UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PLANNING PERMISSION – preliminary issue - appeal against certificate of appropriate alternative development – whether certificates granted for adjoining sites acquired for same scheme, or applications for certificates for such sites, may be taken into consideration when determining prospect of planning permission on cancellation assumptions

BETWEEN:

THE SECRETARY OF STATE FOR TRANSPORT **Appellant**

and

CURZON PARK LTD (1)
THE EASTSIDE PARTNERSHIP NOMINEE COMPANY LTD & PMB GENERAL PARTNER LTD (2)
QUINTAIN CITY PARK GATE BIRMINGHAM LTD (3)
BIRMINGHAM CITY UNIVERSITY (4)

Respondents

Re: Land at Eastside, Birmingham

Martin Rodger QC, Deputy Chamber President and Mr Andrew Trott FRICS

23 January 2020

Royal Courts of Justice

Neil King QC and *Guy Williams*, instructed by DLA Piper UK LLP for the appellant
James Pereira QC and *Caroline Daly*, instructed by Town Legal LLP for the first respondent
David Elvin QC instructed by Gowling WLG (UK) LLP for the second respondent
David Elvin QC and Richard Moules, instructed by Bryan Cave Leighton Paisner LLP for the third respondent
Richard Glover QC, instructed by Mills & Reeve LLP for the fourth respondent

The following cases are referred to in this decision:

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111
Myers v Milton Keynes District Council [1974] 1 WLR 696
Transport for London v Spirerose Ltd [2009] UKHL 44
Trocette Property Co Ltd v Greater London Council (1974) 28 P. & C.R. 408
Waters v Welsh Development Agency [2004] UKHL 19

Introduction

1. The London to Birmingham section of the proposed HS2 railway will terminate at a new station to be opened in 2026 at Curzon Street on the eastern edge of Birmingham city centre.

2. The Secretary of State for Transport is the acquiring authority for the HS2 scheme. In 2018, pursuant to section 4(1) of the High Speed Rail (London – West Midlands) Act 2017, four contiguous sites were compulsorily acquired for the construction of the new terminus. Each of the four sites had belonged to one of the respondents, and each respondent is entitled to compensation for the taking of its land.

3. If compensation cannot be agreed, it will be determined by this Tribunal, but it is first necessary to identify the assumptions to be made when the value of the four sites is assessed. In particular, it is necessary to determine how the sites could have been used if they had not been required for the new station.

4. One means of determining that question is by an application for a certificate of appropriate alternative development (a "CAAD") made to the local planning authority under section 17 of the Land Compensation Act 1961 ("the LCA 1961"). The function of a CAAD is to identify every description of development for which planning permission could reasonably have been expected to be granted (either on the valuation date or at a later date) if the land had not been acquired compulsorily. A person dissatisfied with the decision of a planning authority concerning a CAAD can appeal to the Upper Tribunal under section 18, LCA 1961.

5. The significance of development being identified as appropriate alternative development is that, when compensation is assessed, it must be assumed that planning permission for that development either was in force at the valuation date, or would with certainty be in force at some future date (section 14(3), LCA 1961). Any doubt over the availability of planning permission is removed; land for which, at the valuation date, there would have been only a reasonable expectation of a beneficial planning permission is required to be valued as if the planning permission had already been obtained, or was certain to be obtained in future. The grant of a CAAD, whether by the local planning authority or by the Tribunal on appeal, establishes conclusively that the development described in it is appropriate alternative development (section 17(6)(a), LCA 1961).

6. The compulsory acquisition of the four Curzon Street sites was implemented by separate general vesting declarations and the valuation date for the purpose of compensation is the date on which each site vested in the Secretary of State. Those dates all fall in a period of approximately six months between 16 March 2018 and 26 September 2018.

7. After the last of the vesting dates each of the respondents applied to the local planning authority, Birmingham City Council ("the Council"), for a CAAD. The four sites are close to the main campuses of both Aston University and Birmingham City University, and in each case the CAAD sought was for a mixed-use scheme including provision for purpose-built student accommodation.

8. The four appeals now before the Tribunal arise out of those CAAD applications. Two of the appeals are brought by the Secretary of State against certificates granted by the Council, and two are by respondents whose applications were not determined within the statutory timeframe.

9. Each of the CAAD applications was self-contained, in that it was restricted to development of the applicant's site alone and did not take into account development on the other three sites. If a local planning authority was faced with four contemporaneous applications for planning permission for sites close to each other the cumulative effects of the proposed development would be a material consideration in deciding whether to grant or refuse permission in each case. But the respondents contended, and the Council accepted, that in determining each of the four CAAD applications (which are not applications for planning permission) it should disregard the other applications. As a result, the Council considered each of the applications in isolation, and those which it determined before an appeal was lodged were granted in full.

10. The Secretary of State contends in these appeals that the Council was wrong to approach the CAAD applications as it did, and that in determining each of them it should have taken account of the others which were also before it. It is suggested that if that approach was taken, the certificates granted would be likely to describe development of some or all of the sites on a much smaller scale than in the certificates granted by the Council. As a result, the compensation payable to some or all of the respondents would be likely to be reduced.

11. The Tribunal has been asked to determine a question of principle as a preliminary issue. The issue agreed by the parties is this:

> Whether, and if so how, in determining an application for a certificate of appropriate alternative development under section 17 LCA 1961 ("CAAD") the decision-maker in determining the development for which planning permission could reasonably have been expected to be granted for the purposes of section 14 LCA 1961 may take into account the development of other land where such development is proposed as appropriate alternative development in other CAAD applications made or determined arising from the compulsory acquisition of land for the same underlying scheme.

The agreed facts

12. The issue is a question of law and does not turn on the facts of these cases. Nevertheless, the background facts set the issue in its relevant context.

13. The details of the sites are not material, and it is sufficient to say that each is a substantial potential development site in its own right. The sites were all cleared for development in anticipation of the eastward expansion of the city centre, but the emergence of HS2 saw them earmarked for the new station. They have been referred to as Sites 1, 2, 3 and 4.

14. Site 1 is known as City Park Gate and until its acquisition on 17 July 2018 it was owned by the third respondent, Quintain City Park Gate Birmingham Ltd ("Quintain"). It is the most

westerly of the four sites. An outline planning permission had been granted for it and other land in 2007 for the construction of a major mixed-use development.

15. Quintain made a CAAD application to the Council on 12 February 2019, and on 10 May it appealed to the Tribunal against non-determination. The Council subsequently purported to grant a CAAD for a mixed-use development of up to 99,490 sq m including residential, office, hotel and retail uses, together with student accommodation comprising up to 1,940 bedrooms. Because an appeal had already been commenced the parties have agreed the Council had no power to grant that Certificate, but it is indicative of the Council's view.

16. Site 2 lies to the east of Site 1 and was held by Birmingham City University ("BCU") on a long lease from Birmingham City Council, the freeholder, until its acquisition on 16 March 2018. Planning permission was granted in 2009 for the development of a new university campus on the site, phased over 11 years, and that permission remained extant at the valuation date.

17. BCU made its CAAD application on 28 December 2018 and on 31 July 2019 the Council granted a certificate for a flexible development of up to 88,829 sqm, including up to 895 dwellings, a maximum of 38,580 sqm of offices, a theatre and a concert hall, a hotel, car parking, and a maximum of 66,187 sqm of student accommodation providing 2,279 beds.

18. Site 3 is known as Curzon Park and was owned by Curzon Park Ltd, the first respondent, until its acquisition on 30 August 2018. It is the largest of the four sites. Planning permission was granted in 2008 for a development on Site 3 of up to 130,000 sqm including offices, residential, a hotel, retail, a medical centre and leisure uses.

19. A CAAD application made for Site 3 on 18 April 2019 was granted on 18 June 2019 for a series of buildings of between 7 and 41 storeys comprising up to 181,260 sqm of residential, office, retail and educational uses, a hotel, and up to 37,013 sqm of purpose built student accommodation providing 1,716 beds.

20. Finally, Site 4, the most easterly of the sites, known as Curzon Gateway, was owned until 26 September 2019 by the second respondents. In 2007 planning permission had been granted for a canal-side development providing 260 residential units and 748 student bed spaces with other ancillary uses. An application for a CAAD was made on 22 February 2019, but it remains underdetermined and the appeal is against non-determination. In their CAAD application the respondents proposed development of up to 44,000 sqm including retail, financial and professional uses, café and restaurant, office, residential and student accommodation (of 929 beds) including tall buildings of up to 25 residential storeys.

The relevant legal framework

21. Rules for assessing the amount of compensation payable in respect of any compulsory acquisition are provided by section 5, LCA 1961. Rule 2 concerns the value of the land acquired, which is to be taken to be the amount which it might be expected to realise if sold in the open market. Rule 2 is supplemented by section 14, LCA 1961 which explains how

actual or prospective planning permission is to be taken into account for the purpose of assessing compensation.

22. In their current form sections 14, 17 and 18, LCA 1961, were inserted by the Localism Act 2011. Apart from the procedural changes in section 18, the new provisions apply only to the assessment of compensation for land acquired pursuant to a compulsory purchase order or a special enactment made or confirmed after 6 April 2012.

23. Section 14(2)(a) deals with existing planning permissions, and provides that account may be taken of any planning permission in force on the valuation date for development on the "relevant land" or other land. The relevant land is defined in section 39(2) and means the land in which the interest which has been acquired and has to be valued subsists.

24. Section 14(2)(b) deals with the *prospect* of planning permission being granted on or after the valuation date for development on the relevant land or other land, and provides that it may be taken into account when assessing the value of the relevant land for the purpose of rule 2. That prospect of development of the relevant land or other land must be assessed on the assumptions in section 14(5), but otherwise in the circumstances known to the market at the valuation date. We will return to those assumptions. The prospect of development for which planning permission is in force on the valuation date is excluded from consideration under this provision (that development is already taken into account under section 14(2)(a)). Also excluded from the scope of section 14(2)(b) is the prospect of development which is "appropriate alternative development" (defined in section 14(4), and taken into account as provided by section 14(3)).

25. By section 14(3) it is to be assumed in a rule 2 valuation that planning permission is in force on the valuation date (or is certain to be granted in future) for "appropriate alternative development" as defined in section 14(4). This is a critical valuation assumption since, as we have already explained, it eliminates consideration of the risk that planning permission might not have been granted and treats the prospect of planning permission as a certainty.

26. Appropriate alternative development is defined in section 14(4), as follows:

> (4) For the purposes of this section, development is "appropriate alternative development" if—
>
> (a) it is development, on the relevant land alone or on the relevant land together with other land, other than development for which planning permission is in force at the relevant valuation date, and
>
> (b) on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, planning permission for the development could at that date reasonably have been expected to be granted on an application decided—
>
> (i) on that date, or
>
> (ii) at a time after that date.

27. It should be noted that appropriate alternative development need not be confined to development of the relevant land alone and may comprise development of the relevant land together with other land. It does not include development for which planning permission is in force at the valuation date.

28. Appropriate alternative development is development for which, on certain assumptions, planning permission could reasonably have been expected to be granted on the valuation date. Those assumptions are contained in section 14(5). They are the same assumptions as section 14(2)(b) directs are to be made when considering the prospect of planning permission being granted for development which is not appropriate alternative development:

> (5) The assumptions referred to in subsections (2)(b) and (4)(b) are—
>
> (a) that the scheme of development underlying the acquisition had been cancelled on the launch date,
>
> (b) that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme,
>
> (c) that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers, and
>
> (d) if the scheme was for use of the relevant land for or in connection with the construction of a highway ("the scheme highway"), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet.

29. The 'launch date' referred to in sub-section (5)(a) is defined in section 14(6), and it is agreed that for the purpose of each of these appeals it is 26 November 2013. That was the date on which the High Speed Rail (London – West Midlands) Bill was introduced in Parliament.

30. Appropriate alternative development is therefore, in summary, development on the relevant land alone or on the relevant land together with other land for which, on the valuation date and on the statutory assumptions, but otherwise in the circumstances known to the market on that date, planning permission could reasonably have been expected to be granted on an application determined on or after that date. The effect of the statutory assumptions is that when considering what planning permission would have been likely to be granted, the scheme for which the relevant land was acquired must be assumed to have been cancelled on the date it was first launched, and it must be assumed that no action was taken by the Secretary of State wholly or mainly for the purposes of the scheme.

31. Section 17 is procedural. It allows either of the parties concerned in a compulsory acquisition to apply to the local planning authority for a certificate stating either that there is, or that there is not, development which is appropriate alternative development in relation to that acquisition. The application must specify "each description of development that in the applicant's opinion is, for the purpose of section 14, appropriate alternative development". The local planning authority must then issue a certificate identifying each

description of development that, in its opinion, is appropriate alternative development in relation to the acquisition concerned (a "positive" certificate), or stating that there is no such development (a "negative" certificate"). The certificate may include development which was not included in the application (which might include, in an appropriate case, development on the relevant land and on other land).

32. If a positive certificate is issued, the development described in it is appropriate alternative development for the purpose of section 14 (and no other development is); in the case of a negative certificate, the valuation must be on the basis that there is no development which is appropriate alternative development (section 17(6)-(7)). Subject to the outcome of any appeal, the certificate is therefore conclusive. In a case where no application for a certificate has been made it is still open to a party to argue that particular development is appropriate alternative development within the meaning of section 14(4), with the consequences in section 14(3).

33. On an appeal to the Tribunal against a CAAD under section 18 the Tribunal does not undertake a review of the decision of the local planning authority, but is required to approach matters as if the application for a certificate had been made to it in the first place, and must, as it considers appropriate, either confirm or vary the certificate, or cancel it and issue a different certificate in its place (section 18(2)).

The appeals

34. The approach which the Council took to the cumulative impact of the four CAAD applications is apparent from the officers' reports to the planning committee. Referring to representations from HS2 arguing that the cumulative impacts of all of the CAAD applications should be considered, officers advised that:

> " …, the other current and consented applications for certificates are neither part of the policy context nor the planning position at the relevant valuation date. As the assumption has to be that the project is cancelled on its launch date no CAAD submissions by neighbouring landowners could have been submitted. There is therefore no requirement or basis for considering cumulative effects of these submissions."

35. The Secretary of State dissents from that view and has argued, through Mr King QC and Mr Williams, that the preliminary issue should be answered affirmatively in the following way:

> (a) In determining the development for which planning permission could reasonably have been expected to be granted for the purposes of section 14(4)(b), the decision maker may take into account the development of other land where such development is proposed as appropriate alternative development in other CAAD applications made or determined arising from the compulsory acquisition of land for the same underlying scheme.
>
> (b) The decision maker may do so by treating the other CAAD proposal as a notional planning application on other land on the cancellation assumption

required under section 14(5) which is relevant to the development potential of the relevant land;

(c) The materiality of, or weight to be given to, other applications depends on the ordinary planning approach to material planning considerations, which includes the application of the relevant provisions of the Planning Acts and relevant development plan and other policies.

36. Each of the respondents invites the Tribunal to adopt the approach taken by the Council. They argue, through Mr Elvin QC and Mr Moules on behalf of the second and third respondents, supplemented by supporting submissions by Mr Pereira QC and Ms Daly, and Mr Glover QC, that the CAAD applications must be ignored entirely and that, for the reasons given by the Council, to take them into account would be an error of law. That is said to be for two principal reasons:

(a) The cancellation assumption together with the other assumptions in section 14(5) requires that the underlying purpose of the scheme should be disregarded and that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out. It would be perverse to undertake this exercise and yet take into account CAAD applications and certificates which are no more than a mechanism for the determination of compensation under the compensation code and which only operate, and have effect, in the scheme world.

(b) CAAD applications and certificates are not planning considerations under the Planning Acts and do not fall to be taken into account as material planning considerations in the determination of planning applications. As mechanisms for the determination of compensation they have no role to play in the determination of planning applications under the Planning Acts.

37. In the course of argument, the Tribunal was referred to a number of well-known authorities on the general purpose of the statutory valuation assumptions and the approach which should be taken to their interpretation.

38. For the Secretary of State Mr King QC emphasised that the purpose of the compensation code is to provide fair compensation, based on the principle of equivalence. As Lord Nicholls explained in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 125: "a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount". In *Transport for London v Spirerose Ltd* [2009] UKHL 44 at [36] Lord Walker referred to "the underlying aim of fair compensation – compensation neither obviously in excess, nor obviously falling short, of what the claimant would have received in a no-scheme world".

39. On the other side of the argument counsel for the respondents directed our attention to the guidance given by the House of Lords in *Spirerose*, encouraging fidelity to the language of the compensation code and restraint in its interpretation. Lord Walker warned, at [41], against a court trying "to correct the code in accordance with its perception of what is fair"; to do so "would amount to judicial legislation" and "would upset the balance of the code which Parliament must be supposed to have considered carefully". Lord Collins, at [131],

accepted the proposition that "it is not the role of the court to rewrite legislation by adding additional assumptions of planning permission." In the same vein, Lord Neuberger, at [50], said that:

> "… if a statute directs that property is to be valued on an open market basis as at a certain date, one would not expect any counter-factual assumptions to be made other than those which are inherent in the valuation exercise (such as the assumption that the property has been on the market and is the subject of a sale agreement on the valuation date) or those which are directed by the statute."

40. The basis of the Secretary of State's case was that each respondent would be liable to receive excessive compensation, and the public purse would suffer, unless the cumulative effect of development which had or was likely to come forward on adjoining sites, was taken into account when determining what planning permission would be likely to have been granted for the development of the land acquired. That risk was particularly acute where planning policy suggested that permission would only have been granted for development to meet a demonstrable need, as was the case with purpose built student accommodation in Birmingham. The combined effect of the four certificates sought by the respondents would be to confirm that there was a reasonable expectation of planning permission being granted at the valuation date for a total of 6,864 bed spaces. That number depended on the development potential of each site being assessed independently of the development potential of the other sites. In reality, planning permission would have been limited by planning policy to a much smaller number, yet cumulatively the respondents would be compensated as if permission for the greatest number of spaces possible could have been achieved on each site. Borrowing the words of Scott LJ in *Horn v Sunderland Corporation* [1941] 2 KB 26, 40 Mr King QC said that the outcome would be a return to "the evil of excessive compensation" which the statutory code was intended to mitigate.

41. In discussing these submissions, we will adopt the terminology of section 14 itself by referring to the land which has been taken and for which the amount of compensation payable under rule (2) is to be ascertained as the "relevant land". To reflect the circumstances of these appeals we will refer to other land as "adjoining sites". The preliminary issue asks, in effect, whether development which is the subject of a CAAD application or a certificate for an adjoining site, may be taken into account in determining a separate CAAD application for the relevant land.

42. Council officers gave two reasons why no weight should be afforded to CAAD applications received or determined in respect of adjoining sites when deciding what development to include in a certificate for the relevant land (see paragraph 34 above). The second of those reasons was that, had the HS2 scheme been cancelled on the launch date there would not have been any CAAD applications on the adjoining sites at all. Since section 14(5)(a) required that the cancellation assumption be made, it followed that the CAAD applications would not have been made and must necessarily be disregarded.

43. Mr Elvin QC adopted this analysis when he described other CAAD applications as "scheme world applications" which would not have arisen if the scheme had been cancelled. The function of the CAAD was not to grant a real-world planning permission but was simply to

assist in ascertaining the compensation payable under rule 2. Since each CAAD granted by the local planning authority was a consequence of the CPO scheme, the cancellation assumption required that they should each be disregarded for the purposes of any other CAAD determination.

44. We do not accept this submission. Section 14(5)(a) requires no more than the assumption that the scheme of development underlying the acquisition of the relevant land was cancelled on the launch date. Since the scheme underlying each acquisition was a single scheme, that assumption necessarily requires that the whole scheme be taken to have been cancelled, including those aspects of it which required the acquisition of the adjoining land. Assumption (a) goes no further than that.

45. Section 14(5)(b), on which Mr Elvin QC also placed emphasis, similarly requires that it be assumed that no action has been taken by the acquiring authority for the purposes of the scheme. That assumption must extend to all action taken for that purpose, including the acquisition of the adjoining sites as well as action in relation to the relevant land. Neither of those assumptions appears to us to require the decision maker to assume additionally that CAAD applications were not made on adjoining sites. Such applications are not part of the scheme itself, nor (in this instance) are they actions taken by the acquiring authority. They are therefore beyond the scope of the cancellation assumption. Whether a CAAD application made by an acquiring authority would fall to be disregarded on the cancellation assumption as an action taken by it "wholly or mainly for the purposes of the scheme" is an esoteric point which does not arise in these appeals.

46. It is true that all four CAAD applications were a consequence of the scheme, and that, but for the scheme they would not have been made. But in the absence of a statutory direction that is not a good enough reason to assume them away or disregard them. If the assumption in section 14(5)(a) was intended to require not only that the scheme itself be taken to have been cancelled, but that all consequences of the scheme should be assumed not to have happened, there would have been no need for the additional assumption in section 14(5)(b) that no action had been taken by the acquiring authority wholly or mainly for the purposes of the scheme.

47. The Council's other reason for disregarding CAAD applications in respect of adjoining land, and any decisions made on them, was that "other current and consented applications for certificates are neither part of the policy context nor the planning position at the relevant valuation date". Mr Elvin QC also adopted this argument, pointing out that CAAD applications and decisions are not material considerations and do not fall to be taken into account in the determination of planning applications under section 70 Town and Country Planning Act 1990. They are simply tools in the determination of compensation.

48. The objection that the respondents are inventing an additional assumption not provided for by section 14(5) does not apply to this submission, because it does not treat the CAAD certificates or applications as if they had never been made, but proposes that they are irrelevant and must be disregarded for that reason. But care is necessary when it is suggested that events which occurred in the real world must be disregarded altogether when

considering whether a planning permission might reasonably have been expected to be granted in the hypothetical world of the cancellation assumption.

49. We agree that, for the purpose of deciding a real-world application for planning permission, a decision to grant a CAAD in respect of an adjoining site would be of no relevance. The development of the adjoining land described in such a certificate would not be development for which a real planning permission existed. It would be notional development described simply for the purpose of determining compensation.

50. But it does not follow that a successful application for a CAAD on adjoining land must be disregarded for all purposes in the determination of an application for a CAAD on the relevant land, especially where, as in this case, the applications arose out of the acquisitions of both sites for the same scheme. The exercise required by section 14(4) is to decide the outcome of a notional application for planning permission. The decision is to be made as if on the relevant valuation date and on the basis of the four assumptions 14(5)(a) to (d), but otherwise in the circumstances known to the market at that date. A decision concerning an adjoining site which has been arrived at applying the same statutory assumptions and which has resulted in the granting of a real CAAD (whether positive or negative), is capable of being relied on as evidence of how, in the world of the cancelled scheme, the local planning authority might reasonably have been expected to deal with an application for planning permission on the relevant land.

51. That, in effect, was what the Council was invited to do by its officers' report on BCU's application for a CAAD for Site 2, which was prepared shortly after it had issued a positive certificate for Site 1. One question which officers addressed was the principle of development on Site 2 for student accommodation. After considering the real-world demand for student accommodation, and the number of bed spaces already under construction or consented to meet that demand, the officers added this reminder:

> "Furthermore, members will also recall that a positive CAAD was issued for the City Park Gate site [Site 1] confirming that on 17 July 2018 a total of 1,940 bed spaces could reasonably have been expected to gain planning consent on the adjacent site. As such, subject to the amenity, design and highway considerations (below) at the relevant date it is likely that the principle of student residential would have been supported as proposed."

52. Mr Elvin did not suggest that the officers' use of the outcome of the real world CAAD application on the adjoining site as evidence of what might be expected to happen to a hypothetical application for planning permission made in the cancellation world was in any way objectionable. In our judgment he was right not to do so; to that limited extent at least, a CAAD granted for an adjoining site may properly be taken into account by the decision maker determining an application for a certificate for the relevant land.

53. While it would be for the decision maker to assess what weight to give to real-world events, a CAAD application (as opposed to a certificate) for an adjoining site is unlikely to be of significance in the determination of a CAAD application for the relevant land. The application for a different site might or might not have a realistic prospect of success, and

the mere fact that it had been made would be unlikely to tell the decision maker much of relevance. We agree with Mr Elvin QC to that extent.

54. The use of a certificate granted for an adjoining site as evidence of the likely outcome of a notional planning application for the relevant land does not require the decision maker to consider the cumulative effects of development on both sites. A certificate is not the same as a planning permission for the development of the adjoining site, which the decision maker would be required by section 14(2)(a) to take into account in the valuation exercise, giving it such weight in the valuation exercise as seems to the decision maker to be justified. The same is not true of CAAD applications on adjoining sites.

55. The risk that, cumulatively, the compensation payable to all four respondents could be more generous than the combined value of their sites on the valuation date could only be overcome if, in the determination of a CAAD application for the relevant land, each CAAD application for an adjoining site was treated as a notional application for planning permission for the development of that adjoining site. Only then could the cumulative effects of multiple applications for development for which there is a limited demand be a factor in determining the development likely to be permitted on the relevant land.

56. Recognising this difficulty, Mr King QC argued that other CAAD proposals should be treated as notional planning applications on the adjoining land when assessing the development potential of the relevant land. The purpose of the cancellation assumption was only to isolate and exclude the effect of the scheme underlying the acquisition of the relevant land. It would be contrary to that purpose to ignore CAAD applications on other land as if they did not exist, because it would result in excessive compensation on the basis that each landowner winning a jackpot which, in the real world, would be shared between them. To avoid that outcome all four valuations should proceed on the basis that "each application is effectively made in the same notional world".

57. There are a number of problems with this approach.

58. First, as the respondents pointed out, it begins with a preconceived notion of what fairness requires in an individual case, rather than starting with the statutory provisions themselves. The principle of equivalence and the provision of fair compensation must obviously inform the interpretation of the detailed components of the statutory code, but care must be taken to ensure that legitimate purposive construction does not become impermissible judicial legislation (see Lord Collins, *Spirerose* at [131]). It is dangerous to assume that Parliament cannot have intended a particular outcome, to treat it therefore as anomalous, and then to search for some construction of the statute which avoids it. As Lord Neuberger said in *Spirerose* at [59] "anomaly, and hence unfairness, are very suspect grounds for justifying the addition of a non-statutory assumption to the valuation assessment".

59. The second, and fundamental, objection is that although Mr King QC expressly disavowed reliance on any non-statutory assumption and submitted that his suggested treatment of CAAD applications for adjoining sites as notional planning applications emerged from the language of section 14(4), we can find no trace of it there. The assumed factual context in

which the valuation of the relevant land takes place, so far as planning permission is concerned, is described comprehensively in sections 14(2) and (3). It comprises:

1. real planning permissions in force at the valuation date (section 14(2)(a));
2. assumed planning permissions for appropriate alternative development (section 14(3)(a));
3. the assumed certainty that planning permissions for appropriate alternative development will be granted at a time after the valuation date (section 14(3)(b));
4. the assumed prospect of other planning permissions being granted on or after the valuation date (section 14(2)(b)).

60. The first of these components is lifted directly from the real world and carries no counter factual baggage. The second, third, and fourth are hypothetical constructs with no existence in the real world. These are exclusively derived from and defined by the combination of hypothetical assumptions and real-world circumstances described in sections 14(2)(b) and 14(4)(b), namely, the cancellation assumptions in sub-section (5) and otherwise the circumstances known to the market at the relevant valuation date. Nowhere in those provisions is there found any express assumption about notional applications for planning permission on other land. If it was known to the market at the valuation date a CAAD application on an adjoining site would fall to be taken into account for what it was, and could not be treated as if it was something different. (It is not necessary to consider whether a CAAD application is "known to the market" because none of the applications in these appeals was made before the valuation date.)

61. In *Trocette Property Co Ltd v Greater London Council* (1974) 28 P. & C.R. 408, 420, Lawton LJ said that in the assessment of compensation "no assumption of any kind should be made unless provided for by statute or decided cases". In the passage from paragraph [50] of his judgment in *Spirerose* which we have already referred to (see paragraph [39] above) Lord Neuberger observed that in a statutory valuation exercise the only counter-factual assumptions one would expect to be made are those "directed by the statute" or "which are inherent in the valuation exercise (such as the assumption that the property has been on the market and is the subject of a sale agreement on the valuation date)". For the reasons we have given the only application for planning permission which is directed to be assumed by the statute is the application referred to in section 14(4)(b) which notionally results in the grant of permission for appropriate alternative development of the relevant land alone or the relevant land together with other land. No other application is inherent in the exercise of determining that application for planning permission.

62. A further objection to the Secretary of State's case is that it may lead to unpredictable, arbitrary and capricious outcomes. As Mr Elvin pointed out, the vesting of scheme land may well be phased over the whole period of validity of a CPO (usually 3 years but sometimes longer, as in this case where the Secretary of State's powers of acquisition expire in February 2022). The order in which CAAD applications are made may have nothing to do with the development potential of the land or its value for compensation. The local planning authority has only a relatively short period of time within which it is required to determine applications, and may be wholly unaware of other applications

about to be made. The first applicant for a CAAD might obtain a positive determination which exhausts most or all of the real-world development capacity of an area, thereby depriving any subsequent CAAD applicants of a similarly favourable certificate and thus of compensation. That would be contrary to the objective of ensuring fair compensation for all.

63. Finally, there is considerable force in the respondents' answer to the Secretary of State's complaint that they may receive excessive or unfair compensation. The respondents' freedom to develop their land in their own interests was taken away on the launch date of the HS2 scheme in November 2013. From that time until the dates between March and September 2018 when their interests were finally acquired any application for planning permission they might have made would have been determined in the shadow of the scheme.

64. The cancellation assumption re-writes only one small aspect of history, and, as Lord Brown made clear in *Waters v Welsh Development Agency* [2004] UKHL 19, the licence once permitted to the valuer to "conjure up a land of make-believe" and "let his imagination take flight to the clouds" (see the dictum of Lord Denning MR in *Myers v Milton Keynes District Council* [1974] 1 WLR 696, 704) is no longer available. It cannot be known what value the relevant land would in fact have had on the valuation date if the scheme had been cancelled on the launch date; the events which would have occurred between those dates are a matter of speculation and provide no basis for an assessment of compensation. One or more of the respondents might have obtained more favourable planning permissions than the others, but it cannot be known which would have done well and which badly, because none was allowed the opportunity. In those circumstances, who is to say that it is unfair for the respondents each to be compensated on the basis of favourable assumptions about what might have been the development potential of their land had their hands not been tied by the HS2 scheme?

65. As Lord Walker said in *Spirerose* at [41], Parliament must be supposed carefully to have considered the balance of the code. Section 14, LCA 1961 represents a policy choice as to what amounts to fair compensation. That choice allows each owner the full value of any planning permission which, on the statutory assumptions, could reasonably be expected to be granted on or after the valuation date. Parliament has not limited such owners to hope value alone. It cannot therefore be unintended, or unfair, that the acquiring authority may have to pay more, in aggregate, than, in aggregate, the owners would have been able to achieve for their interests in the open market.

The Tribunal's answers to the preliminary issue

66. For the reason we have given our answer to the preliminary issue is that in determining the development for which planning permission could reasonably have been expected to be granted for the purposes of section 14(4)(b), the decision maker is not required to assume CAAD applications or decisions arising from the compulsory acquisition of land for the same underlying scheme had never been made. The decision maker must treat such applications and decisions as what they are, and not as notional applications for, or grants of, planning permission. They are not material planning considerations. Subject

to those boundaries, it is for the decision maker to give the applications and decisions such evidential weight as they think appropriate.

A J Trott FRICS
Upper Tribunal Member

Martin Rodger QC
Deputy Chamber President

10 February 2020