Neutral Citation Number: [2007] EWCA Civ 293

Case No: C3/2006/0903 & 0903(Z)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE LANDS TRIBUNAL
LCA/30/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

03 April 2007

Before :

LORD JUSTICE CHADWICK
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE THOMAS

- -

Between :

	(1) TERRENCE WELFORD **(2) COLIN PHILLIPS** **(3) IOD SKIP HIRE LTD**	**Respondents**
	- and -	
	EDF ENERGY NETWORKS (LPN) LTD	**Appellants**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Guy Roots QC and Guy Williams (instructed by **Lewis Silkin**) for the Appellants
Romie Tager QC and Philip Kremen (instructed by **Hughmans**) for the **Respondents**

Hearing date: 15 February 2007

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Judgment **Lord Justice Thomas :**

1. This is an appeal from the Lands Tribunal (The President and Mr NJ Rose) on a short point of law as to whether a claim for loss of profits was too remote in law to form part of a compensation claim under the Electricity Act 1989 for the grant of wayleave for underground cables. Although the point arose under the specific legislative provisions

applicable under that Act, the principles applicable were those generally applicable to claims for compensation for the compulsory acquisition of land.

The facts

2.The facts out of which the appeal arises were found by the Tribunal as follows:

i) The first claimant, the first respondent to the appeal, began a waste separation and transfer business in the 1980s in the East End of London; he sold that business and ceased to be engaged in the waste transfer business (the sorting and reclamation of waste and its ultimate sale or disposal). He subsequently developed with the second claimant, the second respondent to the appeal, a skip hire business which was later based at Millwall Wharf in the East End; this business comprised the hire of skips and the disposal of the waste deposited in the skips by the hirers to others who operated a waste transfer business; they did not conduct a waste transfer business. As Millwall Wharf was to be redeveloped, these two claimants looked for alternative premises in the East End of London from which they could operate a waste transfer business together with the skip hire business as the operation of a waste transfer business would maximise their profits.

ii) 0n 21 June 1994 the first and second claimants purchased at auction land (site A) at Canning Town London for £51,000, thereafter negotiating the price down to £41,000. There was a large electricity pylon on the site; its development potential was therefore limited. The sale was completed on 30 April 1995. The intention of the first and second claimants was to transfer their skip hire business to site A and to improve the profitability of their business by undertaking waste transfer themselves by building a waste transfer station on the site. The first and second claimants incorporated the third claimant, the third respondent to the appeal, on 1 December 1994 and transferred all the assets of the business (including a licence to use site A) to the third claimant company, which commenced trading on 1 May 1995; the first and second claimants retained the freehold of site A.

iii) Since 1949 underground electricity cables had run east to west across the middle of site A. This had originally been permitted under a licence granted by the then owner of the site; after the expiry of that licence the presence of the cables was continued by virtue of various statutory provisions. The first and second claimants were unaware of the cables when they purchased the site.

iv) After the purchase of site A, the third claimant spent £10,000 clearing it of fly tipping and £20,000 in improvements to the site, principally by covering it with concrete.

v) On 23 June 1995, the claimants applied for planning permission to build the waste transfer station – essentially a large shed in which the waste would be sorted and reclaimed prior to sale or disposal; permission was granted on 7 September 1995, subject to certain conditions.

vi) In July 1995, the claimants became aware of the presence of the cables. On 12 September 1995 they gave notice to London Electricity plc, the predecessors of the appellants (EDF), to remove them. The presence of the cables made it impossible to build a waste transfer station on Site A. The Tribunal made a finding which is central to this appeal:

> "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."

vii) Upon receipt of the notice, London Electricity became entitled to apply for a statutory wayleave for the underground cables under paragraph 6 of Schedule 4 to the Electricity Act 1989. Statutory wayleaves were granted on 17 August 1998 for a term of 15 years.

viii) On 15 October 1997, the claimants purchased an adjoining site (site B) and used this in conjunction with site A for lorry and skip storage; they obtained planning permission, after an initial refusal, in February 1999 and then developed it into a waste transfer station.

3. As a result of the statutory wayleaves the claimants became entitled to compensation under paragraph 7 of Schedule 4 to the Electricity Act:

> "(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. ”

4. The statutory provisions only provided for compensation as at the date the wayleave was granted – 17 August 1998. The claimants considered that they had suffered loss during the period between 12 September 1995 and the grant of the wayleave on 17 August 1998. They commenced proceedings in the High Court but these were compromised by an arbitration agreement referring the dispute to the Lands Tribunal which under paragraph 7 of Schedule 4 had the jurisdiction to determine the compensation for the statutory wayleave. The agreement provided for the compensation to be determined on the same principles as compensation for the statutory wayleaves. It is not necessary for the purposes of this judgment to deal separately with the position in respect of the statutory claim and the claim referred from the High Court as the applicable principles are the same and as there was no change in the underlying land values between 1995 and 1998.

5. The claims made by the claimants were for:

i) Injurious affection - diminution in the value of the land in consequence of the grant of the wayleave.

ii) A disturbance claim for loss of profits of over £2m on the basis that they would, but for the presence of the cables, have been able to start their waste disposal business in January 1996. They had been unable to start that business until January 2000.

6. The dispute under the Act and the dispute referred under the arbitration agreement were heard together in October and November 2005.

7. EDF accepted that compensation was due for the injurious affection claim but contended that no compensation was payable for disturbance, because the profits alleged to have been lost related to a use of the land which had not commenced on 12 September 1995 and did not flow from disturbance in the use being made of the land at that date.

8. It was agreed that the Tribunal should determine four principal issues; two, issues (a) and

(c), are relevant to this appeal.

> "(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
>
> "(c)In relation to that part of the claim relating to the value of the land:
>
> (i) whether this should be assessed … 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."

The determination by the Tribunal

9. The Tribunal decided that the injurious affection claim occasioned by the grant of the wayleave should be determined on the basis of the diminution of the value of the freehold interest of the claimants occasioned by the presence of the cables on the site and the right of EDF to maintain the cables on the site from 12 September 1995 until the grant of the wayleave and thereafter for the period of the wayleave. The Tribunal rejected the evidence of the claimants' expert who had put forward a valuation on a profits basis; they found the figures did not reflect the market and that the claim was unsupported by evidence. The Tribunal essentially accepted the valuation approach of EDF's expert which was based on general industrial land values, with various adjustments. There is no appeal from that part of the decision of the Tribunal.

10. As to the disturbance claim for loss of profits, the Tribunal approached the issue on the basis that the issue was not to be resolved by an analysis of the specific words of paragraph 7(2) of Schedule 4 to the Electricity Act 1989 but on the principles generally applicable to compulsory acquisition.

> "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."

11. The Tribunal then analysed the loss of profits claim under the three heads identified by Lord Nicholls in *Director of Buildings and Land v Shung Fung Ironworks Limited* [1995] 2 AC 111, concluding that a loss of profits claim lay:

i) **Causation:** The Tribunal found that the loss of profits claim had to be determined

by what had happened as the result of the grant of the statutory wayleaves. It did not matter that the claimants might not have bought the land had they known of the cables. The Tribunal was satisfied that, if the cables had not been present on the site, the claimants would have developed the site in accordance with the 1995 planning permission by building a shed and then using the site as a waste transfer station. Leave to appeal was sought on this point, but refused by Jonathan Parker LJ. The application was not renewed.

ii) **Remoteness:** The Tribunal concluded that the fact that the claimants had not commenced the use of site A for the waste transfer business in September 1995 did not prevent the recovery of compensation for loss of profits or make the claim too remote, as the waste transfer business was in existence. Leave to appeal on this issue was granted by Jonathan Parker LJ.

iii) **Reasonableness:** The Tribunal rejected EDF's contention that the claimants had failed to mitigate their loss by relocating to an alternative site. Leave to appeal was refused by Jonathan Parker LJ on the basis that this was essentially a question for the Tribunal. The application was renewed, but for reasons which I express at paragraphs 34-36 below I would refuse this renewed application.

12. This appeal is therefore concerned solely with the issue of remoteness.

The general approach to the award of compensation under the statutory provisions

13. The statutory provisions under paragraph 7 of Schedule 4 which provide for compensation for the grant of a wayleave make no express reference to the basis on which compensation is payable under sub-paragraphs (1) or (2) in contradistinction to the provisions in respect of compensation for the grant of an easement under Schedule 3; the latter paragraph expressly applies the provisions relating to the compulsory acquisition of land.

14. However, there was no dispute before us as to correctness of the general approach which, as set out at paragraph 10 above, had been taken by the Tribunal. Although paragraph 7 to Schedule 4 expressly distinguishes between compensation under sub-paragraph (1) for diminution in the value of the land and under sub-paragraph (2) for disturbance, the compensation payable under the whole of paragraph 7 is to be assessed on the general principles applicable to the payment of compensation for compulsory acquisition which recognises these two separate heads as elements of the claim for compensation – injurious affection and disturbance. The distinction drawn in paragraph 7 of Schedule 4 is a necessary distinction in relation to compensation for the grant of a wayleave for a fixed period to enable occupiers and owners of chattels to recover compensation for disturbance.

15. Although there was that measure of common ground, EDF contended that the Tribunal

had made two errors of law; the Tribunal should have decided that:

i) The claimants had been compensated for the loss of profits by the award in respect of the injurious affection claim for the diminution in the value of the land claim and they therefore were not entitled to any further recovery.

ii) The claimants had not commenced the waste transfer business at Site A (or anywhere else) by 12 September 1995 and the claim was therefore too remote to be recoverable.

I will deal with each in turn.

(i) The extent of the compensation for the loss in the award in respect of the diminution of the value of the land

16. EDF's first contention was that the Tribunal had fully compensated the claimants by the award for the diminution in the value of the land as that award had within it fair and proper compensation for the loss suffered by the claimants by not being able to commence the business at the time that that they would have commenced it.

17. At paragraph 102 of the judgment, the Tribunal set out its approach to this question:

> 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.

18. The general principle was not in dispute. Compensation for the value of the land at its market value will reflect a number of factors including the development potential of the land. The profits that the owner would have made out of the development of the land will therefore generally be reflected in the market value and the owner is not entitled to seek further compensation in such a case: see: *Collins v Feltham UDC* [1937] 4 All ER 189, *George Wimpey & Co Ltd v Middlesex County Council* [1938] KB 781, *Horn v Sunderland Corporation* [1941] 2 KB 26 *Ryde International plc v London Regional Transport* [2004] EWCA Civ 232, and *Corton Caravans and Chalets Ltd v Anglian Water Services Ltd* [2003] RVR 323.

19. However there are circumstances where the owner of the land is entitled to further compensation; if the personal loss he has suffered is not reflected in the value of the land where it has a special value to him, he is entitled to be compensated for that loss. In *Horn*, Scott LJ, in setting out the principles in classical terms, described the position at page 45:

> "the owner in a proper case – that is in a case where he really does incur a loss of money by disturbance due to the taking over and beyond the loss for which he is to be reimbursed in respect of the land taken – is entitled, because it has to do with the land, to have that element of personal loss taken into the reckoning of the fair price of the land, as has been held by the courts from a very early stage."

Scott LJ went on to say that the personal loss imposed by the compulsory acquisition could include the incidental loss in connection with the business he had been carrying on. However, although the owner is entitled to have that element of loss brought into account, he is not entitled to more than his total loss. The application of that principle gives rise to difficulties; Scott LJ gave at page 49 following illustration:

> "A farmer sells his land with its farm buildings by private treaty, not intending to farm any more. The land is sold and bought as agricultural land, so that it will fetch in the market only agricultural value. The farmer may sell his stock, implements, etc., but he will get nothing for his loss by "disturbance" out of the purchaser. If the same farmer owner is compelled by law to sell, the statutory principle of equivalent compensation entitles him to recover his personal loss arising out of the compulsory sale in addition to the agricultural value of the land. But now suppose that his land has potential building value. As a result of the statutory compulsion he is forthwith put, by the notice to treat, in a position where he is entitled as at that moment to be paid the present building value of the land. If the land is "ripe for development" that value will represent a sum of money many times as much as the agricultural value. If he had sold voluntarily he would have had to set off his

> "disturbance" loss against the purchase price to ascertain the net price realized. How can it be said that, by the compulsory acquisition, he has been caused a loss which is not fully compensated by the present payment of full building value? In my opinion, there is nothing in either Act to give him anything further. I think that it is a false interpretation of the Acts to suppose that, in all circumstances and whatever the evidence, such a loss must, as a matter of law, be added to the actual price of the land to ascertain its legal price under the Act. Where, by reason of the notice to treat, an owner is enabled to effect an immediate realization of prospective building value and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on the top of the realizable building value is, in my opinion, contrary to the statutes.

20. Applying those principles to EDF's first contention, there are two answers. The first is short and a complete answer. The compensation for the diminution in the value of the land was compensation payable to the first and second claimants as the owners of the freehold of site A; the claim for loss of profits was sought by the third claimants as the occupiers of the site. The award to the first and second claimants cannot therefore have compensated the third claimants.

21. The second answer is that, even if the claimants all had the same interests, compensation in respect of the loss of profits was not reflected in the award for the diminution of the value of the land. The Tribunal decided at paragraphs 90-95 of its judgment that the value of the site for general industrial purposes without the cables was £150,000 to which it added £20,000 which had been incurred in works of improvement; the agreed value of the land with the cables was £80,000, giving a permanent diminution of value of £90,000. In determining these values, the Tribunal decided that no adjustment should be made to the value by way of a development premium for use of the site as a waste transfer site; it determined separately the issue of whether the land had a value over and above its market value when it considered the loss of profit claim.

(ii) The loss of profit claim; the commencement of the business

22. The second and principal submission of EDF was that the Tribunal had been wrong to go on to conclude on the basis of the finding which I have set out at paragraph 2.vi) above that:

> "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."

23. EDF contended that there should have been no award for disturbance by way of loss of profits of the waste transfer business as that business had not been commenced on the site at the relevant time – 12 September 1995. The loss was therefore too remote within the second of the three conditions to the award of compensation set out in the opinion of Lord Nicholls in *Director of Land v Shun Fung,* supra, at p 126:

> The adverse consequences to a claimant whose land is taken may extend outwards and onwards a very long way, but fairness does not require that the acquiring authority shall be responsible *ad infinitum*. There is a need to distinguish between adverse consequences which trigger a claim for compensation and those which do not. A similar problem exists with claims for damages in other fields. The law describes losses which are irrecoverable for this reason as too remote. In *Harvey v Crawley Development Corporation* [1957] 1 Q.B. 485, 493, Denning L.J. gave the example of the acquisition of a house which is owner-occupied. The owner could recover the cost of buying another house as his home, but not the cost of buying a replacement house as an investment. The latter would be too remote.
>
> The familiar and perennial difficulty lies in attempting to formulate clear practical guidance on the criteria by which remoteness is to be judged in the infinitely different sets of circumstances which arise. The overriding principle of fairness is comprehensive, but it suffers from the drawback of being imprecise, even vague, in practical terms. The tools used by lawyers are concepts of chains of causation and intervening events and the like. Reasonably foreseeable, not unlikely, probable, natural are among the descriptions which are or have been used in particular contexts. Even the much maligned epithet "direct" may still have its uses as a limiting factor in some situations.

24. There was no dispute that if the land has a personal or special value to a claimant over and above its market value, then the owner is entitled to be paid compensation for the special value of the land to him. For example, if a business is being conducted by the owner on the land, the owner is entitled to compensation for the disturbance to his business, where

that special value is not reflected in the market value of the land. In such a case there will ordinarily be an assessment of this loss as a loss by disturbance calculated by reference to the costs and expenses of moving that business and any net losses sustained. In a land compensation claim under the general statutory provisions such a disturbance claim will be assessed separately from the value of the land, though as a matter of law there is one award for compensation encompassing both the value of the land and the disturbance claim. As I have set out at paragraph 14, it makes no difference to the approach that under Schedule 4 to the Electricity Act 1989, the disturbance claim is a separate claim.

25. It was also common ground that difficulty in proving the loss in respect of such a claim makes no difference. In *Director of Buildings v Shun Fung,* Lord Nicholls gave the following illustration at page 127:

> A businessman may spend large sums of money in setting up a new business. Before the business has time to prove itself, his premises are acquired compulsorily. Having no profit record, the business may be worth little. The compensation payable on an extinguishment basis would be paltry. But a reasonable businessman, spending his own money might consider it worthwhile incurring expenditure in fitting out new premises nearby and continuing his business there. Fairness requires that in such a case the claimant should be entitled, in respect of the disturbance of his business, to his reasonable costs incurred in the removal of his business and in setting it up again at the new property. Otherwise he would not be properly compensated for his loss; he would not be placed in a financially equivalent position.

26. Furthermore, by determining the issue of causation in favour of the claimants, the Tribunal had determined that the presence of the cables had prevented them from developing the site and building the waste transfer station and therefore from making profits from that activity.

27. However, the claimants could not recover in respect of that loss of profit, if that claim was too remote as a matter of law. The question which arose on the appeal was whether the Tribunal had drawn too narrowly the limit of the circumstances in which a loss is to be considered too remote. It was submitted by EDF that the loss was too remote and therefore irrecoverable because the business had not been commenced on site A. There were two principal submissions:

    i) The claimants had not commenced the use of Site A or any other land for a waste transfer business. There had therefore been no disturbance to the use of site A for which fair compensation was payable. This was different to the position which would have existed if there had been an existing waste transfer business which the claimants had intended to transfer to site A but which because of the presence of the cables, the claimants had not been able to transfer to the site. In such a case it was accepted that the claimants would have been entitled to compensation for loss

of profits until they had found an alternative site on which the business could be operated; there would in such a case have been a disturbance to the business which the claimants would in such a case have actually been conducting and which they had intended to transfer to site A.

ii) The Tribunal had been in error when it relied on the decision in *Khan v. Miah.* The application in that case of the rule that parties who agree upon a joint venture do not become partners until they embark on the activity in question was not relevant to the determination of the issue of whether the claimants had suffered a disturbance to an activity being carried out on the land or which would be carried out on the land.

28. It is clear that profits from a business which has not been commenced anywhere will generally be regarded as too remote for the purpose of providing fair compensation for land which is to be compulsorily acquired. That is because compensation for the value of that land will ordinarily reflect the cost of that part of the investment in the commencement of the business which is represented by the cost of the land. Therefore, where a person has land on which he is contemplating starting a new business, but the business is not in existence at the time the land is compulsorily acquired, then ordinarily the market value of the land will reflect the business opportunity that is contemplated; it is but part of the overall investment that will have to be made to realise the profits from the contemplated business. The profitability of that business will be subject to all the risks inherent in the start up of a business which is not in existence. Compensation measured by the market value of the land will be treated as fair compensation, as it will enable him to buy other land as part of the investment he will need to make to start the business he is contemplating. A claim for loss of profits will therefore be treated as too remote.

29. However in the present case, the Tribunal found as a fact that the business of waste transfer (in contradistinction to skip hire and waste disposal) was not merely contemplated, but clearly in existence at the relevant date for the reasons which I have quoted at paragraph 2.vi) above. If this court had jurisdiction to consider findings of fact, it is possible that a powerful argument could have been advanced for questioning that finding. However that was the finding made and it is on that basis that the issue of remoteness must be decided.

30. Although the Tribunal found that the business of waste transfer was in existence and money had been spent on its development, the use of the site as a waste transfer station had not commenced by the relevant date. Did that make the loss too remote so that it was irrecoverable? The Tribunal considered that the decision in *Khan v Miah,* was a relevant authority as set out in the passage quoted at paragraph 22 above. The issue before the House of Lords in that case was whether the parties had ever carried on the business of a restaurant in partnership together. Lord Millett who give the sole judgment summarised the agreement between the parties:

> "They did not agree merely to take over and run a restaurant. They agreed to find suitable premises, fit them out as a restaurant and run the restaurant once they had set it up. 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 of ultimate profit, and formed part of the business which the parties agreed to carry on in partnership together"

He then stated the principle:

> "The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on the activity in question. It is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it. Any commercial activity which is capable of being carried on by an individual is capable of being carried on in partnership. Many businesses require a great deal of expenditure to be incurred before trading commences. …The work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customers walk through the door. Such work is undertaken with a view of profit, and may be undertaken as well by partners as by a sole trader"

The determination of the issue was a factual question and Lord Millett concluded that on the facts the judge had come to the right factual conclusion that the parties had embarked on the business of running a restaurant.

31. Although it may be helpful to have regard to the decision in *Khan v, Miah*, I do not consider it is of much relevance and it is not in any way determinative of the issue. The issue is one to be determined by the principles applicable to the award of compensation for the compulsory acquisition of land as, for example, set out in *Horn* to which I have referred at paragraph 19. The question is whether the land has a definite and ascertainable special value to the owner of the land over and above that which is reflected in the ordinary market value of the land. In my view, once the owner of the land has a business in existence, has made the investment in the land on which that business is to be carried out and commenced work in connection with the business on it, then the business has a sufficient relationship to the land for the land to have a special value to the owner arising out of that business so that compensation for the loss occasioned by its disturbance can be recoverable, even though the land is not yet being used for the business. It is the coming into existence of the business and the investment in relation to the land that is sufficient, even though the land is not yet being used for the business. If the business is profitable, then loss by disturbance to the business which is to be conducted on the land will not be

reflected in the value of the land. In such a case, the land has more than the development value reflected in the market value; it has a special value to the owner of the land, given the existence of the business and the investment in the land on which that business is to be conducted. As the Tribunal determined on the facts that the business was in existence and work had commenced on the land in connection with the business, then in my view they were right to conclude that a claim for loss of profits from the waste transfer business could be made by the claimants even though site A was not yet being used for that waste transfer business.

32. EDF contended that such a view would be inconsistent with the decision of the Privy Council in *Pastoral Finance Association Limited v The Minister (NSW)* [1914] AC 1083 decided under the New South Wales Public Works Act 1900 which provided for three heads of compensation where land was compulsorily acquired – the value of the land, damages by severance and damage caused to other lands of the owner. The claimant company had bought land with the intention of transferring its business to that land; before the buildings necessary to conduct the business had been erected, notice of compulsory acquisition was given. The Minister contended that the claimant was entitled only to the market value of the land and not to the profits that would be made from carrying on the business on the land. It is only necessary to refer to a single passage in the opinion delivered by Lord Moulton:

> "That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the

capitalized savings and additional profits to the market value."

In *Ryde International v London Regional Transport,* Carnwath LJ observed that, although the case was of high authority, it was concerned with the Australian equivalent of the Land Clauses Consolidation Act of 1845 and was therefore an unsafe interpretation of the rules introduced into England and Wales in 1919. I agree with that view and do not consider that the decision assists. In any event that case was concerned with land on which nothing had been done for the purposes of commencing the business, in contradistinction to the position in the present case; therefore I do not think that the conclusion which I have reached is inconsistent with that decision, even on the assumption that it was safe to continue to rely on it in relation to compensation claims in this jurisdiction.

33. I therefore conclude that the Tribunal were right in law on the issue of remoteness and I would dismiss the appeal. It is therefore unnecessary to consider the alternative argument raised by the claimants under s.3 of the Human Rights Act 1998, that the provisions of paragraph 7 of Schedule should be read even more broadly so as to make them compatible with Article 1 of the First Protocol.

The issue of reasonableness

34. EDF contended that the Tribunal had fallen into error on the issue of reasonableness. It was EDF's case that the claimants had not acted reasonably as they had failed to mitigate their loss by locating an alternative site once they discovered the presence of the underground cables. The Tribunal found that the claimants had failed from July 1996 to mitigate their loss by not seeking an alternative site and developing it; they had given no explanation for their failure. Thus EDF's case succeeded in part.

35. It was contended that, as the Tribunal had found in the period prior to July 1996 that the claimants had done nothing to search for an alternative site beyond urging London Electricity to acquire an alternative site from National Power, it had made an error of law in finding that EDF had failed to discharge the burden of proving that the claimants had failed to mitigate their loss in that earlier period.

36. However EDF's case on that earlier period failed, not because of any error of law, but because on the facts, the claimants had not failed to mitigate their loss prior to that date. It is quite impossible to identify an error of law in the Tribunal's approach to the issue of mitigation; it was clearly of the opinion that on the facts EDF had not made out its case; for example, they found that EDF had adduced no evidence that suitable alternative sites were available at the material time. In my view an appeal on this issue had no prospects of success and I would accordingly refuse permission to appeal.

37. Accordingly as I have already stated I would dismiss the appeal on the issue of remoteness

and I would accordingly refuse permission to appeal on the issue of reasonableness.

Lord Justice Chadwick

38. I agree.

Lord Justice Scott Baker

39. I also agree.