front doors and staircases leading to the mid-section and the basement.

(c) *First Floor*

The first floor formed a licensed unit with a bar, seating area, WCs and a separate area which housed snooker tables but which was suitable as a dance floor/club space. The GIA of the first floor is 350.96m^2 (3,777 ft^2).

(d) *Second and Third Floors*

These floors have a similar floor plate to the first floor and comprise a total of 18 apartment rooms. The Valuation Office recorded the area of the third floor as 369.3m^2 (3,975 ft^2) and the second floor is of a similar size.

(e) *Exterior*

At the rear of the property, accessed from the side street, is a metal fire escape leading to a small yard and a ramp down to the rear of the basement. There is a service access and bin stores facing onto Sunderland Street. There are no off-street car parking spaces.

Issue 4: tenure

(i) The reference property

(a) Freehold

47. MM purchased the freehold interest in the reference property in 1996 for £40,000. It was registered in his name on 11 April 1996. The sales particulars show that the fixtures and fittings of the existing fish and chip shop were included in the price.

48. TM acquired the freehold interest from MM in 2001. It was registered in TM's name on 1 March 2001. No price is recorded in the proprietorship register of the copy of register of title.

(b) Lease of 15 Waterloo Street to SM

49. TM (the landlord) says he granted a 19 year lease of "15 Waterloo Street … ('the Property')" to SM (the tenant) on 1 June 2001. The purported lease was a printed document that was signed, dated and witnessed. The initial rent was £36,400 pa which "may be increased" every three years "by 5% of the rent applying before that date" (clause 9.1). There is no reference in the lease to the rent being linked to turnover and there is no defined procedure for implementing a rent review. There is no further description of the demised premises (15 Waterloo Street) other than that contained in clause 15.1 which states:

> "This lease does not let to the tenant the external surfaces of the outside walls of the property and anything above the ceilings and below the floors."

There is no lease plan.

50. Clause 3 of the lease deals with the service charge. Under clause 3.1 the landlord and tenant agree that "the service charge is the tenant's fair proportion of each item of the service cost[s]." The service costs "are the costs which the landlord fairly and reasonably incurs in complying with his obligations under clause 12" and include the costs of any agent, contractor, consultant etc engaged by the landlord together with interest on any sums borrowed by the landlord in discharging his

obligations under clauses 12 (insurance) and 13 (forfeiture). The landlord is to keep full records of the service costs in accordance with clause 3.6.

51. Clause 4 of the lease is the user clause and states at 4.1 that the tenant shall "use the property only for the use allowed." That use is stated in the recitals to be "for use as a shop unit or any other use to which the landlord consents" (such consent not to be unreasonably withheld).

52. The tenant covenants to comply with the provisions of clause 6 relating to "Condition". In particular the tenant is to maintain the state and condition of the inside of the property; to decorate the inside of the property every five years; and maintain and decorate the shop front.

53. Under clause 7.1 the tenant is, subject to the landlord's consent, allowed to share occupation of the property and part of it may be transferred, sublet or occupied separately from the remainder.

54. Under clause 12.1 the landlord agrees to "keep the building (except the glass) insured with [a] reputable insurer…" There is no definition of "the building".

55. The landlord has no repairing obligations under the lease.

(d) Lease of 15 Waterloo Street to ShM and ZM

56. TM (the landlord) says he also granted a lease of "15 Waterloo Street" to ShM and ZM (the tenants) on 1 June 2001. The purported lease was a printed document that was signed, dated and witnessed. The initial rent was £6,400 pa but otherwise it was granted on identical terms to the lease of 15 W St to SM. There is no lease plan and the description of the demised premises is the same as that contained in the lease to SM except in that lease the cover page (but not the lease itself) refers to a lease "relating to the Happy Chip Leisure Group."

(c) Lease of 1A Sunderland Street to MM

57. TM (the landlord) says he granted a lease of "Shop Unit 1A, Sunderland Street" to MM (the tenant) on 1 June 2001. The purported lease was a printed document that was signed, dated and witnessed. The initial rent was £5,200 pa but otherwise it was granted on identical terms to the lease of 15 W St to SM. There is no lease plan.

(e) The residential flat at 1 S St

58. 1 S St was let on a protected tenancy on a weekly rent of £10.50 including water rates when MM purchased it in 1996. It was still subject to this tenancy when TM purchased the reference property in 2001. The protected tenant subsequently died and TM let the flat to Mr I S Offord on an assured shorthold tenancy for a fixed term of 18 months from 1 August 2003 at a weekly rent of £85.

(ii) 4 Waterloo Street

(a) Freehold

59. TM and SM purchased the freehold interest in 4 W St from Lally Manufacturing Limited on 20 September 2000 for £420,000. It was registered in their joint names on 1 March 2001.

60. On 29 November 2000 SM and TM entered into a declaration of trust under which it was acknowledged that the purchase of 4 W St was funded by TM and that SM held the property on trust for TM as beneficiary. SM agreed to insure the property and to keep it in good and tenantable condition. SM also agreed not to create any charge, mortgage, lien etc against the property or to dispose of it without TM's written consent.

(b) Lease from Lally Manufacturing Ltd to SM

61. On 1 February 1999 Lally Manufacturing Ltd, the then freeholder of 4 W St, granted a 25 year lease to "Sajit Mohammed the Happy Chip Leisure Group" of ground and first floor accommodation described as:

> "ALL THAT property comprising part of a building at 4 Waterloo Street Newcastle upon Tyne including the internal surface of the external walls thereof but excluding the remainder of the external walls and including all the portion of the building below the level of the top of the brickwork supporting the joists upon which the floor of the First Floor rests but including the joists themselves and formally [sic] known by the sign of WINDSOR SNOOKER CLUB AND GROUND FLOOR WAREHOUSE (the demised premises)."

The yearly rent for the first five years of the term was:

> "TEN THOUSAND POUNDS (£10,000) per annum Windsor Snooker Club, Ground Floor Warehouse EIGHT THOUSAND POUNDS (£8,000) per annum and 6 months [rent] free period."

There were rent reviews every five years but the details are not known for certain because clause 3(3) (part) to clause 3(8) of the lease (tenant's covenants) are missing from the trial bundle. It is assumed that the covenants are the same as those contained in the lease between Lally Manufacturing Ltd and Farah Rahimi which is otherwise identical (see paragraph 65 below)

62. The tenant covenants at clause 3(9):

> "Not to use or suffer the use of the demised premises or any part thereof to be used otherwise than as a coffee bar/fast food outlet or a computer shop or any other class within Class A of the Town and Country Planning (Use Classes) Order 1987."

63. Under clause 3(21)(a) the tenant covenants not to assign, underlet or part with the possession of part only of the demised premises.

64. Clause 5(1) contains a tenant's break clause exercisable at any time after the fifth year of the term upon not less than six months notice.

(c) Lease from Lally Manufacturing Ltd to Farah Rahimi

65. Lally Manufacturing Limited granted a ten year lease to Farah Rahimi on 12 December 1999 of that part of 4 W St situated at the southern end of the property and known as the Antolia Kebab House. This would subsequently become the front part of Unit 2. The initial rent under the lease was £3,500 pa.

(d) Lease from TM to SM of Unit 1

66. On 5 February 2004 TM says he granted a 25 year lease of "The Happy Chip (Unit 1) 4 Waterloo Street …" to SM and "Partners Happy Chip Leisure Group." The purported lease was a printed document that was sealed by the landlord, signed as a deed by SM, dated and witnessed. The landlord was stated in the Schedule to the lease as being Thariq Mohammed but the lease was made under seal by "TM & S" Limited and affixed in the presence of TM who signed it in his capacity as a director of that company. The initial rent payable was £25,000 pa subject to five yearly upward only rent reviews. The permitted use was as a hot food takeaway.

67. Clause 3.9(i) of the lease provides that "as soon as may be … [the tenant shall] apply for the grant of a Justices Licence or a Club Registration Certificate (as the case may be) for the sale of liquor in the Property…" The remainder of clause 3.9 contains other provisions relating to such licences and certificates. The expression "the Property" is not defined although it is used widely throughout the lease.

68. Under clause 3.11(iv) the tenant is responsible for insuring against "loss or damage to the Property" by the usual risks to its full reinstatement cost (including professional fees). Clause 3.11 also provides for the tenant to effect other insurances including insurance for loss of licence.

69. Under clause 3.12 the tenant is responsible "to keep the interior of the demised premises in good and tenable (sic) repair and condition …" while the landlord is to "keep the load bearing members of the floors ceilings roofs and wall[s] of the block [not defined] in good and substantial repair and condition" and "to repair maintain and clean the exterior of the block" under clauses 4(i) and (ii) respectively.

70. Both clause 3.18 and 3.36 contain similar (but not identical) restrictions on the tenant's rights to assign, sublet or part possession with the demised premises or part thereof.

71. The premises let to SM under this lease formed part of the premises already demised to him under the Lally lease granted on 1 February 1999.

72. The reference to "Partners Happy Chip Leisure Group" in the definition of the tenant under the February 2004 lease is presumably to a partnership agreement dated 1 June 2001 between SM and TM under which the partners agreed to carry on business in partnership as a hot food takeaway under the firm name of "The Happy Chip Leisure Group" ("HCLG"). Under the agreement the capital and profits of the partnership (and any losses) were divided 90% to SM and 10% to TM.

(e) Lease from TM to MM of 4 Waterloo Street (part)

73. On 5 February 2004 TM says he granted a 25 year lease of "The shop unit, 4 Waterloo Street…" to MM. The purported lease was a printed document that was sealed by the landlord, signed as a deed by MM, dated and witnessed. As with the lease of the same date to SM, Thariq Mohammed is named as the landlord but the lease was made under seal by TM & S Limited with TM signing as a director of that company. The initial rent payable was £5,200 pa subject to five yearly upward only rent reviews. The permitted use was "shop unit; convenience store."

74. The other provisions of the lease to MM dated 5 February 2004 are identical to those contained in the lease granted by TM to SM on the same date. Neither lease contains a lease plan.

(f) Lease from TM to SM of Unit 2

75. On 7 June 2006 TM says he granted a 25 year lease of "The Happy Chip (Unit 2), 4 Waterloo Street …" to SM. The purported lease was a printed document that was sealed by the landlord, signed as a deed by SM, dated and witnessed. Again the lease was made under seal by TM & S Limited and TM's signature was made in his capacity of a company director rather than as the landlord. The initial rent payable was £15,000 pa subject to five year upward only rent reviews. The permitted use was "hot food takeaway."

76. The other provisions of the lease are identical to the February 2004 leases between TM and SM and TM and MM.

77. Subsequent to the hearing the parties confirmed that neither the February 2004 leases of Unit 1 nor the June 2006 lease of Unit 2 were registered.

(iii) Disputed facts

(a) The reference property: freehold

78. Mr Fraser said that although the Land Registry entry confirmed that the reference property was registered in TM's name on 1 March 2001 there was nothing to confirm the price paid for the property and no evidence of any sum actually having been paid. There was no rational reason why the value of the freehold should have increased from the £40,000 paid by MM in 1996 to the

£250,000 that TM said he paid in 2001. The acquiring authority did not accept that TM's acquisition of the freehold was a genuine transaction.

79. In reply Mr Denyer-Green said that the price paid by TM for the freehold interest in the reference property was irrelevant to the issue of the existence and effect of the claimed leases. As no expert valuation evidence had yet been given it was not open to the acquiring authority to submit that the price of £250,000 paid by TM was not the market value of the reference property.

80. There is no evidence to corroborate TM's statement that he paid MM £250,000 for the freehold interest in the reference property. The price is not recorded in the title register; there is no copy of the TR1 transfer; there is no record of the money having been paid and received in the accounts of TM or MM since no such accounts were adduced or disclosed for the period in question; there is no evidence of such a payment in any bank statements; and MM did not adduce or disclose the relevant tax returns. TM acknowledged there was nothing in the trial bundle to show such a payment. When it was put to him in cross-examination that there must be documents referring to the transaction, TM said "it was confidential". He said he had taken advice about the purported purchase price but acknowledged there was nothing in the trial bundle to substantiate that comment. It was put to TM that this was not an arm's length transaction and that the payment of £250,000 had not been demonstrated nor how that value had been derived. TM replied this "was just the way I did this particular business with Masriq" and said that the purchase money had been sourced from "family loans". TM gave no details of any such loans. TM took out a 20 year flexible business loan with Lloyds Bank on 19 September 2000 in the amount of £270,000 which appears to have been secured by a registered charge against both the title of the reference property and the title of 4 W St, both of which were registered on 1 March 2001. No explanation was given about the relationship between this loan and the family loans to which TM referred.

81. I accept Mr Denyer-Green's submission that the Tribunal has yet to hear the expert valuation evidence and must therefore be circumspect when considering values. But I also accept Mr Fraser's argument that it is reasonable to look at the historical context of the purported payment by TM to MM and to take into account the suggested increase in the value of the reference property between 1996 (£40,000) and 2001 (£250,000) of 625%; an annual growth rate of 44% in capital value for a building that had not been materially improved (if at all) over that time. It is true that the protected tenant in 1 S St had died and that the flat had been re-let on an assured shorthold tenancy but that would not account for such a change in value. Such a huge increase in value over such a short timescale invites the closest scrutiny and in the absence of corroboration, although TM is the registered proprietor, I do not accept that TM paid MM £250,000 for the freehold interest in the reference property.

(b) The reference property: leasehold

82. I turn next to the three leases said to have been granted by TM to SM, MM and ShM and ZM on 1 June 2001. The acquiring authority criticised these leases on the grounds that, firstly, they are not genuine and, secondly, that if they are genuine they are not valid. The central question about these leases is whether they were intended to bind the parties in a contractual relationship the terms of which were to be applied in practice, or whether the documents were simply shams.

83. The definition of a sham was given by Diplock LJ in *Snook v West Riding Investments Limited* [1967] 2 QB 786 at 802C-E:

> "It is I think necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities…. for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

84. The question of whether the law recognises the concept of the sham at all, alluded to by Diplock LJ in *Snook,* was disposed of by the House of Lords when allowing the appeals in *AG Securities v Vaughan and Antoniades v Villiers* [1990] 1 AC 417 which were heard at the same time. Lord Oliver said at 470A that:

> "I read [the Judge's] finding that 'the licences are artificial transactions designed to evade the Rent Acts' as a finding that they were sham documents designed to conceal the true nature of the transaction."

85. *AG Securities* also established that, in considering whether a transaction is a sham, the court may consider how the parties acted subsequent to, as well as at and before, that transaction. Thus Lord Oliver (with whom Lord Ackner expressly agreed) said at 469C:

> "But though subsequent conduct is irrelevant as an aide to construction, it is certainly admissible as evidence on the question of whether the documents were or were not genuine documents giving effect to the parties' true intentions."

86. In *National Westminster Bank Plc v Jones* [2001] 1 BCLC 98 Neuberger J (as he then was) considered the authorities in some detail and concluded at paragraph 45:

> "In my judgment, the whole point of a sham provision or agreement is that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement, while in fact they have no intention of honouring with their respective obligations, or enjoying the respective rights, under the provision or agreement.
>
> … [O]ne should not lose sight of the fact that there is obviously a strong presumption, even in the case of an artificial transaction, that the parties to what appear to be perfectly proper agreements on their face, intend them to be effective, and that they intend to honour and enjoy their respective obligations and rights. That that is so is supported by the fact that an allegation of sham carries with it a degree of dishonesty, and the court should be slow (but not naively or unrealistically slow) to find dishonesty."

And later at paragraph 68:

> "Both principle and the authorities indicate that the court is slow to find that an agreement is a sham, and that, before the court can reach such a conclusion, it must be satisfied that the purported agreement is no more than a piece of paper which the parties have signed with no intention of its having any effect, save that of deceiving a third party and/or the court into believing that the purported agreement is genuine."

87. In these references the onus is on the acquiring authority to show that the leases were shams.

88. Why would the claimants enter into a series of sham leases between TM, as landlord in each instance, and his siblings? The only reason put forward by the acquiring authority is that the leases were not necessary and were created to increase the compensation which the claimants hoped to receive from the council, contrary to section 4(2) of the Acquisition of Land Act 1981.

89. The claimants produced a chronology of events which says that the scheme for the acquisition of the reference property commenced with the launch in 1997 of the Grainger Town Regeneration Project and included the Action Plan endorsed by English Partnerships in September 1998 and the planning applications for the five development phases that were made in June 2000 and which included the reference property. The council issued a "minded to grant" decision on 3 November 2000, subject to the completion of a legal agreement. The CPO was not made until 1 August 2002. The leases were dated 1 June 2001 having been preceded a year earlier by the purported grant of similar leases by TM before he had purchased the freehold interest. I consider the extent of the scheme in issue 9 below where I conclude that the first indication that the reference property was, or was likely, to be compulsorily acquired by the council was given in April 2001. This provides a plausible reason why the claimants might enter into the 2001 leases upon terms which, the acquiring authority say, included unrealistically high rents. Nevertheless the leases were granted over a year before the CPO was made and there are other possible reasons for their creation. TM gave one such reason during cross-examination when he said that he wanted to secure the rental income by formalising the tenure rather than relying upon informal family arrangements. In his witness statement he said that:

> "I relied upon the rental income from the leases to fund the mortgage repayments on the freehold of the retained land [4 W St] which I had purchased in 2001. …
>
> …I obtained a mortgage from Lloyds TSB to partially fund the purchase. …"

This mortgage was obtained in September 2000, nine months before the leases were granted. It does not seem that the leases were a prerequisite to obtaining the mortgage.

90. There are several other factors affecting the determination of whether these leases are genuine, the first of which is the terms upon which they were purported to be granted. I acknowledge that this may conflate the genuineness of the documents with their effect, but, in my opinion, the wording and content of the leases are relevant to a proper consideration of this issue.

91. The leases, which TM said he had prepared without the involvement of solicitors, are poorly drafted and do not identify with clarity or precision the extent of the demised premises in each case. Two of the leases, those to SM and ShM and ZM, demise the same property; there is no difference in

their wording. The third lease, that to MM, refers to the shop unit at 1A S St but in the absence of any lease plans or further description the demised premises cannot be objectively identified. TM said in cross-examination that his family understood what the leases were supposed to demise and that they all knew that SM would allow MM and ShM to trade from his fish and chip shop. That may be so, but it invites the conclusion that these leases were either genuine but incompetently drafted or were a notional attempt to formalise a tacit family arrangement and at the very least were not intended to be assignable to third parties, or were not intended to create any legal relationship at all.

92. The leases contain provisions that do not appear to have been implemented in practice. For instance there is no evidence that a service charge was ever raised or paid or that "full records of the service costs" were kept by TM. Furthermore no party to any of the leases appears to be responsible for external or structural repairs. This indicates to me that in practice the leases were not documents that properly and objectively regulated the occupation of the reference property.

93. The rental value of the reference property is a matter for expert evidence but I think it is relevant to consider whether the leases are genuine in the context of the rents that are reserved under them. The total rent reserved under the three leases was £48,000 pa. The agreed area of the reference property (excluding the first floor flat at 1 S St) is 825 sq ft of which 324 sq ft is at basement level (see paragraph 30 above). The overall rent reserved under the three leases is therefore just over £58 per sq ft. In his expert report Mr Cairns for the claimants says that this is under-rented and goes on to argue that the open market rental value (at the valuation date) was £56,200 pa, a figure which in his expert report left Mr King, the council's valuation expert, "incredulous". The merits of those experts' arguments are yet to be tested but in my opinion a reserved rent which is £8,000 more than the capital value paid (which included the first floor flat), in the open market, just five years previously and where the condition of the property remained substantially the same, is, *prima facie*, suspect. As Mr Fraser submitted the claimants' own evidence (Mr Day) of rental values at Units 1 and 2 at 4 W St and of the "higher-earning use as a nightclub" shows values that are significantly lower than those reserved under the leases of the reference property when the market was, as TM accepted, weaker.

94. TM said in cross-examination that the rent reserved under the June 2001 leases was based on "a percentage of turnover" of the respective businesses, by which I understood him to refer to a historic turnover. That cannot be true of the Convenience Store since MM said in examination in chief that he "started trading when the lease was granted" (subsequently in cross-examination MM said that he opened the convenience store in 2002). The leases contain no provision for an annual review of rent and there was no evidence of what the percentage of SM's turnover was to be or how turnover was to be defined. I would expect a turnover rent to be based upon annual turnover and not fixed at the commencement of the lease with upwards only rent reviews every three years based upon a set 5% increase. That would fix the rent solely by reference to the tenant's trade at the commencement of the lease. Alternatively, I would expect to see a base rent (a percentage of the open market value) with a percentage of turnover as a top-slice. In either case a turnover lease would usually have a provision to cap the total rent and an obligation for the tenant to have his accounts independently certified. None of the usual turnover rent provisions are present in the 2001 leases of the reference property. The leases do not refer to the turnover. I remind myself that these were homemade documents but there is no evidence to corroborate TM's statement that these were turnover leases in either a formal or informal sense and I do not accept that they were or were intended to be. I think it more likely that TM's reference to a rent being a percentage of turnover

meant that the reserved rents reflected SM and MM's ability to pay. TM said in cross-examination that SM could afford to pay £100 per day (£36,500 per annum) in rent and that MM could afford £100 per week (£5,200 per annum). As such the rents were geared specifically to the business and not to market rental value.

95. An important factor affecting the consideration of whether the purported leases were genuine is whether the rents reserved under the leases were paid. In *National Westminster Bank plc v Jones* Neuberger J said at paragraph 67:

> "On the other hand, the fact that no attempt whatever appears to have been made on the part of the Company, to pay any of the sums due under the agreements, or, on the part of the defendants, to enforce such payments, is, on the face of it, a powerful point in favour of the sham argument."

I look first at the evidence contained in the accounts. There are four sets of accounts. All of them were prepared, without carrying out an audit, by Derek Newton BA, ACPA. The accounts of TM, trading as the TMS Group, are not helpful in establishing whether rent was actually paid to him under the June 2001 leases of the reference property because, as he explained in cross-examination, he owns several other investment properties, the income from which is also shown in his accounts. It is not possible to isolate the rental income from the reference property, although an examination of TM's accounts does reveal some information about rental payment under the leases.

96. The last set of TM's accounts before the reference property was acquired was for the seven month period ending on 28 February 2004. The rent under the June 2001 leases stopped being payable at the end of January 2004. So the rent payable for this accounting period (including the rent from the flat at 1 S St) was £26,550. Adding seven months rent under the Lally lease (£10,500) and one month's rent for the new leases of Unit 1 at 4 W St (£2,517), gives a total of £39,567. It was TM's evidence that the rent "was always paid as per the leases" and that there was "no problem with the rent". So according to TM, the rent due from family members was actually paid. The total rental income stated in the accounts is £46,679. The small difference of £7,112 between these figures represents the rental income from the remainder of the TMS Group's investment properties. During his oral evidence TM identified at least eight such properties. This suggests to me that either the figure shown in the accounts is not an accurate and complete record of the rent received or that the rent reserved under the leases to SM, MM and ShM was not paid, or not paid in full. This invites a further and more detailed examination of the source material upon which Mr Newton, the claimants' accountant, prepared the TMS Group's accounts.

97. Whereas figures are shown in the accounts of SM (trading with KM as the HCLG) and MM for rent and rates, these cannot be reconciled easily or with any certainty to the rents payable under the 2001 leases. The interpretation of SM's accounts is complicated by the fact that he was also paying rent and rates under the Lally lease.

98. The two years accounts of Especially 4 You that were adduced by the claimants for the years ending 31 May 2003 and 31 January 2004, show the figure of £6,400 as the entry under "rent and rates". (The figure of £4,267 for the year ending 31 January 2004 is a pro rata apportionment of this amount). This is consistent with the rent reserved under the purported lease dated 1 June 2001.

There is no amount included for rates since, presumably, Especially 4 You's unit was not separately assessed.

99. The evidence also contained TM, SM and MM's tax returns which reflected the figures shown in their respective accounts for the amount of rent received (TM) and paid (SM and MM).

100. There is nothing that corroborates the claimants' evidence that the rent was actually paid between the family members. There are no demands, no receipts, no bank statements or any other document to show that payment was made.

101. Mr Denyer-Green dismissed the abortive grant of leases of the reference property by TM in 2000 as an irrelevance from which no conclusions could be drawn. Mr Denyer-Green acknowledged that no leases could have been granted by TM at that time because he did not then own the freehold and yet TM said under cross-examination that he had signed a receipt for £100,000 from SM for fixtures and fittings, even though at that time those fixtures and fittings either belonged to MM or SM. TM explained that the consideration was represented by his 10% share in his new partnership agreement with SM. But that partnership agreement was not signed until a year later, in June 2001, and it appears that TM signed the receipt for £100,000 before he acquired the reference property, given that SM's accounts show the addition of £100,000 as fixtures and fittings in the accounts for the year ending 31 December 2000.

102. Mr Denyer-Green also submitted that the leases to MM and SM were consistent with the claimants' response to a requisition notice served by the council on 7 June 2002. In my opinion the claimants' response is not consistent. Firstly, it says that the freeholders of the reference property were TM and SM. TM was the sole freeholder of the reference property as at 7 June 2002; by then he owned 4 W St jointly with SM. Secondly, it says that the leaseholders of 15 W St were "Mr S and Miss S Mohammed" which I take to mean SM and ShM. Mr Denyer-Green does not refer in his closing submissions to ShM at all in this context. Indeed in his closing submissions Mr Denyer-Green submitted that the leases to MM and SM were legal leases or, in the alternative "and in the case of Shabreen", were equitable interests. Mr Denyer-Green did not say that the lease to ShM was a legal interest, but he failed to distinguish it from the identical lease to SM which he submitted *was* a legal lease. The response to the requisition notice did not make clear that there were purportedly two separate leases of 15 W St, one to SM and the other to ShM and ZM. Thirdly, the leases were said to have 15 year terms. In fact they had 19 year terms of which 18 years were unexpired. Finally, the response to question 8 of the requisition notice refers to the use of 15 W St as a "hot food T/A" and to that of 1A S St as a "retail shop". No reference is made to ShM's clothing and jewellery business (Especially 4 You). The use of 1A S St is said to have begun more than six years previously which is incorrect; MM said that he began the Convenience Store business in 2002.

103. I have considered the June 2001 leases in a wide context and in the light of my doubts about the credibility of the claimants' evidence. I am not satisfied that these were genuine leases and, in my opinion, they were shams. They were a family arrangement which cannot be shown, on the balance of probabilities, to have been, or intended to be, implemented in practice according to their provisions and obligations. I am sceptical about the rents reserved and I am concerned at the lack of corroboration about rental payment and receipt. The purported leases were badly drafted and, in my

opinion, were not intended to create any interest assignable to a third party. It seems to me that the purported leases were little more than an accounting device to justify the levels of rent that are recorded in the four sets of the family's accounts. It was put to TM that the separate leases were a device intended to increase the compensation claim and I am persuaded that this was at least part of the claimants' motivation for their creation. I do not rely upon these leases and I give them no weight. It is not necessary for me to consider Mr Denyer-Green's submissions regarding the effect of these leases since if, as I have determined on the facts, the leases are not genuine they can be of no effect.

104. Mr Denyer-Green submitted that if, contrary to the claimants' case, the Tribunal held that the leases were of no effect then SM, MM and ShM would have, or have an inchoate right to, an equitable interest; see *Cobbe v Yeoman's Row Management Limited* [2008] 1 WLR 1752, per Lord Scott at paragraphs 3 to 4 and paragraphs 14 to 24. Mr Denyer-Green submitted that such an equitable interest was compensatable. He said that even if the leases, or any of them, did not take effect as legal leases or as equitable interests they still conferred permission to occupy 15 W St and 1A S St for the purposes of section 37 of the Land Compensation Act 1973 ("the 1973 Act").

105. I do not accept Mr Denyer-Green's submission that the court would confer on TM's siblings an equitable interest to protect their occupation. This is not a case of proprietary estoppel where TM as landlord created or encouraged an expectation that his siblings would have a leasehold interest in land and they then proceeded to act to their detriment upon such expectation. Consistent with my finding that the leases were shams I am satisfied that all parties to those leases knew that they were a pretence and I do not consider that an equitable remedy is available to SM, MM and ShM so as to afford them a proprietary (and thus compensatable) interest in the reference land.

106. There is no dispute that following MM's purchase of the reference property it was occupied without a lease by SM and KM (helped by TM and his wife) for several years from 1997 having first been re-opened as a fish and chip shop by MM. TM said that: "The business was run as a family partnership until late 1999." SM said that "on 1 January 2000 the family arrangement ceased." TM said that ShM and ZM started their jewellery and clothing business in approximately 1997 (TM's witness statement) or approximately 1998 (TM's witness statement on behalf of ShM). According to TM:

> "Initially my brother Sajit and sisters simply occupied [the] ground floor and basement of the acquired land under informal licence arrangements, with nothing written down on paper."

In my opinion, given my finding that the 2001 leases were a sham, SM and ShM remained as TM's informal licensees until the reference property was compulsorily acquired in January 2004.

107. MM was the freeholder from 1996 until 2001, when TM acquired the reference property. MM said he did not commence trading as the Convenience Store until March 2002 after TM had converted the reference property into two shops and MM had fitted out 1A S St. From 1997, when he seems to have handed over (not sold) the fish and chip business to SM and KM, until the middle of 2001 when, he says, he fitted out 1A S St, MM did not occupy any of the reference property. In my opinion his subsequent period of occupation from 2001 until January 2004 was as TM's informal licensee.

108. As licensees SM, MM and ShM do not have compensatable interests. Mr Denyer-Green submits that if the 2001 leases did not, as I have found, take effect as leases, or confer a right to equitable interests, they conferred permission to occupy the reference property for the purposes of the compensation provisions in section 37 of the Land Compensation Act 1973 ("the 1973 Act").

109. Section 37 of the 1973 Act provides for disturbance payments for persons without compensatable interests and states (so far as relevant):

> "37(1) Where a person is displaced from any land in consequence of–
>
> (a) the acquisition of land by an authority possessing compulsory purchase powers;
>
> …
>
> he shall, subject to the provisions of this section, be entitled to receive a payment (hereafter referred to as a "disturbance payment") from–
>
> (i) … the acquiring authority
>
> (2) A person shall not be entitled to a disturbance payment–
>
> (a) in any case, unless he is in lawful possession of the land from which he is displaced;
>
> (b) in a case within subsection (1)(a) above, unless either–
>
> (i) He has no interest in the land for the acquisition or extinguishment of which he is …. entitled to compensation under any other enactment; or
>
> (ii) …
>
> (3) For the purposes of subsection (1) above a person shall not be treated as displaced in consequence of any such acquisition … of that subsection unless he was in lawful possession of the land–
>
> (a) in the case of land acquired under a compulsory purchase order, at the time when notice was first published of the making of the compulsory purchase order prior to its submission for confirmation …"

110. In the present references the claimants, other than TM who owned the freehold of the reference property and therefore had a compensatable interest, must therefore show that they were in lawful occupation of the reference property at the time the notice of the making of the compulsory purchase order was made, namely 1 August 2002.

111. The expression "lawful occupation" is not defined in the 1973 Act but was considered by the Court of Appeal in *Wrexham Maelor Borough Council v McDougall* [1993] 2 EGLR 23. Ralph Gibson LJ said at 28J:

> "To have lawful possession without a legal interest in the land, whether freehold or leasehold, requires that the person in possession has the permission of the owner who does have the legal right to possession. …
>
> If the person is not given exclusive possession he may still, in my judgment, have possession of the land within the meaning of section 37. He will then be a licensee. Any fragility in his right to continue as a licensee in possession of the land, because of the power of the owner to terminate it, will be relevant to the amount of any disturbance payment which must be determined with regard to the period for which the land might reasonably have been expected to be available for the purposes of his business: see section 38(2)."

112. In my opinion SM, MM and ShM were the licensees of TM and were in lawful occupation of 15 W St and 1A S St on 1 August 2002 (the date the CPO was made) and are therefore entitled to a disturbance payment under sections 37 and 38 of the 1973 Act. The question of how many businesses were conducted at the reference property is considered separately.

(c) 4 Waterloo Street

113. The freehold interest in 4 W St is owned jointly by TM and SM and was purchased by them in September 2000. A declaration of trust was made between TM and SM on 29 November 2000 under which SM holds 4 W St on trust for TM. Notwithstanding that he only had a legal interest in the freehold of 4 W St and was also a lessee under the Lally lease at that time, SM covenanted under the trust deed to observe and perform all the (landlord's) covenants, restrictions, conditions and stipulations at any time affecting the property. He also agreed to insure the property and to keep it in repair. TM's oral evidence did not clarify the position about the freehold ownership of 4 W St. He said variously that SM had been involved in the acquisition of the freehold "in case I died" and that it had "something to do with banks". Asked why, if he needed someone else on the title, he chose SM, given the difficulties that this would create, TM answered "that's just the way it happened." SM said the trust declaration had been made because "the bank needed a trustee." I agree with Mr Fraser that the trust is an unexplained relationship of questionable provenance.

114. Mr Denyer-Green says that the acquiring authority did not raise any doubt about the leases of 4 W St to SM and MM being genuine. I do not accept that submission. Mr Fraser referred several times to the leases as being "purported" leases; to the documents making "no sense" and being "worthless"; to there being one family business "and the various agreements were not true agreements"; and there being "no interests in the property [4 W St] other than the registered freehold interest." In considering the cases referred to by Mr Denyer-Green in his skeleton argument Mr Fraser said that the Tribunal must first consider whether the agreements were genuine transactions. In context, this submission includes the asserted leases at 4 W St. Mr Fraser concluded that "the claimed transactions do not appear to be genuine transactions." Mr Denyer-Green contradicts his argument at paragraph 60 of his closing submissions where he states "the AA's submissions at paragraph 127 that these two leases [to SM and MM] were not genuine are not supported by any evidence."

115. I deal firstly with the two purported leases of Unit 1 at 4 W St, granted on 5 February 2004 by TM to SM and MM. There is nothing to distinguish the extent of the demised premises in each case

other than their description in the parcels clauses as "the Happy Chip (Unit 1)" (SM) and "the Shop Unit" (MM). Mr Denyer-Green submits that the extent of the respective businesses was quite clear from the factual matrix. In cross-examination TM said MM knew what he was getting under the lease and that it was only necessary to "look at the shop" to see the two demised areas. Having inspected the property I do not agree. Unit 1 and "the Shop Unit" are not separate and distinct, and are within the same curtilage.

116. The unchallenged evidence of Ms Swaddle for the council was that Unit 1 was brought into the rating list by the VOA on 1 April 2005. Ms Swaddle said that:

> "Correspondence which the council has received over the years relating to the liability for business rates for this unit has been confused and contradictory…
>
> It appears that this particular hereditament is the 'corner unit' at 4 Waterloo Street, which traded as 'Sajways Takeaway/Convenience Store'. This information was given on the Rate Liability Return form provided by 'Mr Thariq Mohammed' on 1 November 2008."

Ms Swaddle said that the council had received an undated typed letter on 30 March 2011 from K & S Mohammed asking the council to amend their records to show that the liability for the shop and premises was that of "Happy Chip Leisure Group K & S Mohammed and convenience store M Mohammed from 1 January 2004 (unit 1) to date". Ms Swaddle said that the council did not backdate and amend their records "as the statements in the letter were not supported by previous evidence as to liability we received." (I note that the letter from SM and KM was written after the reference to this Tribunal was made.)

117. It was not clear to the billing authority that there were two occupiers of Unit 1. It formed a single hereditament for rating purposes. Apparently the claimants did not make a proposal that the property shown in the list ought to be shown as more than one hereditament.

118. There is no evidence that Unit 1 was occupied as two distinct and separately let parcels. In my opinion this supports the council's submission that the two leases of Unit 1 were not genuine.

119. This conclusion is also supported by two documents, previously undisclosed by the claimants, concerning the leasehold disposal of Unit 1, 4 W St in March 2004, a month after the leases are said to have been completed. The first document was handed in by Mr Denyer-Green on day four of the hearing and comprised an agreement between TM and Eblett Ellison dated 6 March 2004 conferring sole selling rights of Unit 1 at 4 W St at an asking price of £250,000 plus stock at valuation (£40,000).

120. The second document was handed in by Mr Denyer-Green on day five of the hearing. It was a set of "internet estate agents" particulars produced by www.Pattinson.co.uk on 22 March 2004. These advertised for sale the lease of "Fish and chip shop, 4 Waterloo Street." The "lease" being offered for sale was not the lease(s) purported to have been granted on 5 February 2004, less than seven weeks previously. The lease being offered was at a rent of £800pw (£41,600pa) plus a premium of £250,000. The combined rent of the purported leases to SM and MM was £30,200pa. The sales particulars do not refer to an assignment of existing leases.

121. In cross-examination it was put to SM that within a month of moving into Unit 1 he was trying to sell it and that he had decided to move to Unit 2 as early as March 2004. SM replied that he had "told Thariq to sell [a] lease to get some money back." But if the leases to SM and MM were genuine TM could not have sold or granted a new lease of Unit 1. Only SM and MM could have jointly assigned their existing (new) leases or jointly sublet the property. The sales particulars are not worded in that way and do not reflect the rents fixed under the purported leases recently granted to SM and MM. In my opinion a more plausible explanation is that the Unit 1 leases were a sham which could be ignored as and when it suited TM to grant an actual lease of Unit 1 to a third party.

122. The amount of the rent and rates shown as payable by SM in his accounts for the year ending 31 December 2004 (£47,185) can only be explained if SM paid rent under both the Lally lease and the lease from TM of Unit 1 at 4 W St at the same time. Mr Denyer-Green said that the effect in law of the grant by a landlord of part of a building already the subject of a lease held by the same tenant is that it operates as a surrender and re-grant of that part. Mr Denyer-Green explained that SM's continued payment of the rent under the Lally lease was due to the fact that SM "is unsophisticated in these matters and would not have understood the legal technicalities, but assumed that he had to pay both rents …" In my opinion SM is not so "unsophisticated" as to pay rent twice for the same property, particularly where he had the benefit of an exercisable break clause in the Lally lease. TM, who is not unsophisticated in business matters, would have known that SM was paying twice. Mr Denyer-Green's explanation not only requires the Tribunal to accept SM's naivety in paying the rent twice, it also requires it to accept, put bluntly, TM's venality in accepting it from his brother. I do not accept that explanation. In my opinion it is more likely, given that there is no evidence of payment, that SM did not pay any rent at all.

123. According to the claimants' chronology, SM relocated his business from Unit 1 to Unit 2 on 15 November 2005, although the purported lease of Unit 2 was not granted until 7 June 2006, the date from which the term commenced. The maximum rent due from SM in the financial year ending 31 December 2005 was £43,000 (£25,000 under the lease of Unit 1 and £18,000 under the Lally lease). This assumes that the lease of Unit 1 was not surrendered when the business moved to Unit 2 in November 2005. But the figure for rent and rates given in SM's accounts is £99,249 which is inexplicable from the evidence.

124. SM's tax returns reflect the accounting entries and provide no further insight into what rent was actually paid, if any.

125. The figures shown in MM's accounts and tax returns are not easily reconciled to the payments that he was obliged to make under the lease of "the shop unit" at 4 W St.

126. As was the case with the reference property there is no evidence to show that rent was actually paid in respect of the purported leases at Unit 1 at 4 W St.

127. The existence of the purported lease of Unit 1 to SM was not disclosed in TM's response dated 25 February 2004 to the council's planning contravention notice dated 9 February 2004. Mr Denyer-Green explained that this, at least so far as the lease to SM was concerned, was due to the lease being granted to one of the joint freehold owners who were identified in the response to the

notice. It was therefore understandable that the separate lease to SM had not been included in the response. That submission does not explain why TM was identified as the person "responsible for the use, operations or activities on the land." Furthermore it is difficult to reconcile Mr Denyer-Green's submission with the fact that the lease to SM was granted just four days before the contravention notice was served and three weeks before the reply. That lease, if genuine, would have been at the forefront of TM's mind when he completed the notice. (The lease to MM does not appear to have been the subject of the planning contravention notice which related to "that part of the development that has opened as a fish and chip shop").

128. Mr Fraser argued that TM had not entered into the purported leases of 4 W St since he had signed them in his capacity as a director of TM & S Limited which had no interest in the property. Mr Denyer-Green said that he had done so as an agent for himself. I agree with Mr Fraser that there was no evidence to support Mr Denyer-Green's submission that TM & S Limited were acting as agent for TM. TM acknowledged that he had signed the leases to SM and MM as a director of TM & S Limited (the word "Limited", contrary to Mr Denyer-Green's submission, does appear on both leases). Mr Denyer-Green argues that the point is irrelevant because TM does not deny that the leases were granted or that he was bound by them. I note that in his accounts TM is shown to be trading as the "TMS Group" which may explain why "TMS" is shown next to his signature on the lease. This is another example of how cavalier the claimants were in preparing documents among the family group and lends weight to the council's belief that these were not genuine leases but rather were documented family arrangements with the appearance of formality but which could be amended or abandoned at will and were never intended to affect the legal relationship between the siblings. This conclusion is reinforced by the poorly drafted leases themselves and the duplication and irrelevance of some of their provisions (see, for instance, paragraphs 66 to 72 above in relation to the lease of Unit 1 to SM, especially those provisions relating to the sale of liquor which the claimants denied was sold at the Happy Chip).

129. There was only a single lease of Unit 2, between TM and SM. The form of the lease was the same as the two leases of Unit 1 and it was signed by TM in his capacity as a company director. In cross-examination SM said that after he had moved to Unit 2 he continued to pay rent under the Lally lease (£18,000) and the Unit 1 lease (£25,000), as well as on Unit 2 (£15,000), although there was no record of any such payments having been made since SM says he paid everything in cash. He said it was "worth it to me" to pay all this rent and that it was not paid in respect of "the same space".

130. SM's accounting records show that the rent and rates paid from and including 2006 are less than the annual total rent payable under these three leases (£58,000) and in 2006 and 2009 were substantially less (by some £10,000). By contrast, in 2005, before the lease of Unit 2 was granted the rent and rates payable are shown as over £99,000. This unexplained anomaly is exacerbated by the existence of a tenancy agreement dated 1 January 2005 between SM (the landlord) and TM & S Construction Limited (the tenant), a company owned by TM. The agreement is exhibited to the unchallenged witness statement of Ms Swaddle but was not put to any of the witnesses in cross-examination. I therefore do no more than note, and briefly comment upon, its contents. The property demised was the "raised shop, right hand side, 4 Waterloo Street, Newcastle" which I take to mean Unit 2 in this context. The term was 5 years from 1 January 2005 with a mutual break clause on four months written notice expiring at the end of the current year. There is no evidence that the break clause was exercised by either party. The rent was £5,200pa. The tenant agreed to use the property for the trade or business of a hot food takeaway only. There is no explanation in the

evidence of how SM could have been the landlord (unless in his capacity as legal owner of the freehold) and TM & S Construction Limited the tenant under such a tenancy agreement or why the tenant, a construction company, accepted the user clause. Ostensibly SM was receiving £5,200pa in respect of this letting but I cannot reconcile that receipt with his accounts for the year ending 31 December 2005 (either as income or as a reduction in the rent and rates payable) or with his tax returns.

131. The position regarding the leasehold tenure of Unit 2 is further clouded by the question of when it became vacant and of what happened to the 10 year lease between Lally Manufacturing and Farah Rahimi dated 12 December 1999. During the hearing Mr Denyer-Green handed in a document produced by Wallhead Boaden, chartered surveyors, dated 4 February 2004 which was headed "Report and opinion of damages pursuant to a claim by Mrs Farah Rahimi." The document was not complete but from the extracts available, the cross-examination of TM and further documents contained in the exhibits to Ms Swaddle's witness statement it appears that Ms Rahimi was excluded by TM no later than 27 February 2003 from her shop unit while grant works were undertaken by TM to the front of 4 W St. Ms Rahimi took action against TM which was finally settled in court in her favour at or around 18 February 2005 with an award to her of £5,000 plus costs and with the lease deemed to have ended on 1 January 2003.

132. The parties have confirmed subsequent to the hearing that the leases to SM and MM of Units 1 and 2 dated February 2004 and June 2006 were not registered despite the requirement to do so under the Land Registration Act 2002. In my opinion this supports the council's view that the leases were not genuine.

133. The factual matrix which forms the setting of the purported lettings of Unit 1 from TM to SM and MM in February 2004 and of Unit 2 to SM in June 2006 shows, when considered objectively, a farrago of mutually inconsistent family arrangements that indicate to me that these leases were not genuine contractual agreements and were not intended to create a binding landlord and tenant relationship. I think they are shams and are therefore of no effect. I do not rely upon these leases and I give them no weight.

134. The consequences of this conclusion are that SM's leasehold interest in 4 W St comprised the Lally lease only. SM's occupation of any part of 4 W St not demised under that lease, including his occupation of Units 1 and 2, was as TM's informal licensee. MM, insofar as he had a separate business (see below), occupied part of Unit 1 as TM's informal licensee.

Issue 5: multiple businesses

135. The claimants say there were three distinct businesses operating at the reference property: the Happy Chip run by SM and KM at 15 W St (Unit A); the Convenience Store run by MM at 1A S St; and Especially 4 You run by ShM and ZM at 15 W St (Unit B). TM's business, trading as the TMS Group, was that of a property investor with an investment portfolio that included the freehold of the reference property.

136. The acquiring authority deny the existence of three separate businesses and argue that the operations at the reference property comprised a single family undertaking.

137. There is no doubt about the existence of the Happy Chip fish and chip business. MM purchased the reference property in 1996 as a going concern and SM said that he took this over at or around 1997 and "ran it with my wife Kishwar and my brother Thariq and his wife Saiqa" until 1 January 2000 when "the family arrangement ceased and I ran the business with my wife from that date until 31 May 2001." TM said he leased 15 W St (Unit A) to SM on 1 June 2001.

138. Nor is there any doubt that at least some of the goods which MM said comprised his stock at the Convenience Store were sold at 15 W St (Unit A). There is photographic evidence showing such items for sale. MM said that he only traded from 1A S St as a separate Unit for a short while (four months) before closing the newly created entrance due to concerns about safety and security given the high value of the stock stored on site. MM said that he started trading on 1 March 2002, although I note that all eight of the invoices he adduces for the cost of building works to 1A S St are dated subsequently, the latest being dated 26 May 2003. MM explained that ultimately he intended to operate a kiosk type operation from 1A S St, with the kiosk window to be located at the site of the new entrance door.

139. There is no photographic evidence to support MM's claim that he traded independently from 1A S St. However the unsigned response to the council's requisition notice dated 7 June 2002 described 1A S St as a "retail shop" which is consistent with MM's version of events, although this response would have been completed by the claimants. The billing authority's rating records show that 15 W St was originally assessed as a single non-domestic hereditament (a shop) from 1990 until May 2001 when the hereditament was divided. 15 W St continued to be described as a shop for which SM was said to be the occupier, while the new assessment was described as 1 Sunderland Street: Store 1 - Hot Food Premises, for which MM was said to be the occupier. While this is independent evidence of a separate hereditament, the description of the two hereditaments is, according to the claimants' evidence, the wrong way around. It is not clear who instigated the alteration to the rating list.

140. Mr Denyer-Green relies upon the fact that MM and ShM were included in both the CPO Schedule and the Notice of Intended Vesting Declaration and the Declaration itself. That is hardly surprising since the council presumably relied upon the information given to them about ownership and occupation in the claimants' June 2002 response to the council's requisition notice. I do not consider that to be independent verification of the claimants' assertion that 1A S St was a separate shop.

141. The fact items were sold at 15 W St which MM said were part of his business does not prove that there was in fact a *separate* business to that of the Happy Chip. Mr Denyer-Green says that other witnesses, Ms Sweet and Mr Mason, gave evidence that they had seen these items for sale. In fact Ms Sweet said she could not recall seeing the items that had been put to her in cross-examination. They may have been there but they may not have been: she could not say either way. Mr Denyer-Green says that Mr Mason accepted that he had seen chocolates, crisps, milk, bread, cigarettes and odorisers for sale. My notes show that he thought the first two items were for sale but

not the others (nor herbal supplements or condoms which Mr Denyer-Green also suggested to him had been for sale). It was put to Mr Mason that the evidence showed that MM was running a business selling the above items. Mr Mason replied:

> "I did not see any sign of anything not associated with fish and chips. Bottles of coke but nothing substantial being sold."

142. Neither Mr Irvine nor Mr Reeve had seen or heard any reference to the separate clothes/party goods business (Especially 4 You) or to the Convenience Store, although neither had been inside the reference property while it was trading. Mr Irvine inspected the reference property on the valuation date and found none of the evidence he would have expected to see had 1A S St been used in connection with the Convenience Store business said to have been conducted there. Mr Irvine said he would "sometimes see racking, shelving or advertisements" in shops that had been stripped out but he could not recall seeing any of those items at the reference property; no marks on the walls or the floors and no sign of the Convenience Store having occupied the storeroom. Mr Irvine said that he could not be sure there was not a shop in 1A S St but he described the likelihood of the Convenience Store having operated from there as being "very low." Mr Reeve could not say that the Convenience Store was not conducted from the reference property but said that he had seen nothing to suggest that the operations there were anything other than a family-owned business.

143. Mr Mason was asked in cross-examination whether he accepted, on the evidence, that there was a clothing store operating at the reference property. He replied that he could not say there was. He had seen a rail with clothes on it "but that could have been employees' coats." He said there was no evidence that Especially 4 You or the Convenience Store was a business conducted at the premises: "I doubt it very much. I don't accept that it might have been. Very, very unlikely." In re-examination Mr Mason said he would have asked about anything else which was out of place in a fish and chip shop. There were "one or two bits and pieces but no clothes, no convenience store."

144. There is just one photograph in the trial bundle that shows a rail of coats (shown at bundles G (ShM)/36A and I/328). TM identified the photograph as having been taken on the ground floor of 1A S St. When this was shown to Mr Mason he said that:

> "I saw a coat rack. That looks like it. We did not take photos of that. It looked out of place in a fish and chip shop. I was told it had nothing to do with the business. I don't think it depicts accurately what was there when I was there. I distinctly recall the clothes rail."

145. TM's evidence on behalf of ShM was that Especially 4 You stored their stock in the basement (Unit B) with a display and sales area in the ground floor shop. The display area was identified in a sketch plan forming an exhibit to TM's witness statement (bundle B/36). But it is clear from a number of photographs (i.e. B/34, I/307, I/310, I/315 and I/320) that the area so identified was taken up with two amusement machines, microwave ovens, pizza box storage, a menu board and a wall-mounted television. There was no room for the display of Especially 4 You's goods, and no photograph shows these goods in situ. When this was put to TM in cross-examination he said, firstly, that the clothes were "hanging up on the walls" and then that they were "hanging off the ceiling" to the side of the frying range and above the doorway between the front and rear parts of Unit A on the ground floor of 15 W St. That, apparently, was also where the party items were kept:

"On a shelf above the door between the front and rear parts of Unit A." I am bound to say that I consider this part of TM's evidence to be fanciful. If clothes of the type described in the evidence and shown in the photograph at I/328 were hanging from the ceiling as suggested by TM they would partially obstruct not only the doorway between the two parts of Unit A but also the wall-mounted television which, presumably, served the customers. Not only that but the rack of clothes shown in that photograph comprises some two dozen jackets which would extend across the whole doorway. The suggested location would also place the clothes above and in close proximity to the frying range with the obvious consequence that such clothes would very soon begin to smell. I do not accept that any clothes were displayed as suggested by TM.

146. During my site inspection of 4 W St TM showed me an area on the first floor, next to the snooker hall, where several racks of clothes were kept together with various party items. I was told that these were the inventory of Especially 4 You listed at bundle G (ShM)/112 to 114 (albeit that Especially 4 You was said to have been extinguished some nine years previously). There was more stock at 4 W St than is shown in the photograph at bundle I/328.

147. Much time was spent in the hearing on the subject of cash tills and registers, and whether there were cash tills for each of the separate businesses for which claims were made. There was some photographic evidence to corroborate the claimants' evidence and which showed a cash register behind the frying range and underneath the wall display of items said to be MM's convenience store stock. This cash register is said by the claimants to be MM's point of sale.

148. Both SM and ShM are said to have used drawer tills, one at either end of the frying range. Various photographs were submitted in evidence but in my opinion they do not clearly show the presence of either drawer till. Mr Denyer-Green handed in a photograph on day six of the hearing, dated 27 December 2003, in which, he says, SM's drawer till can be seen in the foreground. No explanation was given why this photograph had not been disclosed earlier and, at best, I find it inconclusive on the point since the relevant part of the photograph is over-exposed and lacks detail. In my opinion none of the photographic evidence supports the claim that a second drawer till, for use by Especially 4 You, was located at the far end of the frying range near the door between the front and rear parts of Unit A. On my site visit to 4 W St I was shown other cash tills but there is nothing to show that these were used at the reference property.

149. SM said that he used "a calculator with a till roll" to record his transactions. He said that this showed entries for hot food and other categories. The till rolls were then sent to his accountant, Mr Derek Newton. In his expert accountant's report, Mr Nedas, acting for SM, gave as a source of his information "a copy of the Sage Nominal Ledger of HCLG for the years ended 31 December 2000 to 31 December 2008 inclusive." There is no evidence that SM, did, or could, prepare such a nominal ledger which I presume was prepared by Mr Newton, to whom the till rolls were sent. (TM said that the totals from the till roll were entered daily into a book. He did not have this book and did not know where it was.)

150. Neither TM (on behalf of ShM) nor MM gave evidence about the cash tills in use for Especially 4 You and the Convenience Store. Their expert accountant, Mr Peter Smith, said that he

relied upon the accounts of the Convenience Store and the accounts and business plan of Especially 4 You. He makes no reference to a nominal ledger.

151. During cross-examination MM explained that before he commenced trading as the Convenience Store at 1A S St he had trialled the sale of goods "from points of sale in the Happy Chip." Contrary to the main thrust of his evidence, which was that he commenced trading as the Convenience Store on 1 March 2002, MM said in cross-examination that he had traded as the Convenience Store in 2001 but that there were no accounts because it was "just a trial period". He could not remember why, under these circumstances, there was no opening stock shown in his first set of accounts for the year ending 28 February 2003. Before MM started trialling the Convenience Store he said that both the Happy Chip and Especially 4 You had trialled the sale of similar merchandise: "A few months for the Happy Chip and a few months at Especially 4 You." MM was asked why, if this business was profitable, SM and ShM "let you muscle in on it." MM replied that ShM wanted to sell jewellery and clothes while SM was just interested in the sale of hot food. Besides, ShM could not afford to buy the amount of stock required to maintain and grow sales. MM said he opened the Convenience Store for three to four months at 1A S St before closing its separate entrance and just selling his merchandise from a point of sale within the Happy Chip. He would, he says, eventually have opened a kiosk at 1A S St but this did not happen because of the compulsory purchase. Instead he moved his business to Unit 1 at 4 W St together with SM and the Happy Chip. After MM extinguished his business SM continued to sell many of the Convenience Store's product lines from his new premises at Unit 2 at 4 W St.

152. Mr Fraser referred to various correspondence and representations written and made by or on behalf of the claimants which he said undermined their contention that there were three separate businesses. He also referred to the "tortuous record" of the claimants' businesses at 4 W St and to several letters and representations made to the local planning authority and the planning inspectorate which gave the misleading impression that 4 W St was a convenience store and/or that such a store existed at that property independent of the Happy Chip takeaway. Despite the claimants accentuating the convenience store use of 4 W St the planning inspector concluded that this was "little more than a minor ancillary to the primary Class A5 use." Mr Fraser said that *a fortiori* this was also the case at the reference property. TM said that "the obvious place for relocation" of the three businesses was the unoccupied ground floor and basement of 4 W St. That would have maintained the claimed complementary mix of uses and the sharing of staff. Mr Fraser submitted that the fact that Especially 4 You did not move to 4 W St showed that it was a fictitious business. He said it made no sense for Especially 4 You to move to Leazes Park Road more than two years after the reference property had been acquired rather than move to 4 W St immediately.

153. Mr Denyer-Green adopted what he described as a sequential approach to the evidence which he said showed that the Convenience Store and Especially 4 You existed as separate businesses. This approach comprised a reprise of the photographic and witness evidence about the sale from the reference property of the merchandise said to be the stock of the Convenience Store; the photograph of the rack of clothes; reference to notices in which separate businesses and/or lessees are referred to; 1A S St being separately rated; the existence of an outside door to 1A S St; business accounts; tax returns; invoices, plans and diagrams; and a council survey that concluded that 21% of customers leaving 4 W St did so holding "convenience goods".

154. When one looks at the evidence in the round the picture that emerges is of a single family business selling a range of goods from the reference property working together under a series of informal, usually verbal, arrangements. There is not a clear historical or contemporary division into three distinct businesses. The Happy Chip and Especially 4 You are run as family partnerships and are, at least in part, funded by family loans. This familial business approach is exemplified in the staffing arrangements of the Happy Chip, the Convenience Store and Especially 4 You. MM said that he had no staff and that he relied upon the staff of the Happy Chip to sell his merchandise from the point of sale in 15 W St. TM confirmed this arrangement and said, somewhat implausibly in my opinion, that payment for composite transactions – where hot food and Convenience Store produce were bought at the same time – were separated and paid into the respective cash tills by Happy Chip staff. In return MM helped SM run the Happy Chip by, for instance, driving SM's staff home in the early morning and buying fish from the quay at North Shields. MM said that "the store was mainly operated by myself" with help from his family and, at busy seasonal times, by casual staff. But I note that there is no entry for wages and salaries in MM's accounts until the year ending 28 February 2005, his third year of trading as the Convenience Store. By contrast SM said in his witness statement that "each business was responsible for their own staffing arrangements", although he acknowledged that he had kept no staff records.

155. In my opinion the reference property and subsequently 4 W St were used first and foremost for the business of the Happy Chip. That business sold merchandise other than hot food takeaways and which found a ready market with young people generally and nightclubbers in particular. It is said that MM sought to develop this side of the business independently but the Convenience Store, if it had a separate existence at all, was not a distinct trading entity from the Happy Chip upon which it relied for its sole point of sale and its staff, and which continued to sell such merchandise even after the claimed extinguishment of the Convenience Store.

156. The objective evidence for the existence of Especially 4 You as a separate business is still less convincing. It rests mainly on one photograph of a rail of clothes stored in a back room. TM's testimony during cross-examination was, as I have stated earlier, fanciful. There were no photographs of a separate till or of the merchandise on display for sale. The photographic evidence shows that such merchandise could not have been displayed in the area of 15 W St where TM said it was located. The business, which was said to have started in either 1997 or 1998, only has accounts for one and a half years commencing with the (full) year ending 31 May 2003. It is claimed that Especially 4 You relocated two years after the reference property was acquired but that it closed almost immediately. As with the Convenience Store it seems to me that the party paraphernalia forming part of Especially 4 You's stock was marketed specifically to young nightclubbers and that this was an ancillary activity to the main hot food takeaway use. I do not accept that clothes were either displayed in or sold from the front of Unit A at 15 W St, namely from the fish and chip shop. There is no evidence to corroborate the claimants' evidence on this point and there is no breakdown of the type of goods sold contained in the accounts. In my opinion there was only one business carried on from the reference property and from 4 W St, namely the happy Chip. This primarily sold hot food takeaways but also a range of ancillary, mainly non-food, items.

Issue 6: accounts

157. The acquiring authority say that the claimants' submitted accounts are incomplete, inconsistent and at variance with the claimants' evidence. An analysis of TM's fixed assets and of the income from his portfolio of investment properties cannot be reconciled with the accounts and Mr Fraser submits that this raises serious doubts about whether the accounts are genuine.

158. Mr Fraser says that there are similar discrepancies with SM's accounts which are incomplete and lacking proper explanation of missing information such as that for the previous year's trading figures in the 1998 and 2000 accounts. The acquiring authority also argue that the inclusion of the figure of £19,564 for rent and rates in 1998 cannot be correct since there was no lease of 15 W St at that time.

159. The acquiring authority challenge the addition in SM's balance sheet of £100,000 as the cost of fixtures and fittings in the year ending 31 December 2000 as well as the figure shown in the 2001 accounts for rent and rates. Finally, the acquiring authority say that SM's accounts fail to reflect the nature of the claimed partnership agreement between TM and SM dated 1 June 2001.

160. That there are discrepancies in the accounts is not disputed by the claimants. They say that "discrepancies, omissions and missing documents" should be expected in such small unsophisticated businesses; that they should be put to the relevant experts for explanation and that Mr Newton, the accountant who prepared them (but who is not being called to give evidence) may have been incompetent. Mr Denyer-Green said that one "would not expect to find the same rigorous standards in the preparation of accounts by a small local accountant [Mr Newton] as one might expect of a large firm of accountants…" The fact that the HCLG accounts did not comply in all particulars with the partnership agreement between TM and SM may have meant that there were breaches of that agreement, but Mr Denyer-Green submitted "that raises doubts about the competence of the accountant [Mr Newton] rather than the genuineness of the accounts themselves."

161. Mr Denyer-Green explained that the addition of £100,000 of fixtures and fittings in the accounts of the HCLG in the year ending 31 December 2000 was represented by £40,000 worth of expenditure at 15 W St and £60,000 of expenditure at 4 W St, such expenditure being referred to in the witness statements of TM and SM.

162. The accounts for TM (trading as the TMS Group), SM (trading with KM as the HCLG), MM (trading as the Convenience Store) and ShM (shown in the accounts as trading with SM, TM and ZM as "The Happy Chip t/a Especially 4 You") were all prepared by Mr Derek Newton BA, ACPA. The accountant's signed certificate in each case reads:

> "In accordance with instructions given to us, we have prepared, without carrying out an audit, the trading and profit and loss account and Balance Sheet from your accounting records and from information and explanations supplied to us."

163. Each year's balance sheet for the accounts of SM and ShM has been signed by them next to the statement:

> "I confirm that we have made available all records and information required for the preparation of these accounts."

Each year's balance sheet of the accounts for the Convenience Store has been signed by MM but without the inclusion of the above declaration. The balance sheets in the accounts of the TMS Group have not been signed by TM and the above declaration is not included.

164. The discrepancies in the accounts identified by the acquiring authority (with one exception) have not been explained by the claimants. Rather they have been excused by impugning their accountant and blaming their "comparatively unsophisticated" business approach. They urge that such explanation be left to the expert accountants. But those experts have relied upon the accounts prepared by Mr Newton as a primary source of information and there is no suggestion that either of the claimants' accountancy experts (Mr Nedas and Mr Smith) has checked, verified, investigated or audited Mr Newton's accounts or the information upon which they are based. TM said that Mr Nedas was acting on instructions from the claimants using figures provided by them and that Mr Nedas had no independent knowledge of the business. Those accounts, it seems to me, have been accepted at face value by the experts and I cannot see how the discrepancies which they undoubtedly contain can be satisfactorily explained by the experts rather than by Mr Newton. To give an example, Mr Denyer-Green submits that the claimants have not yet been able to ask their expert Mr Nedas why there is no reference in SM's accounts to the previous year's figures in the accounts for 2000, or to a figure for opening stock. He says "one possible explanation is that JN [Mr Nedas] may say that if Derek Newton did not have the previous year's accounts, he would not have had the figures." That does not seem to me to take the matter any further forward; what matters is to establish whether Mr Newton *did* have the previous year's accounts and the only person who can answer that is Mr Newton.

165. Mr Denyer-Green twice impugns the competence and professionalism of Mr Newton (the claimants' own accountant) in the passages I have quoted above from Mr Denyer-Green's closing submissions (see paragraph 160). There is no evidence to support these comments and Mr Newton has had no opportunity to defend his reputation with respect to them.

166. Mr Newton prepared the accounts using the information provided to him by the claimants (as SM and ShM confirmed by countersigning the accounts). It seems to me that the discrepancies contained in those accounts are as likely to be attributable to the accuracy and completeness of that information as it is to any incompetence or lack of diligence on the part of Mr Newton. In either event the accounts are not reliable.

167. The discrepancies identified by the acquiring authority are not minor and they are not challenged in terms; they go to the heart of many of the issues involved in these references, particularly the credibility of the claimants, whether any rent was paid by SM, MM and ShM and the sales and profitability of the business. The claimants were coy about the accounts when they were cross-examined about them. TM was asked about his drawings from the profits of Especially 4 You. His drawings for the year ending 31 May 2003 were shown in the partners' capital accounts as £1,059. That amount was not shown in TM's tax returns. TM denied having drawn out any money but when asked whether the accounts were therefore false he replied that he did not know. TM was

asked how the sales ledger was prepared at the Happy Chip to which he answered "the accountant did that. I do not know."

168. TM was also cross-examined about anomalies in the balance sheets of his TMS Group accounts. The fixed asset schedule showed an addition of £450,000 for freehold property in the year ending 31 July 2002 (the first set of accounts that have been provided). It is not clear whether the accounts for the "TMS Group" were being prepared for the first time, although this seems likely given that there are no comparative figures for the year ending 31 July 2001. But TM said in cross-examination that he had six other commercial and residential properties in 2000. Their accounting treatment was unexplained and no evidence was adduced in respect of TM's business before the 2002 accounting year. It is not clear which properties were included in the "addition" of £450,000 shown in the 2002 accounts but it did not represent the totality of TM's freehold ownership at that time bearing in mind that TM had acquired 4 W St for £420,000 on 20 September 2000 and, TM says, the reference property for £250,000 in March 2001. No further additions or disposals of freehold property are shown in TM's accounts up to and including the year ending 31 December 2008, and yet the reference property was compulsorily acquired in 2004. There is no adjustment to the fixed assets to reflect this disposal. Nor is there any reference to it in TM's tax returns. Similarly a property known as Kensington Lodge was shown in TM's tax returns for the 2005/06 year as having been sold on 22 September 2005 for £203,833 but no adjustment to the fixed assets schedule is shown in the equivalent year's (or any other) accounts. TM's answers to Mr Fraser's questions about his accounts were not helpful, e.g. "I am not an accountant"; "I don't understand the figures"; "I don't know accounts"; and "I don't know".

169. TM gave similar answers when asked about why no opening stock was shown in the accounts of the HCLG for the year ending 31 December 2001 (bearing in mind that SM had been trading before then) or why SM's accounts did not reflect the partnership between TM and SM after its formation on 1 June 2001.

170. When SM was cross-examined about the accounts of the HCLG his typical responses were: "I don't understand it"; I don't know"; "I can't comment"; "I can't remember"; "I can't explain it" and "I am not an accountant".

171. I gained no assistance from the claimant's uninformative responses when asked about the makeup and origin of their accounts. I appreciate that the claimants may not understand the format of the accounts, but it is wholly unsatisfactory for the claimants to evade questions through protestations of ignorance about the information upon which the accounts are based when they provided such information to their accountant in the first place and where they did not call their accountant to explain the discrepancies between the accounts and their own evidence.

172. I referred above to there being one exception to the lack of any explanation by the claimants of the deficiencies in the accounts identified by the acquiring authority. That explanation relates to the entry of £100,000 as an addition to the fixtures and fittings of the Happy Chip business in the year ending 31 December 2000. Mr Denyer-Green says that this comprises expenditure of £40,000 and £60,000 on 15 W St and 4 W St respectively. SM refers to these amounts in his witness statement. I note two points about the work done to 4 W St (the snooker club premises). Firstly, SM said that

"the works were done by my brother Thariq's construction company, TM & S Construction Limited." Secondly, in 2002, when the offer of grant-funding was made to TM by the Grainger Town Partnership, SM said "the snooker club was nearly completed and ready to open." I am at a loss to understand how TM & S Construction Limited could have done the works in the year ending 31 December 2000 when that company was not incorporated until December 2002 and also how the total cost of the works could have been charged in that financial year when they were not completed until 2002 (there are no invoices or other evidence to support these payments).

173. I have offered an alternative explanation of this entry at paragraph 101 above.

174. I accept that the acquiring authority have accurately identified discrepancies in the claimants' accounts. These are not exhaustive; see, for instance, my query about the entry shown in SM's accounts for bank charges and interest at paragraph 24 above. The accounts are not a reliable starting point upon which to base expert accountancy evidence. In my opinion Mr Newton was in the best position to explain these discrepancies but he was not called as a witness by the claimants.

Issue 7: tax returns

175. Tax returns were provided by TM for the five years ending 5 April 2003 to 2007; by SM for the nine years ending 5 April 2000 to 2008; and by MM for the four years ending 5 April 2002 to 2005. There were no tax returns for ShM.

176. None of TM's tax returns were signed or dated copies. Signed and dated copies of the last pages of SM's tax returns for the years ending 5 April 2000 to 5 April 2005 (but not for the following three years) were provided by the claimants on 16 December 2014. Signed and dated copies of the last pages of MM's tax returns were also provided by the claimants on 16 December 2014.

177. Mr Fraser submitted that the tax returns were incomplete and inconsistent with the accounts. He said that there was no evidence to substantiate the returns or to establish that they were genuine copies. Importantly, there was no evidence that the sums said to be due as tax were ever paid. He considered it to be "frankly incredible" for the claimants to suggest that there was no documentary evidence of payment – no reminders from HMRC, no receipts, no correspondence of any kind. It was also incredible that given the amount of tax due it would have been paid in cash. For example, SM's tax return for the year ending 5 April 2001 showed tax due of over £101,000 payable in two equal instalments. Mr Fraser gave several examples of the inconsistencies between SM and TM's accounts and their tax returns.

178. Mr Denyer-Green submitted that an inability to show proof of payment of tax up to 10 years ago did not of itself call into question the genuineness of the copies of the tax returns that had been disclosed. SM was an unsophisticated businessman who unsurprisingly was unable to explain the discrepancies identified by the acquiring authority. Likewise TM relied upon his accountant, Mr Newton, to prepare his tax returns. Mr Denyer-Green said that the fact that the gross rents and income were reconcilable between the accounts and the tax returns "strongly points to the

genuineness" of both. Specific queries on the tax returns would have to be put to Mr Nedas, TM's accountancy expert. That there were "only relatively few discrepancies" did not support a submission that the tax returns were not genuine.

179. I share the acquiring authority's concern that there is no evidence that the tax said to be owing was actually paid. It is true that payment of tax was due many years ago, but the valuation date was 29 January 2004 at which time the claimants must have appreciated the importance of keeping detailed and accurate records of any payment that related to their claim. They have been professionally represented throughout. I find it inconceivable that SM, if indeed he made payments of over £50,000 in cash or otherwise (he said in cross-examination that he could not remember how he had paid the tax), would not have obtained a receipt of payment and yet there is nothing to show that any such payments were made. In my opinion the absence of any proof of payment cannot reasonably be dismissed as simply a consequence of the lapse of time.

180. There is one piece of evidence in the bundle which supports the claim that MM's tax returns were submitted as shown. In his supplemental witness statement MM produced copies of a self-assessment tax calculation issued by HMRC which showed tax and NIC in agreement with MM's tax returns, although that is not proof of payment.

181. I note that none of the claimants has produced any tax returns before SM's returns for the fiscal year ending 5 April 2000. TM does not produce anything before 5 April 2003. Both SM and TM were trading before those dates. MM's records begin in the year ending 5 April 2002 and Mr Denyer-Green explains this by saying that the evidence was that MM did not commence trading as the Convenience Store until 1 March 2002, although that does not explain the income MM made before that while he was trialling the concept (see paragraphs 151 above and 192 below).

182. SM's first tax return, for the fiscal year ending 5 April 2000, was produced by reference to the financial accounts for the year ending 31 December 2000. The gross and net profit shown on tax return form page SE2 correspond to the figures shown in the accounts. But the tax return states that the date of commencement of the Happy Chip business was 1 January 2000. Consequently the figures on the tax return have been adjusted on a pro-rata basis to give a taxable profit of £69,951 for the period 1 January to 5 April 2000. But the Happy Chip business started well before 1 January 2000. SM took over the business "in or about 1997". The accounts for the year ending 31 December 1998 were belatedly produced, in part, on 22 January 2015. The accounts for the year ending 31 December 1999 have not been produced. The claimants do not deny that the Happy Chip business was operating during that year. But the tax returns ignore any profits made during the period 6 April to 31 December 1999. That cannot be right. I also note that the accounts for the year ending 31 December 2000 show the opening stock as nil and give no comparative trading information for the previous year (1999). The accounts and the tax returns, both of which were prepared by Mr Newton, are consistent with the assumption that the business started on 1 January 2000. The claimants have offered no explanation of why this should be so and, it seems to me, this is another example of where evidence from Mr Newton about what information he was given by the claimants would have assisted the Tribunal. This is particularly important given the reliance the claimants place upon the year 2000 accounts in their expert accountancy evidence, treating it as the benchmark for comparison with the pattern of trade in the following years.

183. There are more problems with SM's tax returns in later years. The supplementary self employment ("SE") tax return pages are missing for the fiscal year ending 5 April 2001. Pages SE3 and SE4 were included in the trial bundle but the claimants say that these were misfiled and relate to the fiscal year ending 5 April 2002 not 5 April 2001. Since the basis period for the 2002 tax year began on 1 January 2001 and ended on 31 December 2001, it appears that the basis period for the 2001 tax year must have begun on 6 April 2000 and ended on 31 December 2000, the pro rata taxable profit for which is £196,739.

184. Table 1 below shows the date of the signature of the tax returns and that of the accounts for the fiscal years ending 5 April 2000 to 2006 based upon my understanding of the claimants' evidence.

TABLE 1: DATES OF SIGNATURE AS SHOWN IN THE EVIDENCE FOR THE HAPPY CHIP

FISCAL YEAR ENDING:	THE ACCOUNTS UPON WHICH THE TAX RETURNS ARE BASED:	DATE ACCOUNTS SIGNED:	DATE TAX RETURNS SIGNED:
5.4.00	Y/E 31.12.00 (pro rata)	31.5.01	15.6.01
5.4.01	Y/E 31.12.00 (pro rata)	31.5.01	02.6.02
5.4.02	Y/E 31.12.01	27.2.02	06.6.03
5.4.03	Y/E 31.12.02	31.5.03	28.1.05
5.4.04	Y/E 31.12.03	28.1.05	03.2.05
5.4.05	Y/E 31.12.04	28.1.05	30.6.06
5.4.06	Y/E 31.12.05	25.6.06	NOT KNOWN

185. In order to avoid a fine SM needed to complete the tax returns by 31 January in the year following the end of the fiscal year in question. Apart from the 2000 tax year (when the accounts were not signed until 31 May 2001) in every subsequent year for which information was provided the accounts were signed before a fine became due. And yet SM was late in submitting the tax returns every year (albeit it that he was only three days late in 2005). There was no explanation of why SM was consistently late in submitting his tax returns, sometimes substantially so. For instance the tax returns for the fiscal year ending April 2003 were not submitted until 12 months after they were due.

186. It is of course possible that there are explanations for the anomalies that I have identified and the others raised by Mr Fraser; for instance, how could the accounts for the year ending 31 December 2004 have been produced within a month? In my opinion these matters could have been clarified by receiving evidence from Mr Newton who prepared both the tax returns and the accounts upon which they are based.

187. TM gave no explanation why his earliest tax return was that for the fiscal year ending 5 April 2003. None of the five tax returns that he adduces are signed and four of them do not correspond with the equivalent accounts. Mr Denyer-Green submits that such discrepancies should be put to Mr Nedas to explain in chief but, as I have said earlier, Mr Nedas relies upon the accounts prepared by Mr Newton. Mr Nedas does not appear to have been given a copy of TM's tax returns. I reiterate that the best person to have explained these discrepancies was Mr Newton.

188. TM's tax return for the fiscal year ending 5 April 2003 states that the rents and other income from land and property was £91,212, which is the figure shown in his accounts for the year ending 31 July 2002. But in his tax returns he gives his total expenses as £86,392 (all of which is described as "other expenses") whereas his accounts give a total figure for "overheads" of £52,213. Mr Denyer-Green submits that the coincidence of the income between that shown in the tax returns and the accounts "strongly points to the genuineness" of both. He says of the discrepancy that I have identified that "the treatment of deductions and expenses in the tax return may differ from the accounts". That may be so, but there is no evidence to support this submission and it does not apply to other years, e.g. the fiscal year ending 5 April 2006, where the accounts and the tax return contain the same figure for expenses/overheads.

189. TM's 2004 tax return is apparently based on the accounts for the year ending 31 July 2003 but the figure for income in the tax return is £6,500 higher than that shown in the accounts. The overheads figure of £61,535 is included in the tax return as "other expenses" but in addition there are further expenses deducted totalling £17,873. Some of these expenses seem to duplicate items already included in the figure for overheads, e.g. rent and rates; repairs and legal costs.

190. TM changed his accountancy year twice during 2004. There are accounts for the year ending 28 February 2004 and also for the year ending 31 December 2004. The 2005 tax return only includes the rental income and expenses shown in the accounts for the year ending 31 December 2004 which is only a period of 10 months.

191. TM's 2006 tax return accurately reflects the rental income and overhead figures contained in his accounts for the year ending 31 December 2005 but the 2007 tax return shows a marginally higher income (£610) than that shown in the 2006 accounts.

192. MM's tax returns are generally consistent with the submitted accounts although the 2003 tax returns used the figures from the accounts for the year ending 28 February 2003 which, presumably, also formed the basis of the 2002 tax returns since these returns were for the period 1 March 2002 to 5 April 2002. According to MM the Convenience Store did not trade before 1 March 2002 so the tax returns could only have been based upon income received during the year ending 28 February 2003. If that is so then the income of £6,928 in the 2002 tax return has been double counted in the 2003 tax return. Alternatively the figure of £6,928 may represent income received by MM before 1 March 2002 when he was trialling the Convenience Store concept. But this is specifically denied in Mr Denyer-Green's closing submissions.

193. For the years 2003 to 2005 the figure for general administrative expenses is consistently £520 higher in the tax returns than the equivalent figure in the accounts.

194. I would make the following general comments on the tax returns of SM, TM and MM:

(i) None of the claimants shows any income whatsoever from savings or investments;

(ii) All three of the claimants state on their tax returns that they are single, whereas both TM and SM refer to their wives in their witness statements;

(iii) Both TM and SM give their address as 5 York Street, Newcastle on their tax returns. That is TM's address; in his witness statement SM says that he lives at 10 York Street. On all of his tax returns SM is named on the first page as Sanjit rather than Sajit;

(iv) Neither TM nor SM declared that they were in a partnership and there is nothing in TM's tax returns to indicate that he received a share in the income of either the Happy Chip or Especially 4 You. That throws doubt on whether the partnership agreement between SM and TM dated 1 June 2001 was genuine;

(v) SM states on his tax returns that he does not have a bank or building society account. That is consistent with his evidence. TM states that he has no bank or building society account in his 2006 and 2007 tax returns. That is contrary to his evidence.

195. I do not consider the tax returns to be a reliable source of information because of the unexplained discrepancies that they contain and the lack of any evidence that the tax was actually paid. These discrepancies might have been satisfactorily explained had Mr Newton been called by the claimants to give evidence about how he prepared both the accounts and the tax returns.

Issue 8: surrounding circumstances

196. The claimants' case on this issue is that but for the CPO and the scheme they would have continued to benefit from significant local trade from nightclubs and bars and the presence of the city's gay nightlife in the area known as the "Pink Triangle". As a result of the CPO the claimants argue that such trade was lost as these users relocated elsewhere. In the "scheme world" there was an increase in the amount of residential property in the vicinity of 4 W St which strengthened opposition to the late night operation of the Happy Chip and the Convenience Store at Unit 1. Extended hours of operation were said to be essential to the success of the business which the claimant said had previously enjoyed a monopoly when located in the reference property.

197. Planning permission for the change of use of 4 W St from Class B8 to mixed A1 (retail) and A3 (hot food takeaway) was granted subject to conditions on 22 July 2004. But instead of the unrestricted opening hours that the claimants had enjoyed at the reference property, the hours of opening were limited to midnight (condition No.2). TM appealed unsuccessfully against this condition. In November 2004 the council served an enforcement notice alleging that the material change of use of Unit 1 to mixed A1/A3 use had been undertaken without planning permission, since it was not done in accordance with the conditions attached either to the 2004 planning permission or

an earlier planning permission granted in 2001. TM appealed unsuccessfully against the enforcement notice.

198. In disputing the claimants' submissions on this issue as being unsupported by the evidence, the acquiring authority made several references to the representations that TM had made in respect of his March 2004 planning application and the two subsequent planning appeals. Those representations, which had been made on TM's behalf by Dickinson Dees, a well known firm of solicitors, had emphasised that, far from being much reduced as TM now suggested, the nightlife in the vicinity of 4 W St remained buoyant. Thus the claimants said "this area of town has a thriving night time economy throughout the evening and the early hours" and was "a lively part of town" with "several late opening hot food takeaway businesses currently operating in the area"; and "there is still a substantial level of leisure and commercial use in the area of the appeal site."

199. The planning inspectors who heard the appeals against condition No.2 and the enforcement notice expressed similar views. The planning inspector in the former appeal said that despite the area undergoing major redevelopment and regeneration it "nevertheless maintains a lively atmosphere, including a vibrant evening economy based on the many restaurants, bars, clubs and other leisure venues in the locality". The planning inspector in the enforcement notice appeal said "the appeal premises act as an attraction to those partaking of late night entertainment, drinking and eating in the locality…".

200. These statements were reflected in a number of sales brochures of 4 W St produced for the claimants in March and December 2004. These emphasise the continuing vitality of the area and its proximity to buoyant night life. The redevelopment of the area was marketed as a positive factor.

201. Mr Fraser submitted that the claimants' statements made at the time (2004) belied their argument now that the area had been significantly altered and their business adversely affected by closures and other changes related to the CPO. Those statements "were completely inconsistent with the case now made by the claimants."

202. The claimants relied upon two pedestrian surveys undertaken by Mr Paul Lynn, a chartered town planner, in November 2002 and December 2004. Mr Fraser submitted that TM's evidence on these surveys was contradictory and further undermined his credibility and reliability as a witness. Mr Lynn said in his report on the second survey that it was "not my brief" to make comparisons between the two surveys which, in any event, and as TM accepted in cross-examination, had very little overlap (one hour) in the hours over which they were conducted. The surveys measured different things – one counted customers, the other did not – and seemed to use different criteria for inclusion in the count. Mr Fraser said that the 2004 count, and counts undertaken by the council, confirmed the continuing presence of a substantial night time trade, contrary to the claimants' case.

203. More support for this conclusion, said Mr Fraser, came from the (partial) report from Wallhead and Boaden that had belatedly been disclosed by the claimants on day five of the hearing. This report was prepared for Mrs Rahimi in connection with her dispute with the claimants about her alleged eviction from 4 W St. The report, dated 4 February 2004, stated:

> "Undoubtedly, the general locality was improving at the time of the eviction [January 2003] with a consequential rise in the rental values. This has taken effect over the last 12 months, primarily due to the input of the Grainger Town Project in improving the quality of buildings…"

There was "a desire by traders to remain in the locality as there is a belief that the area is improving significantly."

204. Mr Fraser dismissed the claimants' suggestion that they had enjoyed a monopoly trading position at the reference property. TM had identified six other premises trading in food similar to the Happy Chip, all of which sold takeaways and at least four of which traded late (until 05:00). All these businesses competed with the reference property for both night time and day time trade. If the claimants did have a monopoly it would have made no sense to open a fish and chip restaurant and café at 4 W St. To do so would have cannibalised the claimants' existing trade.

205. Mr Fraser also made two general points:

(i) The claimants' dependence on late night trade from nightclubs and bars made their business inherently vulnerable to changes in fashion; nightclubs and bars came and went and that was a business risk independent of the CPO.

(ii) Under the Licensing Act 2003 the provision of late night refreshment (the supply of hot food or hot drink to the public, for consumption on or off the premises, between 11.00pm and 5.00am) was a licensable activity requiring a premises license. The Happy Chip had its licence revoked due to repeated and serious failures on the part of the claimants and those for whom they were responsible. Such revocation, said Mr Fraser, was not caused by the CPO and again emphasised the inherent risks in this type of business.

206. In reply, Mr Denyer-Green said that these general matters did not affect the claimants' case on this issue, but might go to the measurement of business losses.

207. The claimants intended to open up a fish and chip restaurant at 4 W St, providing a facility to sit down and have a meal indoors, while maintaining the takeaway fish and chip shop at the reference property. Mr Denyer-Green said the proposed restaurant would have complemented the takeaway, not competed against it and cannibalised its trade. Such a restaurant would have given the claimants the monopoly of fish and chip trade in the locality.

208. Mr Denyer-Green said the council had overlooked the key fact that as a result of the CPO the immediate area in Waterloo Street had been substantially redeveloped. It was the "funnelling effect" that the previous layout and environs of Waterloo Street had in channelling people past the reference property that had been so beneficial for the claimants' business. It was the pedestrian traffic in Waterloo Street that was crucial; that there may have been continued night life elsewhere and nearby, such as in Westmorland Road, was not to the point. The CPO had reduced the number of people walking along Waterloo Street and had therefore adversely affected trade at the reference property and latterly at 4 W St. Mr Denyer-Green pointed out that the report from Wallhead and Boaden

relied upon by Mr Fraser had in fact referred to an exceptional increase in rental value for a property in Westmorland Road arising from the displacement of businesses from Waterloo Street due to the CPO. Such moves had depleted business in Waterloo Street because there were no longer so many passers by.

209. Mr Denyer-Green accepted that no conclusions about changes in footfall could be drawn from the two pedestrian counts undertaken in 2002 and 2004. I think that he was right to make that concession and I do not gain assistance from those surveys or give them weight for the reasons given by Mr Fraser and accepted by TM in cross-examination. But I think Mr Fraser was wrong to criticise TM as having been "entirely contradictory" in what he said about the surveys and "apparently saying whatever he thinks might assist his claim irrespective of whether the facts support the contention."

210. Mr Fraser said that in paragraph 11.11 of TM's witness statement "TM claims … that comparison of the two surveys enables one to compare the reduction in the number of people in the street compared to the numbers prior to the closure of the relevant clubs and bars." That paragraph makes no such comparison. It only refers in terms to the survey carried out on "Saturday 2nd November 2002… which shows the reduction in the number of people in Waterloo Street compared to the numbers in the street prior to the closure of Mims Bar, the Marlborough Social Club and the three clubs in Alfred Wilson House." TM says these clubs all closed before, or during, 2002. The 2002 survey is exhibited at pages 358 and 359 of bundle B, where it is reproduced as an appendix to the later 2004 survey. In my opinion paragraph 11.11 is merely an assertion that the number of people in Waterloo Street in 2002 was less than that before the named clubs were closed. But there is no comparative earlier survey to prove this assertion. Mr Fraser goes on to criticise TM because he "for some reason only produces the counts for 2002." In my opinion that is consistent with what I think TM was trying to do in paragraph 11.11. He only referred to the 2002 survey because that was the only one which was relevant to the point he was making in that paragraph. During cross-examination TM said he was not making a comparison between the two surveys but was "trying to show [the number of] pedestrians at the time."

211. I am satisfied that after the CPO had been implemented there was still a busy night life in the vicinity of 4 W St. The evidence supports that conclusion and had there not been a continued substantial night time activity it would have made no sense for the claimants to pursue later opening hours for Unit 1 so vigorously. But in my opinion the essential and immediate character of the area did change. Several nightclubs and bars in Waterloo Street itself had closed or relocated and the "funnelling effect" referred to by Mr Denyer-Green with its suggestion of pedestrian traffic being directed past the reference property no longer exists.

212. There was new residential development which, together with the existing residents, increased the pressure for retaining restricted opening hours at the relocated Happy Chip at Unit 1 at 4 W St. But I accept Mr Atkins' evidence that the CPO did not alter whether policy H2 of the unitary development plan applied when considering whether extended opening hours would be acceptable in this location and that the increase in residential units resulting from the scheme did not necessarily make such extended hours more difficult to achieve. Residential accommodation was already in close proximity to Unit 1 at 4 W St irrespective of the CPO.

213. The Happy Chip did not have a local monopoly of hot food takeaways and it did not just sell fish and chips. But its local monopoly of fish and chip sales is not challenged in terms by the council. It continues to have such a monopoly in its new location at Unit 2 at 4 W St.

214. The relevance of the change in circumstances following the CPO is considered in detail in issue 12 (shadow period losses) below.

Issue 9: the scheme

215. I confine myself in this issue to the identification of the extent of the scheme.

216. The question of the extent of the scheme is relevant to the statutory disregards required to be made under section 6 and Schedule 1 and section 9 of the Land Compensation Act 1961 ("the 1961 Act"); to the *Pointe Gourde* principle; and to the assessment of compensation under section 5 rule (6) of the 1961 Act.

217. I deal with the last of these matters below under issue 12 (shadow period losses).

Legal Principles

218. In *Potter v London Borough of Hillingdon* [2010] UKUT 212 (LC) the Tribunal, the President, George Bartlett QC, and Mr P R Francis FRICS said at [73]:

> "The House of Lords decision in [*Transport for London v Spirerose Limited* [2009] 1 WLR 1797] is a reminder to practitioners and those deciding claims for compensation for compulsory purchase of land that valuation for this purpose is to be made by applying the provisions that are contained in the Land Compensation Act 1961…. The acquiring authority's approach was to take an initial leap into the no-scheme world and to proceed from there….. applying the *Pointe Gourde* rule, compensation was to be assessed at the value the land would have had if the scheme had not existed. We think that in future valuers and their advisers will need to adopt a more methodical approach, considering the potentially relevant statutory assumptions and applying them to the facts of the case and only moving on to consider whether some additional assumption is required under *Pointe Gourde* when those earlier steps have been taken."

219. In my opinion the relevant statutory provisions in these references are sections 6 and 9 of the 1961 Act. I do not understand there to be any dispute about the assumptions as to planning permission under Part II of the 1961 Act.

220. Section 6 and Schedule 1 to the 1961 Act are difficult provisions to understand. In *Waters v Welsh Development Agency* [2004] 1 WLR 1304 Lord Nicholls said at 1316 [49] that:

"Their complexity makes summary difficult. For present purposes it is sufficient to say that the broad thrust of section 6 of the 1961 Act as amended appears to be as follows. The value attributable to development, or prospect of development, of land other than the subject land is to be disregarded [where] the other land and the subject land are within the same compulsory purchase order (case 1) …[and] 'the development … would not have been likely to have been carried out … if the acquiring authority had not acquired and did not propose to acquire any of [the land comprised in the compulsory purchase order]': section 6(1)(A)."

221. Section 9 of the 1961 Act states:

"No account shall be taken of any depreciation in the value of the relevant interest which is attributable to the fact that (whether by way of allocation or other particulars contained in the current development plan, or by any other means) an indication has been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers."

222. The *Pointe Gourde* principle takes its name from the Privy Council decision in *Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands* [1947] AC 565, and was described by Lord MacDermott at 572:

"It is well settled that compensation for a compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition."

223. The relationship of the *Pointe Gourde* principle with sections 6 and 9 of the 1961 Act was considered by the House of Lords in *Spirerose.* The opinions of their Lordships make clear that the *Pointe Gourde* principle can only be applied as a rule of statutory interpretation (see Lord Scott at [9], Lord Walker at [12], Lord Neuberger at [56] and Lord Collins at [128]); and that it relates to the "value to the seller" concept (Lord Scott at [9]) or is "mainly designed and used to explain or amplify the expression 'value'"(Lord Neuberger at [56] agreeing with Lord Collins at [128]). The *Pointe Gourde* principle should not be evoked "for the purpose of adding a wholly new assumption to the statutory assumptions that have been laid down by the legislature … all the more so if that assumption is effectively inconsistent with one or more of the express statutory assumptions." (Lord Neuberger at [56]).

224. In *Hanbury-Tenison v Monmouthshire County Council* [2014] UKUT 0531 (LC) the Tribunal, Martin Rodger QC, Deputy President, and Mr P D McCrea FRICS said at [124]:

"We are conscious that *Spirerose* was concerned with planning assumptions rather than more generally with what would have been likely to have happened but for the scheme under consideration but the emphasis on the *Pointe Gourde* principle as an approach to construction … seem to us to be of general application."

225. In *Waters* Lord Nicholls identified a "gaping lacuna" in the statutory compensation code, namely that there was (i) no statutory provision for the disregard of value attributable to the prospect of development of the subject land itself (as opposed to the value attributable to the prospect of development of associated land); and (ii) that any enhancement in value of the subject land

attributable to the development of land purchased by agreement rather than compulsorily would be outside section 6 and Schedule 1, case 1 to the 1961 Act. Lord Nicholls said at 1317 [54]:

> "The courts therefore found themselves driven to conclude that the statutory code is not exhaustive and that the *Pointe Gourde* principle still applies. This conclusion is open to the criticism that in many instances this makes the statutory provisions otiose. This is so, but this is less repugnant as an interpretation of the Act than the alternative."

226. In *Spirerose* Lord Walker (at [26]) disapproved of the gaps ("lacuna") identified by Lord Nicholls in *Waters* and described Lord Nicholl's discussion of section 6 of the 1961 Act in paragraphs 49 to 54 of *Waters* as not being essential to the House's decision.

227. Lord Collins said at paragraph 129 of *Spirerose*:

> "*Waters v Welsh Development Agency* is an example of an extended interpretation of the concept of value in the context of determining the extent of a scheme in order to give effect to Parliamentary intention to provide dispossessed owners with a fair financial equivalent: see at [61]. The underlying basis of the decision in *Waters* is that the extent of the scheme to be ignored for the purposes of valuation is not limited by the express provisions of sections 6 and schedule 1. It does not go further, …."

228. At paragraph 123 Lord Collins said:

> "The first case in this House to refer to *Pointe Gourde* was *Davy v Leeds Corporation* [1965] 1 WLR 445, where Viscount Dilhorne (at 453) said that what is now section 6(1) of the 1961 Act had given statutory expression to the principle. Section 9 also gives effect to the principle. The position would be the same without such an express provision. Just as an increase in the value of land must be left out of account, so must any decrease."

Evidence and submissions

229. In his skeleton argument Mr Denyer-Green refers to the need to make the statutory disregards of increases and decreases in the value of the reference land in accordance with sections 6 and 9 of the 1961 Act. He then goes on, in paragraph 28 of his skeleton argument, to say:

> "Further, there shall be disregarded any increase or decrease in value attributable to the scheme underlying the acquisition under the *Pointe Gourde* principle, as identified in [*Waters*]…Accordingly, the extent to which the effect of the Scheme would involve the destruction of the night life activities in the surrounding area must be disregarded."

230. In assessing the extent of the scheme Mr Denyer-Green says in his closing submissions that the claimants do not take issue with the approach of the acquiring authority which in turn adopts the "pointers" to the application of the overriding guiding principle of fair compensation contained at paragraph 63 of Lord Nicholls' opinion in *Waters*.

231. The claimants argued that the best evidence of what constituted the scheme is to be found in the statement of reasons in support of the making of the CPO:

> "The purpose of acquiring the Order Land compulsorily is to secure the regeneration and re-use of this development site through development, re-development and improvement consistently with the policies and proposals of the City Council's approved Unitary Development Plan and within the timescale, investment and regeneration objectives of the Grainger Town Regeneration Strategy."

232. Apart from the Grainger Town Regeneration Strategy, which was approved by the council in November 1996, the claimants submit that the scheme includes the Action Plan for English Partnerships' involvement 1998-2003, endorsed by English Partnerships in September 1998. That was further supported by planning applications for five development phases made in June 2000; the council's resolution to grant those planning applications in November 2000; further resolutions to grant planning permission for phases 1 to 3 and 4b on 19 July 2002; proposed highway closures as described in paragraph 2.5 of the council's statement of case for the CPO; and the mixed use scheme of development described at paragraph 6.4 of the council's said statement of case.

233. Mr Denyer-Green drew further support for the claimants' identification of the scheme from the reference in the council's statement of reasons to the Regeneration Strategy and the Action Plan as providing "both the context and impetus for seeking the redevelopment of the site", together with a number of documents describing the early stages of the proposed works, including reference in the proof of evidence to the CPO public inquiry of the Director of the Grainger Town Project, Mr Christopher Oldershaw, and to the Grainger Town Partnership Board's request on 18 June 1999 to the council that they approve "in principle the use of compulsory purchase powers to support the scheme." Furthermore Ms Warneford, for the acquiring authority, said in her witness statement that "the Grainger Town Strategy was a key driver for the need for redevelopment of the order land."

234. The acquiring authority say that the claimants have drawn the scheme too widely by embracing everything from the Grainger Town Regeneration Project in 1997 onwards. Mr Fraser submitted that both the Grainger Town Regeneration Strategy and the Action Plan for English Partnerships Investment 1998-2003 were wide-ranging broad overview documents that covered many geographical areas and were primarily concerned with establishing structures, frameworks and working arrangements rather than bringing forward anything that could meaningfully be described as a "scheme".

235. The Action Plan identified East Blenheim Street (the former name of the St James Boulevard/Waterloo Street site) as one of its ten "priority 1 schemes" and the CPO was eventually made in respect of part of this area. But the Action Plan was not prescriptive or precise about its development, describing the site as offering "considerable potential for the mixed use development including offices, leisure and residential." It continued:

> "A development brief will be finalised and expressions of interest invited with a view to appointing a developer during 1999."

Mr Fraser said that a document such as the Action Plan could not be said to give rise to or form part of a scheme.

236. Mr Fraser said that in re-examination Ms Warneford stressed that the Regeneration Strategy was only one element of policy. The most important document was the unitary development plan adopted in January 1998 which, at policy ED 2.2 had identified East Blenheim Street as one of a number of sites allocated for mixed use development. There was a general encouragement of regeneration in the area but, as Ms Warneford explained in cross-examination, these documents did nothing more than identify development opportunities and set out guiding principles. Redevelopment and regeneration had already been taking place in the wider area and, Mr Fraser said, even without the "scheme" things would not have stood still in the area. Owners and developers were bringing development proposals forward and as Ms Warneford said in re-examination "without the CPO regeneration would have occurred but not as comprehensive."

237. Mr Fraser said that whilst in 1999 there was approval in principle for the use of compulsory purchase powers if necessary there was still no fixed scheme. Ms Warneford described the several changes that then took place between 2000 and 2001. The CPO was not made until 1 August 2002.

238. Furthermore there was no policy requirement for nightclubs or other elements of the night time economy to leave the area; the policy was one of mixed use development (policy ED 2.2). While Ms Warneford had accepted that the two nightclubs in Alfred Wilson House ("AWH") had to vacate in order to allow the refurbishment of that property to proceed, she explained that the decision to remove those nightclubs had been that of its owners, London and Regional Properties ("LRP") and had not been forced upon them by policy or other considerations. The form of refurbishment was a matter for LRP. The vacation of the nightclubs did not arise from, or form part of, the scheme.

239. In response Mr Denyer-Green said that the nightclubs had left AWH, a property included within the CPO, notwithstanding that ultimately it was not compulsorily acquired. TM had been told by the council that he was unlikely to get planning permission for a nightclub in 4 W St, so it was also unlikely that LRP would have been granted planning permission for a nightclub in its redevelopment of AWH.

240. Mr Fraser submitted that the claimants' position on the extent of the scheme meant that the grant aided renovation works undertaken by TM to 4 W St formed part of the scheme. If that was right then the benefit of such grant fell to be disregarded as having been due solely to the scheme.

Discussion and Conclusion

(1) Section 6 and Schedule 1 to the 1961 Act

241. The scheme for the purposes of section 6 and Schedule 1 to the 1961 Act is the project for the development of the land authorised to be acquired under the CPO. Any increase or decrease in the value of the land taken which is attributable to the development, or the prospect thereof, of land, other than the reference property, within the Newcastle-upon-Tyne (St James Boulevard/Waterloo Street) Compulsory Purchase Order 2002, is to be disregarded except insofar as such development would have been likely to be carried out in the absence of compulsory acquisition.

(2) Section 9 of the 1961 Act

242. The Tribunal considered what constituted "an indication" of acquisition by an authority possessing compulsory purchase powers for the purposes of section 9 in *Richards v Somerset County Council* [2001] RVR 204. The member, Mr P H Clarke FRICS, said at 216 [130]:

> "First, for a statement or action to be an indication within s.9 it must be a sign of the intention on the part of the authority possessing compulsory purchase powers that it is, or is likely, to acquire the land. An intention may be evidenced by an action or sequence of actions …
>
> Second, the statement or action said to be an indication must be given by an authority possessing compulsory purchase powers … It cannot be given by the claimant, his advisers or a third party….
>
> Third, the indication must be available not only to the owner of the land but also to hypothetical potential purchasers of the land at the date of valuation…. The indication must be made public or be otherwise ascertainable by potential purchasers. An indication given privately or which is not likely to come to the notice of such purchasers cannot be an indication within s.9 of the 1961 Act.
>
> Fourth, the provisions of the 1961 Act should be interpreted liberally …"

243. Applying these criteria to the facts in this case I do not consider that references in the Grainger Town Regeneration Strategy in October 1996 to the joint venture company having available "the threat of the City Council's compulsory purchase powers" constitutes an indication that the reference land was likely to be acquired by the council.

244. The Action Plan that was approved in September 1998 following the establishment of the Grainger Town Partnership in April 1997 identified East Blenheim Street as one of 10 priority one development opportunities. An outline development brief for the East Blenheim Street site, which included the reference land, was approved by the council in March 1999. Although this emphasised the need for comprehensive rather than piecemeal development there was no indication that the council was likely to acquire the reference land.

245. The development plan at the valuation date was the Newcastle-upon-Tyne Unitary Development Plan adopted on 28 January 1998. Policy ED 2.2 identifies East Blenheim Street as a site allocated for mixed site development and paragraph 3.35 says that the City Council would prepare development briefs for each of the mixed use sites. There is no indication in the UDP that the reference land was likely to be acquired by compulsory purchase powers.

246. An outline development brief for the East Blenheim Street site, which included the reference land, was approved by the council on 19 March 1999. The site was also included in the Grainger Town Regeneration Project area to which the Grainger Town Regeneration Strategy 1996 applied.

247. Mr Peter Shanks, a senior estates surveyor and Other Clients Team Leader of the council, gave evidence to the 2003 CPO inquiry, *inter alia*, about property acquisition by agreement in advance of the proposed CPO. He said that:

> "Cabinet of the council approved the making of the CPO on 20 March 2002, following which negotiations/discussions have been entered into with the majority of the affected owners/lessees included in the CPO."

248. The earliest correspondence in the trial bundle about the possible acquisition of the reference property is a letter from the council to TM's ostensible agent, Mr I R Harris of Swaisland Harris Associates, dated 29 May 2002. However, there is evidence that the council was acquiring property by agreement before 20 March 2002. Mr Shanks refers to the acquisition of the freehold interest in 42/44 Westmorland Road on 15 February 2002, while in his witness statement Mr Irvine said that he "made initial written approaches to the affected property owners and occupiers in April 2001."

249. Two outline planning applications for the comprehensive mixed-use development of the East Blenheim Street (St James Boulevard) site were submitted by LRP on 24 March 2000. One of these applications was withdrawn in August 2000. LRP submitted a detailed planning application for the first three phases of development on 13 June 2000. The council decided they were "minded to grant" planning permission on 3 November 2000 subject to the completion of a legal agreement. These planning applications proposed five development phases, although phase 5, which included 4 W St, was taken out of the CPO and instead external improvements were funded by a grant from the Grainger Town Project.

250. I consider that an indication that the reference land was, or was likely, to be acquired by the council was first given when the council approached the claimants in April 2001 to see whether they would be prepared to sell the reference property. It was not until the outline planning applications had been made and the council began writing to affected land owners that I consider a clear and specific intention to acquire the reference property became manifest, supported by the threat of compulsory purchase powers.

(3) The Pointe Gourde *principle*

251. Following *Spirerose*, the extent of the scheme in these references must be determined in accordance with the requirements of sections 6 and 9 of the 1961 Act. The *Pointe Gourde* principle has, as Lord Neuberger said at paragraph 56 of *Spirerose*, a "relatively limited" role, being a factor to be borne in mind when construing the compensation legislation with a view to achieving so far as possible a result consistent with its aim of fair compensation.

252. Although the extent of the scheme for the purposes of applying the *Pointe Gourde* principle is not constrained to the land authorised to be acquired under the CPO (section 6 and Schedule 1), in the circumstances of these references, where it is claimed that the scheme has depreciated rather than increased the value of the land to the owner, it seems to me that the *Pointe Gourde* principle adds nothing to the application of the statutory disregard under section 9. As Lord Collins said in *Spirerose*, the position would be the same whether section 9 or *Pointe Gourde* applied. That also

means, in my opinion, that the scheme for the purposes of applying the *Pointe Gourde* principle should not be drawn wider than the requirements of section 9. As the Tribunal said in *Hanbury-Tenison* at [88]:

> "As the speeches in *Spirerose* emphasise, compensation for compulsory purchase is a creature of statute; the *Pointe Gourde* principle can properly be relied on in interpreting the compensation code but does not provide an extra-statutory appendix to it and cannot be applied to add to, or contradict, the assumptions laid down by Parliament."

Issue 10: The base year for the claims

253. The claimants say that the choice of the year ended 31 December 2000 as the base year for the purpose of assessing business (rule (6)) losses is primarily a matter for expert evidence but is dictated by two overriding matters:

(i) the need to identify a year which is early enough to avoid any "tainting" effects of the scheme; and

(ii) the availability of accounts.

254. The acquiring authority point out that the claimants' case is that the scheme came into existence before their chosen base year of 2000. They repeat their submissions that the claimants have not established that the year 2000 accounts are genuine and reliable and that, even if they were, there is no evidence to show that this was a representative year whose trade was maintainable. Without any historical perspective it was not possible to determine whether the year 2000 was exceptional.

255. The acquiring authority dispute the significance of the closure of the offices in AWH during 2000. They say that the office leases fell in and that the vacation of the property was part of a normal redevelopment opportunity which was not associated with the CPO and/or the scheme. LRP, the owners, chose to refurbish the property and to change the mix of uses. Any losses arising from the closure of the offices were not recoverable.

256. Mr Denyer-Green responded that AWH was included in the CPO and its redevelopment could not be said to have no relationship to the underlying scheme.

257. The nightclubs and bar in AWH closed in early 2002 and Mr Fraser submitted that any losses that could be established would similarly not be recoverable since such closure was not associated with the CPO and/or the scheme. In any event the claimants had not produced any credible evidence as to the levels of trade derived from existing (or new) nightclubs in the surrounding area.

258. TM said in his witness statement that the closure of the offices in AWH meant "loss of trade from 200/300 office workers at lunchtime." SM adopted the same figure. There was no evidence to corroborate this estimate which Mr Fraser said "appears to be a guess plucked out of the air." Nevertheless Mr Nedas relied upon this figure to inform his expert evidence and had adopted the

higher estimate of employees lost (300). He then assumed, without evidence, that one in four (i.e. 75) of these employees would have purchased a daily meal at the Happy Chip in every working week from when the offices closed in June 2000 until the end of that year. Mr Fraser described Mr Nedas's analysis as "clearly preposterous" and his assessment of losses arising from the closure of the offices as "plainly unfounded and unrealistic".

259. Under cross-examination TM estimated that between 30 to 40 office workers purchased a lunchtime meal every day. He said that he used to talk to his customers and got to know them. He estimated that they spent £3 to £5 each visit. When it was put to TM that Mr Nedas's estimate of 75 office workers per day was "a vast over estimate" he said firstly that Mr Nedas was "going on figures he'd been given" and subsequently "that's the figure he's used." Mr Fraser submitted that this was another example of TM's unreliable evidence.

Discussion and conclusion

260. For the reasons given in issue 6 above (paragraphs 157 to 174) I do not consider that the claimants' accounts are a reliable starting point upon which to base expert accountancy evidence. The claimants' adoption of the year 2000 accounts as a base year is not consistent with their submission that their trade was affected by the scheme rather earlier than this.

261. That the year 2000 was not a typical year of trading for the HCLG is evident from the partial accounts for the year ending 31 December 1998 that were disclosed by the claimants on 22 January 2015. Those accounts showed a net profit of £125,394 (before any of the occupiers of AWH had vacated) compared with Mr Nedas's adjusted net profit of £259,350 for the year 2000, an increase of 107% in two years.

262. Mr Nedas included a gross profit of £22,000 on what he described as "lost turnover" from the closure of the offices in AWH in June 2000. I accept Mr Denyer-Green's submission that Mr Nedas's expert evidence has yet to be given or tested, but I make two observations on that evidence at this stage:

(i) Mr Nedas's calculation of the "lost turnover" is not supported by TM's evidence in cross-examination. Mr Nedas's figure is too high in that context.

(ii) Mr Nedas's assumption that 25% of the office population of AWH, which he takes at the highest estimate of 300 employees, would buy a meal from the Happy Chip *every working day* for 26 weeks, without any adjustment for annual leave, bank holidays and the Christmas period, is, on any reasonable viewpoint, heroic.

263. I do not accept that the claimants' accounts for the year 2000 are sufficiently representative or reliable to form an appropriate base year upon which to found their claim.

Issue 11: the claims for the Convenience Store (MM) and Especially 4 You (ShM)

264. Mr Fraser submitted that the acquiring authority, for the reasons given under issue 5 above, do not accept that the Convenience Store and Especially 4 You were genuine separate businesses. I have determined, at paragraph 156 that only one business was carried on from the reference property and therefore the issue of separate claims for the Convenience Store and Especially 4 You does not arise. That conclusion does not mean, at least as concerns the Convenience Store, that the profits made from the sale of goods it purported to sell as a separate business are to be left out of account when considering the value, and possible losses, of the family business as a whole. For the reasons I have given in paragraph 156 I do not accept that clothes were displayed or sold at the reference property.

265. MM said in his witness statement that were it not for the closure of nearby clubs and bars he estimated that "the sales of my business would have been at least 30% higher". MM's expert accountant, Mr Peter Smith, says in his expert report that he has no way of proving or disproving this figure, but he nevertheless adopts it when adjusting the accounts for the year ending 28 February 2003. In my opinion MM's estimate that his sales would have been 30% higher had the clubs and bars not closed is arbitrary and lacks any objective support. When asked about this in cross-examination MM said that the closure of the clubs and bars meant the loss of "two thousand potential customers", but that is the extent of his analysis. MM does not say that his sales would have been higher had the offices in AWH not closed. As Mr Fraser correctly submits, MM never traded (nor the Happy Chip before him when "trialling the sale of his products") at a time before there was an indication that the reference property was, or was likely, to be compulsorily acquired, so there is no factual evidence upon which to benchmark any estimate of the alleged reduction in potential sales. As Mr Fraser further observed the fact that the claimants elected to sell these products after the clubs and bars in AWH had closed suggests that the market for them was not being blighted at that time.

266. I agree with the acquiring authority that there is no evidence of any losses in respect of the sale of goods said to have been, but not accepted by me as being, conducted as the business known as Especially 4 You. TM said in his witness statement that the accounts of Especially 4 You prior to the year ending 31 May 2003 could not be located and that the previous accountants, Abbott Fisher, had lost the relevant receipts. He went on:

> "I can say the business traded at a higher level than the accounts for the year ending 31 May 2003 show and I estimate that the net profit was at least £35,000 per annum"

267. Mr Peter Smith, who is also the expert accountant acting for ShM, says at paragraph 6.4 of his expert report:

> "In relation to the entire blight period [3 January 2002 to 28 January 2004], I have assumed that the business would have generated a net profit of £35,000 per annum as Thariq Mohammed claims it did during the year ended 31 May 2002" (In fact TM referred to the year ended 31 May 2003.)

268. Mr Smith then refers to trading projections and a reduction in profits between the year ended 31 May 2003 and the period ended 31 January 2004 as "providing some contemporaneous evidence of events at that time." Mr Smith's evidence will need to be heard and tested in due course but

insofar as it relies upon TM's estimated net profits, I consider that figure to be arbitrary and unsupported (on his part) by any objective evidence.

Issue 12: shadow period losses

269. Mr Fraser submitted that losses which arose before possession of the reference land was acquired (shadow period losses) are compensatable if they satisfy the three conditions set down by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 126:

(i) There must be a causal connection between the acquisition and the loss;

(ii) The loss must not be too remote; and

(iii) The claimant must behave reasonably and mitigate his loss.

270. In addition Mr Fraser relied upon *Ramac Holdings Ltd v Kent County Council* [2014] UKUT 109 (LC) where the Tribunal, Her Honour Judge Robinson and Mr P D McCrea FRICS, said at [135] to [138] that to be recoverable the losses must arise "in consequence of the compulsory acquisition of the land (or threat of it)" and not caused "by the construction of the scheme (or imminent threat of construction) underlying the acquisition of the land." The Tribunal said that its approach was consistent with the decisions in the Scottish case of *Emslie and Simpson Ltd* v *Aberdeen City District Council* [1994] 1 EGLR 33 and *Pattle v Secretary of State for Transport* [2009] UKUT 141 (LC).

271. The acquiring authority do not accept that the claimants have established any shadow period losses but they say that insofar as such losses fall to be considered, the claimants' clear case was that they arose as a result of other businesses moving or closing. They were not the result of the acquisition or threat of acquisition of the reference property. It was not sufficient for the claimants merely to contend that the making and/or confirmation of the CPO constituted the threat of acquisition. In any event many of the losses claimed pre-dated the making/confirmation of the CPO.

272. The claimants do not dispute that for a shadow loss to be claimable it has to satisfy the three conditions set down in *Shun Fung*. Mr Denyer-Green in his skeleton argument, repeated in his closing submissions, said that it was open to the Tribunal to follow its decision in *Optical Express (Southern) Ltd v Birmingham City Council* [2005] 2 EGLR 141 rather than its decision in *Ramac*. Mr Denyer-Green also said that the dissenting judgment of Lord McCluskey in *Emslie*; the House of Lords decision in *Hughes v Doncaster Metropolitan Borough Council* [1991] 1 AC 382 (HL) and *Pointe Gourde* would allow the Tribunal to come to a contrary view to *Ramac* in these references. Further or alternatively, Mr Denyer-Green said (i) that the making and/or confirmation of the CPO plainly constituted a threat of acquisition, and (ii) the claimants reserved the right to submit that the decision on this point in *Ramac* was wrong in law.

273. The facts of *Optical Express* are summarised at paragraph 122 of *Ramac*:

> "In *Optical Express* there was a claim for pre-acquisition losses in the form of decreased turnover caused by the start of construction work on the scheme, nearby shops becoming empty and short lettings to inferior traders, see paragraph 65. The Lands Tribunal referred to the guidance in *Shun Fung* and then considered to what extent the fall in turnover was caused by the scheme. The Tribunal awarded compensation for the last 3 months of decline in turnover on the grounds that it had been caused by the scheme, paragraph 74."

274. Counsel for the claimant in *Ramac* also relied on *Budgen v Secretary of State for Wales* [1985] 2 EGLR 203 described by the Tribunal as:

> "Another application of the same principles where part of an agricultural holding was acquired and the claimant was awarded compensation for the effects of noise and dust caused by construction of the road scheme."

275. The Tribunal's analysis of *Optical Express* and *Budgen* appears at paragraph 127 of *Ramac*:

> "In *Optical Express* and *Budgen* … the claims based on the general blighting effect of the scheme were allowed on the assumption that they were recoverable in principle without any consideration as to whether that was correct. We reject [counsel for the acquiring authority's] submission that because the claim allowed in *Optical Express* was for the 3 months trading prior to acquisition, it was so close to acquisition as to be indivisible from it. The claim based on the construction of the scheme, together with the vacancy and inferior lettings of other shops was not caused by the threat of acquisition of the claimant's shop, rather by the imminent construction of the scheme. These two decisions therefore awarded compensation for losses caused by the scheme rather than the compulsory acquisition of the claimant's land."

276. The Tribunal in *Ramac* considered two cases which the acquiring authority in that reference submitted were to the opposite effect to *Optical Express* and *Budgen*: *Welford v Transport for London* [2010] UKUT 99 (LC); and *Pattle*. The Tribunal found that neither of these cases decided the issue. But the Tribunal said at [128]:

> "However, it is right to note that the Tribunal certainly took the view [in *Welford*] that if the loss was caused by the prospect of the [imminent disruption from the] roadworks [to construct the scheme] it was not recoverable."

277. The Tribunal in *Pattle* said, obiter, at [53]:

> "In a case where the loss to the letting business is caused by the general blighting effect of the scheme and the consequent depression of rental levels, rather than by the prospective acquisition of the land (or part of the land) on which the letting business is conducted, then we consider that such losses cannot be recovered. We did not understand [counsel for the claimants] to argue to the contrary….
>
> We reach this conclusion for the simple reason that such losses cannot be brought within the basic test set forth by Lord Nicholls in *Shun Fung*, namely that the losses are "fairly attributable to the taking of his land." Instead such losses are fairly attributable to the general blighting effect of the scheme. Also such losses (i.e. which are reasonably attributable to the general

blighting effect of the scheme) would plainly be irrecoverable if none of the landowner's land was ever within the CPO or if none of his land was ultimately taken. Such a loss being irrecoverable as a matter of principle, we do not consider that such a loss (deriving merely from general blight) becomes recoverable as some form of parasitic claim if the landowner's land (or some part thereof) is subsequently taken, see for instance the analysis of Lord Hoffman in *Wildtree Hotels v London Borough of Harrow* [2000] UKHL 70 in part 5 of his speech dealing with the second issue."

278. In *Emslie* Lord President Hope said at [37]:

"The point at issue is whether the loss must be shown to have been caused by the dispossession, that is to say by the taking of the premises from the claimant in the exercise of compulsory powers, or whether it is sufficient for the loss to be recoverable that it was caused by the overall effects of the scheme of acquisition."

279. Having reviewed the relevant statutes and authorities Lord Hope concluded at [38]:

"It is dispossession caused by the taking of the lands which gives rise to the right to compensation, not the threat of dispossession or the effects of publication of plans for the execution of the works.

Where, as in [*Aberdeen City District Council v Sim* [1982] 2 EGLR 22] and in [*Prasad v Wolverhampton Borough Council* [1983] 1 EGLR 10], loss incurred under the threat of dispossession has been held to be recoverable, this is because the dispossession has followed and the loss has been shown to have been caused by the dispossession. The loss for which compensation was awarded in these cases was for expense which might have been incurred after the dispossession but which the claimants had chosen to incur beforehand….

I can find nothing in these authorities to support the proposition that a loss which cannot be shown to have been directly caused by the taking of the lands is recoverable….. loss which is held to be due to the effects of the blight on trading generally cannot be said to have been caused by the dispossession of the claimant from the land. The two events are quite separate. Blight on trading is the result of the way the scheme is perceived by the public, and it is indiscriminate in its effects…. It affects all traders in the area irrespective of whether their land is to be taken from them under the scheme. Dispossession, on the other hand, is the result of action taken directly against the claimant by the promoter and it is particular to the person whose interest is acquired from him by the taking of the land. A causative link between the taking of the land from the claimants and their trading losses has not been established in this case, and I think that the Tribunal were bound in these circumstances to refuse this part of the claim."

280. Lord Mayfield agreed with the Lord President's opinion but Lord McCluskey dissented. In doing so he treated the claim for disturbance as one of equity. He said at [39]:

"…. the equitable principle is that if a public authority uses compulsory powers to dispossess a person of his interest in land and causes him to suffer loss thereby the loss should not be allowed to fall upon the person dispossessed; he should be compensated for that loss by the acquiring authority. In so formulating the principle I recognise that it must be applied in such a

way as to guide against spurious claims… but the principle itself is not to be restricted just because it has to be cautiously applied. And clearly the causal link must be proved."

281. In applying this test Lord McCluskey concluded that "the whole reasoning of the Tribunal on causation is flawed." He continued at [40]:

"In my view, it is plain that the cause of the loss in respect of which the appellants now claim was the threat, ultimately realised, of compulsory acquisition of premises in area B under the scheme. In the light of that conclusion in fact … the only question which remains is whether the loss sustained by the appellants, whose interest in land was compulsorily acquired, was a loss occasioned, 'by reason of' their dispossession. I consider that the claim must be a proper claim if the scheme, of which an integral part is their dispossession, causes the blight, which in turn causes the loss, provided that the threatened dispossession actually occurs."

282. In adopting this approach in the present case Mr Denyer-Green is, in my opinion, arguing that the threat, ultimately realised, of compulsory acquisition of premises in the CPO, caused the blight which in turn caused the claimants' loss.

283. In *Ramac* the Tribunal reviewed the development of the law of compensation for disturbance as summarised by Lord Nicholls in *Shun Fung* at 124F and the "classic exposition" of Scott LJ in *Horn v Sunderland Corporation* [1941] 2 KB 26, 43-49. It concluded at [135]:

"Both of these passages make clear that the object of disturbance compensation is to cover personal losses suffered by the owner as a result of having to sell his land against his will, to reflect the value of the land to him. The losses which may be claimed are those suffered in consequence of the compulsory acquisition of the land (or threat of it). Losses caused by the construction of the scheme (or imminent threat of construction) underlying the acquisition of the land are not losses caused to the owner by the forced sale of his land but rather are caused to the owner, and usually many others, by the inconvenience of construction of the public authority's scheme as a whole."

284. The Tribunal considered its approach to be consistent with *Emslie*. The reasoning of Lord McCluskey's dissenting judgment in that case was considered to be inconsistent with the passages in *Shun Fung* and *Horn v Sunderland* cited by the Tribunal. The Tribunal said at [136]:

"The fact that an owner whose land is compulsorily acquired suffers loss as a result of construction of the scheme which is not compensatable is no more unfair than the fact that the owner opposite, none of whose land is acquired for the scheme, suffers similar losses which are not compensatable either."

285. In my opinion *Ramac* was correctly decided on this point and I agree with the Tribunal's reasoning. I do not accept Mr Denyer-Green's alternative argument that the making and/or confirmation of the CPO constitute the threat of acquisition. That echoes Lord McCluskey's dissenting judgment which was rejected by the Tribunal in *Ramac*. What matters is that the losses claimed are caused by the specific threat of the compulsory acquisition of the reference property, not that they are referable to a general threat of dispossession under the CPO.

286. Mr Denyer-Green said in his skeleton argument, repeated in his closing submissions, that "the claimants reserved the right to submit" that Lord McCluskey's dissenting judgment, the House of Lords decision in *Hughes* and the opinion of the Privy Council in *Pointe Gourde* would allow me to come to a contrary view to that of the Tribunal in *Ramac*, a decision which the claimants also reserved the right to submit was wrong in law. It is not clear whether Mr Denyer-Green intends to develop his arguments on these points later in these references, once the expert evidence has been heard, or whether his reservation is intended for the possibility of a future appeal. Either way the submissions on this issue were not developed orally at the hearing and have only been presented in summary form in the parties' skeleton arguments and closing submissions. Nevertheless, and subject to any further submissions the parties may wish to make at the end of the hearing, the above analysis and conclusions set out my approach to the legal framework of this issue and provide the context of how I propose to consider the expert evidence.

287. For the sake of completeness I should add that neither *Hughes*, which emphases that the claimants' losses are to be assessed on a "value to owner" basis, nor *Pointe Gourde*, which I have considered in issue 9 above, affects my conclusion on this issue.

Issue 13: injurious affection

Facts and legal principles

288. Both TM and SM claim for injurious affection/severance to their respective freehold and leasehold interests in 4 W St under section 7 of the Compulsory Purchase Act 1965 ("the 1965 Act"). In order to succeed they must show that their interests in 4 W St were held together with their interests in the reference property. The retained land does not need to be contiguous or adjacent to the land taken, provided the possession and control of each gives an enhanced value to them both (see *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153). At the valuation date TM held the freehold interest of the reference property and the beneficial freehold interest in 4 W St. I have determined under issue 4 above that at the valuation date SM was a licensee of 15 W St. SM was also the legal owner of the freehold interest in 4 W St and a lessee under the Lally lease.

289. Section 7 of the 1965 Act states:

> "In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the value of land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained to 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."

290. As a licensee SM did not have a proprietary interest in the reference property. As such no land was compulsorily acquired from SM and there can be no injurious affection under section 7 of the 1965 Act to SM's interest under the Lally lease. SM does not claim for injurious affection under section 10 of the 1965 Act. SM therefore has no claim to compensation for injurious affection under any enactment. Consequently I am only concerned with TM's claim for injurious affection.

291. TM held the freehold interest in the reference property and the beneficial freehold interest in 4 W St at the valuation date. The essential question in his claim is whether these interests were held together for the purposes of section 7 of the 1965 Act.

292. The parties' rights of light experts have agreed that certain window apertures in 4 W St benefited from rights of light over the land included in the CPO; that the development undertaken pursuant to the exercise of the CPO resulted in a reduction in natural day lighting and interference with the said rights of light; and that if the CPO had not been made the claimants would reasonably have expected to have received compensation.

293. The parties agree that the interference with the rights of light was authorised under section 237 of the 1990 Act and that compensation is payable under section 7 or section 10 of the 1965 Act (section 237(4)(a)).

Submissions

294. In support of TM's injurious affection claim Mr Denyer-Green relied upon *Cowper Essex* and also *Holditch v Canadian Northern Ontario Railway* [1916] 1 AC 536 (PC) in which Lord Sumner said at 542:

> "The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbour. Compensation for severance therefore turns ultimately on the circumstances of the case."

295. Applying these principles to TM's claim Mr Denyer-Green submitted that:

(i) The reference property and 4 W St were in very close proximity being immediately opposite each other in Waterloo Street;

(ii) TM's expert valuer, Mr Cairns, explains the benefit of this proximity in his expert report;

(iii) TM's expert injurious affection valuer, Mr Day, considers that the value of the two properties held together is greater than their value individually due to the common use of the car parking area along the Sunderland Street frontage of the reference property and other commercial advantages;

(iv) TM's evidence supports Mr Day's opinion as he purchased 4 W St because:

(a) The ground floor had the potential to be developed as a fish and chip restaurant that would complement the takeaway business conducted from the reference property; while the first floor had potential as a snooker hall/nightclub;

(b) 4 W St gave TM a measure of control of the late night leisure activities in the area and the four A3 licenses at 4 W St; it protected the Happy Chip from local competition and secured his rental income stream from the acquired land.

296. Mr Denyer-Green said that the area used for car parking in Sunderland Street was within TM's registered title of the reference property; there was plenty of room to park cars as was shown in a number of the exhibited photographs; the acquiring authority had not shown evidentially that the area used to park cars was part of the public highway or that any offence of obstructing the highway had been committed.

297. To the extent that he was not already compensated under section 7 of the 1965 Act, Mr Denyer-Green submitted that TM was entitled to compensation for injurious affection for the acquiring authority's interference with an admitted right to light to the first, second and third floors of 4 W St under section 10 of the 1965 Act.

298. The conditions which must be satisfied in order to sustain a claim under section 10 of the 1965 Act are known as the McCarthy Rules after the decision in *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243. There are four such conditions:

(i) the works must have been lawfully executed under statutory powers;

(ii) the injury done must have been actionable at law but for those statutory powers;

(iii) the injury must be damage to land and not just a personal or financial loss; and

(iv) the injury must have been caused by the execution of the works and not by their subsequent use.

299. Mr Denyer-Green submitted that the execution of the works caused an interference with the admitted right to light of a number of windows in 4 W St which would have been actionable as a nuisance but for the exercise of statutory powers. Mr Denyer-Green said that the compensation payable was for the diminution of the value of TM's interest in 4 W St caused by the interference with the rights to light and not simply in respect of those windows and rooms where there would be an actionable interference.

300. Mr Fraser submitted that the bare fact that the reference property and 4 W St were held by the same owner (TM) was not sufficient to establish a claim for injurious affection. TM had to show that the two parcels were so connected one with the other that the loss of one meant that TM was prejudiced in his ability to use or dispose of the retained land (4 W St) to advantage. Mr Fraser said that TM had not shown this to be the case.

301. Mr Howard Day was the claimants' expert valuer on this issue and in his expert report he relied upon the area of "off-street" car parking outside the reference property as being the key to the two properties being held together. Mr Fraser said that this car parking area was all part of the pavement within the highway. There was no power or right in the landowner to park vehicles on the pavement or to drive on it or to obstruct it. That itself was sufficient to remove any reliance on car parking as being relevant to whether the two freehold interests were held with each other.

302. Mr Fraser gave several other reasons why Mr Day's contention about injurious affection was misconceived:

(i) The claimants did not themselves place any significance upon the car parking area;

(ii) Use of the car parking area would conflict with (a) the moveable tables that were placed outside the Happy Chip; and (b) the entrance to the flat at 1 S St and the claimed entrance to 1A S St.

(iii) Use of the car parking area would also conflict with MM's proposed development of a kiosk/service counter at 1A S St with a canopy extending over the pavement. This proposal would have required unimpeded access to this area which would be incompatible with its use for car parking;

(iv) The unimportance of the car parking for the use of 4 W St was emphasised by the terms of the planning application made in respect of that property in 2001. TM had completed the application form and identified two existing car parking spaces but no proposed car parking spaces; and

(v) 4 W St was a typical fringe city centre location where car parking was neither a requirement nor an expectation to enable full and proper use of the property.

"Quite simply", submitted Mr Fraser, "car parking is not sufficient to satisfy the legal tests."

Discussion and conclusion

303. In *Cowper* Lord Watson said at 167:

> "But I am prepared to hold that, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation."

304. The common ownership of the reference property and 4 W St is not sufficient in itself to establish a claim for injurious affection. The test is whether TM's possession and control of the freehold interests in each property gives an enhanced value to them both. That is not an issue which, it seems to me, can be fairly decided without hearing the expert evidence. Nevertheless I consider it sensible for me to indicate to the parties my provisional views about the issue in the light of the factual evidence heard to date.

305. The claimants' valuation expert on injurious affection, Mr Day, bases his evidence on the alleged benefits to the owner of 4 W St of being able to park cars outside the Sunderland Street frontage of the reference property. Those benefits were not identified by TM in his evidence and did not form part of what he described as "the massive potential in 4 W St". I find Mr Fraser's criticisms of this approach to be cogent and well founded. In my opinion Mr Day's reliance upon the car parking spaces as giving an enhanced value to both 4 W St and the reference property is tenuous and contrived.

306. Mr Denyer-Green does not seek to rely in his closing submissions solely upon the car parking as establishing "the characteristics required to satisfy the legal test". He relies also upon other evidence given by TM, SM and MM. But insofar as such evidence relates to the leasehold interest at 4 W St it is irrelevant given my finding that SM had no proprietary interest in the reference property at the valuation date and thus cannot sustain a claim for injurious affection.

307. The advantages of acquiring 4 W St that TM describes at paragraphs 5.5 and 14.9 to14.10 of his witness statement are mainly advantages that would accrue to SM running the Happy Chip business and, possibly, a snooker hall on the first floor. TM also said that the acquisition of 4 W St would give him "a measure of control of the late night leisure activities and the four A3 uses in the retained land." Those are ostensible advantages of owning 4 W St, not of owning that property together with the reference property.

308. In my opinion compensation for interference with the rights of light must be calculated *either* under section 7 *or* under section 10. Both sections cannot apply simultaneously. If, having heard the expert evidence and contrary to my provisional views, the reference property is found to be held with 4 W St then the compensation under section 7 will reflect the interference with those rights, but if the two properties are not held together then compensation falls to be determined under section 10 since no part of the affected land (4 W St) was acquired.

309. The parties do not agree the approach to the assessment of compensation for the loss of the rights of light and this is a matter for expert evidence.

Issue 14: causal connection and mitigation of loss

Submissions

310. The parties agree that the three conditions set down by Lord Nicholls in *Shun Fung* (see paragraph 269 above) must be satisfied for a loss to be compensatable.

311. Mr Fraser submitted that these conditions had not been met in respect of the claimant's relocation to Unit 1 at 4 W St and their subsequent move to Unit 2.

312. Mr Fraser said that the claimants' surveyor, Mr Harris of Swaisland Harris, provided the claimants with particulars of four suitable alternative properties on 11 November 2002. It was clear

from his cross-examination that TM had not inspected any of these properties and he failed to give any reasons why they might have been unsuitable for the Happy Chip business. Mr Fraser submitted that the claimants' actions regarding relocation of the business and mitigation of loss should proceed from the position that suitable alternative premises had been identified by their own professional adviser which they had the opportunity to investigate. Mr Fraser also noted that similar businesses affected by the CPO had been able to relocate successfully in the vicinity, as TM had recognised in his evidence.

313. Mr Fraser said that the claimants' case rested on the argument that late night opening hours were essential to the success of their business. If that position was genuine then the claimants should not have considered Unit 1 for the following reasons:

(i) The 2002 planning permission was conditional upon restricted opening hours which the local planning authority had made clear it was not prepared to relax. This had been explained to TM in correspondence with his then surveyor, Louise Mason of GL Hearn, dated 13 February 2003.

(ii) The 2002 planning permission contained conditions that needed to be discharged before the claimants could rely on the permission. Dickinson Dees, acting for the claimants said in a letter dated 26 March 2004 that it would be very difficult, if not impossible, for the claimants to discharge those conditions and that they had not implemented the 2002 planning permission. So the claimants had moved to Unit 1 at 4 W St without any planning permission for the proposed use. This was a further failure to mitigate their loss.

(iii) Contrary to his position about the need for extended trading hours TM had not sought late night opening hours when he submitted a planning application for the change of use of Unit 1 from A1 to A3 use in March 2001. Nor were materially different trading hours proposed in the retrospective planning application made in March 2004.

(iv) The claimants said that their decision to move to Unit 1 at 4 W St was influenced by their understanding that the council's proposals included a nightclub on the CPO land. But there was no reasonable basis for the claimants' belief since this proposal had been publicly dropped by the time of CPO inquiry.

314. If on the other hand the claimants' position about late night trading was not genuine then they had been making unfounded claims which fundamentally undermined their case and their credibility. Mr Fraser considered that if late night opening was necessary then it was not reasonable to move to Unit 1 and to spend substantial monies in doing so.

315. Mr Fraser then considered why, if late night trading was so important, the claimants had not moved directly into Unit 2 which had no restriction on trading hours. The claimants' position about Unit 2 was inconsistent. At the hearing they argued that Unit 2 was not available in early 2004, but that was not their original position and it was contradicted by their actions and the contemporary documents.

316. In the planning appeals TM's solicitor had made it clear that although Unit 2 had been vacant since December 2002 it was unsuitable for the Happy Chip. Nevertheless there continued to be strong interest in it from other operators. That Unit 2 was vacant was corroborated in the Wallhead Boaden Report which stated that Ms Rahimi was evicted in approximately January 2003. Mr Day in his expert report said that a lease of Unit 2 was granted on 5 February 2004, which contradicts the claimants' position that the Unit was not available at that time. Furthermore the claimants had marketed Unit 2 in March 2004 which was very strong evidence of its availability. Mr Fraser said the documents in evidence, including those forced out of the claimants in the course of the hearing, did not accord with the claimants' position that Unit 2 was unavailable. During cross-examination TM said that the Rahimis were not in occupation of Unit 2 in 2002 and he knew before the grant works started to the front of the building that they were not returning.

317. Mr Fraser said that the claimants were actually marketing Unit 1 in March 2004, at the same time as they were marketing Unit 2 and within a month of moving there from the reference property. He said this suggested that the move to Unit 1 was not a serious proposal. The marketing of both Units simultaneously had to be viewed in the context of the claimants' attempts from the outset to obtain compensation on a total extinguishment basis. The Happy Chip was not the astonishingly successful business that the claimant said it was.

318. Mr Fraser submitted that the claimants' alleged losses at Unit 1 had not been caused by the CPO and/or the scheme (see issues 9 and 12 above) and a reasonable person properly mitigating their loss would not have incurred such losses or incurred the costs of creating and fitting out Unit 1.

319. Mr Fraser said the second move to Unit 2 was not justified or reasonable given that the claimants had failed to establish any losses at Unit 1 and/or that they arose from a change of circumstances in the area. The cost of moving to, or any losses incurred in trading from, Unit 2 was not caused by the CPO and/or the scheme and/or was too remote. If, on the other hand, the losses claimed at Unit 1 had been sustained, a reasonable businessman would not have moved to Unit 2 and incurred the cost of creating and fitting it out and would not have continued trading at a loss.

320. Mr Denyer-Green submitted that the burden of proof fell upon the acquiring authority to show that any item was too remote or that the claimants had failed to mitigate their loss: see *Bede Distributors Ltd v Newcastle-upon-Tyne Corporation* (1973) 26 P&CR 298 at 319 to 320. In determining what steps a reasonable businessman would take it was necessary to apply a standard of reasonableness that was to be expected of relatively unsophisticated businessmen such as the claimants. It was significant that Mr Reeve from the council had advised the claimants that relocation to 4 W St was a reasonable step in a letter dated 10 December 2004 and that Mr Atkins had accepted in cross-examination that it was reasonable for the claimants to have instructed Dickinson Dees to advise them on planning matters. The claimants, as unsophisticated parties dealing with a difficult and unknown position, had done their best in the circumstances. In cross-examination TM denied that he had instructed Mr Harris to act on his behalf as suggested by the acquiring authority and Mr Denyer-Green submitted that it was not uncommon for some surveyors to purport to act for claimants in communications with acquiring authorities in the hope of an instruction and a fee.

321. Mr Denyer-Green said that TM had made it clear in cross-examination that alternative premises would not be suitable unless they could replicate the business model enjoyed at the reference property, namely with unrestricted trading hours.

Discussion and conclusion

322. It is a key part of the claimants' case that they had to have unrestricted opening hours in order to maintain their profitability. The reference property had unrestricted hours and the claimants wished to ensure that this continued in the future at the replacement premises. The claimants had three choices in order to continue trading:

(i) create, fit out and move to Unit 1 at 4 W St;

(ii) reconfigure and move to Unit 2 at 4 W St; or

(iii) move to alternative premises elsewhere.

323. Option (iii) does not appear to have been seriously considered. Mr Harris of Swaisland Harris forwarded to TM details of four possible alternative properties on 11 November 2002 but the claimants only say that Mr Harris was not instructed by them. TM said in cross-examination that "I did speak to Mr Harris [but he was] not officially instructed by me." Mr Denyer-Green suggests, unfairly in my opinion, that Mr Harris may have been trying to solicit business. There are several letters from Mr Harris in the trial bundle, the tone of which suggest that he at least thought he was instructed. It is also worth noting that the claimants have instructed a number of surveyors to act for them in connection with the CPO including G L Hearn, Knight Frank and BIV Bowes.

324. On 22 January 2005 Mr Irvine sent to TM "for Mr M Mohammed" (who he thought at that time owned the fish and chip business) details of three fish and chip takeaway shops as potential alternative premises. There is no evidence to show that the claimants considered seriously, or at all, any of the alternatives put forward by Mr Harris and Mr Irvine.

325. Turning to the option of moving to Unit 1 at 4 W St, Mr Denyer-Green says that Mr Reeve advised the claimants that this was a reasonable step to take. Mr Reeve was responding to a letter from MM dated 4 November 2004 which in cross-examination TM said he had written on MM's behalf. That letter asked:

> "Would you confirm in writing that if I were to relocate at 4 Waterloo Street you would expect this to be a reasonable move from [one] side of the street to the other.
>
> Would you confirm that the planning permission for A3 use would be a simple formality and you would expect the planning department to grant planning permission as previously enjoyed up to 4am A3 use, due to being CPO by the council. [R]elocation directly opposite would put the business in an even location."

326. The letter was written some nine months after the Happy Chip had moved and was signed by MM. There is nothing in the letter to suggest authorship by TM other than the reference to A3 use –

MM's purported convenience store business was an A1 use. As Mr Fraser put to TM in cross-examination (denied by him), the letter "would make perfect sense if there was none of this other business argument."

327. Mr Reeve's reply cannot be taken as an unqualified endorsement of the reasonableness of the move. He said:

> "I would agree that [the move to Unit 1] is reasonable providing the alternative premises have the appropriate planning permission and other necessary approvals.
>
> … The city council will offer compensation based on a temporary loss of profits and relocation costs which arise from a legitimate transfer of a business."

328. The problem for the claimants is that planning permission for extended hours was not granted, either in the first instance or on appeal. Mr Fraser submits that the claimants should have expected this outcome but TM vigorously denied this in cross-examination saying that it was "absolutely not correct".

329. Mr Denyer-Green submitted that the claimants were unsophisticated in such matters and that they acted reasonably in relying on advice from Dickinson Dees. As I have stated earlier I do not accept this depiction of the claimants. I think they knew exactly what they were doing as was demonstrated by TM's reply to Mr Fraser's cross-examination asking why, if late opening hours were critical to the success of the Happy Chip, TM had offered limited hours of operation (11pm) in his March 2001 planning application. TM said:

> "[We were] given advice. Get what you can [and] extend the hours later. [Get a] foot in the door first. One thing at a time."

That is not the strategy of an unsophisticated businessman; it is a deliberate and shrewd policy to achieve a specific objective. It also contradicts TM's denial that he should have expected the council to resist longer opening hours.

330. Putting aside the question of the cost of creating and fitting out Unit 1, which is considered further under issue 15 below, I think it was reasonable in principle for the claimants to move the short distance from the reference property to 4 W St, a property already owned by TM and which had conditional planning permission for the proposed use. Such a move, it seems to me, must have maximised the prospects of retaining existing business. Mr Reeve accepted that such a move was reasonable in correspondence and I think that he was right to do so.

331. I next consider whether it was reasonable for the claimants to make a second move to Unit 2. The claimants had already said in terms that Unit 2 was not suitable for their business (see paragraph 316 above). It seems to me that the only reason they moved twice was to secure late night opening hours similar to those they enjoyed at the reference property. I agree with Mr Irvine's answer in cross-examination when it was put to him that the alternative premises that he had identified would not "replicate the existing business model". He queried whether it was reasonable to replicate exactly what had been lost: the claimants were to be compensated for losses arising from moving from one

fish and chip shop to another – that was the nature of the business – but it was not necessary to secure the exact trading hours previously available.

332. The claimants are entitled to claim for the temporary loss of profits, if any, they sustained as a result of relocating from the reference property to Unit 1 at 4 W St and also for any partial permanent loss of profits that they might have sustained as a result of the move, including any such losses as can be shown to have arisen by the more restrictive opening hours at Unit 1 compared with the reference property. The claimants had done their best to mitigate their losses by trying to obtain longer opening hours (even though they were disingenuous about the prospects of success when giving evidence).

333. The failure to obtain longer opening hours for Unit 1 is not sufficient justification in itself for a second move to Unit 2. In my opinion such a second move was not a direct and natural consequence of dispossession from the reference property. There is no causal connection between the acquisition and the second move. The cause of the second move was the claimants' inability to secure longer opening hours at Unit 1, a shop which they designed and adapted for their own use and which was otherwise fit for purpose. There was no suggestion when the first move took place that it was to be temporary and conditional upon extended opening hours being allowed; indeed it was TM who proposed restricted hours of opening for Unit 1 in the planning application for mixed A3/A1 use made in March 2001 and the retrospective planning application made in March 2004.

334. In *Shun Fung* Lord Nicholls considered whether a claimant could ever be entitled to compensation on a relocation basis if this would exceed the amount of compensation payable on an extinguishment basis. In deciding there was no such absolute bar to the assessment of compensation on a relocation basis Lord Nicholls said at 127E:

> "It all depends on how a reasonable businessman, using his own money, would behave in the circumstances. In such a case, however, the tribunal or court will need to scrutinise the relocation claim with care, to see whether a reasonable businessman having adequate funds of his own might incur the expenditure…. Compensation is not intended to provide a means whereby a dispossessed owner can finance a business venture which, were he using his own money, he would not countenance. However, when considering these matters the tribunal or court might allow itself a moderate degree of latitude in approving as reasonable the relocation of a family business…."

335. I consider that this passage also applies to the present circumstances where the claimants are seeking compensation for a second move and where the third test in *Shun Fung*, whether the claimant has behaved reasonably and mitigated his loss, falls to be applied. Even allowing for the fact that this is a family business, I do not accept that the claimants would have moved a second time, within two years of the first move, before the new pattern of trading was fully established, and before the planning appeals into the extended hours at Unit 1 had been finally determined, if they had been using their own money without the expectation of compensation.

336. On the claimants' amended case the cost (excluding personal time) of moving to Unit 2 was greater (£410,878) than the cost of moving to Unit 1 (£368,034). I consider this to be a cost that was unreasonably and unnecessarily incurred and I do not accept that the acquiring authority should

be expected to pay for such a move. In my opinion the claimants have not satisfied any of the three tests set down in *Shun Fung* and I disallow the claim for the second move from Unit 1 to Unit 2.

337. There remains the question of whether the claimants could have mitigated their losses by moving directly to Unit 2 rather than Unit 1. The only reason this was not possible, it seems to me, is that although the property was vacant it was still the subject of ongoing litigation regarding Ms Rahimi's lease. The claimants' statement that the property was not suitable for their business is belied by the fact that they eventually moved there. The evidence concerning the marketing of Unit 2, and indeed Unit 1, is puzzling and raises serious questions about the claimants' motives and actions. I have already commented on the marketing of Unit 1 under issue 4 at paragraphs 119 to 121. I set out my conclusions about Ms Rahimi's lease at 4 W St in paragraph 131. The court action referred to in that paragraph was settled at or around 18 February 2005. Before that time it was not possible for the claimants to occupy Unit 2 and, in my opinion, it was not available as potential alternative accommodation at the valuation date. But I cannot finally decide the issue until Mr Day is called to explain his reference to a lease of Unit 2 having been granted on 5 February 2004.

Issue 15: Unit 1 Works

Evidence and Submissions

338. The parties agree that:

(i) the claimants cannot receive compensation for the costs of any works for which they received an environmental improvement grant (totalling £215,578); and

(ii) there are issues regarding what work was done, the quality of the work, what was within the grant works and the value and measurement of the works which are matters of expert evidence yet to be heard.

339. Mr Fraser submitted that there are a number of points which can be made at this stage about the grant works and the other works to Unit 1 at 4 W St. Such works were carried out by TM&S Construction Limited ("TMSCL"), a company owned by TM. TM said that his company had been awarded the grant works contract after a "successful tendering process" but when asked in cross-examination to produce evidence of this tender TM said "I can't, but it did happen". Subsequently TM said that he asked the council whether he could tender and they gave him a form to complete and to return as a sealed bid: "for the external [grant] works there were sealed envelopes." Mr Denyer-Green submitted that the council had approved TM and SM's application for an environmental improvement grant on 2 August 2002, with the figure of £215,578 being based on pre-tender estimates; that the grant had been secured by a legal charge dated 13 March 2003 between the council and TM and SM as freeholder to ensure satisfactory assurance of the works; and that the charge was removed on 13 March 2006 as the conditions of the charge had been satisfied.

340. The claimants said that the Unit 1 works, which in general terms comprised works to the interior of the building, had been awarded to TMSCL because it gave the lowest quote. In cross-examination TM said that "he beat the estimate for the internal works [to Unit 1]" that had been

made by PPM Developments Limited ("PPM") (£365,000 + VAT) on 10 January 2003 at the request of SM. TM said that he did not know this company or whether it was related to SM. Mr Fraser said that no details of PPM's estimate were provided, nor of PPM itself, nor of their experience, nor why SM had sought the estimate rather than TM, since the works were TM's responsibility.

341. TM provided a schedule of invoices for construction work to Unit 1 (totalling £401,662) that was, in the main, carried out by TMSCL. By 10 January 2003, the date of PPM's estimate, TMSCL had already invoiced SM £118,000 for work that was said to have been done, with payment due. Mr Fraser submitted that it was clear that a large proportion of the work had been done before the estimate from PPM had even been obtained.

342. Mr Fraser said that the claimants' expert, Mr Huitson, had no direct knowledge of the Unit 1 works but relied upon what the claimants had told him. There was no evidence to establish that the works had been done; there was only TM's word for it which lacked credibility. Most of TMSCL's invoices were for round figures and amounted to £391,995 out of the total of £401,662. £8,766 of the balance of £9,667 consisted of quotations and not invoices. There was no evidence that any of the work, if done at all, had been paid for.

343. The only receipted invoices were from Glazewell Glass and were addressed to TMSCL. They did not refer to Unit 1 at 4 W St and there was no explanation of why bills to TMSCL should be compensatable.

344. More than half the invoices (12 out of 23) were raised before the CPO was confirmed in June 2003 at a time when the claimants had been resisting the CPO and which they then challenged in the courts. Such costs could not have anything to do with the CPO.

345. The last two invoices were dated October and November 2005 by which time the claimants said they were going to move to Unit 2. When this was put to him in cross-examination TM said that "I did not invoice at the time the work was done. Sajit paid when he could afford it." Mr Fraser said this again raised a question of whether the invoices were ever paid and showed that these were not commercial transactions which could be taken seriously.

346. The cost of the works was attributed to HCLG but the works were of a structural character that was designed to add value to Unit 1. As such the works should properly be to the cost of the freeholder who retained such value. They could not properly or reasonably be attributable to the CPO and/or the need for the Happy Chip to relocate. TM had got value for money from the works and the council should not have to pay for him to re-order his property.

347. Finally, Mr Fraser submitted that to spend over £400,000 to create one unit on the ground floor of 4 W St was unreasonable given that the whole building was valued by Mr Simon Elliot MRICS of the Grainger Town Partnership in February 2003 at £546,000, especially given the claimants' assertion that business was seriously declining, the area was declining because of the CPO,

Unit 1 did not have planning permission for the intended use and it was unsuitable because of the lack of late trading. Mr Fraser said the claimants had not mitigated their losses.

348. Mr Denyer-Green submitted that many of the matters raised by Mr Fraser did not arise because the claimants were not seeking compensation based directly on the invoices. Their claim now relied upon the description of the works as shown on those invoices and as measured and valued by Mr Huitson at £368,034.

349. Mr Denyer-Green said that TM only sought to enforce payment of the invoices at later dates because he knew he could get the money "without suing his own business" i.e. the HCLG in which he was a partner.

350. The works to Unit 1 had to overcome two particular problems:

(i) the difficulties caused by different floor levels; and

(ii) alterations to the structure were required to accommodate the frying range and the requisite ventilation/extraction plant.

Whether or not the works added value was a matter of expert evidence. Mr Denyer-Green said the acquiring authority had not adduced any evidence relating to the proportion of the costs it alleged added value to 4 W St. The acquiring authority had confused the roles of landowner and the business; it may well be reasonable for a business to incur this level of expenditure in order to continue and maintain its trade. The question of land values did not affect that decision.

Discussion and conclusion

351. As now pleaded the claimants do not rely on the total of the invoices (£401,662) contained in TM's evidence and referred to at paragraph 82 of Mr Denyer-Green's re-amended skeleton as representing the costs to HCLG of adapting Unit 1. Instead they rely upon Mr Huitson's evidence in which he prices a bill of quantities for the relocation and adaptation works in the sum of £368,034. This expert evidence, and that of the acquiring authority's expert, Mr Wardle, has yet to be heard and tested. I therefore confine my comments to the credibility of TM's evidence on this issue.

352. No explanation was given for the obvious discrepancy and timing of TMSCL's first four invoices for work done (totalling £118,000) and PPM's estimate dated 10 January 2003 for the totality of the works. In cross-examination TM was asked "you said you produced a better quote for the works than SM's firm [PPM]" to which he replied "that was for the internal works. [I was] shown a price by another firm. I beat the estimates for internal works." As TM had already done a substantial amount of those works (over 25% by cost) by the time PPM submitted their estimate, his comments can only make sense (if true) if he was shown that estimate after he had started the works and was comparing it with hindsight. But that invites the question of why SM would ask PPM for a quote knowing that TMSCL had already been awarded the work. Whatever the answers to those questions it is clear that there was no competitive bidding process for the award of the Unit 1 works, contrary to the impression that the claimants sought to give in their evidence.

353. There is no evidence to corroborate SM's claim that he actually paid the invoices. The copies of the invoices in the trial bundle are not receipted apart from the two identified by Mr Fraser as having been addressed to TMSCL. Like Mr Fraser I cannot see the relevance of these two invoices to SM's claim. I also note (i) that two of the invoices have the same reference number (003/010) and that one of these invoices, that dated 2 January 2003, is out of chronological sequence; and (ii) that there is no accounting evidence from TMSCL which would show when, if at all, the invoiced amounts were received.

354. The accounts of HCLG contain entries under "refurbishment costs" for the years ending 31 December 2003 (£277,328), 2004 (£53,970) and 2005 (£137,606) which are the three accounting years when invoices were raised by TMSCL for the Unit 1 works. The total of the entries in the accounts is £468,904 which is greater than the total of the invoices. The distribution of the entries coincides with the invoice totals for 2003 (£277,335) but not for 2004 (£33,527) and 2005 (£90,800).

355. In his witness statement TM refers to further expenditure of £15,850 on complying with planning permission conditions and £29,823 on the purchase of new equipment at Unit 1. There are also four invoices for Unit 2 that were raised in 2005 and amounting to £34,516. Adding the total of these amounts (£80,189) to the figure for adapting Unit 1 of £401,662 gives £481,851 which still does not reconcile with the figures in the accounts. (In any event several of these invoices are addressed to TMSCL or TM; one is a quotation and some appear to have been partly redacted.) This is another example where Mr Newton was in the best position to explain the accounts and the information upon which they were based.

356. I do not find Mr Denyer-Green's explanation convincing that TM was prepared to wait until SM was able to pay before TM sent out the invoices. That meant he was carrying significant costs in his own company, TMSCL, and effectively subsidising the HCLG in which he only had a 10% share (a share which he said he did not take in any event. Nor is such a share shown in his accounts).

357. In my opinion the claimants' evidence of invoices in support of the works said to have been done by TMSCL on Unit 1 at 4 W St and said to have been paid for by SM, is not reliable so far as payment is concerned. The claimants do not rely upon the amounts so paid as representing their rule (6) claim on this issue; they rely instead upon the invoices describing the nature of the work done which has then been priced independently by Mr Huitson. Whether this is a reliable approach is a matter for expert evidence.

Issue 16: Unit 2 works

Evidence and Submissions

358. The claimants originally relied upon invoices submitted by TMSCL (£331,110) and one invoice from Northern Gas Networks (£1,741) in the total sum of £332,851. They now rely upon priced bills of quantities produced by Mr Huitson amounting to £410,878.

359. Mr Fraser made similar criticisms about the claimants' evidence of expenditure on Unit 2 at 4 W St to those that he made regarding Unit 1 and which are directed at the credibility of the claimants' evidence on this issue.

360. Mr Fraser emphasised that the amount claimed for the cost of the works, especially when added to the figure claimed for Unit 1, was disproportionate to the value of the whole building. When asked in cross-examination whether he thought it was reasonable to spend a further £332,851 on a property for which he had paid £425,000 TM said "that was not in my mind set at the time" and that he was not thinking about whether it was worth spending this money. Mr Fraser submitted that this was a clear indication that the claimants had not sought to mitigate their loss.

361. The claimants again said that they obtained an estimate from PPM before awarding the contract to TMSCL. This estimate (for £385,000 + VAT) was unsigned and, said Mr Fraser, so vague as to be worthless. The one invoice for Unit 2 works submitted by a company other than TMSCL, and the only one to be receipted, referred to a cheque number 000037. Mr Fraser said that this was evidence of bank accounts and cheque payments which the claimants had refused to disclose.

362. As with the TMSCL invoices for Unit 1, many of the invoices for works said to have been done on Unit 2 were dated well after the work must have been completed. The claimants (according to their own chronology) moved into Unit 2 on 15 November 2005. Four invoices (including that from Northern Gas Networks) had been submitted by then. The four remaining invoices were dated 2 November 2006 (£60,000), 2 December 2006 (£39,867), 2 November 2007 (£93,740) and 4 April 2008 (£104,733). Mr Fraser said that the claimants had been unable to provide any satisfactory explanation for what he described as this glaring discrepancy.

363. In reply Mr Denyer-Green said that it was only after they had pursued all reasonable steps to try to obtain planning permission for late night opening at Unit 1 that the claimants created and moved to Unit 2. They had acted reasonably in doing so. The claimants only relied upon the invoices as showing the works carried out to Unit 2; they relied upon Mr Huitson's expert evidence, yet to be heard, of their measurement and value.

Discussion and conclusion

364. Given that I have found under issue 14 above that the move to Unit 2 is not compensatable, and that the claimants only rely in any event on the TMSCL invoices to describe the nature of work said to have been done and not upon their value, this issue is only concerned about the general credibility of the claimant's evidence.

365. There is no evidence that the amounts invoiced by TMSCL were paid by SM, or at all. The one invoice not raised by TMSCL (that from Northern Gas Networks) was addressed "c/o Mr T Mohammed" at his home address of 5 York Street (which is also the address to which all the TMSCL invoices are addressed). There is no explanation why TM might have paid that invoice by cheque.

366. The invoices raised by TMSCL in 2007 and 2008 correspond to the amounts shown in HCLG's accounts for those years but the amount shown for 2006 is not the same: the accounts show £112,078 whereas the total of the TMSCL invoices for that year is £99,862. According to TM's evidence TMSCL invoices were raised in 2005 for work done on both Units 1 and 2. Indeed the first invoice for Unit 2 pre-dates two invoices for work done on Unit 1. The total of the TMSCL invoices for 2005 was £125,316 whereas the HCLG accounts for that year show £137,606. The claimants did not adduce the TMSCL accounts so there is no corroboration of payment from that source.

367. At the start of his cross-examination about the works at Unit 2 TM confirmed that the works were structural works to the inside of the building and were "done in 2005". When it was pointed out to him that some of the TMSCL invoices were not issued until 3 years later he said that the "works continued after the move had taken place." Both answers cannot be correct. Mr Denyer-Green said that the reason for submitting delayed invoices in respect of Unit 1 had been to allow SM to pay when he could afford to. That reason was not given in respect of Unit 2 and, in my opinion, TM's explanation that further works on Unit 2 continued long after the Happy Chip had commenced operation is not credible.

368. The evidence in respect of the costs of Unit 2 is based upon the TSMCL invoices. I consider these invoices to be suspect and I am not satisfied that they were paid, either timely or at all, by HCLG. I do not consider them to be reliable evidence upon which to found this head of SM's compensation claim.

Issue 17: claimants' personal time

369. This part of the claim was particularly confusing. In the re-re-amended statements of case forming part of the trial bundle, TM and SM's claim for rule (6) losses in respect of Units 1 and 2 at 4 W St included:

(i) Partnership time spent supervising and arranging the relocation to Unit 1
332 hours at £25 per hour: £ 8,300

(ii) Partnership time spent supervising and arranging the relocation to Unit 2
368 hours at £25 per hour: £ 9,200

(iii) Partnership time spent resourcing materials for the refurbishment of Units 1 & 2
2,946 hours at £25 per hour: £73,650

Total (3,646 hours at £25 per hour): £91,150

370. These items of claim were apportioned between TM (10%) and SM (90%) in accordance with their partnership agreement.

371. In his amended statement of case MM claimed under rule (6) for:

(i) Personal time spent supervising and arranging the fitting out of and relocation to Unit 1

1,285 hours at £50 per hour: £64,250

(ii) Personal time spent supervising and arranging the closure of the Convenience Store business

100 hours at £50 per hour: £ 5,000

Total personal time for MM (1,385 hours at £50 per hour): £69,250

372. The total personal time claimed for TM, SM and MM in the pleadings as they were at the start of the hearing was therefore £160,400.

373. In the claim summary of costs and expenses attached to his witness statement TM provided different figures:

(i) Time spent resourcing materials for Unit 1

1,185 hours at £50 per hour: ` £59,250

(ii) Time spent on relocation to Unit 1

886 hours at £50 per hour: £44,300

(iii) Time spent resourcing materials for Unit 2

2,369 hours at £50 per hour: £118,450

(iv) Time spent in relocation to Unit 2

921 hours at £50 per hour: £ 46,050

(v) Time spent corresponding with counsel and instructing solicitors "in respect of the Council scheme"

313 hours at £50 per hour: £ 15,650

Total (5,674 hours at £50 per hour): £283,700

374. So far as I can tell items (i) and (iii) above relate to time spent by MM since the hours correspond with the totals he gives in appendices to his witness statement.

375. The position at the start of the hearing was set out in Mr Denyer-Green's amended skeleton argument dated 21 January 2015. MM claimed for:

(i) Time spent supervising the relocation of equipment

36 hours at £50 per hour: £1,800

(ii)	Moving stock and displays, arranging storage, fitting out Unit 1	
	500 hours at £50 per hour:	£25,000
(iii)	Supervising the relocation to Unit 2	
	5 hours at £50 per hour:	£250
	Total (541 hours at £50 per hour):	£27,050

TM and SM claimed for:

(i)	Planning the relocation from 15 W St to Unit 1		
	500 hours at £50 per hour:	£25,000	
(ii)	Supervising and arranging the move to Unit 1		
	208 hours at £50 per hour:	£10,400	
(iii)	Relocating from Unit 1 to Unit 2		
	500 hours at £50 per hour:	£25,000	
	Total (1,208 hours at £50 per hour):		£60,400

376. At the hearing the claimants' position changed yet again. On 2 February 2015, day six of the hearing, Mr Denyer-Green handed in a revised summary of claims. The revised claim for MM's personal time (£27,050) was deleted because that, and the balance of the hours comprising the figure of £283,700 (see paragraph 373 above), was now allowed for in Mr Huitson's evidence and subsumed within his allowance for supervision work. Mr Denyer-Green said that there was therefore no double-counting of personal time between the claimants' time and that allowed by Mr Huitson. Unfortunately this amendment was not explained until late in the hearing and Mr Denyer-Green accepted that it should have been dealt with on the first morning. Mr Denyer-Green dismissed as irrelevant Mr Fraser's comments regarding the hours previously claimed.

377. I acknowledge that the claimants' latest amendments show a substantial reduction in the number of personal hours claimed. That does not, as Mr Denyer-Green suggests, render irrelevant Mr Fraser's submissions about the number of hours originally claimed. Those submissions go to the claimants' credibility.

378. The hourly rate claimed by TM, SM and MM was originally £25. MM revised this figure to £50 per hour in an amended statement of case dated 4 July 2013 which was the statement of case contained in the trial bundle. Both TM and SM in their re-re-amended statements of case dated 23 September 2014, which were the versions in the trial bundle, retained an hourly rate for personal time of £25. It was not until shortly before the hearing, as detailed in Mr Denyer-Green's amended skeleton argument, that TM and SM increased their hourly rate to £50 per hour. This was done arbitrarily and without any explanation. Mr Fraser suggested, and I agree, "that these figures are being plucked out of the air." There is not a scintilla of evidence to support either hourly rate.

379. The number of hours originally claimed was extremely high, at one time amounting to 5,674 hours (nearly 142 working weeks, assuming a 40 hour working week). Mr Fraser put it to TM that, assuming such a working week, the revised claim amounted to £2,000 per week or some £100,000 per annum. The majority of time spent was claimed by MM and his profits from the convenience store business simply could not command that hourly rate. TM responded that Mr Fraser's analysis was "incorrect" but that is not an adequate answer. Nor was TM able to give a satisfactory reply to Mr Fraser's questioning about when and how the personal hours had been incurred. Mr Fraser said that the move to Unit 1 at 4 W St was completed by February 2004 and yet there were numerous entries in the claim for time spent on this move dated between October and December 2005. When pressed on this point by the Tribunal TM said "I don't remember." That answer was repeated at least 15 times as Mr Fraser probed deeper into the reasons why the claimants' revised case had not been explained earlier and as he examined individual items in detail regarding the move to Unit 1.

380. Many pages of the claimants' analysis of their personal time for the "resourcing of materials for Unit 1" contained numerous entries described as "Diesel". Against this description was an entry for 1 hour "time spent" and then an amount that varied for each entry but was typically less than £20. TM could not remember what these entries were about. MM's explanation of these entries was, frankly, unintelligible. It was not a claim for diesel fuel in respect of mileage incurred and MM was unable to explain clearly, or at all, what these items of claim represented. The amounts shown in the last column did not appear to be correlated to the time said to have been spent (always shown as 1 hour). Mr Fraser also correctly pointed out that the claim for personal time regarding the move to Unit 2 was made at a time when MM's Convenience Store business had already been extinguished.

381. TM could not explain the numerous discrepancies in the claim for personal time spent on the move to Unit 2 which took place in November 2005. TM produced 64 pages of "time/invoices" sheets showing how the claim was constituted for Unit 2, but 62 of these pages contained entries all of which were made after this date. Mr Fraser put it to TM that the entries for dates after November 2005 were wholly irrelevant, to which TM replied "there is a reason for it but I can't remember it." TM went on to say that "works were done [after the move]."

382. Many of the items for which personal time is claimed appear to have nothing to do with the acquisition. There are claims for trips to the Post Office, to Tesco (including topping up a mobile phone and two hours spent on "Tesco laptop"), and numerous other unexplained entries, such as one labelled "MasterCard" for which an hour is claimed.

383. TM also claimed for the personal time spent on the installation of equipment (included in item 373 (iv) above). Half of the itemised claim of 421 hours was spent on fitting the frying range, a job apparently done by specialised fitters. There is no explanation why partnership time needed to be spent on this, and other, works of fitting out.

384. In the original claim TM added a further 500 hours for his time and that of SM in supervising the move to Unit 1 at 4 W St as well as a further 500 hours in respect of the subsequent move to Unit 2. Those additional hours were unsupported by any evidence or explanation.

385. The claim for personal time as originally presented was utterly unconvincing and obviously exaggerated. The supporting evidence was, as Mr Fraser described it, preposterous and a joke. It lacks any credibility. I am not surprised that the claimants, presumably on professional advice given that MM was "deeply aggrieved to abandon" this element of his claim, have dramatically reduced it, subsuming the majority of their personal time into Mr Huitson's analysis which is yet to be heard and tested. I am concerned, however, that the claimants changed this head of claim several times and continued to do so both immediately before and during the hearing. That lends weight to Mr Fraser's criticism that the claimant's case was being amended "on the hoof".

386. Of the total of 1,208 hours of personal time still claimed, 1,000 hours have no explanation or justification other than TM's brief description of what was done by himself and SM at Unit 1:

> "[We] spent from October 2003 planning the relocation, moving stock items and displays into the new Unit, arranging for shelving and display cabinets to be installed and arranging works to make the Unit ready for occupation and I estimated 30 hours per week was spent making a total of 500 hours."

387. A similar claim of 500 hours was made by TM, without supporting evidence, in respect of the subsequent move to Unit 2.

388. The claim for the remaining 208 hours of time spent on the move to Unit 1 was itemised on a schedule forming an exhibit to TM's evidence. Mr Boncey identified on day six of the hearing those items on the schedule that were still being claimed separately to the allowance for supervision costs made by Mr Huitson.

389. In *Lancaster City Council v Thomas Newall Limited* [2013] EWCA Civ 802 the Court of Appeal considered a claim for the management time of the directors of the claimant company. Rimer LJ said at [32]:

> "The 'management time' issue was not, however, one falling within the specialist expertise of this tribunal. It was, in substance, a straightforward common law claim for compensation that had to be made good on the evidence; and if there was no evidence sufficient to make it good, the tribunal's duty was to reject it. The tribunal's error was to make an award of compensation when there was no evidence proving loss. That was unquestionably an error of law …. against which an appeal lies to this court; and it was an error of law that this court has a duty to correct."

390. Unlike *Thomas Newall Limited* the present claim concerns individuals trading in partnership rather than a company, a distinction recognised by Rimer LJ at [26]:

> "I can well see that if an individual faced with a compulsory acquisition reasonably devotes his own time to dealing with it, he ought in principle to be compensated for his time. He can fairly say that the expenditure of such time represents a loss to him. In this case, the question is whether TNL, a company, has incurred any like loss."

391. Nevertheless in order to sustain a claim an individual must adduce evidence of the quantum of his loss, in terms of the time spent, what it was spent on and a reasoned explanation for the value of that time. In these references the claimants have not properly satisfied those criteria.

392. The claim in respect of personal time spent on the move to Unit 1 is in two parts. Firstly, the claimants assert they spent 500 hours on the matters listed at paragraph 386 above. Secondly, the claimants say they spent a further 208 hours on the items specified in the schedule exhibited to TM's evidence (although there was no explanation about why claims were made after the move was completed). Some of the items claimed in this schedule appear to be exaggerated in some respects; for instance, a total of 14 hours spent "supervising connections" undertaken by NPower and five hours said to have been spent instructing the solicitor to reschedule possession dates.

393. The claimants have not provided any justification for their hourly rate of £25 which was then, remarkably, doubled at a late stage. There must be a reasoned explanation for the hourly rate claimed if the Tribunal is to make an award. In this case the amount claimed is arbitrary and unexplained.

394. The 500 hours of personal time claimed in respect of the move to Unit 2 is irrelevant because I have already found that this second move was too remote.

395. Mr Denyer-Green submitted that "plainly time had to be spent in relation to the two moves." I do not doubt it in respect of the first move, but the claimants have to prove their loss. They have not done so as concerns their claim for 708 hours of personal time in respect of the move to Unit 1 at 4 W St. In my opinion a fair and reasonable allowance for such a move is 100 hours.

396. As to the hourly rate I reject the claimants' figure of £50 as being arbitrary and unexplained. It seems to me that in the absence of any evidence or argument to support the claimants' figure the hourly rate should be based upon the cost to the claimants of employing staff to cover for them while they were engaged in dealing with the move occasioned by the compulsory purchase of the reference land. In my opinion the rate should be at least the adult national minimum wage in force at the valuation date (£4.50 per hour). I therefore allow the sum of £450 for the claimants' personal time.

Disposal

397. This interim decision determines the facts relating to the 17 identified issues. It is now necessary to arrange a further substantive hearing to consider the expert evidence. In my opinion, not all of the expert evidence which has been adduced to date remains necessary or relevant in the light of this interim decision. For instance, evidence about the move to Unit 2 will not be required since I have found that move to be too remote. Similarly the valuation evidence will need to be reconsidered by the experts in the light of my decision about the genuineness of the leases.

398. I propose to hold a case management hearing within eight weeks of the date of this decision to determine how these references will be progressed.

399. This decision is final on all matters in the interim issues of fact other than costs. The parties may now make submissions on costs and a letter giving directions for the exchange of submissions accompanies this decision.

Dated: 6 October 2015

A J Trott FRICS

Upper Tribunal, Lands Chamber

ADDENDUM ON COSTS

400. The acquiring authority submit that they should receive all of their costs to date on the indemnity basis and that the claimants should be required to pay those costs as a precondition to proceeding further with their claims.

401. The acquiring authority say that the claimants failed to comply with the requirements of section 4 of the 1961 Act by not delivering a notice in writing of the amounts claimed by them. The first indication of the nature and amounts of the claims was contained in the claimants' statements of case following the references (which were made at the last minute). The claimants then constantly amended their claims which continued to "evolve" during the course of the hearing.

402. The acquiring authority also submit that the claimants failed to comply with the procedural requirements of the reference by failing to give proper or complete disclosure despite three separate orders having been made by the Tribunal. The claimants' conduct of the proceedings was manifestly unreasonable and had led to unnecessary and wasted expenditure and a prolonged hearing. The disputed factual issues had been determined almost entirely in the acquiring authority's favour.

403. The acquiring authority say that the claimants made manifestly incredible claims and lacked candour when giving their evidence. The effect of the Tribunal's decision was that very significant elements of the claims could no longer be pursued and other elements would have to be substantially reduced. The claims were grossly exaggerated and wholly unreasonable.

404. The claimants submit that the cost of the hearing should be reserved until the final outcome of the claims is known. This was the approach taken by the Tribunal in *Thomas Newall Limited v Lancaster City Council* [2010] UKUT 2 (LC).

405. The claimants say that in order to comply with section 4(2) of the 1961 Act they waited to give notice of their claims until the costs of the second relocation were known and the preparation of accounts completed (May 2009). The statements of case that were subsequently served were notices in writing containing sufficient particulars to comply with section 4(2).

406. Alternatively, the claimants say there is a special reason for them not to pay costs under section 4(1) at this stage. The general rule is that a claimant who obtains an award of compensation should receive his costs, except in exceptional circumstances. The Tribunal should therefore reserve its decision on costs until its final decision in order to give proper effect to this principle. At this stage it is not possible to say ultimately how successful the claimants will be.

407. The claimants submit that any costs order the Tribunal might make against them should be on the standard basis rather than on the indemnity basis. They say they succeeded on a number of issues which should not be dismissed as "minor". Furthermore the acquiring authority contributed to the length of the hearing by protracted cross-examination of the claimants, often about matters where the

claimants relied on their experts' evidence rather than their own. The extent to which the claimants' failure on various issues will affect the level of compensation cannot be determined at this stage.

408. The claimants submit that the Tribunal does not have specific powers to order that the continuation of a reference should be made conditional upon the payment of interim costs. Its powers, if any, are based upon its general power to give directions as to the conduct of the proceedings and to regulate its own procedure. Those general powers must be exercised in the context of the Tribunal's overriding objective to hear cases fairly and justly. That objective would not be achieved by making the costs order sought by the acquiring authority. In particular it would not ensure that the claimants could participate so far as possible in the proceedings and would cause delay in the event of the need for a detailed interim costs assessment. The acquiring authority will be able to deduct any costs from the compensation ultimately payable by them to the claimants (s.4(5) of the 1961 Act).

409. My interim decision is, in many respects, critical of the claimants' conduct. The conduct of the parties, both during and before the proceedings, is an important consideration in the issue of costs. But it is not the only circumstance to be taken into account. Other matters include whether a party has succeeded on part of their case, even if they have not been wholly successful, admissible offers to settle and whether the claimants have exaggerated their claim. The references were adjourned part heard and I have not yet heard any of the expert evidence. Until I do I cannot determine the final extent of the claimants' success or failure or the total amount of compensation payable. Nor at this stage of the proceedings do I know whether any offers to settle have been made by any of the parties. Those are relevant factors in the consideration of costs and on balance I consider that the overriding objective to deal with the references fairly and justly would be best served by reserving the costs of the first hearing and I so determine.

Dated: 10 November 2015

A J Trott FRICS

Upper Tribunal, Lands Chamber