

LANDS TRIBUNAL ACT 1949

COMPENSATION – electricity – underground cables – land with planning permission for waste transfer station – statutory wayleaves for retention – preliminary issues – injurious affection – valuation method – quantum – disturbance claim for loss of profits – entitlement to this – factual basis for determination of claim – mitigation of loss - Electricity Act 1989, Schedule 4 para 7.

IN THE MATTER of A NOTICE OF REFERENCE

BETWEEN (1) **TERENCE WELFORD**
(2) **COLIN PHILLIPS**
(3) **IOD SKIP HIRE LIMITED** **Claimants**

and

EDF ENERGY NETWORKS (LPN) PLC **Compensating Authority**

Re: Approx 0.6 acres of industrial/commercial, land between Bidder Street and Stephenson Street, Canning Town, London E16

Before: The President and Mr N J Rose FRICS

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 31 October, 1-4, 7-10 and 17 November 2005**

Romie Tager QC and Philip Kremen instructed by Hughmans for the claimants.
Guy Roots QC and Guy Williams instructed by Lewis Silkin for the compensating authority.

The following cases are referred to in this decision:

Macleod v Central Electricity Generating Board [1997] RVR 94
Holt v Gas, Light and Coke Co (1872) LR 7 QB 728
Oppenheimer v Minister of Transport [1942] 1 KB 242

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111
Clinker and Ash Ltd v Southern Gas Board (1967) 18 P & CR 372
Snook v Somerset County Council [2004] RVR 254
Khan v Miah [2000] 1 WLR 2123
Ryde International plc v London Regional Transport [2004] RVR 60
Corton Caravans Ltd v Anglian Water Services Ltd [2003] RVR 323

The following additional cases were cited in argument;

Mercer v Liverpool, St Helens and South Lancashire Railway Co [1903] 1 KB 652
Horn v Sunderland Corpn [1941] 2 KB 26
Harvey v Crawley Development Corpn [1957] 1 QB 485
Pastoral Finance Association Ltd v The Minister [1914] AC 1083
Collins v Feltham UDC [1937] 4 All ER 189
Wimpey v Middlesex County Council [1938] 3 All ER 781
McEwing and Sons Ltd v Renfrew CC 1960 SC 53
Wickham Growers Ltd v Southern Water Plc (1996) 73 P & CR 351
Hobbs (Quarries) Ltd v Somerset County Council (1975) 30 P & CR 286
Bwlfa and Methyr Dare Steam Collieries Ltd v Pontypridd Waterworks [1903] AC 426
Wrotham Park Settled Estates v Hertsmere Borough Council [1993] EGLR 15
Argyle Motors (Birkenhead) Ltd v Birkenhead Corpn [1975] AC 99
Aslam v South Bedfordshire District Council [2001] RVR 65
Optical Express (Southern) Ltd v Birmingham City Council [2005] RVR 230
Tobin v London County Council [1959] 1 WLR 354
Blue Circle Industries Plc v Ministry of Defence [1999] Ch 289

INTERIM DECISION

Introduction

1. The reference in this case concerns a number of underground electricity cables vested in EDF Energy Networks (LPN) plc (“EDF”) as licensed distributor of electricity under the Electricity Act 1989. They have existed for many years, and they cross a site (“site A”) at Bidder Street, Canning Town, that the first and second claimants bought at auction in 1994, intending to use it as a waste transfer station. The third claimant is a company wholly owned by the first and second claimants. It was incorporated on 1 December 1994. The first and second claimants intended to operate the waste transfer business on the land through this company. When they bought the land they were unaware of the presence of the cables. They were notified of the presence of the cables in July 1995, and on 12 September 1995 they gave notice to EDF’s predecessor, London Electricity plc, to remove them. London Electricity applied for statutory wayleaves for the retention of the cables and,

following a hearing in November 1997, these were granted on 17 August 1998.

2. In October 1997 the first and second claimants had acquired the leasehold interest in land (“site B”) adjoining site A. A building for the handling of waste was erected on site B, and in about January 2000 the third claimant began to handle waste collected in its own skips at sites A and B.

3. Under the Electricity Act 1989, schedule 4 paragraph 7 the claimants are entitled to compensation in respect of the wayleaves granted in August 1998. This is the subject of the first reference. The second reference arises under an arbitration agreement between the parties, entered into to compromise a High Court claim by the claimants in respect of losses incurred between 12 September 1995 (when notice to remove the cables was given) and the grant of the wayleaves on 17 August 1998. The effect of the presence of the cables was to prevent the erection of a building for the handling of waste on site A. The claimants say that they could have erected such a building in the winter of 1995 and could have begun their waste transfer use at that time, rather than in January 2000. They claim that the value of their land has been diminished by £472,970 on account of the cables. They say also that they have lost profits of £3,270,000 and have suffered additional costs of £555,000, and they claim these amounts as disturbance. In addition they claim interest on the lost profits and additional costs, calculated up to 31 October 2004 and totalling between £1,330,000 and £1,580,000 depending on the basis of interest payment adopted. The compensating authority say that the diminution in value of the land is £78,151; and they deny that the claimants are entitled to any compensation by way of disturbance.

4. In the course of the hearing it became clear that the claim for loss of profits was dependent on a number of factual assumptions that were the subject of dispute between the parties. It appeared to us that it would be appropriate to determine these disputed assumptions, along with other issues that were capable of determination at this stage, before proceeding to hear the accountancy evidence on the loss of profits claim. The parties agreed the formulation of these interim issues, and we set them out below. This is the decision on those issues.

The claimants’ land

5. The land currently occupied by the claimants consists of 4 parcels - sites A and B, to which we have referred, and two smaller adjacent parcels, plot C and plot D. Site A, otherwise referred to as the reference land is a roughly L-shaped area running between Bidder Street on the west and Stephenson Street on the east. It is 0.24 ha (0.6 acre) in area. To the north of it is an industrial building. Site B is to the south. The north-western part of site A is occupied by a large electricity pylon which supports a double-circuit 400 kV overhead line. The pylon is 55m high, and because of its size vehicles of quite large dimensions can pass between its legs. To the south of the pylon two sets of underground cables cross the site from west to east. There are eleven 11 kV cables, which run for a distance of 82m, and four 66 kV cables, which run for a distance of 105m. They are buried at depths of between 0.6m and 3.6m.

6. Site A was in the ownership of the London Borough of Newham when it was put up for

auction in 1994. It appears that it had been used as public open space (known as “Oasis Park”), but at the time of the auction it had been subject to fly-tipping and there was a substantial volume of waste on the site. The first and second claimants’ successful bid was £51,000. Subsequently they negotiated this down to £41,000, and the sale was completed on 30 April 1995. At the first valuation date (12 September 1995 – see below) the site had been cleared of the fly-tipped material and a concrete surface had been laid over part of it. At the second valuation date (17 August 1998) it was in use in conjunction with site B for lorry and skip storage, and portakabin offices had been erected in association with this use.

7. Site B is a rectangular site lying immediately to the south of Site A and is contiguous with it. It is roughly similar in area to site A. On 15 October 1997 the first and second claimants purchased for £230,000 the leasehold interest in site B for a term expiring on 31 March 2056 at a ground rent of £390 per annum. Between the date of purchase and the commencement of the waste transfer use, site B was used by the claimants as a skip storage and vehicle depot in conjunction with site A. It had previously been used as a British Telecommunications transport and storage depot. At the time of purchase there were a number of buildings on the site, some of which were later demolished. The claimants constructed on site B a waste transfer shed approximately 17m by 38m (646 sq m) with a maximum height of 12.5m. A trommel screen with associated conveyors has been installed inside the shed and these feed material storage bays on site A. Plot C adjoins site A and extends to approximately 0.12 ha (0.29 acre). The freehold interest was acquired by the claimants on 3 June 2003 for £500,000. The claimants have also been in occupation of site D since 2001; it has an area of approximately 0.09 ha.

The cables

8. The eleven 11 kV cables were laid pursuant to a licence granted on 25 May 1949 by the then owner of the land, the County Borough of West Ham, to the London Electricity Board. The licence was granted for a period of 25 years in consideration of an annual payment of £6. The licence expired on 25 March 1974. The retention of the cables from then until 1989, when the Electricity Act 1989 came into force, was authorised by section 11 of the Electricity (Supply) Act 1922. Under the transitional provisions of Schedule 17 to the 1989 Act, a wayleave for the cables was deemed to be granted under paragraph 6 of Schedule 4 to the Act. They were authorised to be retained under paragraph 8(1)(a) of the Schedule. On 12 September 1995 the claimants by their solicitors requested their removal. On 8 December 1995 London Electricity plc (the successor to the London Electricity Board) applied to the Secretary of State pursuant to paragraph 6 of the Schedule for the grant of the “necessary wayleave” to enable the cables to be retained. As a consequence of this application it was authorised by paragraph 8(2) to retain them pending determination of this application.

9. The four 66kV cables were laid pursuant to a licence granted on 20 May 1963 by the County Borough of West Ham to the London Electricity Board. The consideration was an annual payment of £1. The licence was terminable by either party on the giving of six months’ notice. There was no power to retain the cables by virtue of this licence once the ownership of the land had changed on 30 March 1995. However, London Electricity plc was authorised to retain the cables by virtue of the

1989 Act. As with the 11 kV cables, on 12 September 1995 the claimants by their solicitors gave notice of termination of the licence, and on 8 December 1995 London Electricity plc applied for the necessary wayleave (and were authorised under the 1989 Act to retain the cables pending determination of the application).

10. On 3 April 1996 London Electricity plc commenced proceedings in the High Court for a declaration that it was authorised to retain its 11kV cables under an easement acquired by prescription. The case was transferred to the Central London County Court, and on 15 May 1997 His Honour Judge Rich QC held that no easement had been acquired by prescription, but that London Electricity plc was entitled under the 1989 Act to retain the cables pending the determination of its application for the necessary wayleave, and he made a declaration to this effect. The application for the grant of the necessary wayleaves for the 11 kV and 66 kV cables was considered at a hearing held by an inspector of the Department of Trade and Industry on 25 November 1997. In his report the inspector recommended that the wayleaves should be granted, and on 17 August 1998 the Secretary of State granted the wayleaves pursuant to paragraph 6 of Schedule 4 to the Act for a period of 15 years. Throughout the whole of the period under consideration the cables have remained in the land and have been used for the distribution of electricity in the London area.

Planning history and use

11. On 23 June 1995 a planning application to Newham London Borough Council was made on behalf of IOD Skip Hire Ltd seeking permission for a waste transfer station on site A. The application had been the subject of prior discussion between the claimants' agent and officers of the council, and in a letter to the council the agent, Dusan Savic of Echo Design, had said that the site would handle construction and commercial waste totalling 250 tons per day. There would be 50 skip loads and 10 bulk loads on a normal working day. The planning application stated that 19 people would be employed as the result of the development and that of those 7 would be new jobs. As considered by the council the application contained a plan (drawing number 9542/01/A) and sections and elevations (drawing number 9542/02/A). The plan showed the transfer station building, 26m by 12.5m (325 sq m), along the western (Bidder Street) frontage. It extended from the southern boundary of the site up to the pylon. The sections and elevations showed the building as having a maximum height of 12.5m, with an opening 11 m high in the eastern facade divided by two supporting stanchions. The plan showed an area for skip storage immediately to the east of the building on the southern boundary of the site, 6 car parking spaces, 13 lorry spaces, a weighbridge and a workshop and offices. Entrance to the site was shown to be from Stephenson Way, with the exit to Bidder Street from underneath the pylon.

12. Planning permission subject to conditions was granted by the council on 7 September 1995. Condition 2 tied the permission to the two submitted drawings. Condition 3 required that the area shown as car parking should be permanently retained for that use. Condition 4 prevented the storage of refuse anywhere on the site except within the building. Condition 11 required that skips should only be stored in the area designated for skip storage and should not be stacked more than 2

metres high.

13. A planning application was made in respect of site B on 20 April 1998. This was refused by the local planning authority on 19 June 1998. An appeal was made against the refusal and a hearing was held by a planning inspector on 27 January 1999. The agreed description of the proposed development was “The extension of the site area for a proposed waste transfer shed and on-site car parking for staff.” In his decision letter of 10 February 1999 the inspector recorded that the planning permission on site A had been partially implemented but the approved building could not be erected over underground electricity cables. He rejected the council’s contention that there was a policy objection to the development. He noted that there were 8 waste transfer stations in the borough but that only 5 of these could take the sort of waste proposed for the site, which was close to major construction sites at the Isle of Dogs and Docklands. The inspector granted planning permission subject to conditions, in accordance with six application drawings.

14. On 4 November 1999 an application was made on behalf of the claimants for a waste management licence. A licence was granted on 11 August 2000. It limited the amount of waste that could be accepted to 400 tonnes per day or 24,999 tonnes per year. On 16 October 2001 the licence was modified to permit up to 600 tonnes per day or 74,900 tonnes per year.

Arbitration agreement

15. On 12 March 2002 the claimants issued High Court proceedings against London Electricity plc seeking damages and other relief consequential upon the retention of the cables on site A for the period between 12 September 1995 and 17 August 1998. These proceedings were withdrawn pursuant to the arbitration agreement of 2 March 2004. The agreement provided

“2. If and in so far as the Claimants (or any of them) demonstrate that they have suffered loss attributable to the presence or use of the electric lines between 12 September 1995 and 17 August 1998 which is not fully compensated by an award of compensation pursuant to the Electricity Act 1989, schedule 4 paragraph 7, the [compensating authority] agrees to pay to the claimants (or each of them as the case may be) an amount assessed in accordance with clause 3 of this Agreement in addition to the amount due under the Electricity Act 1989 schedule 4 paragraph 7.

3. The amount of compensation payable in respect of the period 12 September 1995 to 17 July 1998 shall be assessed pursuant to the Electricity Act 1989, schedule 4 paragraph 7 as if the wayleave had been granted by the Secretary of State with effect from 12 September 1995, but not so as to duplicate any compensation payable to the Claimants pursuant to the Electricity Act 1989 schedule 4 paragraph 7 for the actual grant of the wayleaves on the 17 August 1995.”

Claim against Newham London Borough Council

16. On 29 September 1997 the first and second claimants issued proceedings in the Chancery Division against Newham London Borough Council claiming

- (a) Damages for breach of the Defendant's duty as vendor of the reference land to disclose to the purchasers the existence of the electricity cables under the land in pursuance of the wayleave agreements of 1949 and 1963 with the Defendant's predecessor;
- (b) Damages for misrepresentation in describing the land in the auction particulars as suitable for B1, B2 and B8 development when the cables precluded such development; and
- (c) Damages for breach of the contract of sale.

17. The Particulars of Claim dated 25 August 2000 show the claim to be made up as follows:

- (i) £30,000: the wasted costs of site clearance and preliminary building work;
- (ii) £6,205: irrecoverable costs of litigation against London Electricity;
- (iii) £25,510.18: irrecoverable costs of Secretary of State inquiry;
- (iv) Loss of profits until replacement premises on stream:
01.01.1996 to 17.08.1998: £2,715,471;
17.08.1998 to 31.12.1999: £1,583,368;
- (v) £6,154 cost of management time wasted.

18. The council served a defence dated 26 November 1997, which was replaced on 8 February 2001 by a defence to the Particulars of Claim of 25 August 2000.

Evidence

19. For the claimants Mr Romie Tager QC and Mr Philip Kremen called as witnesses Terence Charles George Welford and Colin Phillips, the first and second claimants; Patrick Gladwell, director of Clearun Limited; S P Worthy MRICS, a partner in C M Parker Browne; John Warren CEng, MIMechE, Eur Ing, FCIWM, LCGI, the principal of Ampthill Consulting Engineers; and Eric Frank Shapiro BSc (Est Man), FRICS, IRRV, FCI Arb, consultant to Moss Kaye Pembertons. Mr Welford gave evidence of his involvement in the business of waste transfer, his association with Mr Phillips as business partner, the background to the purchase of site A, the proposals for development of the site, the effect of the cables on these proposals and related matters, and on matters arising from the report of the compensating authority's witness Mr Thaddeus. Mr Phillips gave evidence about his business as a skip hire operator, the company IOD Skip Hire Ltd, the purchase of site A, and related matters. Mr Gladwell gave evidence of his experience of the waste transfer industry and on matters arising from the report of Mr Thaddeus. Mr Worthy's evidence related to the costs of construction. Mr Warren was called as an engineer expert in waste management to express an opinion as to whether site A, if, in the absence of the cables, it had been

developed in accordance with the 1995 planning permission, could have been used between 1996 and 2000 as a fully operational waste transfer station. Finally, Mr Shapiro gave evidence on the value of the land.

20. Reports had also been lodged on behalf of the claimants by an accountant, Jeffrey E C Davidson, MA (Cantab), FCA, MAE. This evidence was directed to establishing the claim for loss of profits. Mr Davidson was not called to give evidence pending the determination of the interim issues.

21. For the compensating authority Mr Guy Roots QC and Mr Guy Williams called Stephen Pearce BSc, CEng, MICE, MCIWEM, MCIWM of Pearce Environmental Ltd; David Thaddeus FRICS, a partner in Matthews & Son; and Colin David Smith FRICS, IRRV, a partner in Bruton Knowles of Gloucester. Mr Pearce gave evidence that addressed Mr Warren's expressed opinion in relation to the quantities of waste that could have been handled on site A. Mr Thaddeus gave evidence on the suitability of site A as a waste transfer station and the market for waste transfer sites. Mr Smith gave evidence on the value of the land. There was also a report by an accountant, Antoinette Pincott LLB, FCA, on the claimant's claim for the loss of profits. As with Mr Davidson, Ms Pincott was not called to give evidence pending the determination of the interim issues.

22. The issues which the parties agree should be decided at this stage as interim issues are as follows:

- (a) Whether in the light of the evidence the claim for loss of profits properly falls within and is in accordance with the Electricity Act 1989 Schedule 4 paragraph 7.
- (b) Whether the evidence so far has established the assumptions on which the claimants' accountancy evidence is based, and, if not, what alternative assumptions have been established by the evidence.
- (c) In relation to that part of the claim relating to the value of the land:
 - (i) whether this should be assessed (on each relevant date) in relation to both site A and site B or to site A alone;
 - (ii) whether the land should be valued on the profits basis, as contended by the claimants, and what is the diminution in the value of the land pursuant to the Electricity Act 1989 and the arbitration agreement.
- (d) What award should be made for compensation in respect of the grant under Schedule 4 paragraph 7(1).

23. In order to determine these issues we consider first the statutory provisions so as to identify the nature of the compensation for which they provide. We then go on to consider, in this order, (d) (the value of the wayleaves granted), (c) (the diminution in value of the claimants' land) and (a) and

(b) (the claim for loss of profits).

Events leading up to the acquisition of site A: evidence of the claimants

24. Mr Welford said that in the early 1980s he and his then partner, Norman Hill, operated the Blackwall Transfer Station on a site of 0.5 acres at Blackwall Goods Yard, Poplar, London, E14, on the south side of the A13 and the west side of the river Lea. They received skips from third parties and separated heavy waste from light waste by tipping the material into two heaps using a shovel and an excavator. They did not operate a skip hire business. The site contained no buildings apart from a small office and wc. The terms of their occupation of the site were not reduced to writing and no rent was paid.

25. The scrap metal was separated by hand and sold to the adjoining yard. A man was allowed to come on to the site and retrieve old London stock bricks and remove them. That person also separated out some other recyclable items, such as computer paper, which Mr Welford then sold. The London Recycling Company was allowed to use space in the yard. They hand picked paper and cardboard and took it away. Both heavy and light waste was taken in bulk tipper lorries from the Blackwall Transfer Station to a landfill site in Rainham, Essex. A charge was made at the landfill site for tipping the light waste, which consisted of plastics, wood and household waste, based on its volume. No charge was made for tipping heavy waste, comprising concrete, hardcore, muck, sand, soil and ash.

26. In the mid 1980s the Blackwall Transfer Station was compulsorily acquired by the LDDC and Mr Welford and Mr Hill received compensation of £100,000 for such interest as they had in the site. They then acquired a site at Moody Wharf, Lanrick Road, London, E14 which bordered the river Lea and included a number of arches beneath the East India Dock Road. Planning permission was granted on 2 May 1986 to use the site as a waste transfer station, including a transfer shed. Paper, metal, wood and cardboard were sorted and stored separately in different arches. Mr Hill was a former rag and bone merchant. He separated the different types of metal before it was sold.

27. In about 1987 Mr Welford was approached by Shanks and McEwan, a large waste transfer company, which was interested in acquiring Moody Wharf. A sale of the business including the land, goodwill, plant and machinery was agreed and completed on 1 September 1988. At that time the site had been operational for only one or two months. Mr Welford and Mr Hill retained part of the site, including the arches, from which they recycled cars for scrap. The sale agreement included a covenant preventing Mr Welford from taking part in a business connected with waste transfer. In his witness statement dated 12 November 2004 Mr Welford said that the covenant was for a period of seven years from the date of sale. On the third day of the hearing he said that he had been discussing the matter with Mr Hill who had told him the period was five years, but the final sale agreement was not made available to the Tribunal.

28. Mr Welford first met Mr Phillips in the early 1980s. Mr Phillips was then employed as a skip driver by Rehene Skip Hire Company Limited, a labour hire company with a skip hire division. He

would deliver skips to the original Blackwall Transfer Station and later to the new site at Lanrick Road. In the mid 1980s he told Mr Welford that the owner of Rehene had died and that the new owner was closing the skip hire part of the business. Mr Phillips asked whether Mr Welford would back him financially in a new skip hire business. Conscious of the restrictions imposed in the sale to Shanks and McEwan, Mr Welford became what he described as the silent partner of Mr Phillips, providing finance for the purchase of a second-hand truck and fifty skips as well as working capital. Mr Welford did not receive interest on the money he invested; all profits earned were re-invested in building up the business. Mr Phillips took over some of Rehene's customers and Mr Welford introduced him to all the contacts he had built up over the years. In addition to providing a source of customers, this meant that Mr Phillips was able to set up accounts at other waste transfer stations, rather than paying immediately. The fee paid to the waste transfer station was included in the fee Mr Phillips charged to the customer. Mr Welford also dealt with the acquisition of further trucks and skips as the business grew.

29. Initially the business was based at Mr Phillips's home in Millwall, with his wife operating the telephone. It operated as Colin Phillips, trading as IOD Skip Hire. Mr Welford and Mr Phillips decided that increased profits could be earned if the skip hire business was combined with a waste transfer station. By the early 1990s the operation had six lorries and 200 to 300 skips. Mr Phillips obtained a site at Millwall Wharf, which was used to store the vehicles and skips. Mr Welford was aware that this site was going to be re-developed. He and Mr Phillips wanted to obtain a yard for their own waste transfer station to maximise the potential of the business. Mr Welford was responsible for viewing potential sites, which had to be in a residential area with good road and transport links. Any location in the East End of London would have been suitable.

30. In November 1994 Mr Welford received an auction catalogue which advertised the sale of site A. He was particularly interested in that site, because it was described as being suitable for B1, B2 and B8 development, which he said he understood to mean industrial. The special conditions of sale referred to the wayleave for the pylon and the overhead electricity cable. Mr Welford said that he concluded that the height of the pylon was adequate for trucks to be able to drive off beneath it. He met a representative of the planning department of the London Borough of Newham, who was fairly optimistic that planning permission for a waste transfer station on the site would be granted. The auction took place on 21 November 2004 and Mr Welford's bid of £51,000 was successful. The price was subsequently reduced to £41,000 to reflect the occupation of gypsies on the site and the sale was completed in April 1995.

31. The business was incorporated as IOD Skip Hire Limited on 1 December 1994. The assets of the business were all transferred into the new company without consideration. At the time they included 8 lorries, 200 to 300 skips and goodwill. The company commenced trading on 1 May 1995. In his witness statement Mr Welford said:

“by that time I was out of my seven year restrictive covenant”.

The freehold interest in the land was retained in the ownership of Mr Welford and Mr Phillips. The

company paid the cost of clearing and fencing the site.

Compensation: the statutory provisions

32. Paragraph 7 of Schedule 4 of the Electricity Act 1989 provides as follows:

“(1) Where a wayleave is granted to a licence holder under paragraph 6 above –

- (a) the occupier of the land; and
- (b) where the occupier is not also the owner of the land, the owner

may recover from the licence holder compensation in respect of the grant.

(2) Where in the exercise of any right conferred by such a wayleave any damage is caused to land or to moveables, any person interested in the land or moveables may recover from the licence holder compensation in respect of that damage; and where in consequence of the exercise of such a right a person is disturbed in his enjoyment of any land or moveables he may recover from the licence holder compensation in respect of that disturbance.

(3) Compensation under this paragraph may be recovered as a lump sum or by periodical payments or partly in one way and partly in the other.

(4) Any question of disputed compensation under this paragraph shall be determined by the Tribunal; and sections 2 and 4 of the Land Compensation Act 1961 or sections 9 and 11 of the Land Compensation (Scotland) Act 1963 shall apply to any such determination.”

33. Mr Shapiro’s valuation on behalf of the claimants was expressed to be an assessment of the diminution in value of sites A and B in consequence of the grant of the wayleaves by the Secretary of State. He did not refer to the statutory provisions, but (since he referred to the grant of the wayleaves rather than their exercise) by implication he was basing himself on subparagraph (1). Mr Davidson’s assessment of the claimants’ loss of profits was not expressed in terms of the statutory provisions, but impliedly this head of claim was based on sub-paragraph (2). In his closing submissions Mr Tager was concerned to distinguish between “the land” in subparagraph (1) and the references to “land” and “any land” in subparagraph (2). Although the former might be confined to the land needed to install and maintain the cables subparagraph (2) was not, he submitted, so restricted. It followed, he said, that Mr Shapiro was right to assess compensation by reference to sites A and B together, and the same applied to the disturbance claim.

34. In his valuation report on behalf of the compensating authority Mr Smith said that he was instructed that the payment under subparagraph (1)(a) was to reflect the use made by the compensating authority of the stratum or strata of land below the surface where the cables were situated, and the measure of compensation under subparagraph (1)(b) was the diminution in the market value of the land (by which he meant site A) at the relevant date in consequence of the presence of the cables. He made his valuation on this basis. Mr Roots said that under subparagraph

(1) the owner or occupier, as the case might be, was entitled to a payment to reflect the right of the compensating authority (in the case of an underground cable) to use the stratum or strata of land in which the cables were situated. It did not depend upon an exercise of the right. Under subparagraph (2) on the other hand the claimant was entitled to compensation for damage to land arising from the exercise of the right. While the words were apposite to include physical damage they also extended to what in the context of compulsory purchase was known as injurious affection. Thus the proper measure of compensation under subparagraph (2) was the depreciation in the open market value of the claimants' land by reason of the presence of the cables.

35. The scope of the compensation provided for under paragraph 7 had been the subject of consideration in *Macleod v Central Electricity Generating Board* [1997] RVR 94, which concerned the compensation payable in respect of an overhead line. At 110 the Member (P H Clarke FRICS) said:

“Although compensation for the grant of a necessary wayleave is to be determined by para 7 of sch 4 to the 1989 Act, this provides for the recovery of ‘compensation in respect of the grant’. The fundamental principle of compensation is equivalence (see *Horn v Sunderland Corporation* (not cited)). It follows therefore that the claimant is entitled to compensation for all the loss (which is not too remote) which flows from the grant of the necessary wayleave. This includes direct loss due to the siting of the pylons on the land and indirect loss due to the depreciation in the value of the reference land which is not under the pylons and line. This was the approach adopted by this Tribunal in the past (see eg *Turris* and *Naylor*) and which I adopt in this reference.”

Mr Roots submitted that the Member wrongly treated the “direct” and “indirect” loss to which he referred as falling under paragraph 7(1), ie as compensation in respect of the grant. Such loss, Mr Roots said, properly fell under paragraph 7(2), which entitled the claimant to compensation for damage to land.

36. Mr Roots submitted that the claimants' loss of profit claim could not be brought within the scope of subparagraph (2). He said that the provision for compensation for disturbance should be applied according to the established principles relating to disturbance in relation to the compulsory purchase of land. The words used in the provision reflected the general law. The claimant had to be “disturbed in his enjoyment” of land in consequence of the exercise of the wayleave. This meant that there had to be interference with the use that the claimant was making of the land at the time of the exercise of the right. A use which had not started at that date could not be interfered with since the claimant would not be enjoying the land for this purpose and thus his enjoyment could not have been disturbed. Moreover “enjoyment” implied lawful enjoyment, so that a use that was not lawful was not relevant for this purpose. Since the waste transfer business had not commenced by 12 September 1995 (under the arbitration agreement, the date of the assumed grant) there had been no disturbance of the claimants' enjoyment of the land for this purpose by the exercise of the wayleave.

37. The claimants' claim thus contained two elements that can be categorised as injurious affection (the depreciation in the value of their land on account of the cables) and disturbance (loss of profits due to the presence of the cables). The compensating authority's assessment of the compensation

due also contained two elements – the value of the wayleaves (a head of claim not advanced by the claimants) and injurious affection; and they denied that there was any entitlement to disturbance compensation consisting of loss of profits. There is thus no disagreement that compensation for injurious affection is payable, although there are substantial differences as to its quantification, and there is some doubt as to its statutory basis (Mr Smith treated it as arising under subparagraph (1) as part of the compensation for the grant, whereas counsel in their submissions saw it as arising under subparagraph (2) as damage to land.) The compensating authority's contention that no compensation is payable for loss of profits is based in part on the construction of subparagraph (2). In view of these doubts and differences, it is appropriate for us to consider the scope of the compensation provided for by paragraph 7. In order to do this it is necessary in our view to consider it in a wider context.

38. Before the 1989 Act an electricity undertaker had power under section 22 of the Electricity (Supply) Act 1919 with the consent of the owner and occupier (or, in the absence of such consent, with the consent of the relevant Minister) to “place any electric line below ground across any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground in cases where the placing of such lines is otherwise lawful.” This provision was also brought into play under section 11 of the 1922 Act where the undertaker was seeking consent from the Minister to retain a line that had been placed under a consent that had expired. There was no specific provision relating to compensation for the grant of such consent, but section 17 of the Electric Lighting Act 1882 made general provision for compensation in these terms:

“In the exercise of the powers in relation to the execution of works given them under this Act, or any licence, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration.”

39. It was not possible for an undertaker to obtain a compulsory wayleave from the Minister under section 22 for a line across a building or land used as a garden or pleasure ground. Under section 9(1) of the Electricity Act 1947, however, undertakers were given the power to acquire land compulsorily, and section 9(2) defined land to include easements and rights over land, a power, therefore, which could be used in such circumstances as well as in others in which the undertaker considered a permanent easement rather than a terminable wayleave to be requisite. Compensation was payable under the legislation that applied to the compulsory acquisition of land – the Acquisition of Land (Assessment of Compensation) Act 1919 and the Lands Clauses Consolidation Act 1845, and subsequently the Land Compensation Act 1961 and the Compulsory Purchase Act 1965. Section 5 of the 1961 Act sets out rules under which compensation is to be assessed. Rule (2) of section 5 provides: “The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the market by a willing seller might be expected to realise.” Rule (6) provides: “The provision of rule (2) shall not affect the assessment of compensation for disturbance or any matter not directly based on the value of the land.” Section 7 of the 1965 Act provides for compensation in respect of the reduction in value of the claimant's retained land due to severance or injurious affection. Thus where a permanent easement was compulsorily acquired the

claimant was entitled to compensation for the market value of the easement (under rule (2) of section 5 of the 1961 Act, but subject, of course, to the no-scheme rule), the depreciation in value of his land (as injurious affection under section 7 of the 1965 Act) and for disturbance (under rule (6) of section 5).

40. One further provision in the old legislation is to be noted, because there are echoes of it in the provisions that we have to consider. Under section 35(1) of the Electricity Act 1957 electricity boards were empowered to enter upon and survey land, and section 35(3) provided as follows for the payment of compensation in respect of the exercise of this right:

“Where in the exercise of any power conferred by this section any damage is caused to land and chattels, any person interested in the land or chattels may recover compensation in respect of that damage from the Electricity Board by whom or on whose behalf the power is exercised; and where in consequence of the exercise of any such power any person is disturbed in his enjoyment of any land or chattels, he may recover from that Electricity Board compensation in respect of that disturbance.”

41. Our recollection is that, in the case of voluntary or compulsory wayleaves under section 22 of the 1919 Act, the electricity boards fulfilled their statutory duty to pay compensation by making annual payments in addition to payments for damage during construction or maintenance. In the case of agricultural land, which constituted the vast proportion of land crossed by overhead lines, the annual payments were negotiated between the industry and the National Farmers Union and reflected the size of the line and the nature of the agricultural use. The boards took the view that compensation for injurious affection was not payable in the case of such wayleaves in the light of section 17 of the 1882 Act, which required them to pay “full compensation...for all damage sustained...by reason or in consequence of the exercise” of their powers. The boards were, however, prepared, where a landowner considered that his land had been depreciated by the line, to enter into a permanent easement and to pay compensation that reflected any such depreciation.

42. The 1989 Act replaced entirely the old Electricity Acts. Section 10 makes provision for the powers of licence holders, and subsection (1) gives effect to Schedules 3 and 4. Schedule 3 contains the equivalent powers of compulsory purchase that were formerly contained in section 9 of the 1947 Act. Thus an undertaker may acquire under these provisions a permanent easement for an overhead or underground line and pay compensation in accordance with the 1961 and 1965 Acts. Paragraphs 6 and 8 of Schedule 4 contain the successor provisions to the compulsory wayleave provisions of section 22 of the 1919 Act and section 11 of the 1922 Act. Paragraph 7 makes provision for compensation in the terms set out above. Of its components, subparagraph (1) appears to have no predecessor in the electricity legislation, and paragraph (2) appears to be derived from section 35(3) of the 1957 Act (compensation for entry on land for the purposes of survey). Subparagraph (3) is new and provides that compensation under the paragraph may be recovered as a lump sum or as periodical payments or partly in one way and partly in the other. It appears now to be the practice of the Secretary of State, as evidenced by the present case and that of *Macleod*, when granting a necessary wayleave under paragraph 6, to impose a term of 15 years, and the appropriateness of enabling a lump sum payment of compensation to be made in such circumstances

is obvious.

43. The right to install or retain and to maintain an electricity line, whether overhead or underground, may thus be acquired compulsorily as an easement under Schedule 3 or as a wayleave under Schedule 4. If acquired as a wayleave it is likely to be for a term of 15 years. There is no obvious reason why compensation should be assessed on a different basis if it is acquired in one way rather than the other. In terms the compensation provisions are nevertheless quite different. Schedule 3 applies the provisions relating to the compulsory purchase of land (market value of the interest acquired, injurious affection of the land retained, disturbance or other loss not directly based on the value of the land). Schedule 4 makes no mention of market value or injurious affection, but simply provides for “compensation in respect of the grant”, and it makes provision for damage and disturbance in terms that owe nothing to the compulsory purchase code but appear to be derived from section 35(3) of the 1957 Act. The explanation for the differences seems to us to lie in the fact that paragraph 7 of Schedule 4 is designed to provide compensation for occupiers as well as owners and for damage to chattels as well as land and to cover wayleaves that may only be short term. Despite the differences between the two sets of provisions, however, we should be reluctant to construe paragraph 7 as it applies to a wayleave for 15 years in a way that would require a different approach to the assessment of compensation from the one that would apply if a permanent easement had been acquired. Happily we see no need to do this.

44. Under paragraph 7(1) the owner is entitled to compensation in respect of the grant. These words are apposite in our view to cover compensation both for the value of the wayleaves and compensation for any consequential reduction in value of the claimants’ land. The Member in *Macleod* treated the provision as operating in this way, and we think that he was right to do so. Disturbance is specifically provided for in subparagraph (2), and, although what it relates to is disturbance in the enjoyment of land that has not been acquired, there is no difficulty in applying this provision in accordance with the principles established under the law relating to compensation for the compulsory purchase of land. We are thus concerned with the three standard elements of compensation. No difficulty arises in respect of the value of the wayleaves. It would, we accept, be a modest amount. The compensating authority put forward a figure of £2,360, while the claimants include nothing at all for it.

45. There is a disagreement in relation to injurious affection in that the compensating authority say that it should be assessed in relation to site A alone whereas the claimants say that as at the second valuation date it should be assessed in relation to both site A and site B. There is no reason why compensation for injurious affection should not be claimed in respect of land in which the interest held is different from that in the land acquired (see *Holt v Gas, Light and Coke Co* (1872) LR 7 QB 728, *Oppenheimer v Minister of Transport* [1942] 1 KB 242), so that it may be assessed in relation to both site A and site B at the second valuation date. As far as disturbance is concerned, the claimant’s claim for loss of profits falls to be determined in accordance with the tests identified in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111, 126 – causation, remoteness and reasonableness – and we shall return to these shortly.

46. Mr Roots, concentrating on the words “disturbed in his enjoyment of any land” in paragraph

7(2), submitted that on the facts there could be no claim for compensation under this head. “Enjoy” in its ordinary meaning meant “have the use of”, and “disturb” in its ordinary meaning meant “interfere with”. The ordinary meaning of “disturbed in his enjoyment of any land” must refer to circumstances where an event caused interference with the use which the person was making of land when the event occurred. Moreover, when used in the context of a statute which provides compensation in consequence of the exercise of a statutory power to use land, “enjoy” must mean “enjoy lawfully”, so that a use which did not have the benefit of planning permission could not be taken into account in assessing compensation. Mr Tager submitted that “enjoyment” was not to be as restrictively construed as Mr Roots suggested. A covenant for quiet enjoyment, he said, would be breached if the landlord acted so as to interfere with a prospective use of the premises by the tenant. It would not matter that the particular use was not yet implemented.

47. We do not think that the question whether the claimants have a right to compensation in respect of loss of profits is to be resolved by an analysis of the particular words used in paragraph 7 (2). As we have said, that provision creates an entitlement to compensation for disturbance that is effectively the same as that arising under the compulsory purchase legislation and the claim falls to be determined in accordance with the same rules. We do not accept Mr Roots’s contention that a use that does not have the benefit of planning permission must be disregarded in assessing such compensation. If, as a matter of fact, it was not envisaged that any enforcement action would be taken by the local planning authority in respect of a use that did not have the benefit of planning permission, we can see no reason why such use should not be taken into account.

Value of the wayleaves

48. As we have said, the compensating authority put forward a figure of £2,360 for the value of the wayleaves granted, and the claimants include nothing for it. We see no reason for not accepting the compensating authority’s figure, and we determine that as the value of the wayleaves.

Diminution in value of land: evidence

49. The claimants’ expert witness on valuation was Eric Frank Shapiro BSc (Est Man), FRICS, IRRV, FCI Arb, consultant to Moss Kaye Pembertons Ltd. Mr Shapiro’s first report was dated 7 October 2004. He approached the diminution in value exercise as at the second valuation date on the basis that the operational capacity of the waste transfer station which was constructed by the claimants on sites A and B was essentially the same as that of the proposed waste transfer station on site A for which planning permission had been granted on 7 September 1995. He therefore considered that, if site B had been freehold, it would not have been necessary to assess its site value for development as a waste transfer station. The situation both before and after the grant of the wayleaves would have been the same, in that such a depot could be developed, the only difference being that it would have been developed on different parts of the overall site. The existence of the wayleaves, however, had caused the waste transfer station to be constructed on the leasehold site and the value of the land as a waste transfer station had therefore been reduced.

50. Mr Shapiro’s freehold valuation of the waste transfer station site used a combination of the profits basis to arrive at the value of the completed waste transfer station and a residual calculation to estimate the site value before development commenced. He explained the reason for using the profits basis as follows:

“A site with planning permission for a waste transfer depot has a value which is related to the profitability derived from working the site. This profitability will in turn be dependent upon the maximum use to which the site can be put, and this in turn will depend on the waste management licence. This being the case, the most appropriate valuation method is ‘the profits basis’. This method is used where rental or capital value evidence is absent.”

51. In preparing his valuation, Mr Shapiro relied on information as to the profitability of the waste transfer station business obtained from Mr Davidson and as to development costs obtained from Mr Worthy. His calculation may be summarised, very briefly, as follows:

Capital value of freehold waste transfer station when operating at full potential	£7,151,295
Defer for three year run-up period	<u>0.675</u>
Capital value immediately after construction (August 1998 prices)	4,826,920
<i>Less</i> costs of development, including interest and profit	<u>1,390,481</u>
Capital value of land without cables	<u>£3,436,439</u>

52. Mr Shapiro expressed the view that the best evidence of the value of the leasehold interest in site B was the price of £230,000 paid by the claimants on 15 October 1997. He adjusted this figure to reflect the increase in values between the date of that sale and the valuation date and arrived at a value for the leasehold site at the valuation date of £250,000. He concluded that the value at that date of the claimants’ interests in sites A and B, without wayleaves, and assuming site A had consent for a waste transfer station, was £3,686,439 (£3,436,439 plus £250,000).

53. Mr Shapiro assumed that, after the grant of the wayleaves, the waste depot use was effectively transferred from site A to site B and, in those circumstances, the value of a waste transfer station would have been the same on either site, all other things being equal. But all other things were not equal because the waste transfer station had to be located, not on a freehold site, but on a leasehold site with an unexpired term of approximately 57½ years. Mr Shapiro derived a notional rental value from his capital value of site A by using a yield of 14%. He capitalised the resultant figure for 57½ years at 16%, with a sinking fund of 2.5% adjusted for tax at 35%, and arrived at a leasehold value for site B of £2,792,794.

54. Mr Shapiro did not allow for any residual value of site A in his first report

“because of the near impossibility of carrying out any development and for the limitations on the use of the site because of the need to gain access to the power cables. In reality this site is being used as an overflow to the leasehold site which houses the waste transfer depot and the skip hire business but it does not add in any significant way to the value of

either these two businesses.”

55. Finally, Mr Shapiro reflected the fact that site B was larger than site A. He calculated the area of the buildings which were retained on site B after construction of the waste transfer station. This accommodation comprised 6,807 square feet of old buildings on two floors. He considered that it had a rental value of £17,000 per annum which, capitalised for 57½ years at 12%, 2½% and tax at 35%, produced a capital value of £119,000. He thus arrived at the diminution in the value of sites A and B, after the grant of wayleaves, of £774,645, calculated as follows:

Value before wayleaves	£3,686,439
<i>Less</i> value after wayleaves (£2,792,794 + £119,000)	<u>£2,911,794</u>
	<u>£774,645</u>

56. Mr Shapiro did not take any account in his calculations of the fact that the wayleaves were granted for only 15 years and not in perpetuity. He accepted that it was theoretically possible that unrestricted possession of site A would be available at the end of the 15 year period and this would allow the site to be developed at that time. He believed, however, that the market would not reflect any reversionary value for the site, because of the speculative nature of any development which might take place so far in the future and the possibility that the wayleaves would be renewed. He added, however, that in order to avoid double counting, no additional compensation would be payable if the wayleaves were renewed in the future.

57. In the course of his oral evidence, Mr Shapiro said that sites with planning permission for a waste transfer station tended not to be offered for sale on the open market. Market activity was restricted to the sale “for huge amounts of money” of companies operating such properties.

58. Mr Shapiro’s second written report was dated 16 May 2005 and commented upon matters which had been raised by Mr Thaddeus and Mr Smith in their first reports. He described as “a truism” Mr Thaddeus’s observation that waste transfer stations were commonly found on the outskirts of conurbations, and usually located within industrial estates with a predominance of secondary industrial uses and/or open storage land. But, he said, this ignored the fact that London was a large conurbation and inner London sites were of great benefit to the building industry. The cost of transporting waste products from central building sites across London was significant, so that more profits could be earned from an inner London site than from one in outer London.

59. Mr Thaddeus had produced details of a number of waste transfer stations in the London area which had come to the market in recent times. In addition, Mr Thaddeus had said, it was possible to acquire such sites in the same manner as the claimants had done, namely by purchasing suitably located industrial land and then seeking planning consent. There were a number of similar open storage land uses which might be considered to have potential for conversion to waste transfer uses, such as concrete batching plant sites, scaffolding yards, skip and maintenance depots and builders’

yards.

60. Mr Shapiro agreed with Mr Thaddeus that there were a significant number of waste transfer stations. However, he said, planning permission for such use was not easily obtained, as evidenced by the difficulties which had faced the claimants when they tried to obtain consent for site B. The economic viability of any site depended on its location. The fact that waste transfer stations were sold elsewhere was not necessarily evidence of the ease of obtaining planning permission for a site in a central location such as the subject property.

61. Mr Shapiro produced a third report dated 3 November 2005. It was prepared as a result of the expert report of Ms Pincott dated 7 October 2004, which had identified a number of discrepancies between the figures in Mr Davidson's report and those used in Mr Shapiro's valuation. As a result Mr Shapiro had met Mr Davidson and reviewed all Mr Davidson's figures. This review has resulted in a revised diminution in value of £472,970, calculated as follows:

Capital value of freehold waste transfer station when operating at full potential	£4,968,550
Defer for three year run-up period	<u>0.675</u>
Capital value immediately after construction (August 1998 prices)	3,353,630
<i>Less</i> costs of development, including interest and profit	<u>1,100,734</u>
Capital value of land without cables	<u>£2,252,896</u>

Decapitalising this value at 14% produced a rental equivalent of £315,405 per annum which, capitalised for 57½ years at 16%, 2½% and tax at 35%, produced a revised leasehold value for the waste transfer station on site B of £1,830,926. Taking into account his previous valuation of the buildings which had been retained on site B, and his recent agreement with Mr Smith that the value of site A with the cables in place was £80,000, Mr Shapiro considered that the value of the combined freehold and leasehold sites after the grant of the wayleaves was £2,029,926 (£1,830,926 plus £119,000 plus £80,000). His amended calculation of the diminution in value was therefore:

$$£2,252,896 + £250,000 - £2,029,926 = £472,970.$$

62. The compensating authority's first valuation witness was David Thaddeus FRICS, a partner in Matthews and Son. He said that, in 1998/99, there were approximately 160 waste transfer stations of varying sizes and types within the London conurbation and various other sites merely handling inert materials or simply carrying out recycling activities. A further 300 waste transfer stations were located throughout south-east England outside London. It was likely that some of those sites were operationally different from the reference land.

63. Given these numbers, waste transfer stations came on to the market at fairly frequent intervals. In addition other such sites changed hands, on a freehold or leasehold basis, without ever formally reaching the market. As examples of properties which had been placed on the market he produced agents' particulars of sites in Watford, Orpington, West Thurrock, Erith, Beckton and Cricklewood.

In view of the availability of market evidence, Mr Thaddeus saw no need to rely on the profits basis when valuing the reference property. He accepted in cross-examination that the Watford and Orpington properties were available on a leasehold basis only and it was later agreed that the Cricklewood property did not have consent to be used for waste purposes.

64. The compensating authority's second and principal valuation expert was Colin David Smith FRICS, IRRV, a partner in Bruton Knowles based at that firm's Gloucester office. In arriving at his valuations, Mr Smith considered the actual and potential planning position and demand for land in the locality. The sales particulars for the auction in 1994, at which the claimants purchased site A, stated that the land was

“suitable for B1, B2 and B8 development subject to consent.”

In addition, Mr Smith considered that there were other potential uses for which planning consent would have been achieved on site A, including open storage with a small office and workshop, a builder's yard, a vehicle pound and indeed as a waste transfer station for which planning consent was in fact obtained in September 1995. Mr Smith adopted the opinion expressed by Mr Thaddeus that, whilst the property could have been used as a waste transfer station, the value for such use was essentially similar to that of other industrial land and buildings. It was on that “general industrial” basis, therefore, that Mr Smith prepared his valuation of the site without the cables, which he termed valuation A.

65. Mr Smith produced details of a number of transactions involving B2/B8 sites in the locality of the reference site which were sold or let during the period from 1997 to 2000. In his opinion, the value of site A at the valuation date, prior to any improvements having taken place and without the underground cables, was £150,000, or £300,000 per acre based on the site's effective developable area excluding the electricity tower. The Particulars of Claim submitted by the claimants in their High Court action for damages against the vendors of site A for failing to disclose the existence of the cables, stated that the wasted cost of site clearance and preliminary building work was £30,000. Mr Smith considered that the value of the improvements which the claimants had made to the site – by way of fencing, concreting over of part and laying hardcore, but excluding the removal of fly tipping – was £20,000. Thus his valuation A was £170,000.

66. Mr Smith observed that, adopting the Particulars of Claim figure of £30,000, the claimants had achieved a cleared site at an overall cost of £71,000 including the purchase price of £41,000. This equated to approximately £150,000 per acre of effective developable area and represented the cost of the site to the claimants in 1995. He considered that this represented a “good deal”, and reflected the apparent reluctance of other bidders to purchase at the auction because of the unattractiveness of the land due to the presence of fly tipping.

67. In his initial report, Mr Smith expressed the view that the value of site A in 1998 with the cables in place – his valuation B – was £124,000. As we have said, shortly before the hearing he agreed with Mr Shapiro that the correct figure was £80,000. In consequence, his opinion of the diminution in the freehold value of site A, assuming the wayleave was permanent, was £90,000

(£170,000 - £80,000). The claimants' actual loss, however, was limited to the term of the wayleave. He arrived at an equivalent figure for that period by decapitalising the £90,000 in perpetuity at 14% (7.14 Y.P.) and capitalising the resultant rental equivalent of £12,605 for 15 years at 14% (6.2 Y.P.). This gave a "damage to land" compensation payment of £78,151 for the statutory wayleave.

68. It was also necessary, for the purposes of the arbitration, to assess the depreciation in the value of the claimants' land by reason of the presence of the cables as at 12 September 1995, ensuring that the amount payable did not duplicate to any extent the statutory compensation payable under this head. Mr Smith said that the claimants purchased the land for £41,000 and apparently spent £30,000 clearing the site and carrying out improvements. Thus, the total cost to the claimants of making the land suitable for use compatible with the presence of the cables did not exceed £71,000. The agreed value of the reference land after completion of the works and at the time of the grant of the wayleaves in August 1998 (assuming a permanent wayleave) was approximately £80,000. Thus, the claimants suffered no loss on 12 September 1995, since the value of the land at that time was in excess of its cost.

69. In his rebuttal report dated 16 May 2005, Mr Shapiro did not expressly disagree with Mr Smith's approach to the claimants' loss at the first valuation date. He questioned, however, whether Mr Smith was right to assume that the amount spent on site clearance was only £30,000. He also disagreed with what he described as Mr Smith's failure to reflect the value of a waste transfer station use in his valuation.

70. Mr Smith's rebuttal report was dated 8 April 2005. He there described Mr Shapiro's approach, taking site A alone as the "before valuation" and site A and B together as the "after valuation," and adjusting the latter to reflect the leasehold tenure and the value of the retained buildings, as an

"academic and unreal valuation process entirely divorced from market realities".

In his view the availability of site B in 1997 provided an opportunity for the claimants to establish a waste transfer station business which was significantly different in nature and scale from the business which could have been established on site A alone.

71. Mr Smith produced a third, supplementary, report on 14 October 2005. He confirmed that he was not aware of any transactions relating to sites used for waste purposes which could be applied directly to value site A for waste transfer and recycling use. The use of land for a waste transfer station with or without recycling was, however, in many respect a similar use to the class B2 "general industrial" use in the town and country planning use classes order. It would often be suitably located on land which would otherwise be regarded as suitable for general industrial use. Consequently, the open market value of land with planning permission for a waste transfer station could be expected to have a relationship with open market values for industrial use. A waste transfer station might command a premium above general industrial values. The amount of any premium would depend upon factors such as the locational and physical suitability of the land for a waste transfer station and the availability of other sites with planning permission or where planning

permission could reasonably be expected to be granted for such use. In this regard, there were within the immediate locality scrap yards, open storage sites (for cars, scaffolding and pallets) and several transport depots. Generally, the amount of any “waste use premium” was related to and would increase in line with the ease with which the site could be operated and the extent to which advantage could be achieved over competitor businesses in the area. Mr Smith considered that a premium would only be paid where there was competition for a site, with more than one potential waste operator seeking to buy. In his opinion a premium uplift for waste processing use on site A was unlikely, having regard to its size, shape and inherent limitations and to the availability of other sites. Intuitively, he certainly did not consider that any premium, assuming one was appropriate, would exceed 25%.

72. Mr Smith said that an indication of the market for waste industry sites could be obtained from Mr Thaddeus’s original report. Of the six waste use or potential waste use sites identified, two – at Cricklewood and Beckton – were acquired for non-waste purposes. Mr Smith subsequently discovered that there was no planning consent for waste transfer station use on the Cricklewood site. One of the selling agents had identified that site as being suitable for such use, however, because the adjoining uses comprised a large household waste depot and a concrete batching plant.

73. Mr Smith considered that further guidance could be obtained from the claimants’ purchase of site B only a year before the statutory valuation date. The original asking price for the long leasehold interest in site B had been £400,000. In view of the length of the lease remaining and the low ground rent Mr Smith thought that the value of that interest was virtually equivalent to a freehold. When the claimants’ offer of £230,000 was accepted in August 1997, site A had waste transfer consent and clear hope value existed in respect of site B, whether as a stand alone site or, as had happened, for use in conjunction with site A. Nevertheless, the purchase price of site B, with an area of 0.75 acres, was equivalent to £307,000 per acre, which was directly in line with the then general industrial land values in the locality. If Mr Shapiro’s apportionment of £119,000 to the value of spare accommodation was taken into account, the price paid for the open land was equivalent to less than £250,000 per acre.

74. Moreover, when site C was acquired in June 2003, sites A and B were fully operational as a waste transfer station and the vendor would have been aware of the marriage value arising, as well as the potential to secure possessory title in respect of site D. The price of £500,000 paid for site C was equivalent to £1.724m per acre. Mr Smith considered that by June 2003 general industrial values in the area had increased significantly from the £300,000 per acre which had prevailed in 1998 to approaching £1m per acre.

Diminution in value of land: conclusions

75. What has to be valued at the second valuation date (17 August 1998) is the diminution in value of the freehold interest in site A and the 57½ year leasehold interest in site B occasioned by the presence of the cables on site A and the acquiring authority’s right to maintain them there for a period of 15 years. In the light of clause 2 of the arbitration agreement, what in our judgment, has to

be valued at the first valuation date (12 September 1995) is the diminution in value of the freehold interest in site A occasioned by the presence of the cables and the acquiring authority's right to maintain them there for the period between the first and second valuation dates.

76. The claimants' valuation was based on the value at the second valuation date of the two sites as a waste transfer station. There is no evidence before us that would lead us to conclude that the presence of the cables on site A had any effect on the value of the two sites as they were eventually developed for this purpose. The effect of the cables is to prevent the construction of buildings on the land through which they pass. The shed was built on site B, and site A was used for the storage of skips and other open uses for which land adjacent to the shed was needed. There is no evidence to suggest that in connection with the use of the sites as they were in due course developed, the inability to construct a building on site A had any adverse effect. However, as at the second valuation date site A had planning permission for the construction of a waste transfer station but there was no planning permission for a shed on site B. Our conclusion (see below) is that planning permission could at that date reasonably have been expected for a shed on site B, but a purchaser would have taken account of the fact that he would have to wait some months before he could achieve planning permission and begin development, whereas no such delay would have been suffered if he had been able to build the shed that had been permitted on site A. If the sites were to be valued for use as a waste transfer station, therefore, the effect of the cables would be to diminish their value to the extent of this deferment. As for site A at the first valuation date, the effect of cables and the right to maintain them until the second valuation date was to defer until the second valuation date the site's value as a waste transfer station.

77. Mr Shapiro's view was that the value of the sites as a waste transfer station was in excess of their value for general industrial or warehouse purposes. If that view were correct, the proper approach to valuing the two sites at the second valuation date and site A at the first valuation date would be on the bases we have just set out. Mr Smith's view, however, was that the sites had no greater value for use as a waste transfer station than for use for general industrial or warehousing purposes. If that is right, the proper approach to valuation would be to assess the diminution in value of the sites for these purposes on the basis that the cables inhibited the construction of buildings on site A, as at the second valuation date for a period of 15 years, and as at the first valuation date for a period of 3 years.

78. By the commencement of the hearing it was common ground that none of the valuers had managed to identify a sale or letting of a site used for waste purposes which could be applied directly to value a waste transfer station on the land owned by the claimants. Mr Shapiro's evidence throughout was that no such rental or capital value evidence was available. Mr Thaddeus produced details of a number of waste transfer stations which had been offered on the market, but he made it clear that this information was provided to show that there was a regular market in such properties, not as evidence of market value. Mr Smith's approach was rather less clear-cut. In his first report he valued site A at £150,000 per acre before taking improvements into account. He said that this level of value was supported by a number of transactions relating to industrial development or open storage sites in the locality (paragraph 29). In his rebuttal report (paragraph 3.6), he stated that the

“large number of waste transfer depots in and around London (see David Thaddeus's

report para 9.2) and the sales evidence available in respect of such premises provides the obvious basis of valuation.”

79. In fact, as we have said, the waste transfer stations to which Mr Thaddeus referred were put forward, not as evidence of value but to indicate the existence of an active market, and Mr Smith did not in fact base his valuation on the prices achieved for any waste transfer stations. Indeed, in his supplementary report (paragraph 4) he stated that he was

“not aware of any comparables of sites used for waste purposes which can be applied directly to value site A for waste transfer and recycling use”.

80. Notwithstanding the absence of comparable waste transfer station evidence, the extent of the difference between the opinions of the two principal valuation experts is remarkable. Mr Shapiro’s final – and substantially reduced – valuation of site A, assuming it to be free of cables, was £2,252,896, compared with Mr Smith’s figure, prepared on the same basis, of £170,000. Having carefully considered the evidence of both valuers, we have concluded that that of Mr Shapiro is of no assistance to us. The reasons for this conclusion are as follows.

81. Firstly, as Mr Smith observed, Mr Shapiro failed to “stand back and look” at his valuation, in order to consider whether it was right in the light of the history of the site. That history, so far as is relevant, is this. On 21 November 1994 it was offered for sale by auction on the basis that it was suitable for B1, B2 and B8 development subject to consent. The claimants’ bid (£51,000) was successful, and the sale was completed on 3 April 1995 at £41,000 because of the presence of gypsies. On 7 September 1995 planning permission was granted to use the site as a waste transfer station. On 29 September 1997 the claimants issued a writ against the vendors of the site, and the subsequent Particulars of Claim alleged that they (the claimants) had spent £30,000 on site clearance and preliminary building work since the purchase was completed. If Mr Shapiro is right, the value of site A therefore increased from £51,000 in November 1994 to £2,252,896 in August 1998, subject only to the expenditure of £30,000 on the site. That is to say, the value increased by about 28 times from the original £81,000 despite the fact that, as Mr Shapiro accepted, there was no significant movement in underlying land values between 1995 and 1998. (We refer in more detail later in this decision to the amount spent by the claimants on the site following completion of their purchase).

82. This increase in value is so great that, if it had indeed occurred, one would expect to find some corroborative evidence, such as evidence that land with planning permission for a waste transfer station was selling at prices well above general industrial values; or evidence of strong demand, such as many potential operators seeking sites and engaging agents to search for sites; or evidence that many potential operators or middle men were making planning applications and pursuing appeals. In closing, Mr Roots submitted that the

“absence of any such evidence drives one to the conclusion that Mr Shapiro’s profits basis valuation has thrown up a figure which does not reflect the market and is completely

unsupportable, unsupported and counter intuitive. It is, frankly, incredible.”

We agree.

83. We should refer to Mr Shapiro’s evidence that waste operators had paid extremely high prices for companies operating existing waste transfer stations. The only example he offered in this connection was the sale by Mr Welford and his former partner, Mr Hill, of their previous business operating from Moody Wharf for a figure in excess of £3m. We do not consider that transaction to be material to the current exercise. It took place 10 years before the valuation date; the sale price included the existing business, machinery and plant; and the sale contract imposed an obligation on the vendors to construct a large building on the site and a condition prohibiting Mr Welford from carrying on a business connected with waste transfer for a lengthy period. The final condition is particularly significant, in view of Mr Welford’s evidence that the value of the business depended very much on his own personal skills and contacts, which were considerable. The price paid for the Moody Wharf business in 1988 is, therefore, of no assistance in valuing site A in 1998.

84. The second reason for our rejection of Mr Shapiro’s evidence is that he has been selective in the information he provided to the Tribunal. He justified his use of the profits basis by the absence of any rental or capital value evidence. However, he was not the first experienced chartered surveyor to have advised the claimants on the value of site A at around the valuation date. On 24 November 1997 Mr John Trustram Eve, MSc (Econ) FRICS, a consultant to and former joint senior partner of Messrs Grimley, prepared a proof of evidence which he subsequently gave on behalf of the claimants at the hearing before the engineering inspector appointed to consider the application by London Electricity Plc for the grant of compulsory wayleaves across the site. Starting at paragraph 5.3 Mr Eve said:

“At present ordinary industrial land in this area is worth about £300,000 per acre or more for small lots such as we are considering here. Say £150,000 for the land in question before any improvements or buildings are taken into account. The land has improvements upon it worth about £100,000 so that the total open market value of the land as it stands is in the order of £250,000.

Waste transfer stations a few years ago were worth a very large premium over general industrial land values however many more have been permitted and the premium which we are finding on our valuation of transfer stations is now down to an uplift of 30% to 50%. The actual figure depending very much on both the nature of waste which is permitted and the actual alternatives available.

The planning permission permits all types of waste. No licence has yet been issued because the land has not yet been developed but I can see no reason why it should make any restrictions other (than) for very dangerous wastes. It seems likely therefore that its value would be nearer the higher end of the range say £375,000 ...”

85. Mr Shapiro was aware of the contents of Mr Eve’s report when he prepared his own first report. He stated in cross-examination that he had been influenced by it. Indeed, in his first report

he adopted one of the opinions which had been expressed by Mr Eve, namely that site A would be without value if no buildings were permitted to be erected over either of the wayleaves. Nevertheless, he did not seek to discuss the valuation with Mr Eve, notwithstanding that he (Mr Shapiro) had not previously valued a waste transfer station, he had found no comparable evidence to assist him and his initial valuation of the site, at £3,436,439, was nine times higher than that which had been put forward by Mr Eve. In our view, Mr Shapiro's failure to mention Mr Eve's valuation until after it had been referred to by Mr Smith in his supplementary report, or to seek clarification from Grimley as to the basis upon which they had been valuing waste transfer stations, is not what one would expect from an independent expert, seeking to assist the Tribunal to arrive at the right answer.

86. There is an additional reason why we consider Mr Shapiro's valuation approach to be unreliable. It arises from the fact that it was based on a combination of the profits method and a residual calculation. This Tribunal has on many occasions rejected residual valuations which have been prepared solely for the purposes of litigation. The reason for this is that, in contrast to the situation where the method is used by a vendor or a purchaser in prospect of an actual transaction, there is no external sanction facing the valuer who, for the purposes of an arbitration, produces what is a calculation of potential profit made in vacuo; and the potentially wide range of plausible assumptions that may be made as to the inputs in such a valuation and the wide variations in the final result that quite small differences in these assumptions may make means that it is in general an unreliable valuation method (see *Clinker and Ash Ltd v Southern Gas Board* (1967) 18 P & CR 372 at 377-379; *Snook v Somerset County Council* [2004] RVR 254 at 259). The scope for error is magnified in the present case because of the use of the profits basis to arrive at the capital value of the completed waste transfer station. A surveyor using this valuation method is required to apportion the "divisible balance" between the hypothetical landlord and tenant. Mr Shapiro assumed that there would be an equal apportionment, but this was pure conjecture, since there was no evidence to support any particular level.

87. Furthermore, the profits basis is normally conducted by looking at a number of years of revenues and costs prior to the valuation date, in order to make a judgment as to the likely future revenue and costs for the year in which the value is to be assessed. In this case the waste transfer station had not been developed at the date of valuation. Although the claimants were operating a skip hire business, there were no accounts which took account of the waste transfer business. Consequently, there was no evidence of revenue and costs which would have been available to a hypothetical buyer and seller of the land in 1998. Nor was there a contemporaneous business plan of projected revenue and costs which might have provided some evidence of what was contemplated at that time.

88. Mr Shapiro relied upon Mr Davidson to provide revenue and cost figures which were then incorporated in the profits based valuation. Mr Davidson identified the revenue and cost per tonne, in the year ended April 2002, of the waste handled by the claimants in the waste transfer station erected on site B. He then adjusted those figures back to 1998 by reference to the retail prices index. In the course of re-examination Mr Shapiro was asked whether, if Mr Welford had prepared a business plan for the site in 1995, that would have been of assistance in measuring the diminution in

value at the valuation date. He replied that the relevance of the plan would depend upon

“what we felt about Mr Welford as an operator. Was he the most efficient? Was he the least efficient, and so on. We are looking at what the market as a whole would do, so you cannot say ‘here is one business plan’ and we must take those figures.”

If that approach is correct in respect of a business plan prepared by Mr Welford before the valuation date – and in our view it must be – then it is at least equally apposite in relation to revenue and cost figures achieved by Mr Welford’s company, which were not available until three years or more after the valuation date.

89. Having discounted the profits basis as a reliable method of valuing the sites together or site A alone as a waste transfer station, we turn to consider Mr Smith’s approach, namely valuation by reference to general industrial land values. Mr Smith considered that such a valuation might be subject to adjustments to reflect, firstly, the value of site improvements, secondly, the special suitability of a particular site for waste transfer station use and, thirdly, the availability of other sites where planning consent for such use had been obtained or could reasonably be expected.

90. Mr Smith considered that the value of site A as a site for general industrial use at the second valuation date, and assuming there were no underground cables, was £150,000. We accept that valuation. It seems to us to be consistent with the comparable transactions to which Mr Smith referred and Mr Shapiro did not expressly disagree with the level of industrial land values upon which it was based. That figure ignores the value of the works which the claimants carried out to clear and improve the site. Mr Davidson found that it was not possible to ascertain these costs from the books of IOD and there were very considerable differences between the estimates given for them at various times. On 25 August 2000 Mr Welford signed the Particulars of Claim in the proceedings for damages for misrepresentation and breach of contract, which he and Mr Phillips had brought against the vendors of the site. In that document, Mr Welford stated that the claimants had spent £30,000 on site clearance and preliminary work. In Mr Eve’s report for the wayleaves inquiry, he expressed the view that the value of the improvements carried out by the claimants was £100,000. For the purposes of the current reference a report was prepared by Mr Worthy. Mr Worthy estimated that an appropriate budget for the works was £278,803. In his witness statement Mr Welford said that, when considering the purchase of the land in 1994, he had estimated that it would cost £100,000 to clear the site.

91. The relevant oral evidence relating to these estimates was as follows. Mr Welford said that he could not remember the exact cost of the work, but he had no evidence to indicate that the figure of £30,000, which he had signed as being a correct figure in the High Court, was incorrect. He could not remember whether he had given Mr Eve the figure of £100,000 which appeared in the latter’s report, but Mr Eve had seen the land after the works had been completed. Mr Worthy said that his estimated figure was based on a description of the work, which had been provided by Mr Welford and Mr Phillips.

92. Having seen and heard Mr Welford giving evidence, we consider it unlikely that he would

have underestimated the costs which had been incurred when he signed the Particulars of Claim in the High Court proceedings. We find that £30,000 was spent on site clearance and preliminary work and we accept Mr Smith's opinion that, of that total, £20,000 related to works of improvement. We do not accept Mr Worthy's evidence as showing either the cost or the value of the works that were carried out. We find that the value of site A on the second valuation date, based on general industrial development values, and assuming no cables, was therefore £170,000.

93. The factors which Mr Smith considered might justify a "waste premium" above general industrial value were the ease of operating the site and the availability of other suitable sites. Mr Smith's opinion was that the limited size of site A, and its physical limitations, particularly the presence of the electricity tower, would not of themselves have resulted in a premium being paid and we accept that evidence. The remaining question is whether the difficulties of obtaining an alternative site in the locality with planning permission for a waste transfer station, would have resulted in competition between waste operators, forcing the price paid for site A above its base site value. There was a noticeable absence of detailed evidence as to the difficulty of obtaining planning permission for a waste transfer station in the vicinity of the reference property or as to the likely demand from competing operators. It was a crucial element of Mr Shapiro's justification for a high value that planning permission could not be easily obtained. In the course of his oral evidence he said that he was not a planning expert and

"therefore I have made no attempt and it is not within my province to find out how many applications are made and are refused".

94. The claimants apparently had no difficulty in obtaining planning permission for waste transfer station use on site A in 1995 and, although consent to use site B for that purpose was refused by the local planning authority, that refusal was contrary to the Council officers' advice. Moreover, the planning inspector who granted consent for a waste transfer station on site B on 10 February 1999 concluded that there was no policy objection to the principle of the proposed development on a site which, together with the surrounding area, was designated as one of a number of principal industrial areas on the London Borough of Newham Unitary Development Plan.

95. The onus is on the claimants to establish that planning permission could not easily have been obtained at the valuation date and in our judgment they have failed to discharge that onus. We therefore conclude that Mr Smith was right to consider that there was no justification for a waste premium to be added to the industrial site value of site A. We can see no reason why the value of sites A and B, taken together, would at the second valuation date have been diminished by an amount greater than that by which site A, considered alone, was diminished. We accept Mr Smith's assessment of the diminution in value of the freehold of site A as at the second valuation date, assuming the wayleaves to be permanent, at £90,000 (ie £170,000 minus the agreed value of £80,000 with the cables in place). We do not accept his view that as at the first valuation date there had been no diminution in value on account of the cables. The experts agreed that there was no change in underlying land values between 1995 and 1998. We can see no reason, assuming as Mr Smith did that the £30,000 had been spent at the first valuation date, why its value then should be

any different from that on the second valuation date.

96. The diminution in value of site A was not, however, permanent. The wayleaves granted on the second valuation date were for a term of 15 years, and any extension of the term would give rise to a fresh claim for compensation. The assessment of the diminution in value of the land must reflect this. As at the first valuation date what has to be valued, as we have said, is the diminution in value of the freehold interest in site A occasioned by the presence of the cables and the acquiring authority's right to maintain them there for the 3-year period between the first and second valuation dates. We accept Mr Smith's adjustment of the £90,000 that represents the permanent diminution in value in order to reach the claimants' actual loss, except that, in the light of what we have just said, the rental equivalent must be capitalised for 18 years rather than 15. This gives, at 6.5 YP, a figure of £81,932.

Loss of profits: entitlement to compensation

97. The tests as to entitlement to compensation for disturbance are those of causation, remoteness and reasonableness identified by Lord Nicholls of Birkenhead in *Shun Fung*. There must be a causal connection between the acquisition and the loss in question ([1995] 2 AC 111, 126A); the loss must not be too remote (ibid 126F); and a loss incurred which a reasonable person in the position of the claimant would have avoided cannot be the subject of compensation (ibid 126G). Mr Roots submitted that the claim for loss of profits failed to satisfy any of these tests.

98. On causation Mr Roots relied on the statement in the particulars of claim in the claimants' action against the London Borough of Newham that if they had known of the presence of the cables they would not have bought the land. Mr Welford had signed those particulars, and the action was being maintained. In cross-examination Mr Welford put it differently, saying that they would not have bought it for the purposes of a waste transfer station, but it is not suggested that this difference affects the causation argument. The loss, said Mr Roots, had been caused by the decision of the claimants to acquire the land without knowledge of the cables. If the council were at fault for not revealing the existence of the cables, the loss of profits for which compensation was claimed was caused by the council and not by the compensating authority. Mr Tager said that it was not the purchase of the land that had caused the loss, and in any event the damages in the claim against Newham would be confined to the difference in the price that the claimants paid for the land and the amount for which they could have bought it if they had had knowledge of the cables.

99. In our judgment the claim does not fail on the ground of causation as Mr Roots has submitted. The question is whether the loss has been caused by the grant of the wayleaves. Causation is thus to be determined by reference to what happened as the result of the grant of the statutory wayleaves and what would have happened if those wayleaves had not been granted. The fact that at an earlier date the claimants had bought the land when, if they had known about the cables, they would not have done so does not impinge on the determination of this question.

100. We are satisfied on the evidence that in the absence of the cables the claimants would have

developed site A in accordance with the 1995 planning permission by building the shed that was permitted and using it and the rest of the site as a waste transfer station. Loss of profits arising from their inability to do this is accordingly, in our judgment, recoverable, subject to the satisfaction of the tests of remoteness and reasonableness.

101. On remoteness Mr Roots said that the waste transfer use had not commenced at either of the relevant dates, so that the claimants were thus not disturbed by the grant of the wayleaves. Any claim for loss of profits rested on speculation that a series of events would have occurred that would have enabled profits to be made as they were later in fact made from the waste transfer station on sites A and B, and this uncertainty made the claim in this respect too remote. At the first valuation date, said Mr Roots, although the claimants appeared to have been using site A since June or July 1995, this use was confined to the skip hire business and not the waste transfer business. The claimants were sufficiently compensated by being compensated for the diminution in the value of their land. Mr Tager relied on *Khan v Miah* [2000] 1 WLR 2123, in which the House of Lords rejected the contention that the business venture that the parties had agreed to pursue had not come into existence before trading began. The waste transfer business was in existence at each valuation date, he said, even though the waste transfer use had not begun, and the claimants had accordingly been disturbed in their enjoyment of the land.

102. In general, in our view, it would only be in exceptional circumstances that an award of compensation in respect of loss of profits for a business that was not being conducted at the relevant date could be justified. The market value of the land will usually reflect what someone contemplating the commencement of the business in question would pay for the land. He would pay that amount in contemplation that with further investment in terms of development and the employment of his time and others' labour he could realise a profit. The profit, however, would represent his reward for making the investments and assuming the risks associated with the business. If, therefore, the effect of the use of the compulsory powers is to prevent him from starting his business, it also had the effect of relieving him of the risks and the need to make the investments. In these circumstances to award him compensation for loss of the profit that would have represented his reward for such risk-taking would not be appropriate because it would not represent his actual loss. It was on the basis of reasoning similar to this that the Court of Appeal in *Ryde International plc v London Regional Transport* [2004] RVR 60 rejected a claim for loss of profits, although that was a case in which the profits would have been made from the land itself; see also the decision of this Tribunal in *Corton Caravans Ltd v Anglian Water Services Ltd* [2003] RVR 323 at paragraphs 112-120.

103. In the present case, however, at the first valuation date the first and second claimants had done more than simply purchase the land with the intention of using it as a waste transfer station. They had also devoted substantial time and money in clearing the site and laying concrete in order to fit it for use for this purpose. They had had plans drawn up and had applied for (and had received) planning permission for this use. They were using the land for skip storage, which was a component part of the proposed waste transfer use (albeit it could, and did at the time, constitute a use in itself). Even though the use of the site as a waste transfer station had not begun, the business was clearly in existence. It is the fact that the business had come into existence and that time and

money had been spent on it that is in our view relevant, rather than the fact that the use for which the business was established had not started, and we agree with Mr Tager that *Khan v Miah* is a relevant authority. There Lord Millett said ([2000] 1 WLR 2123 at 2127D):

“The acquisition, conversion and fitting out of the premises and the purchase of furniture and equipment were all part of the joint venture, were undertaken with a view to ultimate profit, and formed part of the business which the parties agreed to carry on in partnership together.”

We do not consider, therefore, that the fact that the waste transfer use had not commenced on either valuation date is a bar to the recovery of compensation for loss of profits or that this head of claim should be treated as too remote.

104. On reasonableness Mr Roots submitted that the claimants had not acted reasonably in that they had failed to mitigate their loss by locating an alternative site once they had discovered the presence of cables in site A. It was not until November 1997 that they acquired site B. Mr Roots relied on correspondence from February 1996 onwards to show that the claimants had made no serious attempt to find an alternative site.

105. Mr Welford said that site B had been available on the market as a freehold site a few months before he and Mr Phillips bought the leasehold interest in it. It could have been acquired at the relatively modest sum of £230,000 together with two additional parcels. He said that they did not buy the freehold when it was available because at that time London Electricity thought that they owned a site across the road, formerly part of the West Ham power station site, that could be swapped for site A, but eventually they said that they only owned a narrow strip of land. By that time some months had passed and only the leasehold interest was on offer.

106. The general rule in the award of damages at common law is that the onus of proving a failure to mitigate loss is on the defendant: see *McGregor on Damages* 17th Edn para 7-019. The same rule applies, in our judgment, in a claim for statutory compensation for disturbance or consequential loss. It is for the compensating authority to show that the claimant has not acted reasonably and that, if he had done so, his loss would have been reduced. While we are satisfied on the material on which the compensating authority rely that the claimants did not do all that they might reasonably have been expected to do to find an alternative site, we have insufficient evidence to conclude that, if they had searched diligently, they would have found a suitable site other than site B in a timescale that would have enabled them to start operating a waste transfer station before the time when they in fact began operating on site B. Mr Roots put to Mr Welford the proposals maps of the Newham and Tower Hamlets Unitary Development Plans and pointed out the extensive areas that were shown as industrial employment areas, but Mr Welford did not accept that a suitable site for a waste transfer station could have been found in them. No evidence was adduced on behalf of the compensating authority that suitable alternative sites were available at the material time. Mr Roots placed reliance on the fact that Mr Gladwell had had no difficulty in finding an alternative site for himself, but that was in 1988 and the period with which we are concerned begins in July 1995. We are not satisfied that the claimants could have reduced the delay in commencing their waste disposal

operations by finding an alternative site other than site B.

107. Mr Welford in his witness statement (B1 pp73-4) said that the claimants could have acquired the freehold of site B at a time when it had previously been on the market together with two additional parcels of land for the sum of £230,000. However, he said, London Electricity were seeking to provide them with a site in the old West Ham power station, and as a result they lost the opportunity to buy it. He reiterated this in cross-examination (Day 3 p286/19-23). The correspondence shows that Mr Welford was told that the leasehold interest was on the market for £400,000 in May 1997 (B9/2 p1247) and that he offered £230,000 for it in August 1997 (B9/2 p 1248). It was eventually bought for this amount in October 1997.

108. The correspondence that was produced (B10 p1599 et seq) shows that between February 1996 and May 1996 in successive letters Hughmans, the claimants' solicitors, were pressing Lawfords, on behalf of London Electricity, to make available to their clients a 1-acre site "over the road" as a "swop"; Lawfords said in April that it was not a viable proposition and on 17 May 1996 that the swop was not viable as the land was owned by National Power. Hughmans, on 28 May 1996, said: "We suggest that your clients come up within the next 7 days with further details as to any other proposed sites". In a letter of 3 July 1996 Hughmans said: "We understand that the cost of removal of the cables will be in the region of £500,000.00 and we would have thought it possible with presumably the interconnection between your company and National Power that they were to do the deal that we set out in our letter to you of 10 May 1996." On 8 July 1996 Lawfords reiterated that London Electricity were not in a position to discuss the suggested land swap.

109. In May 1997, following the judgment in county court proceedings, Hughmans reverted to the land swap suggestion and said that it was in London Electricity's interest to fully explore the possibility of procuring an alternative site "which we have advised our client they will obtain should this matter go before the DTI and the Lands Tribunal." On 19 August 1997 Hughmans wrote saying that they understood that London Electricity were in discussion with National Power on a nearby site. Lawfords replied on 5 September 1997 that terms had been agreed for the purchase of the site, which was to be used in the construction of a deep bore cable tunnel. In November Hughmans wrote saying that they understood the National Power site, previously considered in relation to a land swap, had now become surplus to the requirements of National Power, and Lawfords replied that they understood from National Power that they wished to retain the land for their own potential future use.

110. We conclude from this correspondence that the approach of the claimants to the question of an alternative site was to treat it as the responsibility of London Electricity to find a site for them. They understood that the cost of removal of the cables would be in the region of £500,000, so that they must have realised that there was, at the very least, a strong possibility that wayleaves for their retention would be granted. Indeed the suggestion made that London Electricity should come up with an alternative site shows that the need for such a site to be found was understood. The claimants, however, did nothing to search for an alternative site beyond urging London Electricity to

acquire a site from National Power.

111. There is nothing in the correspondence to suggest, as Mr Welford did, that London Electricity were seeking to provide the claimants with a site. It appears that Hughmans on behalf of their clients were urging that a site should be provided for them, but the claimants had no reason for not actively seeking a site themselves. The correspondence also shows that the claimants continued to press for a site to be provided after they had acquired site B. We conclude that the claimants were more concerned to use their negotiating position in relation to the wayleaves, at the time when London Electricity's applications had not been determined, to press London Electricity to provide a site than to they were to mitigate their own prospective loss through establishing a waste transfer station on site B.

112. There is no direct evidence as to when it was that the claimants could have acquired the freehold of site B for £230,000, but Mr Welford said that it was some months before the leasehold was on offer (May 1997) and at a time when, according to him, London Electricity were seeking to provide the claimants with a site. The correspondence shows that the exchange of letters in relation to an alternative site began in February 1996 and ended in July 1996 after Lawsons had reiterated that they were not in a position to discuss the suggested land swap. Thereafter the matter did not arise again until May 1997. The necessary inference from this, in our view, is that the time at which the claimants could have acquired the freehold of site B was between February and July 1996.

113. Our conclusion is that the claimants had the opportunity to acquire the freehold of site B no later than July 1996. There is no adequate explanation for their failure to do so. They had no reason to believe that London Electricity would be providing them with a site. In failing to acquire the freehold of site B in or before July 1996 and actively to pursue its development they failed to mitigate their prospective losses. Any claim for loss of profits is excluded on the ground of reasonableness to the extent that it is based on the assumption that site B could not have been acquired until some later date.

Loss of profits: the factors

114. The loss of profits claim as advanced in Mr Davidson's reports is dependent on the two underlying factors – the period of delay in commencing waste disposal operations and the capacity of site A. In his assessment of the claimants' loss Mr Davidson assumed that the claimants were delayed for 48 months (from January 1996 to January 2000) in processing waste collected by their own skips and for 56 months (from January 1996 to September 2000) in processing waste from third party skips. He also assumed that site A would have had the same capacity as site B, so that the loss of profits was represented by the actual annual profits on site B when fully operational multiplied by the number of years' delay. In addition he included the extra costs of developing site B as compared with site A. Both the period of delay and the capacity of site A were in issue, as were the costs of development, and evidence was called in relation to these. There are also other aspects of the loss of profits claim that are in dispute (for instance the compensating authority do not accept that that the profits actually made during the period when site B was in operation are a true

reflection of what the claimants lost through not operating a waste transfer station during the period of delay). We will deal first with the capacity of site A, then the period of delay, and finally we shall say what we feel able to say at this stage about the other factors.

Loss of profits: evidence on capacity of site A

115. Mr Warren said that he was an independent consulting engineer, specialising in waste, environmental and project management. He gave evidence as to what was likely to have happened on site A in the absence of the cables. He said that he doubted whether a transfer shed would have been erected with the steel upright supports which were shown on the approved planning permission drawings, although he considered that such supports would have had little effect on operations within the shed. He prepared drawings, based on the approved design of the shed, showing the arrangement of equipment for sorting and recycling waste which he said would process 75,000 tonnes of waste per annum. He estimated that the recycling rate from such an operation would have been at least 75 per cent, the remaining 25 per cent being sent to landfill for disposal.

116. Mr Warren's drawings showed a trommel – a revolving cylindrical sieve, designed to collect certain types of waste and allow others to pass through – and two hydraulic excavators (or “360s”) which are also used by the claimants as part of their current recycling operations. He accepted that operations on site A would have been more convenient if they had been carried out in a shed with an area larger than the 325m² for which the claimants had planning permission. In sorting and recycling waste, however, he considered that space was a luxury, not a necessity. Nor did he consider that the presence of the electricity tower would be a material constraint on operations in the yard. He thought that a driver qualified to drive heavy goods vehicles would have had no difficulty manoeuvring a vehicle 2.5m wide and less than 4.5m high through a gap measuring 5m wide and 5m high.

117. Mr Thaddeus was instructed by the compensating authority to prepare a report containing his opinion as to the suitability of site A as a waste transfer station and as to the market for such sites. We have referred earlier to his evidence on the market. As for the suitability of the site, Mr Thaddeus accepted in the course of cross-examination that he did not have the expertise required to give evidence on the nature of the recycling operations which could take place inside the shed; that was a matter for Mr Pearce. In the light of that answer we propose to say no more about this aspect of Mr Thaddeus's evidence.

118. Like Mr Warren, Mr Pearce is an independent consultant, providing a service on environmental and waste management issues. He disagreed with Mr Warren's conclusion that site A could have handled 75,000 tonnes per annum and recycled 75 per cent of this waste. He had tried to produce a layout which would provide the necessary recycling containers within the approved shed, allow sufficient floor space to receive waste and sort the material, provide access for the containers to be moved in and out of the building and room for the temporary storage of residual waste before loading onto bulkers. (A bulker is a large articulated lorry, usually used to transport waste material from a waste transfer station to landfill). He had been unable to produce a layout

which he considered viable. He would not advise a client to consider carrying out any recycling with the layout of plant and equipment proposed by Mr Warren.

119. Mr Pearce also considered that the numbers of vehicles which would need to enter and leave the site would have produced a potential bottleneck. Vehicles would have been required to deliver waste, collect waste and collect recycled materials. They would not arrive at regular intervals to suit the convenience of the operator. Queuing would be inevitable and would cause delays. If residual waste was not removed more or less as fast as it was generated, it could seriously reduce the amount of space available for the discharge of delivery vehicles within the building and also hamper other operations. It was normal when designing transfer stations or recycling facilities to assume some delay by the bulkers and to allow for the storage of at least one day's generation of residual waste, in case of delays to the arrival of those vehicles. If the average weight of material delivered to the site was 2.75 tonnes per skip – which Mr Pearce considered a reasonable assumption – and not the 5.5 tonnes assumed by Mr Warren, the number of vehicles delivering waste would be substantially greater than estimated by Mr Warren and would lead to even more congestion within the site.

120. So far as vehicle movements on the site itself were concerned, Mr Pearce agreed with Mr Warren that it was possible for a bulker to enter the site and reverse into position within the loading bay. However, it would in his view have been impossible for a large rigid vehicle – an 8-wheeled tipper used by construction sites for hauling soils and other heavy materials – to drive on to the weighbridge and to sweep round on its turning circle. The transfer shed and the pylon would have been in the way. It would have been necessary for the driver of such a vehicle to reverse back from the weighbridge into the shed and then drive forward on a hard lock towards the pylon. Further shunting in order to get into position would be inevitable. This would result in potential delays for other vehicles entering the transfer station and increase cycle times for any vehicle entering the site whilst this operation took place.

121. Mr Pearce also pointed out that, on Mr Warren's proposed layout, the operation of the 360s would allow the arms of the machines to pass over recycled material. It was inevitable that some waste would fall into the containers for these recycled materials and contaminate them, with the result that they would be unacceptable to a reprocessor.

122. Mr Pearce suggested that it would have been possible for some recycling to take place on site A by establishing an area within the shed for incoming skips containing largely inert waste (hardcore and soils) and another area for those containing mostly mixed wastes. A fixed trommel and short picking belt would be provided in the northern half of the shed for the screening of inert waste and two or three pickers would be employed to remove any contamination which had not been pulled out by hand before loading into the hopper. The fines would fall onto the floor beneath the trommel and the hardcore would fall to a conveyor at the end of the trommel and discharge to form a stockpile. The fines beneath the trommel would be cleared with a small loading shovel. The mixed wastes would be hand sorted with help from a 360 and placed in containers strategically located within the building. When these containers were full, if the planning permission and licence permitted they would be stored outside the shed until they could be sent for reprocessing. The

residual waste would be sent for final disposal to landfill.

123. In the southern half of the building the two or three floor operatives would hand pick card, clean paper, timber and metals which would be stockpiled. The stockpiles would be more flexible than containers, which need only be brought into the shed once there was sufficient material in the recycled waste stockpile. A 360 would support the operation including the loading bulkers and recycled material.

124. Mr Pearce considered that the main constraint on throughput and recycling was the size and internal layout of the building on site A. The constraints resulting from the shape and other physical features of the site – the pylon and the trees – and the actual size of the site were secondary, although they were relevant in terms of empty skip storage and vehicle movements. He prepared calculations which showed that his suggested method of recycling could have resulted in a throughput between 25,000 and 30,000 tonnes per annum and allow the recovery of recyclables of some 10 to 12,000 tonnes per annum – a recycling rate of approximately 40 per cent.

Loss of profits : conclusion on capacity of site A

125. We start by considering the type of waste which is likely to have been received at the site if the construction of the waste transfer station had not been delayed as a result of the presence of the electric lines. In oral evidence Mr Warren said that he had assumed that there would have been approximately 60% of construction waste, such as hardcore, soils, concrete and bricks, and 40% mixed waste, including plastics, wood, paper and card. Mr Pearce, on the other hand, gave his evidence on the basis that the site would have handled average mixed waste, of which only a minority would comprise inert material. The distinction is significant, because the average load in a skip from a construction site is much heavier than one from a typical commercial or industrial operation. The number of vehicle movements necessary to handle a given tonnage of construction waste, therefore, is smaller than for an equivalent tonnage of mixed waste.

126. Mr Warren's opinion was based on his observation of operations at the site during two visits he made in October 2005, together with information extracted by Mr Davidson from the claimants' diaries, listing the total waste processed and the different destinations of the various types of material during two months in 2002. Mr Pearce's view was based on his interpretation of Mr Warren's report. He said it was supported by a number of invoices which had been produced by Mr Phillips during the course of the hearing. These showed that in 1995, before they had their own waste transfer station, IOD were disposing of their waste in skips which generally contained 2 tonnes or less of material. That did not suggest that skips contained much construction waste, which tended to be quite heavy. In our opinion, the most reliable indication of the mix of wastes which would have been received on site A is provided by the working plan in support of the application for a waste management licence for sites A and B, submitted by G L Hearn Planning on behalf of IOD in 1999. This stated, at paragraph 3.2, that the

“waste to be accepted at the transfer station will comprise inert wastes, scrap metal and

degradable industrial and commercial wastes, including builders waste.”

127. The application sought a licence for processing 24,995 tonnes per year, broken down as follows:

Inert waste	10,000
Scrap metal	5,000
Degradable commercial other than inert, scrap metal or special	2,995
Degradable industrial other than inert, scrap metal or special	<u>7,000</u>
	<u>24,995</u> tonnes

128. Mr Pearce said that the 10,000 tonnes of inert waste could be described as construction waste and the remainder as mixed waste and we accept that evidence. Thus, the licence application suggested that construction waste would account for 40 per cent of the total. Furthermore, Mr Warren’s calculations, based on a majority of construction waste, assumed that the average weight of a skip delivering waste would be 5.5 tonnes, whereas Mr Pearce assumed an average weight of only 2.75 tonnes. Again, Mr Pearce’s approach is supported by G L Hearn’s working plan, which stated at paragraph 3.22 that the maximum load to be carried in a skip lorry would be 3.5 tonnes. We therefore accept Mr Pearce’s assumption that the majority of the material arriving at the site would comprise average mixed industrial and commercial waste.

129. We are not satisfied on the evidence that, as the claimants contend, a waste transfer station on site A would have had the same capacity as the one that was developed on sites A and B. Site A is about 0.6 acre in area, about half that of the combined sites, and the claimants have added sites C and D in order to increase the area further. The area of the shed for which planning permission was granted on site A was 325 sq m, in contrast to the site B shed, which is 646 sq m. The pylon on site A restricts the use that can be made of part of the site and inhibits vehicle movements. Treated waste is piled outside the site B building, and site A is used for skip storage. When we visited the site on the second day of the hearing we formed the view that the shed on site B was being fairly well used. Mr Pearce said, and we accept this evidence, that when he visited the site in September 2005 the amount of material being stored was considerably more than it was on the day of our inspection. We are in no doubt that a waste transfer station on site A would have had very substantially less capacity.

130. Mr Warren sought to demonstrate that 75,000 tonnes per annum was achievable on site A. He produced calculations of the tonnage that could have been delivered to and removed from the site, and he purported to show how the shed could have been adapted to deal with 75,000 tonnes per annum. We did not find him a convincing witness. His evidence appeared to us to be more an exercise in showing what in theory could have been achieved by way of throughput than a genuine endeavour to assess what in reality could have been expected to be achieved. We accept that the shed could and would have been built without the two stanchions at the front that restricted the

movement of vehicles and machinery, and without the windows which, like the stanchions, were shown on the approved drawings. We also think it right to assume that, despite not being mentioned in the planning application, a trommel would have been installed when the building came to be constructed. But the size of the building in particular, together with the restricted area of the site and the obstruction caused by the legs of the pylon would have reduced the actual capacity of the site well below Mr Warren's estimate.

131. Mr Warren referred to three other sites as evidence of what could be achieved, and he produced photographs and plans of these. The only one of these that appeared to us to be comparable with site A, was a site at Kempston in Bedfordshire. This was about 0.64 acre and was processing about 73,000 tonnes per annum of waste. There was a shed with a floor area of 540 sq m, substantially larger than the one planned for site A. There was also a concrete-crushing machine on the site, and a substantial proportion of the waste delivered to the site was deposited close to the machine and did not pass through the shed. Mr Warren estimated that about 60% of the waste passed through the shed. The amount of skip storage appeared to us to be limited. That the site was being over-used was, we find, evidenced by the fact that Mr Warren had been instructed in connection with an extension of the site and improved arrangements for vehicular movements.

132. The Kempston site appears to us to provide good evidence that the capacity of site A would have been substantially less than Mr Warren's estimate. Condition 4 of the planning permission for site A dated 7 September 1995 provided that "the storage of refuse shall not take place anywhere on the site except within building(s)". In our judgment, the effect of that condition would have been that all incoming waste would have had to pass through the shed. Thus, the shed on site A, 60% of the size of that at Kempston, would have had to accept 100% of the waste and not just 60% of it. Other planning conditions limited the use of particular areas of site A to skip storage and the parking of vehicles, and the pylon inhibited the use of part of the site.

133. Mr Pearce estimated the potential capacity of the approved shed at 30,000 tonnes. We formed the view that he was an experienced engineer and a straightforward witness. We bear in mind that only 0.35 acres of the site at Kempston was used for waste transfer, the remainder being used for crushing and screening. We find that Mr Pearce's estimate is supported by the evidence of Kempston and we accept it. We also accept his opinion of the extent of the recycling that could have been achieved. In that connection, there was a disagreement between the experts as to whether a shredder was likely to have been employed in addition to a trommel. In the course of cross-examination, however, Mr Pearce agreed that he would not have thought of recommending a shredder until about August 2004. We find that the following materials would have been recovered each year from site A, as suggested by Mr Pearce, and that this would have been achieved without the use of a shredder:

Hardcore	7,500
Fines	3,000
Ferrous metals	300
Wood	600
Non-ferrous metals	150

Card	<u>75</u>
	<u>11,625</u> tonnes

134. The remaining 18,375 tonnes would have been sent to landfill. For the avoidance of doubt, these figures incorporate waste collected by the claimants' own skips as well as third party skips. Site A would thus have had a throughput of 40% of the combined sites A and B, in a shed half the size, and on a site half the area and more restricted.

Loss of profits: period of delay

135. Mr Warren said that he considered that it would have taken three months to complete the building works for which planning permission had been granted on 7 September 1995. A waste management licence would have been needed before the transfer station could have received waste from outside skip operators. Nevertheless, once an application for a licence had been made, it was common for the London Waste Regulation Authority ("LWRA") to give tacit permission for the operator to commission and use the facility to process its own waste before the licence was issued, provided it was operated within the terms of the licence application and its associated working plan. That had happened on site B, where operations started in January 2000, some seven months before the licence was issued.

136. Once planning consent was granted, Mr Warren said that the issue of a licence was almost assured. The conditions of the licence could make certain activities difficult and limit the types and quantities of waste if they were not mentioned in the planning consent. Site A, however, already had planning permission for waste transfer with no tonnage or traffic restrictions and would have been granted a licence. This would probably have limited inputs to 24,990 tonnes per year for about a year as a period of probation, before being increased to 74,990 tonnes per year.

137. In Mr Warren's opinion, the chronology of events was likely to have been as follows:

10 July 1995	IOD submit planning application for use of site A as waste transfer station
July 1995	IOD prepare draft of WML application documents
August 1995	Discuss application with WRA and negotiate any modifications before submission of application
August 1995	Submit WML application with application fee
September 1995	WLM application accepted as duly complete

7 September 1995	Planning permission to use site A as waste transfer station granted
Winter 1995	WRA allow IOD to start processing own waste subject to operating within the terms of their licence application
March 1996	Licence for 24,900 tonnes per year issued
March 1996	IOD start to accept third party waste
April 1996	Environment Agency formed
October 1996	Introduction of landfill tax
March 1997	WLM tonnage increased to 74,900 tonnes per annum
October 1997	IOD buy site B to expand business

138. In his assessment of the claimants' loss Mr Davidson, as we have said, assumed that the claimants were delayed for 48 months (from January 1996 to January 2000) in processing waste collected by their own skips and for 56 months (from January 1996 to September 2000) in processing waste from third party skips. The claimants started processing waste from their own skips in January 2000, and they say that the Environment Agency turned a blind eye to the fact that they did not by then have a waste management licence. The licence was issued in August 2000, and it was only after that that they were able to process waste from third party skips. The licence granted in August 2000 was for 24,900 tonnes, and this was modified to 74,900 tonnes in October 2001. Mr Davidson assumed that the Environment Agency would have licensed site A in January 1996, but Mr Tager accepted that there would have been a delay of perhaps 6 months in the licence being granted, so that the claim in respect of the third party skips business was, he said, for a 48-month rather than a 56-month period.

139. Delay has to be considered in relation to two scenarios. The first is what actually happened in the real world, adjusted for any period of delay in commencing operations on site B that was due to the claimants' failure to acquire it earlier than they did ("the adjusted real world scenario"). The second is what would have happened if there had been no cables in site A ("the no-scheme world scenario").

140. The claimants' 48-month periods (for waste from the claimants' own skips and waste from third party skips) are based on the actual date of acquisition of site B, October 1997. We have concluded, however (see para 113 above), that the claimants could have acquired site B no later than July 1996 (15 months earlier than in fact they did) and ought to have done so in mitigation of their prospective losses. Had they done so, we can see no reason why the other relevant events (application for and grant of planning permission, application for, negotiations on and grant of waste management licence) would not also have taken place 15 months earlier. The claimants began processing their own waste in January 2000, 2 months after the licence had been applied for, and third party waste once the licence had been granted in August 2000. In the adjusted real world scenario each of these events would have been advanced by 15 months, to October 1998 and May

1999 respectively. On the same basis the waste management licence for 75,000 tonnes would have been obtained in July 2000 (rather than October 2001, as actually occurred).

141. We have set out above Mr Warren's opinion of what the chronology of events would have been in the no-scheme world. We think that his conclusion that a waste management licence for site A would have been obtained for 25,000 tonnes in March 1996 and for 75,000 in March 1997 is exceedingly over-optimistic. In the real world 9 months elapsed between the grant of planning permission on site B and the application for a licence and there were a further 9 months between the application and the grant. There is nothing that would suggest to us that a licence on site A could have been obtained in a shorter period of time than the one on site B. Indeed the licensing period at the earlier time could have been longer because the Environmental Protection Act 1990 brought a new licensing regime into force in 1994 and the Environment Act 1995 created a new licensing agency with effect from April 1996. We conclude that application for a licence would have been made 9 months after the grant of planning permission on site A (ie in June 1996), with own waste being processed from 2 months after that (ie in August 1996), and that a licence for 25,000 tonnes would have been obtained 9 months after the application (ie in March 1997) and that third party waste could have been processed from that date.

142. Mr Warren assumed that in the no-scheme world the claimants would have bought the leasehold interest in site B in October 1997 as they did in the real world. We have concluded above that the claimants could have acquired the freehold in site B no later than July 1996. There must, we think, be some doubt as to whether they would have done this in the no-scheme world. In July 1996 waste transfer operations would not have started and the claimants would have been looking forward to the commencement of the operations that they had planned to carry on when buying and developing the site. They might not at that time have regarded paying £230,000 for site B as an attractive thought. On balance, however, we conclude that they would have bought site B at that time, just as we have concluded they would have done in the adjusted real world. Hughmans letter of 15 February 1996 makes clear that what the claimants were looking for was a one acre freehold site, and this implies a realisation at that time that site A was too small for the operations that they had in mind. We find, therefore, that in the no-scheme world the claimants would have bought the freehold of site B in July 1996.

143. We agree with Mr Pearce that, having bought site B, the claimants would have carried out the same development as they did in the real world, whilst continuing to use the shed on site A until the new facilities were available. We see no reason to assume that the number of months between the acquisition of site B and its availability for use would have been any less in the no-scheme world than it was in the real world. Indeed the pressure on the claimants to bring it forward for use would have been less in the no-scheme world, with site A in operation. In the real world the claimants had every incentive, once site B had been acquired, to bring it forward as soon as possible to enable waste transfer operations to start. In the real world they had to go to appeal to achieve planning permission, but we do not think that the likelihood of refusal would have been any less if waste transfer operations had started on site A. Thus, as in the adjusted real world scenario, the claimants could have started processing waste on site B in October 1998. We think it right to assume, however, that, since site A would have been licensed from March 1997, there would have been a

licence for 75,000 tonnes by October 1998 on the combined site.

144. The two scenarios to be assumed are therefore as follows. In the adjusted real world scenario the claimants would have begun processing their own waste in October 1998 and third party waste in May 1999. A waste management licence would have been obtained in March 1999 for 25,000 tonnes and in July 2000 for 75,000 tonnes. In the no-scheme world scenario the claimants would have begun processing their own waste at site A in August 1996 and third party waste in March 1997, and they would have transferred their processing operations to site B in October 1998 with the benefit of a licence for 75,000 tonnes.

Other matters

145. The claim, as we have noted, includes an amount for the extra costs of developing site B as compared with site A. It follows from the conclusions we have reached that in the no-scheme world the claimants would have incurred costs in developing sheds on both site A and site B, whereas in the real world such costs were only incurred on site B. The difference between the costs of development that were actually incurred and the costs that would have been incurred in the no-scheme world will have to be assessed and fed into the overall calculation of disturbance compensation.

146. Mr Davidson calculated the loss of profit resulting from the delay in processing the claimants' own waste in two parts. He estimated the reduction in profit due to the need to dispose of the contents of skips at third party waste transfer stations. In his closing submissions Mr Roots stated that this issue should not be resolved as part of the interim issues. Mr Tager did not challenge that submission and we make no finding on the matter. Secondly, Mr Davidson estimated the loss of revenue resulting from the claimants' inability to operate roll on/roll off containers, which have a capacity of between 20 and 40 cubic yards and this was contested by the compensating authority. In the light of the evidence of Mr Welford and Mr Phillips on this issue, we find that the claimants did lose some customers who required a mix of skips and roll on/roll off bins.

147. As we have noted above, the compensating authority do not accept that the profits actually made during the period when site B was in operation are a true reflection of what the claimants lost through not operating a waste transfer station during the period of delay. This is not a matter that we can determine at this stage. We merely say that evidence of the profits subsequently made appears to us to be admissible, but how that evidence is to be used in assessing the disturbance claim must be the subject of further evidence and submissions.

Conclusions

148. We conclude as follows:

- (a) The value of the wayleaves is £2,360 (para 48). This amount is payable jointly to

the first and second claimants.

- (b) The diminution in the value of the land is £81,932 (para 96). This amount is payable jointly to the first and second claimants.
- (c) Loss of profits, payable to the third claimant, is to be assessed by comparing the profits that would have been made in the adjusted real world scenario with those that would have been made in the no-scheme world scenario (para 139). In the adjusted real world scenario the claimants would have begun processing their own waste in October 1998 and third party waste in May 1999. A waste management licence would have been obtained in March 1999 for 25,000 tonnes and in July 2000 for 75,000 tonnes. In the no-scheme world scenario the claimants would have begun processing their own waste at site A in August 1996 and third party waste in March 1997, and they would have transferred their processing operations to site B in October 1998 with the benefit of a licence for 75,000 tonnes (para 144).
- (d) The capacity of site A would have been 30,000 tonnes per annum, of which 11,625 would have been recovered (para 133) and the rest sent to landfill (para 134).

149. The parties are now invited to make representations as to costs, and a letter relating to that accompanies this interim decision, which will take effect when the question of costs has been determined. Thereafter we will consider what directions need to be given for the further conduct of the reference.

Dated 10 March 2006

George Bartlett QC, President

N J Rose FRICS

Addendum on costs

150. The parties are agreed that costs should be reserved, and we so order.

Dated 24 March 2006

George Bartlett QC, President

N J Rose FRICS