



LCA/30/2004

**LANDS TRIBUNAL ACT 1949**

*COMPENSATION – electricity – underground cables – land with planning permission for waste transfer station – statutory wayleaves for retention – disturbance claim for loss of profits – how lost profits to be assessed – interest on compensation – basis for this – delay – simple or compound interest*

**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 14-17 July 2008**

*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*

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The following cases are referred to in this decision:

*Claymore Services Ltd v Nautilus Properties Ltd* [2007] EWHC 805 (TCC)  
*Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561

The following cases were referred to in argument:

*Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1975] AC 111  
*National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 EGLR 183  
*Stevens v Gullis* [2000] 1 All ER 527  
*Smith v Barking Havering and Brentwood Health Authority* [1994] 5 Med LR 285  
*Chandrasekaran v Deloitte and Touche* [2004] EWHC 1378 (Ch)  
*President of India v La Pintada* [1985] AC 108  
*Aslam v South Bedfordshire District Council* [2001] RVR 65

## DECISION ON QUANTUM

### Introduction

1. On 10 March 2006 we issued an interim decision on two references to determine the amount of compensation payable to the claimants by EDF Energy Networks (LPN) Plc under the Electricity Act 1989, Schedule 4 paragraph 7 and pursuant to an arbitration agreement dated 2 March 2004. The circumstances giving rise to the references were described in our interim decision.
2. In addition to determining the compensation payable to the first and second claimants (Mr Welford and Mr Phillips) for the value of the wayleaves and the diminution in the value of the land, we held that compensation for loss of profits was payable to the third claimant, IOD Skip Hire Ltd. Such compensation was to be assessed by comparing the profits that would have been made in the adjusted real world with those that would have been made in the no-scheme world. In the adjusted real world 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 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. We also found that the capacity of site A would have been 30,000 tonnes per annum, of which 11,625 tonnes would have been recovered and the rest sent to landfill.
3. Although expert accountancy evidence had been submitted prior to the initial hearing, this evidence was not heard at that time and the quantum of compensation for loss of profits was held over for subsequent determination.
4. At the resumed hearing to determine such compensation Mr Tager QC and Mr Kremen again appeared for the claimants. They called factual evidence from Mr Welford and expert evidence from Mr J E C Davidson MA (Cantab), FCA, MAE, a partner in Baker Tilly. Mr Roots QC and Mr Williams appeared for the compensating authority and called expert evidence from Mr Pearce and Mr Thaddeus, both of whom – like Mr Welford – had given evidence at the first hearing. They also called, as their third expert witness, Ms Antoinette Pincott FCA, MAE, MEWI, MCI Arb, a member of Stoneturn UK LLP.
5. By the commencement of the resumed hearing the dispute between the parties had narrowed considerably compared with the position at the initial hearing. The revised amount of disturbance compensation claimed was £1,058,000 and the compensating authority contended for £661,000, less 5% or 10% for uncertainty and less a capital cost adjustment of between £199,000 and £321,000.

## Issues

6. The issues between the parties may be summarised as follows:

- (i) Whether sales in the no-scheme world in the 26 month period from August 1996 to September 1998 would have been the same as in the real world and, if not, the extent of the difference.
- (ii) The gross profit margin to be applied to lost sales.
- (iii) The annual cost of operating a waste transfer station on site A.
- (iv) Whether a deduction should be made from the estimated lost profits to reflect uncertainty.
- (v) The capital cost which would have been incurred in erecting a waste transfer station on site A.
- (vi) The basis upon which interest on the compensation moneys should be calculated.

We consider each of these issues in turn.

### **Issue 1 – Would sales in the no-scheme world between August 1996 and September 1998 have been the same as those subsequently achieved in the real world?**

7. Mr Davidson considered that in the no-scheme world between August 1996 and September 1998 the claimants would have generated the same level of sales from site A alone as they later achieved in the real world when operating from both sites A and B. In Mr Davidson's view the limited size of the site only restricted the waste processing capacity of the business. It did not affect its skip hire revenue generating capacity, as all standard skip hire waste in excess of 30,000 tonnes (after allowing for all third party and roll on-roll off (ro-ro) waste) could have been disposed of at an external waste transfer station. None of the restrictions on site A would have limited the business in terms of its revenue. All the additional revenue available as a result of being able to undertake ro-ro and third party waste was within the capacity of the waste transfer station on site as determined by the Tribunal and so the entirety of those waste streams would be processed.

8. Ms Pincott considered that only 70% of the real world sales could have been achieved on site A in the no-scheme world. In reaching that conclusion she bore in mind concerns which had been expressed by Mr Pearce in a letter to the compensating authority's solicitors dated 13 March 2008.

9. Mr Pearce considered that there would have been restrictions on the operation of the skip hire business on site A alone. If the claimants had operated the waste transfer station at the same time as running a skip business from site A, there would have been insufficient space to

store skips and ro-ros. In addition, severe congestion would have resulted from drivers having to shunt around and between the skips in order to position themselves properly for reversing and discharging in the waste transfer station. As drivers were normally set targets to collect four or five skips per day this would have taken up valuable time, possibly losing one or more collections, which could have affected their income. This difficulty would have been compounded by skip drivers arriving at the waste transfer station in bunches, as a result of leaving their depots at about the same time each morning. In this situation Mr Pearce thought that the capacity of the waste transfer station would be reduced by 25 to 30% with drivers, including third parties, having to divert to other waste transfer stations with some of their loads.

10. Mr Pearce did not agree with Mr Davidson's view that the claimants would have managed their operations so as to prioritise the more lucrative business. Mr Davidson thought they would deal first with ro-ro waste, then third party waste. Only when these two demands were fully satisfied would the claimants dump their own skip hire waste in their own waste transfer station. Mr Pearce accepted that it might theoretically be possible to control waste streams in this manner, but he considered that it was not practical and, and in his experience, it would not happen. In any large conurbation there would be several waste transfer stations competing for business. Most of these would have their own skip hire businesses – they would probably have developed from a skip hire business to a waste transfer station operator in the same way as Mr Welford had done. As waste transfer station operators normally took in their own skips before offering their facility to third parties, the only available market for third party skips would be from skip operators without a waste transfer station. These operators would deliver to the station that offered the best gate price at the time. There could be no guarantee that they would favour the claimants' station.

11. Moreover, said Mr Pearce, Mr Davidson had not taken into account the vagaries of the market place, which would inevitably result in an excess of one form of waste or another in any particular year and at any particular time; a perfect and uniform stream of waste would be unlikely to occur. It was also difficult to know at what stage during the day, week or year the hierarchy should be applied. For example, if sufficient third party waste had not arrived by midday, would a decision be made to start accepting ro-ros and, if insufficient of these had arrived by say 3.00pm, would a decision only then be made to accept "own" skips into the station? Alternatively, would the decision be related to weekly inputs, with say Wednesday as a "break point", or even yearly with, say, June or July as "break points"? In Mr Pearce's view, operating in such a manner did not make sense.

12. It was put to Mr Pearce in cross-examination that the Tribunal had found that, a month before site A opened for business in the no-scheme world, the adjoining site B would have been purchased. He accepted that it would have been possible for the claimants to park their vehicles and skips on site B, but he thought that planning permission for such use might have been required.

13. In the course of her oral examination in chief Ms Pincott was asked to what extent, if at all, her deduction of 30% from the real world sales figures would be affected if site B were

assumed to be available. She replied that, if site B could be used for the skip hire business, one of the constraints on its operation would be removed. However, an increase in the size of the site would not necessarily benefit third party revenue. The amount of waste from third parties would not be within the claimants' control. Moreover, Ms Pincott said that she had a number of concerns about Mr Davidson's analysis of the sales. She had seen no evidence to prove that the increase in the skip hire revenue which occurred when the waste transfer station came into operation had been due to ro-ro business. She accepted that there had been a growth in business and she understood Mr Davidson's analysis of the proportion of the total attributable to ro-ro in 2002. There was, however, no information to show how ro-ro trade had built up to that level and, therefore, whether Mr Davidson's model would have been replicated in the no-scheme world. She considered that the availability of site B would justify a reduction in her suggested discount of 30%. Given her other concerns about Mr Davidson's financial assumptions, however, she would not feel comfortable reducing the discount to below 20%.

14. We think Mr Davidson was right to assume that site B would have been available for use in conjunction with site A throughout the period in question. It had previously been used for industrial purposes by British Telecommunications Plc and we are not persuaded by Mr Pearce's suggestion that planning permission would have been required to use it for vehicle parking and skip storage.

15. On the other hand we accept Mr Pearce's evidence that the availability of site B would not have made any difference to the manner in which ro-ro and third party business could have been prioritised for processing at the waste transfer station on site A. We also accept Ms Pincott's opinion that Mr Davidson has not provided satisfactory evidence to support his claim that the business would have grown in the no-scheme world at the same rate and to the same level as in the real world. Ms Pincott made it clear that her approach of deducting 30% (or 20%) was a blunt instrument, but we are satisfied that it is reasonable. We find that, in the no-scheme world, sales could have been achieved at the rate of 80% of those in the real world.

## **Issue 2 – What gross profit margin should be applied to the lost sales?**

16. Mr Davidson and Ms Pincott disagreed as to the correct gross profit margin to be applied to lost sales. The position can be summarised as follows:

	Lost Ro-Ro sales		Lost third party sales	
	without WTS	with WTS	without WTS	with WTS
Mr Davidson	17.4%	37.7%	47.2%	67.5%
Ms Pincott	17.4%	26.3%	47.2%	56.1%

17. Thus the dispute is whether the presence of a waste transfer station increases the gross margin by 20.3% (Mr Davidson) or 8.9% (Ms Pincott). Ms Pincott's calculations were based on comparing the margin obtained from the accounts before and after the erection of a waste

transfer station. Mr Davidson's calculations were based on a detailed analysis of all the waste processed in October and November 2001. Because his figures were based on a cost analysis of only two months, he subsequently decided to look at further periods to try to establish whether his analysis was representative of a full year or of the whole period of loss. It seemed to him that this additional work broadly showed a similar result in later periods.

18. Mr Davidson was unable to explain to our satisfaction why his calculation of gross margin was inconsistent with the accounts. He described the figures in the accounts, curiously, as illustrative. This implies that the company accounts, which are prepared and filed at Companies House to meet statutory requirements, and which form the basis upon which tax is calculated, should carry less weight than his own limited analysis. We cannot accept that suggestion. We find that Ms Pincott's assessment of the appropriate gross profit margin is correct.

**Issue 3 – What would have been the annual cost of running a waste transfer station on site A?**

19. Ms Pincott assumed that the annual cost of running a waste transfer station on site A would have been £202,000, based on an estimate prepared by Mr Pearce.

20. Mr Pearce said that he had worked for Shanks and McEwan, a large waste management company, between the late 1980s and 1997 and had there been responsible for tendering for waste contracts. Every contract had included a waste transfer station. He had prepared his estimate for the current exercise on the same basis as he had adopted when tendering for such contracts, although he added that every tender for Shanks and McEwan would have also been discussed with the company's accountant. His estimate was made up as follows:

Vehicle running	£22,620
Permits/licences	£ 3,000
Sub-contractors	£ 1,964
Wages & salaries	£60,480
Equipment hire	£26,000
Plant repairs	£22,500
Depreciation	<u>£40,900</u>
Total	<u>£177,464</u>

21. In addition, Mr Pearce considered that an operation of the size in question should have employed a manager at an annual cost of £25,000.

22. In a report dated 27 July 2007 Mr Davidson said that there were no figures to indicate the cost of running a waste transfer station on site A, but he had discussed the matter with the claimants who had suggested that the smaller waste transfer station would have cost at most 25% of the cost of running the larger waste transfer station erected on site B. He concluded that it was

“difficult to be overly analytical about this, but if one considers that the smaller waste transfer station is doing less than half the physical throughput, and at less than half the efficiency, one can see that 25% becomes an appropriate fraction”.

23. Shortly before the hearing Mr Davidson prepared new calculations, based on what he described as a more analytical approach. He concluded that a fairer figure for running costs would amount to £95,100, being approximately 33% of the costs of running the waste transfer station four years later on site B. So far as the operational aspects of his revised approach were concerned, however, Mr Davidson continued to rely on information obtained in discussions with the claimants.

24. We are in no doubt that any information based on discussions with the claimants must be treated with the utmost caution. In his report dated 13 March 2008 Mr Pearce listed the tonnage figures reported by the claimants in their quarterly returns to the Environment Agency. These showed that, whereas the figures for 2001, 2004, 2005 and 2006 ranged from 57,457 to 70,020 tonnes per annum, those for 2002 and 2003 were very much higher, at 133,400 and 166,200 tonnes respectively. In a witness statement prepared subsequently and dated 26 June 2008 Mr Welford said that the true figures for 2002 and 2003 were less than half those reported to the Environment Agency, namely 63,338 and 73,365 tonnes respectively. He added:

“The reason why the EA has a higher figure is that we had been told, off the record, by the Environment Agency that if we wished to increase our licence from 74,990 tonnes per annum to 350,000 tonnes per annum we had to show that the tonnage was increasing. In 2003 we were nearly hitting 74,999 tonnes per annum. Consequently acting on that suggestion, for the years 2002 and 2003 we increased the figures over and above the actual figures. We submitted our application for a licence for 350,000 tonnes and that was granted on 18 May 2004 ... I wanted to get the licence as it would increase the value of the WTS. I can say I never anticipated doing 350,000 tonnes through site B.”

25. In oral evidence Mr Welford accepted that it had been his idea to submit false returns to the Environment Agency in order to obtain a licence which would increase the value of his property. This admission demonstrated a clear disregard for the truth and undermined the credibility of his evidence. We therefore reject Mr Davidson’s estimate of the running costs for the waste transfer station.

26. Mr Davidson suggested that the inclusion of depreciation in Mr Pearce’s figures resulted in double counting. Ms Pincott denied that this was the case and Mr Davidson partly withdrew the criticism under cross-examination. We find that there has been no double counting. Nor do we accept Mr Davidson’s suggestion that Mr Pearce’s figure for plant repairs was higher than the costs incurred in 2001/2 when the claimants were carrying out a larger operation. We accept Ms Pincott’s evidence that it is not possible to extract an exact figure for plant repairs from the accounts.



27. In the course of cross-examination Mr Pearce accepted that the cost of employing a manager should not be included in the calculation of the claimants' loss. In the absence of any reliable evidence on the matter from the claimants, we find that the annual cost of running a waste transfer station on site A would have been £177,464.

**Issue 4 – Should a deduction be made from the calculated lost profits to reflect uncertainty?**

28. Ms Pincott considered that a deduction of between 5 and 10 per cent should be made from the claimants' calculated loss to reflect uncertainty as to whether everything would have happened in the no-scheme world as it did in the real world. Mr Davidson felt that no such deduction was justified in the circumstances of the present claim, because the uncertainties applied both ways. The chances that the profits earned in the no-scheme world would have been lower than those earned in the real world were no greater than the chances that they would have been higher.

29. We think that, with one exception, Mr Davidson is right on this issue. The exception relates to uncertainty regarding the effects of the landfill tax increases on the claimants' profitability in the year ended 30 April 2002 when compared with earlier years. Landfill tax on non-inert material commenced on 1 October 1996 at £7 per tonne and was increased on 1 October 1999 to £10 per tonne and thereafter by £1 per tonne per annum. Mr Davidson considered that there was nothing in the accounts to support the suggestion that landfill tax had improved profitability. Ms Pincott, on the other hand, relied on evidence given by Mr Phillips and Mr Welford at the first hearing. Mr Phillips said this:

“Since 1996 when the landfill tax came in it has become more profitable as the tax was paid at the end and consequently the tax would be imposed in the various steps of re-cycling. We pass on the tax to the customer. Our aim would be to put as little waste into the landfill site as possible. The effect is that a substantial amount of the fee on the initial tipping is retained.”

30. Mr Welford said:

“The advent of the landfill tax did increase the prices to the WTS operators but obviously they then had to pay an increased fee to the landfill sites who are the final point of collection for the landfill tax. It meant that recycling became more profitable in the business model.”

31. Mr Thaddeus expressed the view that, without proper adjustment for the difference in landfill tax between Mr Davidson's base year of 2001/2 and the years 1996 to 2000, the claimants' figures were likely to indicate a higher profit figure than would otherwise be appropriate. We accept that opinion. Landfill tax, however, was only one of a number of factors upon which Ms Pincott relied in support of her uncertainty deductions of between 5 and 10 per cent. We are satisfied that the claimants' profits in the year to 30 April 2002 were

increased as a result of the higher landfill tax. We find that the claimants' loss should be reduced by 1 per cent to reflect that effect.

**Issue 5 – What costs have the claimants saved as a result of not having to construct a waste transfer station on site A?**

32. In paragraph 145 of our interim decision we said that the compensation payable for disturbance should take account of the difference between the costs of development that were actually incurred on site B and the costs which would have been incurred in developing sheds on both site A and site B. In his report dated 27 July 2007 Mr Davidson explained that, in the light of that decision, it was necessary to calculate the cost of erecting a waste transfer station on site A. He said this:

“Calculating the cost of erecting the hypothetical WTS on site A is an exercise which in large measure falls outside the scope of my expertise. I have been instructed however to suggest a reasonable quantum, to act as an illustration rather than an expert opinion, based on such financial information I have to hand, and taking account of the respective sizes of the two WTSs.

There is of course no evidence to rely on in relation to the costs of erecting the hypothetical WTS on site A. There is little enough evidence of the costs of erecting the actual WTS on site B.

I understand that the main costs of erecting a WTS are the cost of the steel, the cost of the cladding and the labour to erect these.”

33. Mr Davidson added that he had been provided with an invoice in the sum of £20,000, relating to the design and provision of the steel works for the real world waste transfer station on site B. He estimated that the equivalent cost for the smaller station would have been 75% of this figure, or £15,000. To this he would add £10,000 for the cladding and £10,000 for labour, giving a total cost in the region of £35,000. The compensating authority's solicitor subsequently asked Mr Davidson to explain the basis for his estimates for cladding and labour. In a letter dated 11 December 2007 Mr Davidson replied as follows:

“As expressly stated in the report, these figures are illustrative only, although they are based on discussions with the Claimants, who regard them as reasonable.”

34. In a document annexed to a joint statement of the accounting experts dated 4 July 2008 Mr Davidson summarised Mr Welford's evidence about some of the items discussed in Ms Pincott's report. This summary showed various differences compared with the figures in Mr Davidson's earlier report. The cost of steel works was reduced from £15,000 to £10,000 and the figure for cladding from £10,000 to £7,850. The figure of £10,000 for labour was removed altogether. On the other hand, various sums were included for items which had not previously been included – £5,512 for the trommel, £1,800 for the weighbridge and £9,712 for concreting. The effect of these various changes was that Mr Davidson's cost adjustment increased from £35,000 to £40,574.

35. Ms Pincott's assessment of the costs which had been saved by the claimants was based mainly on evidence given at the initial hearing by the claimants' own surveyor, Mr Worthy, as adjusted by Mr Thaddeus to take account of factual matters or matters which were outside Mr Worthy's instructions. The respective figures, together with Mr Thaddeus's comments on any differences, are set out in the following table.

	<b>Item</b>	<b>Mr Worthy's costs</b>	<b>Mr Thaddeus's adjusted costs</b>	<b>Comments</b>
1.	Demolition and site clearance prior to date of claim	£ 82,500	Nil	Works carried out.
2.	Construct transfer station	£113,750	£113,750	
3.	Construct workshop and office	£ 49,725	£ 21,294	Workshop constructed by IOD. No offices constructed on site A. Area of offices scaled from planning application plan.
4.	Perimeter gates and fencing	£ 13,500	Nil	Works carried out.
5.	Site paving/concrete	£ 60,225	£ 20,075	Assume 1/3 of site requires concrete.
6.	Drains, statutory connections, etc	£ 25,000	£ 25,000	
7.	Weighbridge	£ 15,000	£ 15,000	
8.	Prelims OH & P at 15%	£ 53,955	£ 29,268	15% applied to items 1-7 as per Worthy.
9.	Contractor's design fee 5%	£ 20,685	£ 11,219	5% applied to items 1-8 as per Worthy.
10.	Anticipated building contract	£434,340	£235,606	
11.	Professional fees and expenses approx. 6.5%	£ 28,500	£ 15,314	
12.	Anticipated budget cost as at 1995	£462,840	£250,920	

36. Mr Thaddeus's figures did not include the likely costs of a trommel which would have been installed on site A in the no-scheme world. This aspect was covered by Mr Pearce. Mr Pearce said that he had obtained, through one of his clients, two quotes for a typical static installation of a trommel to process 30,000 tonnes per annum of mixed builders type waste. One was £66,000 and the other was £74,200. He would allow £70,000 at current rates, plus £5,000 for a picking belt, £4,500 for electrical installation and £1,500 for crane hire.

37. In the light of the evidence of Mr Thaddeus and Mr Pearce Ms Pincott considered that the minimum capital adjustment should be £199,000, based on Mr Thaddeus's figures for items 2 and 7 and Mr Pearce's figure for the trommel (which she calculated was equivalent to

£70,000 at 1996 prices). If the Tribunal decided that the evidence supported Mr Thaddeus's remaining figures, totalling £122,000, the total adjustment should be increased accordingly.

38. It was pointed out to Ms Pincott in cross-examination that Mr Worthy had expressed the view that £278,803 of the total cost of the original scheme would have been expended at the time of the injunction, suggesting that the outstanding work would have cost £184,000, some £72,000 less than the figure assessed by Mr Thaddeus based on Mr Worthy's evidence. Ms Pincott conceded that she had not previously noticed this discrepancy. She agreed that, in the light of the oral evidence of Mr Pearce to the effect that an existing off the shelf trommel could have been moved to site B and continued in use, there would have been no saving in the cost of a trommel apart from removal costs; the new trommel would merely have been purchased 26 months earlier than might otherwise have been the case. Similarly, if on the basis of Mr Thaddeus's evidence the weighbridge could have been moved over to site B, the only amount saved would have been the cost of moving it, digging a new pit and connecting it to the electrical supply.

39. Having considered the cost of constructing the original waste transfer station on site A according to Mr Worthy's evidence as adjusted by Mr Thaddeus, Ms Pincott compared this information with evidence relating to actual costs incurred by the claimants in developing site B and constructing the larger waste transfer station, to the extent that such evidence was available. Since, according to Mr Davidson's report, site B had been completed by January 2000, it was likely that the majority of costs relating to the development of site B would have been completed during the claimants' financial year ended 30 April 2000. Having reviewed the third claimant's statutory accounts, Ms Pincott asked Mr Davidson to what extent the additions to the fixed assets category "Improvements" related to work carried out on site A or site B. She pointed out that additions to this category totalled approximately £114,000 in the year ended 30 April 2000 and £5,600 in the following year. In response to that query Mr Davidson provided copies of two schedules headed "IOD Skip Hire Limited Improvements Schedule" for the years to 30 April 2000 and 2001.

40. Ms Pincott concluded from this information that the minimum amount actually expended on the construction of the waste transfer station on site B was approximately £112,000, but it was possible that certain other costs also related to the same project. In addition there were weighbridge costs of approximately £21,500. Ms Pincott observed that it was not clear whether these figures included any labour. Moreover, they did not appear to include preliminaries, contractor's design fee or professional fees, all of which had been estimated by Mr Worthy.

41. Mr Davidson also provided Ms Pincott with the third claimant's trial balance as at 30 April 2002. Ms Pincott said that this information was inconclusive. In particular she had not been able to reconcile the fixed asset balances shown on the trial balance with the accounts for the year ended 30 April 2002.

42. It is clear that Mr Davidson's estimated cost of £40,547 was based to a large extent on information which he had obtained from the claimants. In the light of the conclusion we have

reached as to the reliability of Mr Welford we are unable to obtain any assistance from this aspect of Mr Davidson's evidence.

43. The starting point for Ms Pincott's assessment was the evidence of Mr Worthy. Mr Davidson did not consider that evidence to be relevant because, he said, Mr Worthy had not been asked to estimate the absolute cost of building the waste transfer station on site A or site B. His instructions had been to calculate by how much the cost of building site B and part of site A would have exceeded the cost of building the whole of site A alone. In fact, Mr Worthy said in terms that he had priced the work as if a third party company had undertaken the scheme for the third claimant. In those circumstances it is in our judgment hopeless for Mr Davidson to argue that Mr Worthy's evidence is not relevant. Mr Worthy is an experienced independent qualified quantity surveyor, who has given evidence to this Tribunal in relation to the very matter now in issue. Using evidence of published building price indices, his estimate related to site A expressed in prices at about the right date. We accept Ms Pincott's opinion that the available accounting information is inadequate to provide a reliable indication of the amount the third claimant has spent on site B. We find that the evidence of Mr Worthy in relation to the cost of constructing a waste transfer station on site A is the best available to us.

44. Mr Worthy expressed the view that the cost of work outstanding at site A at the time when the injunction prevented any further works, was £184,000. We think that this provides a more reliable starting point for calculating the amount saved by the third claimant than Mr Thaddeus's £250,920, which is derived from Mr Worthy's calculations but relies for its accuracy on the correctness of a number of assumptions. It is likely that the outstanding works included the supply and installation of a weighbridge. In the light of Mr Thaddeus's evidence we find that a weighbridge on site A would have been moved to site B. The amount saved should therefore exclude the cost of the weighbridge, namely £19,289 (£15,000 plus 15% plus 5% plus 6.5%), but include the cost of its removal.

45. Mr Worthy's costs did not include a trommel. We accept Mr Pearce's evidence that the original trommel would have been moved to site B. The only additional saving, therefore, is the cost of removing the trommel.

46. There was no evidence as to the precise cost of moving the weighbridge or trommel. It is clear, however, that the work involved in both would have been limited and we find for a total figure of £3,500.

47. The total capital cost adjustment, therefore, is £168,211 (£184,000 - £19,289 + £3,500).

## **Issue 6 – What basis should be used to calculate interest on the compensation moneys?**

48. The claimants seek the award of interest on the compensation under section 49 of the Arbitration Act 1996. Subsections (3) and (4) of that section provide:

“(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case –

- (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;
- (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).”

49. Mr Tager submits that it would be fair and just to award interest on a compound basis. It is said that Site B was bought with mortgage borrowings; and that, whether the lost profits in Periods 1 to 5 would have reduced borrowings or would have enabled the claimants to invest the profits that they would have made, such profits would have been an economic benefit that fairness requires to be calculated on a compound basis. Quarterly compounding is suggested as appropriate, at 0.5% below Base Rate, from the respective mid-dates of each of the five periods until the date of the decision, with further interest from the date of interest until payment. Interest should be awarded on the amounts determined by the interim decision (£2,360 as the value of the wayleaves, and £81,932 as the diminution in the value of the land: see paras 48, 96 and 148 of the interim decision). Such interest should run from 17 August 1998 (the date of the grant of the compulsory wayleaves) to the date of payment at the rates prescribed pursuant to the Land Compensation Act 1998.

50. Mr Roots points out that there is no statutory provision which expressly gives an entitlement to interest on compensation payable under paragraph 7 of Schedule 4 to the Electricity Act 1989. When the Planning and Compensation Act 1991 was enacted section 80 provided for compensation under a large number of statutes to carry interest, but the Electricity Act 1989 was not among these. Notwithstanding this, however, the compensating authority accepts in principle that interest should be awarded under the Tribunal’s Arbitration Act power. Clause 3 of the Arbitration Agreement introduced the same basis of compensation for the period before the grant of the statutory wayleaves as applies under Schedule 4 of the 1989 Act after the wayleaves had been granted, and it follows, Mr Roots says, that the approach on interest should be the same.

51. Subject to two points, therefore, the compensating authority contended that interest should be calculated in the same manner and at the same rate as applies to compensation for compulsory purchase. The amounts awarded in respect of the grant of the wayleave, including that for the diminution in the value of the first and second claimants' land, should carry simple interest, from 12 September 1995 to 17 August 1998 on the compensation payable under the Arbitration Agreement and from 17 August 1998 on the compensation awarded under the statute, to 4 May 2006, when £100,000 was paid in respect of these amounts. Compensation for disturbance should carry interest from the mid-point of each of the five periods taken for the calculation of loss of profits.

52. The compensating authority say, however, that no interest should be awarded on the compensation for diminution in the value of the land and also that the amount of interest which would otherwise be awarded on any part of the claims should be reduced to take account of the delay caused by the Claimants in the process of determining the compensation.

53. On the first of these points Mr Roots says that interest on an award of compensation is intended to reflect the fact that a claimant has been kept out of his money from the date when the loss occurred until payment of the principal sum. Here, however, the claimants have not been kept out of their money. The land was purchased at a favourable price and had increased in value by the second valuation date. The claimants did not have to acquire any other land on account of the presence of the cables. The Tribunal has concluded that they would have acquired site B in the no-scheme world.

54. As to delay, Mr Roots submits that, in exercising its discretion to award interest, a court may take into account the extent to which the period during which the claimant has been kept out of his money is attributable to delay caused by the claimant himself. Here the statutory wayleaves had been granted on 17 August 1998, but it was not until 18 May 2004 that the reference to the Tribunal was made. Proceedings against the London Borough of Newham had been issued on 23 September 1997, but two years elapsed following the grant of the wayleaves before in August 2000 it was agreed that the proceedings should be stayed pending the determination of compensation by the Lands Tribunal; and then two more years passed until, on 12 March 2003, High Court proceedings were commenced against London Electricity. The compensating authority then came to the rescue of the claimants by suggesting and agreeing to the Arbitration Agreement, which enabled the totality of the matter to be considered in one forum on a consistent basis. As a broad brush means of taking account of the delay caused by the claimants, the compensating authority contend that interest should commence on 21 March 2002, the date on which the High Court action against London Electricity was commenced.

55. We do not know why it was that the compensation provisions in Schedule 4 to the Electricity Act 1989 were omitted from the provisions of the Planning and Compensation Act 1991 dealing with interest on compensation. Nevertheless we have power to award interest under the Arbitration Act, and the compensating authority accept that it would be appropriate for us to do so. It is to be noted that Schedule 18 to the 1991 Act prescribes, in relation to each compensation provision, a date from which interest is payable. Generally, where damage is suffered, the date is the date on which the damage was sustained; otherwise it is the date of

claim. In our judgment the approach on which these provisions are founded can fairly be applied in claims such as those before us. The award for depreciation in the value of the first and second claimants' land ought to carry interest from the date when it was claimed in the notice of reference to this Tribunal, 18 May 2004, up to 4 May 2006 when the £100,000 was paid. We should have seen no justification for interest on the amount awarded as the value of the wayleaves (£2,360), as this amount was never claimed but was volunteered by the compensating authority in the course of the proceedings.

56. As far as the loss of profits claim is concerned, the starting-point, in our judgment, is that interest ought to be paid on the amount of the loss from the date on which it was suffered; and that it would be appropriate to calculate the interest from the mid-point of each of the five periods identified in Mr Davidson's evidence. There is, however, the issue of delay. The principles to be applied in considering whether to disallow interest on account of a claimant's delay are helpfully summarised in the judgment of Jackson J in *Claymore Services Ltd v Nautilus Properties Ltd* [2007] EWHC 805 (TCC). At paragraph 55, having reviewed the relevant authorities, the judge said that he derived the following propositions from them:

- “(1) Where a claimant has delayed unreasonably in commencing or prosecuting proceedings, the court may exercise its discretion either to disallow interest for a period or to reduce the rate of interest.
- (2) In exercising that discretion the court must take a realistic view of delay. In the case of business disputes, litigation is for all parties an unwelcome distraction from their proper business. It is not reasonable to expect any party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. Delay should only be characterised as unreasonable for present purposes when, after making due allowance for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period.
- (3) When determining what disallowance or reduction of interest should be made to mark a period of unreasonable delay, the court should bear in mind that the defendant has had the use of the money during that period of delay.”

57. Bearing these principles in mind, we consider that it is appropriate to reduce the length of term for which interest should be paid for loss of profits. Proceedings were not commenced against London Electricity until well over 6 years after they had notified the claimants of the existence of the cables, and the statutory claim for compensation was not referred to the Lands Tribunal until nearly 6 years had elapsed from the grant of the wayleaves. We regard these periods of delay as unreasonable and we consider it appropriate to reduce by 3 years the length of time for which interest should be paid in respect of the loss of profits. Interest, calculated from the mid-point of each of the five periods, should be paid up to the date three years before the date of payment.

58. The remaining question is the rate of interest. The claimants say that compound interest should be awarded; the compensating authority that simple interest only should be given. The



claimants rely on *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, and in particular the passage from the judgment of Lord Nicholls of Birkenhead at paragraph 52:

“We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. That is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality.”

59. Mr Roots correctly points out that in *Sempra*, where the claimant had been required to make advance payments of corporation tax under a provision in a taxing statute that was later held to be contrary to an article of the EC Treaty, the claim was for damages under the common law for breach of statutory duty and for restitution. The damages sought comprised only the interest which would have been earned on the money if it had not been the subject of a premature tax payment. It was a claim for loss of interest for money of which the claimant had been wrongfully deprived. Here, by contrast, loss of interest has not been claimed as part of the disturbance claim, so that it is not seen as part of IOD’s business loss. The accounts of the company ought to reflect such additional costs as may have been incurred on account of borrowing that would have been avoided if the profits the subject of this claim had been received at an earlier date. To that extent, therefore, they should be reflected in the loss of profits claim, and there is no evidence to justify any additional claim. It does not seem to us, therefore, that fairness demands the payment of interest on a compound basis. In our judgment simple interest, for which provision is made for awards of compensation covered by the 1991 Act, is appropriate in this case also, and we consider that the statutory rates of interest should be applied.

60. We trust that the accountancy experts will be able to agree the total amount of compensation and interest payable to the claimants on the basis of the conclusions we have reached in this decision. If they are unable to do so, they should each prepare a statement explaining the point or points of difference, and the justification for their own calculations. Such statements should be exchanged and delivered to the Tribunal within 21 days of the date of this decision. Comments on these statements should be exchanged and filed within 14 days thereafter.

61. If the amount of compensation is agreed, submissions on costs should be exchanged and filed within 21 days of the date of this decision and any further comments within 14 days thereafter.

Dated 25 November 2008

George Bartlett QC, President

N J Rose FRICS