Neutral Citation Number: [2019] EWCA Civ 555

Case No: C3/2018/0572

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
MR MARTIN RODGER Q.C. AND MR P.D. McCREA F.R.I.C.S.
[2017] UKUT 405 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2019

Before:

Lord Justice Lindblom
and
Lord Justice David Richards

- -

Between:

(1) Maxim Alexander Bishop
(2) Nigel Elston Bishop — **Appellants**

- and –

Transport for London — **Respondent**

- -
- -

Mr Mark Warwick Q.C. (instructed by **Gordon Dadds LLP**) for the **Appellants**
Mr Guy Williams (instructed by **Town Legal LLP**) for the **Respondent**

Hearing date: 31 January 2019

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. This appeal attacks an award of costs made in favour of an acquiring authority on a claim for compensation for compulsory purchase in a reference to the Upper Tribunal (Lands Chamber) ("the Tribunal").

2. The award of costs was made by the Tribunal (Mr Martin Rodger Q.C., Deputy Chamber President, and Mr P.D. McCrea F.R.I.C.S.) in its "Addendum on Costs", dated 8 January 2018, ordering the appellants, Maxim and Nigel Bishop, to pay the costs of the respondent, Transport for London Ltd. ("TfL") – save for 20% of the costs incurred before 9 February 2017 and the costs of a preliminary issue – in a claim for compensation for the compulsory purchase of leasehold interests in Bishop's Yard at Lake Avenue in Slough. The site was required for the Crossrail project, and TfL was authorized to acquire it compulsorily by section 6 of the Crossrail Act 2008. Permission to appeal against the Tribunal's decision on costs was granted by Lewison L.J. on 13 July 2018.

3. For more than 90 years the appellants' family had carried on business at Bishop's Yard – since the 1940s dealing in scrap metal through several companies. A portion of the site, about half a hectare, was held under a series of leases from Network Rail and its predecessors. The last of these was granted to the appellants on 29 October 2012 for a term expiring on 22 December 2031. The site was compulsorily acquired by TfL on 4 February 2014. Metal Recycling Services (UK) Ltd., a company of which the appellants were directors, had been trading from the site but had discontinued its business there within three months of receiving TfL's notice of entry on 13 May 2013. It later went into liquidation. Members of the Bishop family continued trading from a smaller site within Bishop's Yard, at 69 Lake Avenue, of which they owned the freehold.

4. The appellants made a claim for compensation totalling £4,177,782, which, they said, represented the remuneration they would otherwise have received from using the land the subject of the lease in the period between its leaving the site on 13 September 2013 and the expiry of the lease in 2031. The claim came before the Tribunal on a notice of reference dated 28 January 2016. As formulated in the appellants' statement of case, dated 15 January 2016, the claim was for (1) lost income from the cessation of the business carried on from the site, from 13 September 2013 until the expiry of the lease, valued at £4,024,260; (2) loss of income before 13 September 2013, valued at £43,206; (3) expenses incurred in vacating the site, valued at £56,513, plus VAT; and (4) losses incurred because of the disposal of equipment from the site, valued at £53,803. In its statement of case in reply, dated 10 March 2016, TfL maintained that the appellants were not entitled to any compensation because they could not show that, had the site not been taken, the leasehold land would have generated enough profit to pay them the income they said they had lost, or indeed any income at all, except at the expense of their creditors. In a letter from its solicitors to the appellants dated 8 February 2017, TfL made a sealed offer to settle the claim, for £378,000 plus costs. The offer was stated to be "Without prejudice save as to costs", and "… open for acceptance unless and until we notify you otherwise". The appellants did not accept it.

5. The hearing before the Tribunal took place on 6, 7, 10, 11 and 13 July 2017. The appellants both gave evidence, as did other lay witnesses on their behalf, and their two expert

witnesses – an engineer and a forensic accountant. Two expert witnesses – an engineer and a forensic accountant – gave evidence for TfL. On 14 July 2017 TfL's solicitors withdrew the offer.

6. The Tribunal's decision on the reference was issued on 18 October 2017. It concluded that the only head of claim on which the appellants were entitled to compensation was their expenditure in clearing the site, totalling £46,815. The Tribunal then invited the parties' submissions on costs. It dealt with those submissions in its "Addendum on Costs", which explains the decision now the subject of this appeal: that the appellants were to pay 80% of TfL's costs of the reference incurred before 9 February 2017 – though not the costs of the preliminary issue, which had already been awarded to them – and TfL's costs incurred on or after 9 February 2017. On 16 February 2018 the Tribunal refused permission to appeal against that decision.

The issues in the appeal

7. The only contentious part of the Tribunal's decision on costs relates to the period before the sealed offer was made on 8 February 2017. The appellants accept that the Tribunal cannot be criticized for awarding TfL its costs from that date, the award of compensation having fallen well short of the sealed offer. The main issue in the appeal, therefore, is whether the Tribunal erred in law in ordering the appellants to pay 80% of TfL's costs in the period before the offer was made (ground 2 of the appeal). Within that issue lies another, which is whether the Tribunal was wrong to conclude that TfL was the "successful party" in the reference (ground 1).

The Tribunal's costs jurisdiction

8. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides:

> "(1) The costs of and incidental to –
> …
> (b) all proceedings in the Upper Tribunal,
> shall be in the discretion of the Tribunal in which the proceedings take place.
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

9. Section 4 of the Land Compensation Act 1961 provides, in subsection (A1), that "[in] any proceedings on a question referred to the Upper Tribunal under section 1 of this Act … (a) the following subsections apply in addition to section 29 of [the 2007 Act] and provisions in Tribunal Procedure Rules relating to costs". Subsection (1) provides:

> "(1) Where …
> (a) the acquiring authority have made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Upper Tribunal to that claimant does not exceed the sum offered …

…
the Upper Tribunal shall, unless for special reasons it thinks it proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the offer was made …".

10. Rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("the Lands Chamber Rules") states:

"Orders for costs

10. – (1) The Tribunal may make an order for costs on an application or on its own initiative.
(2) Any order under paragraph (1) –
(a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);
(b) must, in a case to which section 4 of the 1961 Act applies, be in accordance with the provisions of that section.
...
(6) The Tribunal may make an order for costs in proceedings –
(a) for compensation for compulsory purchase;
…
…
(8) In proceedings to which paragraph (6) applies, the Tribunal must have regard to the size and nature of the matters in dispute.
…".

11. Paragraph 1.1 of the Upper Tribunal (Lands Chamber) Practice Directions ("the Practice Directions"), published on 29 November 2010, states that they "… (c) supplement the Rules and must be read in conjunction with them". Paragraph 12 amplifies the provisions of the Lands Chamber Rules relating to orders for costs. It states:

"12. Costs

12.1. Power to award costs

1) Under section 29 of [the 2007 Act] the Upper Tribunal has power to order that the costs of any proceedings incurred by one party shall be paid by any other party …
…

12.2. Exercise of discretion in awarding costs

Costs are in the discretion of the Tribunal, although this discretion is qualified by the particular provisions in section 4 of [the 1961 Act] (see paragraph 12.3(2) below). Subject to what is said below the discretion will usually be exercised in accordance with the principles applied in the High Court and county courts. Accordingly, the Tribunal will have regard to all the circumstances, including the conduct of the parties; whether a party has

succeeded on part of their case, even if they have not been wholly successful; and admissible offers to settle. The conduct of a party will include conduct during and before the proceedings; whether a party has acted reasonably in pursuing or contesting an issue; the manner in which a party has conducted their case; whether or not they have exaggerated their claim; and the matters stated in paragraphs 2.2, 8.3(2), 8.4 and 10 above.

12.3. The general rule for costs

1) The general rule is that the successful party ought to receive their costs. On a claim for compensation for compulsory acquisition of land, the costs incurred by a claimant in establishing the amount of disputed compensation are properly to be seen as part of the expense that is imposed on the claimant by the acquisition. The Tribunal will, therefore, normally make an order for costs in favour of a claimant who receives an award of compensation unless there are special reasons for not doing so.

2) Particular rules, however, apply by virtue of section 4 of [the 1961 Act]. Under this provision, where an acquiring authority has made an unconditional offer in writing of compensation and the sum awarded does not exceed the sum offered, the Tribunal must, in the absence of special reasons, order the claimant to bear their own costs thereafter and to pay the post-offer costs of the acquiring authority. …

…

12.7 Offers to settle

1) In any proceedings before the Tribunal any party may make an offer to any other party to settle all or part of the proceedings or a particular issue on terms specified in the offer. Neither the offer nor the fact that it has been made may be referred to at the hearing if it is marked with 'without prejudice save as to costs' or similar wording, or if it is said to be a 'Calderbank' offer.

…

3) … The Judge or Member hearing the case will not see the offer … or be informed of its existence until after the proceedings have been determined. If requested by a party to do so, the Judge or Member may then consider the offer, when considering the question of the costs of the proceedings.

…".

The Tribunal's decision on the claim

12. In its decision, dated 18 October 2017, the Tribunal described the claim as "an unusual claim formulated in an unusual way". The appellants had not sought compensation for the value of their leasehold interest in the site, nor for any diminution in the value of the parcel of adjacent freehold land. Nor was there any claim by the liquidators of Metal Recycling Services for a disturbance payment to compensate for any loss sustained as a result of its having to give up occupation of the site (paragraph 6 of the decision). It was agreed, however, that a claim for lost remuneration may be brought under rule 6 in section 5 of the 1961 Act, which permits compensation to be paid "for disturbance or any other matter not directly based on the value of land" (paragraph 7).

13. Rejecting the head of claim seeking compensation for "lost remuneration", the Tribunal referred to the indebtedness of Metal Recycling Services and other companies in the family business, and concluded that "[in] view of that very recent history of repeated insolvency the brothers would at the very least have been at risk of investigation for possible breaches of their fiduciary duties as directors in causing or allowing their companies to trade while unable to meet their liabilities" (paragraph 86). At least latterly, the "very substantial remuneration" the appellants had drawn from their "failed businesses" had been "at the expense of the creditors of those businesses", and "no credible evidence" had been provided "to explain how any business conducted from the Yard could have continued to sustain those drawings". The appellants "could not have continued to authorise payments to be made to themselves for longer than they actually did without being in breach of their duties as directors". The Tribunal therefore assessed the sum for loss of remuneration as "nil". The loss of remuneration was "not caused by the acquisition of the Reference Land (the first of the *Shun Fung* requirements)". The appellants' business was "both unprofitable and unsustainable long before the notice of entry was given" (paragraph 88).

14. On the claim for expenditure said to have been incurred in vacating the site, the Tribunal was "[on] balance … prepared to accept that the cost of clearance was met by [the claimants]", and therefore allowed this element of the claim "totalling £46,815 (inclusive of VAT)" (paragraph 94). The business of Metal Recycling Services "would have failed in any event, and losses which are the consequence of that failure were not caused by the compulsory purchase". The claim for the quarter's rent that fell due under the lease on 29 September 2013, the Tribunal concluded, "fails for the same reasons as the claim for lost remuneration" (paragraph 96). The appellants had also "failed to establish any loss arising from the sale of the plant and machinery" (paragraph 100).

15. The Tribunal's final conclusion was this (in paragraph 101):

> "101. On our findings the sole head of claim for which the claimants are entitled to compensation is in respect of their expenditure totalling £46,815 in clearing the site. That may seem a harsh or at least a surprising conclusion, since the claimants have been dispossessed of land which their family has occupied as lessees for several generations. But by the time the land was required for the Crossrail project, the businesses carried on from the land had repeatedly failed and, on investigation, it has become clear that the cause of the claimants' loss was not the acquisition but the fragility of the enterprise from which they had derived their income. Whether the lease itself might have had a value, or whether any claim might have been made by MRS, are not questions which we have been asked to consider."

The Tribunal's decision on costs

16. In their written submissions to the Tribunal on costs the appellants maintained that their claim had been "successful", even though the Tribunal's award of compensation had been "significantly less than the sum claimed". Until 8 February 2017 TfL had chosen to make no offer at all. In the circumstances, it was submitted, the appellants were entitled to their costs up to that date.

17. TfL submitted that the award of compensation for expenses incurred in vacating the site represented "success on one aspect of the claim amounting to less than 1% of the compensation claimed", and that "[by] far the biggest element of the claim was for loss of … future income", which "took up the vast majority of the evidence and time at the hearing", and for which "[the] award was nil". The award of compensation was "in relation to such a small part of the claim that it does not mean that [the appellants] should be viewed as successful". TfL's "position at all times was to accept [the appellants'] entitlement to compensation subject to proof of causation and loss", which "was not forthcoming". In the "Preliminary Statement of Agreed Matters between Expert Accountants", dated 9 December 2016, it had been agreed "that further documentation is required to confirm whether the costs to vacate the site were incurred personally by [the appellants] or by another legal entity". In the later agreed statement, dated 19 May 2017, it was agreed "that evidence has not been provided demonstrating that [the appellants] paid these costs". Thus, at the date of the sealed offer, the appellants' expert had agreed that "the necessary evidence to make out the claim had not been provided". In these circumstances, TfL submitted, it was "the successful party" and the appellants should pay its costs in the period between the making of the reference and the date of the sealed offer, and after that as a result of their failing to beat the offer. The effect of the Tribunal's decision was that TfL was "at all times correct not to accept the claim for the loss of remuneration for the reasons [it] gave". This was not a case of a claimant exaggerating a claim but supporting it on a sensible basis; it was "a claim that was not sustainable".

18. In further submissions, responding to TfL's, the appellants referred to the unfruitful mediation held on 24 July 2015. TfL's approach to that mediation had not been "constructive". In the period before the sealed offer was made TfL was "strongly maintaining its legal contention … that … [the appellants] had no greater interest in the Reference Land, than a tenant from year to year" – a contention abandoned on 12 August 2016, only after the Tribunal had directed that a preliminary issue be determined. The proper approach here was to recognize that the appellants had advanced a large claim, which TfL had "rebuffed … "root and branch"", making no sealed offer after the failure of the mediation and requiring the appellants "to commence their case, and prosecute it for about a year, before making any sealed offer". As for the relevant legal principles, the appellants relied on the "leading case" of *Day v Day (Costs)* [2006] C.P. Rep. 35 – in particular, the observation of Ward L.J. (in paragraph 17 of his judgment) that "the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case", and that of Sir Martin Nourse (at paragraph 23) that it had been "necessary for [the claimant] to bring the action even if only to succeed on the fallback basis of 40 per cent". TfL had had an ample opportunity to appraise the

appellants' case. Its basic objections did not change until it made the sealed offer on 8 February 2017. It was "a sophisticated litigant, who would have [known] that without making any sealed offer it was exposed to an order for costs, if [the appellants] were to recover any sum under any head of claim". There was no reason to depart from the "general rule". TfL should pay the appellants' costs for the period before the sealed offer was made.

19. In its "Addendum on Costs", the Tribunal said:

> "…
>
> 104. On 8 February [2017] the acquiring authority made a sealed offer of £378,000 plus costs. On 14 July [2017], after the conclusion of the hearing but before the decision, that offer was withdrawn. The sum awarded by the Tribunal was less than the sum offered on 8 February [2017] and on normal principles applying section 4 of [the 1961 Act], the claimants should be responsible for the costs incurred after the offer.
>
> 105. The parties agree that the claimants should be ordered to pay the acquiring authority's costs for the period between 8 February 2017 and 14 July 2017. The claimants submit that, having been awarded £39,013 plus VAT, they must be regarded as the successful party in the reference in respect of the period up to the date on which the sealed offer was made. The acquiring authority submits that the sum awarded was so small, representing less than 1% of the claim, that the claimants cannot be regarded as having achieved any meaningful success. The authority also says that it was willing at all times to accept responsibility for the claimants' losses subject to proof of causation and loss, and points out that the additional information required by the experts to enable them to be satisfied of the costs of vacation claim was never produced. It had also warned the claimants that the claim for future remuneration was hopeless.
>
> 106. Looking at the reference as a whole, rather than dividing it into periods, we are satisfied that the acquiring authority is the successful party. It has fought off a claim in excess of £4 million by defeating all elements of it except for one worth less than £50,000 in total. It secured protection for its own costs of the reference after 8 February 2017 which will include the hearing costs. In the event, the sum which the claimants were awarded will provide a small down payment towards the costs payable to the authority. The claimants succeeded only to a very modest extent.
>
> 107. On the other hand, the authority took a risk that the claimants would be unable to prove any part of their claim and, having put the claimants to proof, cannot claim to have achieved complete success when the claimants managed to prove part of the claim. The usual rule that the successful party should recover its costs from the unsuccessful party is subject to modification where a different order is justified. In respect of the period before the sealed offer a different order is appropriate. Although comparatively modest, the sum the claimants were awarded was not insignificant. The acquiring authority could have protected itself against the risk that the claimants might succeed in part by making an earlier offer. It is no answer that the acquiring authority considered it had not yet seen enough evidence to justify making such an offer. The claimants could not have secured the award they did without bringing the

reference. A discount should therefore be made in the sum which the claimants are required to pay. In our judgment that discount should be 20%, which is not a proportion based on any precise assessment of the costs of the issue on which the claimants succeeded, but is a reflection of the three factors we have already identified.

108. There is no reason to terminate the claimants' liability from the date the sealed offer was withdrawn. The costs of the reference had all been incurred by then, with the sole exception of the costs of the exchanges over costs, which are insignificant in comparison to the sums already expended; in any event we have resolved the question of costs largely in favour of the acquiring authority.

109. The claimants shall therefore pay 80% of the acquiring authority's costs of the reference incurred before 9 February 2017, but excluding the costs of the preliminary issue ordered on 6 May 2016 which were awarded to the claimants when the issue was abandoned by the acquiring authority. The claimants shall also pay the acquiring authority's costs incurred on [and] after 9 February 2017.

110. The parties shall each be entitled to set off the costs and the compensation awarded against their own liabilities. If the costs cannot be agreed they will be assessed on the standard basis by the Registrar.

111. There has been no application for payment on account, so we make no order for one."

20. In refusing permission to appeal, the Tribunal stated:

"1. The Tribunal's decision to order that the Claimants should pay 80% of the Acquiring Authority's costs up to the date of its offer reflected the reality of the outcome of the reference: the claimants brought a very substantial claim, supported by elaborate evidence from two experts, but failed entirely on the substance of that claim. The very modest sum which they did recover was in relation to a discrete issue which occupied only a few minutes of the trial and largely turned on the claimants' oral evidence unsupported by anything the experts had to say.

2. In the Tribunal's view the claimants' success on what was, in effect, a make-weight point does not justify designating them the successful party in the reference. To do so would be mechanistic and would disregard the substance of the dispute.

…".

Was the Tribunal wrong to order the appellants to pay 80% of TfL's costs in the period before the sealed offer was made?

21. In *Atlasjet Havacilik Anonim Sirketi v Ozlem Kupeli and others* [2018] EWCA Civ 1264 Hickinbottom L.J. said of the court's discretion as to costs in CPR r.44.2 (in paragraph 5 of his judgment, with which Davis L.J. agreed):

> "5. …
>
> ii) Before an appeal court will interfere with the exercise of that discretion, as with any appeal, it must be satisfied that the decision of the lower court was wrong or unjust because of a serious irregularity in the proceedings below (CPR rule 52.21(3)). …
>
> iii) Before an appeal court concludes that the costs decision below was "wrong", it must be persuaded that the judge erred in principle, or left out of account a material factor that he should have taken into account, or took into account an immaterial factor, or that the exercise of his discretion was "wholly wrong" (see, e.g., *Adamson v Halifax Plc* [2002] EWCA Civ 1134; [2003] 1 WLR 60 at [16] per Sir Murray Stuart-Smith, adopting (post-CPR) the conventional (pre-CPR) approach he described in *Roache v News Group Newspapers Limited* [1998] EMLR 161 at page 172).
>
> iv) An appeal court will only rarely find that the exercise of discretion below is "wholly wrong", because not only is that discretion particularly wide but the judge below is uniquely well-placed to make the required assessment, having heard the relevant evidence."

22. In *Mann v Transport for London* [2018] EWCA Civ 1520 this court considered an appeal from the Tribunal's decision on costs in a case where compensation for depreciation had been awarded under Part 1 of the Lands Compensation Act 1973. I said that "where the Tribunal's exercise of its discretion in making an award of costs under the Rules and the Practice Directions is challenged, the court should not interfere with the Tribunal's decision unless the approach it has adopted was wrong in some obvious respect" (paragraph 24 of my judgment); that "[the] Tribunal's discretion as to costs is a deliberately broad discretion, exercisable in a wide variety of proceedings" (paragraph 25); and that "[it] is not for this court to revisit the Tribunal's exercise of its discretion as to costs by going behind the conclusions it reached, unless those conclusions are demonstrably unsound" (paragraph 36).

23. Much of the argument before us drew upon two decisions on appeal against awards of costs in claims for compensation for compulsory purchase – the decision of the Court of Appeal in *Purfleet Farms Ltd. v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1430, [2003] 1 P. & C.R. 20 and the decision of the Privy Council in *Blakes Estates Ltd. v Government of Monserrat (Practice Note)* [2006] 1 W.L.R. 297.

24. In *Purfleet Farms*, compensation of £12.26 million had been claimed for the open market value of land taken. Contending that the claim was worth £3.75 million, the Secretary of State had made a sealed offer of £5 million. The Lands Tribunal awarded compensation of £6.66 million. It found the claimant was the successful party, but awarded it only 75% of its costs because the amount of compensation it had sought had been "significantly higher than [could] be supported by reliable evidence". On appeal the claimant put forward an

argument based on the "principle of equivalence" underlying the law of compensation for compulsory purchase, as stated by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd.* [1995] 2 A.C. 111 (at p.125), and relied on the decision of the Court of Session in *Emslie & Simpson Ltd. v Aberdeen District Council* [1995] R.V.R. 159.

25. In *Emslie & Simpson* the claim was for compensation of more than £400,000, the acquiring authority had made an offer of £55,390, the sum awarded was £75,400, and the claimant had been awarded all its costs. Lord Morison, with whose judgment Lord President Hope and Lord Weir agreed, said (on p.163) that "[in] most cases … it is perfectly reasonable that, having been put to the expense of establishing a right which has been disputed, a claimant should put forward his claim on the maximum basis which he can reasonably support and should be entitled to the expenses of doing so if he is successful in the general assertion of his right". The claimants had been "required to go the tribunal to establish that they were entitled to a substantially greater sum than that which had been offered", and the tribunal was "therefore entitled to regard the fact that the award exceeded by a substantial margin the compensation which had been offered as the major consideration bearing on expenses in the circumstances of the case".

26. Agreeing with Lord Morison, the Lord President said (on p.164):

> "… I am not satisfied that the position in cases of disputed compensation is the same as that which applies to litigation generally. It seems to me that the underlying principle in these cases is that the acquiring authority is liable to pay compensation to the owner or occupier of the lands taken. The expenses of determining the amount of disputed compensation may be seen to be part of the reasonable and necessary expense which is attributable to the taking of the lands compulsorily by the acquiring authority. The principle which applies to litigation … is that the cost of litigation should fall on him who caused it. The cost of determining the amount of the disputed compensation would seem, according to this principle, to fall on the acquiring authority without whose resort to the use of compulsory powers there would have been no need for the owner or occupier to be compensated. That seems to me to be the proper starting-point for an examination of the question of expenses in these cases. …".

27. Giving the leading judgment in *Purfleet Farms*, Potter L.J. also referred to the judgment of Morritt L.J. in *English Property Corporation v Royal Borough of Kingston-Upon-Thames* (1998) 77 P. & C.R. 1, which was a "tacit endorsement" of the judgments in *Emslie & Simpson* (paragraph 28). In *English Property Corporation* the Lands Tribunal had assessed compensation at £171,400 for the compulsory purchase of a sliver of land for the widening of a road, the authority having made a sealed offer of £151,000. In the light of the decision of the Court of Session in *Emslie & Simpson* and the Court of Appeal's in *Wootton v Central Land Board* [1957] 1 All E.R. 441, the Tribunal concluded that it was "entirely consistent with principle … to award to the authority costs unnecessarily occasioned by claims which did not arise from their exercise of compulsory powers on the land taken … but from allegations as to the scope and effect of their powers which [it had] held to be mistaken". The claimants "should pay the costs in so far as increased by their claim for compensation in respect of loss of development value on the green and orange land". That approach was supported by this court. In Morritt L.J.'s view, the Tribunal was entitled to

treat the failure of the severance claim on the green land and the orange land as "a special reason for departing from the normal rule" (p.12).

28. Potter L.J. continued (in paragraph 29 of his judgment):

> "29. Leaving aside the impact or influence (if any) of the CPR upon awards of costs in the Lands Tribunal it is my view that the proper approach of the Tribunal for the costs of a successful claimant (i.e. a claimant who is awarded more than the amount of an unconditional offer by the respondent) should be that he is entitled to his costs incurred in the proceedings in the absence of some "special reason" to the contrary. Whether such special reason exists in any given case is a matter for the judgment of the Lands Tribunal. …".

29. He went on to say (ibid.) that, in his view, "following the hearing of a compensation reference in the Lands Tribunal in which the claimant has been successful, a special reason for departing from the usual order for costs should only be found to exist in circumstances where the Tribunal can readily identify a situation in which the claimant's conduct of, or in relation to, the proceedings has led to an obvious and substantial escalation in the costs over and above those costs which it was reasonable for the claimant to incur in vindication of his right to compensation". As was clear from the Lord President's judgment in *Emslie & Simpson*, there was, he said, "a particular need in the case of a compensation reference before the Lands Tribunal to take as a proper starting point the fact that the claimant has had both the procedure and the need to vindicate his right to compensation thrust upon him by use of compulsory powers …" (paragraph 30). He accepted that "if as a result of applying the principles of ordinary litigation to the hearing of compensation references, the Lands Tribunal adopts a practice of 'ready departure' from the principle that the successful claimant is entitled to his costs in the absence of a special reason to the contrary, that would involve a change of approach which has previously and properly been adopted in compensation reference cases" (paragraph 36). Having considered the circumstances in which a proportion of the costs of a "successful claimant" might be disallowed (paragraphs 36 to 38), he found no error in the Lands Tribunal's decision (paragraph 39). Finally, he stressed that "[despite] the similarities in procedure, a compensation reference before the Lands Tribunal does not itself constitute "ordinary litigation" and, for the present at least, remains outside the purview of the CPR" (paragraph 40).

30. Chadwick L.J. agreed with Potter L.J. that unless the relevant guidance in the Lands Tribunal's Practice Directions were "read with the principle of equivalence well in mind, there is a danger that the Tribunal will be led into error when exercising its discretion to award costs in compensation cases" (paragraph 41). Thus, he said, "where there has been no offer or where the amount of the award exceeds the amount of the offer, then (again, *prima facie*) "the expenses of determining the amount of disputed compensation may be seen to be part of the reasonable and necessary expense which is attributable to the taking of the lands compulsorily by the acquiring authority", as the Lord President observed in [*Emslie & Simpson*] …"; and "[in] such a case the refusal to allow the claimant some part of his costs of the reference must be justified by a finding that the costs to be disallowed have not been incurred as part of the reasonable and necessary expense of pursuing the reference" (paragraph 42). He concluded that "[where] the Tribunal makes an award of compensation which is well below the amount claimed, it is appropriate for it consider, in

the context of an award of costs, both whether the fact that the claim was exaggerated has led the claimant to incur costs which (given a more realistic evaluation of his claim) he would not have incurred and whether the explanation for the difference between the award and the amount claimed is that issues were pursued on which the claimant had no real chance of success" (paragraph 43). Here it was "plain that the Tribunal had taken the view that the exaggeration of the claim was the product of the claimants' reliance on expert evidence which should have been recognised as unreliable; and that the decision to rely on that evidence had led to the waste of substantial time and expense", and "[on] that basis, the Tribunal was entitled to exercise its discretion as to costs in the way that it did" (paragraph 44).

31. In *Blakes Estates* the Privy Council, on an appeal from a decision of the Court of Appeal of the Eastern Caribbean (Montserrat), endorsed the approach indicated by this court in *Purfleet Farms*. The claimant had contended that the land taken had a value of between $16.9 million and $31.4 million, the respondent had offered $4.8 million, and the board of assessment made a total award of $5.9 million. It awarded the claimant 65% of its costs, on the basis that although the claimant had succeeded in obtaining an award of compensation higher than the offer made by the respondent, "[the] award … falls woefully short of the amounts being claimed". Giving the judgment of the Privy Council, Lord Carswell said (in paragraph 21) that in *Purfleet Farms*, the judgments in the Court of Appeal had made it clear that "a successful claimant should ordinarily be entitled to all his costs and that exaggeration by itself should not give rise to a reduction, unless his conduct has led to "an obvious and substantial escalation in the costs over and above those which it was reasonable for the claimant to incur"". The Privy Council's conclusion was this (in paragraph 25):

> "25. Their Lordships consider that the principles set out in the *Purfleet Farms* case … should be applied to the operation of the provisions of section 22 of the Land Acquisition Act of Montserrat. A claimant should prima facie be entitled to his full costs of preparing and presenting his claim. The board of assessment's discretion to reduce the award from the payment of full costs should be exercised judicially. If it holds that the claim was grossly excessive, it is necessary for the board then to inquire whether the exaggeration gave rise to an obvious and substantial escalation in the costs over and above those which it was reasonable for the claimant to incur. If it is satisfied that this was the case, then it is open to the board to exercise its discretion to deprive the claimant of part of his costs. The amount of departure from full payment of the claimant's costs should be proportionate, having regard to the amount of waste of time and costs properly attributable to the claimant's acts or omissions."

Neither the board of assessment nor the Court of Appeal had applied these principles to the award of costs to the claimant, and the award was remitted to the board (paragraph 26).

32. For the appellants, Mr Mark Warwick Q.C. confirmed that they do not contest their liability to pay TfL's costs after the making of the sealed offer, only the award of costs in TfL's favour for the "pre-offer period". That, submitted Mr Warwick, was wrong in principle and contrary to authority. The Tribunal ought not to have concluded that TfL was the "successful party". It should not have ordered the appellants to pay any of TfL's costs for

the period before the sealed offer was made. Its decision was not only contrary to the guidance in paragraph 12.3(1) of the Practice Directions but also irreconcilable with the Privy Council's decision in *Blakes Estates* and the Court of Appeal's in *Purfleet Farms*. The jurisprudence in *Purfleet Farms* ought to have been applied. The Tribunal's starting point should have been that the appellants were the "successful party" and should therefore recover their costs for the "pre-offer period". TfL could have contended for a reduction, perhaps even a substantial reduction, in those costs. But to order the appellants to pay 80% of TfL's costs was mistaken.

33. Mr Warwick argued that the appellants' claim for compensation was equivalent to a "single cause of action", even though there were four heads of claim. He submitted, in effect, that it could be regarded as analogous to a "money only" claim. The Tribunal had accepted (in paragraph 107 of its "Addendum on Costs"), that although it was "comparatively modest" the sum the appellants had been awarded was "not insignificant". Under the principles adopted in "money only" cases – for example, *A.L. Barnes Ltd. v Time Talk (UK) Ltd.* [2003] EWCA Civ 402, *Day v Day* and *Straker v Tudor Rose* [2007] EWCA Civ 368, [2007] C.P. Rep. 32 – and in line with the guidance in the Practice Directions, the appellants ought to recover their costs from TfL. There was no special reason pointing to a different outcome. The result of the reference was that TfL had to "pay money" to the appellants (see the judgment of Longmore L.J. in *A.L. Barnes v Time Talk (UK)*, at paragraph 28, and the judgment of Waller L.J. in *Straker v Tudor Rose*, at paragraph 13); it had to "write the cheque at the end of the case" (as Ward L.J. put it in *Day v Day*, at paragraph 17). For the whole period before the sealed offer was made, said Mr Warwick, TfL's position was, in effect, that the claim was misconceived and worth nothing. It had failed to protect its position by making an offer, and the appellants were entitled to weigh the risks of continuing, knowing that no offer had been made. The Tribunal accepted this. It acknowledged (in paragraph 107) that TfL could have protected itself against the risk that the claim might at least partly succeed "by making an earlier offer", regardless of whether it had seen enough to justify doing so; and that the appellants "could not have secured the award they did without bringing the reference". The Tribunal seems to have thought that sealed offers, and similar "Calderbank" offers, have retrospective effect. They do not.

34. I am not persuaded by that argument. As Mr Guy Williams submitted for TfL, the Tribunal's approach to its decision on costs was consistent with relevant principle, in accordance with the relevant provisions of statute and the Lands Chamber Rules, and not contrary to any relevant guidance given in the Practice Directions. I do not think we can properly set its decision aside as wrong in principle. It exercised its discretion as to costs lawfully.

35. The first question for the Tribunal to decide, as it did, was which of the two parties in the reference was the "successful party". As is implicit in paragraphs 12.2 and 12.3(1) of the Practice Directions, this was the starting point for the exercise of its costs discretion. This exercise had to be undertaken with realism and good sense, having regard to all the circumstances of the case.

36. The Practice Directions do not prescribe a particular conclusion on this question in any given circumstances. Their guidance is general. In paragraph 12.2, under the heading "Exercise of discretion in awarding costs", they emphasize that the Tribunal's discretion is

"qualified" by the provisions of section 4 of the 1961 Act, and this is further explained in paragraph 12.3(2), under the heading "The general rule for costs". Paragraph 12.3(2) acknowledges the statutory rule in section 4 of the 1961 Act, which modifies the "general rule" stated in paragraph 12.3(1) in a case where the acquiring authority has made an unconditional offer to settle and the award of compensation does not exceed that offer. In such a case it is, in principle, open to the Tribunal, looking realistically at all the circumstances of the case, to conclude that the "successful party" in the reference, including the period before the offer was made, is the acquiring authority, not the claimant, and to exercise its costs discretion accordingly. It is not constrained to conclude that the acquiring authority is the "successful party" only for the period after the offer was made, or that the claimant must be regarded as the "successful party" for the period preceding the offer, or that there is, in fact, no "successful party". The concept of the "successful party" in the proceedings as a whole, both before and after the making of an offer to settle, is not a rigid concept. It is for the Tribunal to determine, in the particular case before it, whether the claimant or the acquiring authority has emerged as the "successful party". Which of the parties is, in reality, the "successful party" will always depend on the specific facts and circumstances of the case in hand. The facts and circumstances will vary widely from one case to another.

37. Such pragmatism is also necessary in the realm of civil litigation. In *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 Simon Brown L.J. observed (in paragraph 35 of his judgment) that the court can "properly have regard to the fact that in almost every case even the winner is likely to fail on some issues and it should be less ready to reflect that sort of failure in the eventual costs order than the altogether more fundamental failure to make an offer sufficient to meet the winner's true entitlement".

38. As Hickinbottom L.J. said in *Atlasjet* (in paragraph 8 of his judgment), it is "well-established that the question of who is the "successful party" for CPR purposes requires a fact-specific evaluation by reference to the litigation as a whole (see e.g. *Kastor Navigation Company Ltd v Axa Global Risks* [2004] EWCA Civ 215 … at [143] per Rix LJ)". He endorsed (in paragraph 9) Lightman J.'s observation in *Bank of Credit and Commerce International SA (in Liquidation) v Ali (No. 4)* (1999) 149 N.L.J. 1734 that "[for] the purposes of the CPR, success is not in my view a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense". Having referred (in paragraphs 10 to 13) to the judgment of Ward L.J. in *Day v Day* and that of Longmore L.J. in *A.L. Barnes v Time Talk (UK),* as well as Jackson L.J.'s caution in *Fox v Foundation Piling Ltd.* [2011] EWCA Civ 790 against the tendency for first instance courts to depart from the general rule in CPR Part 44 that the unsuccessful party will be ordered to pay the costs of the successful party, Hickinbottom L.J. went on to say (in paragraph 14) that there were, however, "limits to which "the payer of the cheque" must be considered the unsuccessful party in the litigation". For example, in *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750, a case of alleged clinical negligence in which quantum had been agreed at £525,000 and the claimant had been awarded damages of only £2,000 for pain and suffering, the trial judge had ordered the defendant to pay 50% of his costs, but the Court of Appeal overturned that decision. The majority (Sir Anthony May, President of the Queen's Bench Division, and Tomlinson L.J.) thought that no rational person would have pursued the proceedings to recover only £2,000. Thus, they concluded, the real claim had failed, the defendant was the "successful party", and the claimant must pay 75% of the

defendant's costs – discounted because the defendant had not made a "Calderbank" offer even of a small amount (paragraphs 17 to 21 of the President's judgment, and paragraphs 43 to 52 of Tomlinson L.J.'s). In his dissenting judgment (in paragraphs 22 to 30, and 35 to 42) Jackson L.J. concluded that, in the absence of a Part 36 offer, the claimant had succeeded in the action, and the starting point should therefore be that he was entitled to his costs – though with a considerable discount.

39. In my view the Tribunal's conclusion that TfL was the "successful party" in the reference is not in conflict with any relevant case law, and cannot be faulted. It was deciding this question in the context of a claim for compensation for compulsory purchase, which is quite different from civil litigation. As Mr Williams submitted, the case law on awards of costs in "money only" cases is of limited value here. The question of who has to "pay money" or "write the cheque at the end of the case" is not apt in a claim for compensation. Unless the claim is misconceived and fails completely, the party that will pay money at the end of the reference will always be the acquiring authority – having taken the claimant's land by compulsion.

40. The Tribunal had no difficulty in finding that in this case, "[looking] at the reference as a whole", TfL was the "successful party". Its reasons for doing so, in paragraphs 105 to 107 of its "Addendum on Costs", are, I believe, cogent. It had regard, as it must, to a range of factors. The considerations it took into account were all relevant, and nothing of relevance was left out. The appellants could not say they had beaten the sealed offer and were the "successful party" in the reference for that reason. By that measure they were clearly the unsuccessful party; the award of compensation had fallen well short of the offer. But was the Tribunal also entitled to reject their argument that because they had secured an award of compensation of some £39,000 plus VAT on one of their four heads of claim, they should be regarded as the successful party in the period before the offer was made? In my view it clearly was. As one might expect, it saw force in TfL's contention, which was simply a matter of fact, that the appellants had been awarded compensation amounting to only a tiny fraction of the total claim – about 1% of it – on a single, small and distinct issue. It had in mind too that on the head of claim where the appellants had succeeded – the "costs of vacation claim" – TfL had always accepted they should be compensated for their true losses "subject to proof of causation and loss", but they had failed to produce the "additional information" the experts required. Only at the hearing was such evidence provided. The Tribunal also noted that TfL had warned the appellants their claim for "future remuneration" was hopeless (paragraph 105). The fact that they secured a total award of some £46,000 did not compel it to find that they were the "successful party".

41. There can be no criticism of the Tribunal for having regard to the circumstances in the round, including the parties' conduct in the reference, the number and nature of the issues raised, the evidence given and the submissions made at the hearing, and its own findings and conclusions. That was, after all, the task it had to perform; and it was well able to do so. Looking at the reference "as a whole" to establish which was the "successful party" – as the Tribunal did – was not inconsistent with the guidance in the Practice Directions. On the contrary, the Tribunal did exactly what paragraphs 12.2 and 12.3 of the Practice Directions say it will do. Dividing the reference into two or more periods was unnecessary, and would have been artificial. The size of the claim, and the extent of the appellants' failure, were highly significant here. TfL had successfully resisted a claim for more than £4 million,

defeating it all, apart from one discrete element worth less than £50,000. The scale of the appellants' success, seen in this context, was so little that the compensation they were awarded would yield only "a small down payment towards the costs payable to [TfL]". That, I think, is telling. The conclusion that the appellants had "succeeded only to a very modest extent" was not merely realistic; it was the only view the Tribunal could reasonably have taken (paragraph 106).

42. This was not simply a case of a claimant failing to beat an acquiring authority's sealed offer. On the core of their claim – as Mr Williams put it, the "main" head of claim – which was for lost remuneration, the appellants were totally unsuccessful, as TfL had predicted they would be. The central issue before the Tribunal, to which most of the evidence had been directed and which had occupied most of the time at the hearing, was the claim of more than £4 million for loss of income. That part of the claim the Tribunal comprehensively rejected, and with it two other heads of claim – for loss of income before 13 September 2013, and for loss incurred through the disposal of equipment. On those three components of the claim it awarded no compensation at all. As the Tribunal recognized, however, until TfL made the sealed offer in February 2017 it had taken the risk that the claim would fail completely, and it had not achieved "complete success" – because one small element of the claim had in the end been proved (paragraph 107).

43. I do not think the appellants can complain about any of those conclusions. The crucial point is that the "very modest" success they had achieved was not enough to displace the finding that TfL was truly the "successful party" in the reference when viewed "as a whole".

44. That was a conclusion the Tribunal could properly reach in the particular circumstances of this case. Not only was it unsurprising; it was also legally sound. As the Practice Directions recognize, in paragraph 12.2, a party may not be "wholly successful". Success for a claimant on a single limited element of its claim is not necessarily determinative of the question "Who is the successful party?". It does not automatically prevent a conclusion that, in the reference as a whole, the acquiring authority has emerged as the "successful party". There is no reason in principle why an acquiring authority whose offer to settle a claim for compensation has not been beaten by the claimant cannot be regarded as the "successful party" in the reference as a whole, even though a relatively very small award of compensation has ultimately been made. Nor is there any reason in principle why, in such a case, the Tribunal should not award the acquiring authority its costs, or a proportion of them, for the period before the offer was made as well as for the period that followed. In exercising its broad discretion as to costs, the Tribunal must always adopt an approach sensitive to the whole facts and circumstances of the case before it. Paragraph 12.3 of the Practice Directions do not state or suggest otherwise; on the contrary, their language is deliberately flexible. And in my view, in the circumstances of this case, the Tribunal could quite properly conclude, as it did, not only that TfL was the "successful party" in the reference but also that there was no good basis for withholding an award of costs for the period before the offer was made.

45. That analysis is not inconsistent with any relevant case law, with Rule 10 of the Lands Chamber Rules, or with the guidance in paragraphs 12.2, 12.3 and 12.7 of the Practice Directions.

46. It does not offend the jurisprudence in *Purfleet Farms* and *Blakes Estates*. The main dispute on costs in those two cases was not whether the claimant or the acquiring authority was truly the "successful party", and in neither case was any definitive guidance given on that question. The critical issue in both was whether in the circumstances the claimant, as the "successful party", should be awarded a greater or lesser proportion of its costs than the tribunal or board had determined. The court's reasoning in either case aligns with the "general rule" in paragraph 12.3(1) of the Practice Directions that the "successful party" ought to receive its costs, and with the principle in section 4 of the 1961 Act**,** acknowledged in paragraph 12.3(2), that, in the absence of "special reasons", a claimant who has not beaten a sealed offer will be liable for the post-offer costs of the acquiring authority. In both cases – as also in *Emslie & Simpson* and *English Property Corporation* – the claimant had beaten a sealed offer and there was no dispute that it was the "successful party". None of those cases supports a submission that when a claimant fails on all elements of its claim except one small distinct head of claim, the acquiring authority can never be regarded as the "successful party" or can never recover its costs for the period preceding an offer.

47. Having determined that TfL was the "successful party", the Tribunal went on to ask itself whether there was any reason to depart from the "general rule" that the "successful party" should be awarded its costs. Its approach to answering that question was correct. As it recognized, the "usual rule" that the "successful party" should be awarded its costs was not inflexible, but, as it said, "subject to modification where a different order is justified". Here, it thought, a different order was justified for the period before TfL made its sealed offer. It was entitled to take that view, for the three particular reasons it gave: first, that the compensation awarded to the appellants, though "comparatively modest", was "not insignificant"; second, that TfL could have protected itself by making an "earlier offer"; and third, that the appellants had to proceed with the reference to get the compensation they did. The Tribunal did not think that, in the particular circumstances of this case, those factors warranted either an award of costs in the appellants' favour or its making no order for costs, for the pre-offer period. They were strong enough, however, to justify a "discount" in the award of costs to TfL, reducing it to 80%. This again was a matter for the Tribunal's discretion, which, in my view, it exercised lawfully. It made clear that the discount of 20% had not been precisely assessed as the costs of the single issue on which the appellants had succeeded, but was simply a reflection of the three factors it mentioned (paragraph 107). This was, I think, a sensible way of reducing the award of costs to allow for the appellants' limited success. It was not wrong in principle.

48. As the Tribunal said when it refused permission to appeal to this court, the appellants had brought a very substantial claim, supported by elaborate evidence from two experts, but had "failed entirely" on "the substance" of that claim – a summary that seems perfectly apt. The appellants had been awarded only a "very modest sum" in compensation, on "a discrete issue" that had taken "only a few minutes" of the hearing and turned largely on their own evidence, unsupported by anything the expert witnesses had said – "in effect, a make-weight point".

49. In my view, therefore, the Tribunal made no error of law in exercising its costs discretion as it did in this case. Its decision on costs was not wrong. That decision reflected the realities of the reference and its outcome – a relatively very small award of compensation, well short of TfL's offer, on one head of a much more ambitious claim, which had not called for any

expert evidence and had occupied only a very short time at a hearing that had lasted five days.

Conclusion

50. For the reasons I have given, I would dismiss this appeal.

Lord Justice David Richards

51. I agree.