



LCA/118/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – purchase notice – land in use as public open space – terrace of houses on land demolished during second world war – whether Third Schedule rights to be assumed – held they were – compensation £1,600,000 – Land Compensation Act 1961 ss 14(1) and 15(3)

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN

GREENWEB LIMITED

Claimant

and

LONDON BOROUGH OF WANDSWORTH

**Acquiring
Authority**

**Re: Site 9-15 Orville Road
Battersea
London SW11**

Before: The President and P R Francis FRICS

**Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 5 September 2007**

John Male QC instructed by Lovells for the claimant

Reuben Taylor instructed by M B A Walker, Borough Solicitor, for the acquiring authority

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The following cases are referred to in this decision:

Horn v Sunderland Corpn [1941] 2 KB 26

Director of Building and Lands v Shun Fung Ironworks Ltd [1995] AC 111

Northern Metco Estates Ltd v Perth & Kinross District Council 1993 SLT (Lands Tr) 28

Dutton v Blaby District Council [2006] RVR 203

Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] 1 AC 132

Ivens & Sons (Timber Merchants) Ltd v Daventry District Council (1975) 31 P & CR 480

The following further cases were cited in argument:

Cynon Valley Borough Council v Secretary of State for Wales [1986] JPL 760

Petticoat Lane Rentals Ltd v Secretary of State for the Environment [1971] 1 WLR 1112

Trustees of the Walton-on-Thames Charities v Walton and Weybridge Urban District Council
(1969) 20 P & CR 250; (1970) 21 P & CR 411

DECISION

1. This is a claim for compensation for the deemed compulsory acquisition of land following the service of a purchase notice. The land is 0.22 acre in area, and on it there were built in the 1880s a terrace of nine 3-storey dwellinghouses of brick construction abutting the public highway and a 2-storey commercial building. During the second world war the buildings sustained bomb damage and were demolished. Following clearance of the land four prefabricated houses were erected on the land. These were in existence on 1 July 1948. They remained there for a long time, but they had been removed by 1978. On 6 June 1979 Wandsworth Borough Council gave itself deemed planning permission for use of the subject land as a temporary public open space. The permission was for 5 years, and the reason for the time limit was that the site was ultimately required as a school extension. In 1979 or 1980 the council laid out on the subject land and land to the west of it (an area of perhaps 7 times that of the subject land) an area of public open space known as Fred Wells Gardens. On 3 September 1980 it gave deemed planning permission for this development. The development was described as a “local park” with recreational facilities. The park has continued in existence and in use as a public open space up to the present. It occupies most of the area between Orville Road to the east, Vicarage Crescent to the north, Lombard Road to the west and the embankment of the West London Extension railway line to the south. Included within the park are the sites of former houses fronting Vicarage Crescent and Lombard Lane, but excluded is the site of a former primary school on Vicarage Crescent, which has been developed since the park was laid out with a block of 14 flats.

2. At the time that Fred Wells Gardens were laid out the subject land was owned by the Greater London Council, and the GLC was given notice of the intention to incorporate the land into the park, but it appears that no lease for this purpose was entered into. With the demise of the GLC the subject land was transferred to the London Residuary Body, who, despite representations from Wandsworth, sold it on the open market in 1988, advertising it as “land with residential development potential”. On 13 June 1997 Wandsworth opened negotiations for purchase of the site from its then owner. On 18 April 2000, since the land was proposed to be acquired by the council, the owner made application under section 17 of the Land Compensation Act 1961 for a certificate of alternative development, specifying as the development dwelling houses or day nursery or a mix of the two. On 7 June 2000 he applied for planning permission for the erection of five 2-bedroom mews houses. The council failed to determine either application, and the owner appealed. A public inquiry was held in February 2001 (a few days after the land had been transferred to the present claimant for the sum of £30,000), and on 15 May 2001 the Secretary of State for the Environment, Transport and the Regions, accepting the recommendations of the inspector, dismissed both appeals. The effect, as far as the section 18 appeal was concerned, was that the deemed nil certificate stood: planning permission would have been granted for any development for which the land was being acquired but not for any other development.

3. Following this decision a purchase notice was served by the claimant, and the acquiring authority accepted it. Accordingly they are deemed to be authorised to acquire compulsorily the claimant’s interest in the land and to have served notice to treat, and compensation falls to be assessed under the 1961 Act.

4. The claim for compensation is based on the contention that under section 15(3) of the Act planning permission is to be assumed for development falling within paragraph 1(1)(a) of the Third Schedule of the Town and Country Planning Act 1990, and such development would encompass both the rebuilding of the nine houses and the commercial building that formerly stood on the land and also the four prefabs. The acquiring authority say that the claimants cannot rely on section 15(3). They accept, however, that if the planning permissions are to be assumed they would be capable of implementation. In the course of the hearing, before we had heard any evidence, complete agreement on values was reached between the parties on three alternative bases:

- (a) With an assumed planning permission for the rebuilding of the 9 houses and the commercial building: £1,600,000.
- (b) With an assumed planning permission for the rebuilding of the four prefabs with additional hope value for a more profitable development: £1,200,000.
- (c) As public open space only: £15,000.

5. The relevant statutory provisions are these. Section 5 of the 1961 Act provides that the provisions in sections 6 to 16 are to have effect with respect to the assessment of compensation for the land acquired. Section 14(1) provides:

“Assumptions as to planning permission

14. (1) For the purpose of assessing compensation in respect of any compulsory acquisition, such one or more of the assumptions mentioned in sections 15 and 16 of this Act as are applicable to the relevant land or any part thereof shall (subject to subsection (3A) of this section) be made in ascertaining the value of the relevant interest.”

Section 15 includes the following:

15. (3) Subject to subsection (4) of this section, it shall be assumed that, in respect of the relevant land or any part of it, planning permission would be granted –
- (a) subject to the conditions set out in Schedule 10 to the Town and Country Planning Act 1990, for any development of a class specified in paragraph 1 of Schedule 3 to that Act; and
 - (b) for any development of a class specified in paragraph 2 of Schedule 3 to that Act.
- (4) Notwithstanding anything in subsection (3) of this section –
- (c) where, at any time before the said date, an order was made under section 102 of the said Act of 1990 in respect of the relevant land or any part thereof, requiring the removal of any building or the discontinuance of any use, and compensation became payable in respect of that order under section 115 of that Act, it shall not by virtue of the said subsection (3) be assumed that planning permission would

be granted, in respect of the relevant land or that part thereof, as the case may be, for the rebuilding of the building or the resumption of the use.”

In subsection (4)(c) “the said date” is the date of notice to treat. The conditions set out in Schedule 10 do not need to be referred for present purposes.

6. The classes of development specified in paragraphs 1 and 2 of Schedule 3 are:

“1. The carrying out of –

- (a) the rebuilding, as often as occasion may require, of any building which was in existence on July 1, 1948, or of any building which was in existence before that date but was destroyed or demolished after January 7, 1937, including the making good of war damage sustained by any such building;
- (b) the rebuilding, as often as occasion may require, of any building erected after July 1, 1948 which was in existence at a material date;
- (c) the carrying out for the maintenance, improvement or other alteration of any building, of works which –
 - (i) affect only the interior of the building, or do not materially affect the external appearance of the building, and
 - (ii) are works for making good war damage,

so long as the cubic content of the original building is not substantially exceeded.

2. The use as two or more separate dwellinghouses of any building which at a material date was used as a single dwellinghouse.”

7. The contention advanced by Mr John Male QC for the claimants is simple. The terrace of houses and the commercial building were in existence on the land on 7 January 1937 and was destroyed or demolished after that date, and the prefabs were in existence on the land on 1 July 1948. Accordingly planning permission for the rebuilding of these buildings is to be assumed under section 14(1) and 15(3)(a). For the acquiring authority Mr Reuben Taylor submits that the assumption in section 15(3)(a) is not, or ought not to be treated as being, “applicable” within the terms of section 14(1). Under the purchase notice procedure, he says, a landowner is able to divest himself of land that he cannot use beneficially and could be a burden on him by transferring the land and such burden as it represents to the local planning authority. He is to be compensated as though the land had been compulsorily acquired from him. Compensation for compulsory acquisition is to be assessed so as to give effect to the principle of equivalence: to ensure that the claimant is compensated fairly and fully for his loss but does not receive more than fair compensation. Reliance is placed on the well-known passages in *Horn v Sunderland Corpn* [1941] 2 KB 26 at 42 (in the judgment of Scott LJ) and *Director of Building and Lands v Shun Fung Ironworks Ltd* [1995] AC 111 at 125 (in the speech of Lord Nicholls of Birkenhead). To give effect to the principle of equivalence, the starting point, Mr Taylor says, is the value that the land would have had in the no scheme world. The land would not have had a residential value in the no scheme world, and so the statutory provisions must be operated in order to ensure that compensation is not paid as

though it did have such a value: and that means that the assumption in section 15(3)(a) is not, or ought not to be treated as being, applicable.

8. There are two answers of a general nature to the acquiring authority's contention that section 14 should be treated as being subject to the principle of equivalence as it has been articulated in the cases or as conferring a discretion on the Lands Tribunal as to whether in any particular case to apply the assumptions contained in sections 15 and 16. The first is that the language of the provisions does not permit this. Section 14(1) provides that "such one or more of the assumptions mentioned in sections 15 and 16 of this Act as are applicable to the relevant land or any part thereof shall...be made." Sections 15 and 16 lay down assumptions ("it shall be assumed") "where" or "if" a particular state of affairs exists (see section 15(1) and (5) and section 16(1)-(4)). In terms of section 14(1) any one of those assumptions is "applicable" where the assumption is required to be made because the state of affairs that is specified in relation to it exists (for example, where a section 17 certificate has been issued: see section 15(5)). Expressed in these terms there is no scope for refusing as a matter of discretion to apply an assumption when the state of affairs that requires it to be made exists. In the case of Third Schedule development, there is no need for "where" or "if" in the subsection since the provision is of universal application. It is required to be assumed that planning permission would be granted for any class 1 or class 2 development. That is an assumption that, by reason of the words used, is "applicable to the relevant land".

9. The second answer is that, as Mr Taylor accepted, there is simply no authority that even begins to suggest that the application of the assumptions in sections 15 to 16 is discretionary.

10. There is in any event, in our view, nothing in Mr Taylor's submission that it is inappropriate, under the scheme of the legislation, to apply the assumption in section 15(3) in the case of a purchase notice since this would be to give the claimant of land that he is offloading on to the acquiring authority compensation far in excess of the value of the land. In order to understand the scheme of the legislation, and how section 15(3) fits into it, it is necessary to refer to the legislative history and the function of the Third Schedule.

11. Paragraph 1 of the Third Schedule was enacted in substantially the same form as paragraph 1 of the Third Schedule to the Town and Country Planning Act 1947, paragraphs 2 to 8 of which specified other classes of development. In the 1947 Act paragraphs 1 and 2 were included in Part I of the Schedule under the heading "Development included in existing use for purposes other than compensation under section 20." Paragraphs 3 to 8 were included in Part II under the heading "Development included in existing use for all purposes."

12. Under the 1947 Act development value was nationalised. Part VII of the Act provided for the payment of development charge on the carrying out of operational development, but operations of the descriptions in the Third Schedule were (under section 69(2)) excluded for this purpose. Part VI of the Act provided for payment to be made out of central funds under a scheme to be made by the Treasury where an interest in land was depreciated in value by virtue of the provisions of the Act. The measure of the depreciation was the difference between the unrestricted value of the land (the value that it would have had if the Act had not been passed)

and its restricted value (the value of the land assuming that planning permission would be granted for Third Schedule, existing use, development): section 61(2).

13. In addition to Parts VI and VII of the 1947 Act, certain provisions within Parts III and V are to be noted. Under section 20 in Part III compensation was payable where planning permission was refused for any development falling within Part II of the Third Schedule. Such development included, for instance, the alteration of a building (paragraph 3 of the Schedule). Development within Part I was excluded for this purpose. But under section 19 a purchase notice could be served where land had become incapable of reasonably beneficial use, with compensation being payable as though the land had been compulsorily acquired. Compensation for compulsory acquisition was dealt with under Part V. Section 51(2) provided:

“The value of [any interest compulsorily acquired] shall be ascertained on the assumption that planning permission would be granted under Part III of this Act for development of any class specified in the Third Schedule to this Act, but would not be so granted for any other development.”

Where planning permission was revoked or modified (under section 21) the same assumption was to be made in assessing compensation for the revocation or modification (section 22(7)).

14. The function of the Third Schedule was thus to identify those classes of development of which the value was not nationalised. No development charge was payable in respect of such development; no payment out of central funds was to be made in respect of the value of such development; and in assessing compensation where land had been compulsorily acquired, or was deemed pursuant to a purchase notice to have been compulsorily acquired, it was to be assumed that planning permission would be granted for such development. These provisions ensured that the value of development in any of the classes within the Third Schedule remained with the landowner. The right under section 19 to serve a purchase notice where land had become incapable of reasonably beneficial use was clearly not there only for the purpose of enabling a landowner to divest himself of land that was useless to him or potentially burdensome. It provided an opportunity for him to realise the value retained by him under Part I of the Third Schedule (an opportunity that was not open to him under section 20, by virtue of which only the Part II value could be realised).

15. The body charged with the operation of development charges and payments out of central funds for the depreciation in land values was the Central Land Board, and under section 1(3)(d) of the Lands Tribunal Act 1949 any dispute arising in relation to the determination of development value by the Board was to be referred to the Lands Tribunal. The Town and Country Planning Act 1953 denationalised development value by abolishing development charges and discontinuing payments under Part VI, so that the function of the Third Schedule became limited to the assessment of compensation (under section 20, where planning permission was refused for Part II development, or where land had been, or was deemed to have been, compulsorily acquired or where planning permission was revoked or modified). The underlying purpose of the schedule – to identify those classes of development for which the landowner retained the value – was, it is clear, unaffected.

16. The Town and Country Planning Act 1959 enacted as sections 2 and 3 the provisions that shortly afterwards became sections 14 and 15 of the 1961 Act. The assumption of planning permission for Third Schedule development, contained in section 51(2) of the 1947 Act, was thus retained by a combination of sections 14(1) and 15(3). Section 15(3) as originally enacted provided:

“Subject to subsection (4) of this section, it shall be assumed that planning permission would be granted, in respect of the relevant land or any part thereof, for development of any class specified in the Third Schedule to the Town and Country Planning Act, 1947 (which relates to development included within the existing use of land).”

17. In the principal Town and Country Planning Acts that have succeeded the 1947 Act (the Acts of 1962, 1971 and, the one now currently in force, 1990) the Third Schedule remained the Third Schedule and only minor drafting alterations were made to it. The headings of the two Parts of the Schedule were changed from those in the 1947 Act to reflect its more limited role after the abolition of Part VI payments and development charge. In the 1990 Act Part II is headed “Development ranking for compensation under section 114”. Section 114 was the successor provision to section 20 of the 1947 Act. However, the Planning and Compensation Act 1991 repealed section 114 and Part II of the Third Schedule, so that since the repeal no compensation has been payable in respect of the refusal of planning permission for Part II development nor has it any longer to be assumed when determining compensation for compulsory acquisition that permission for Part II development would be granted.

18. Part I of the Third Schedule was not, however, repealed by the 1991 Act. In the light of the amendments made by the 1991 Act, therefore, the fact that it was not repealed shows a conscious intention that in assessing compensation for compulsory purchase (including deemed compulsory purchase) it should continue to be assumed that planning permission would be granted for Part I development. It was, as we have said, part of the scheme of the legislation that a claimant under a purchase notice should receive compensation that reflected the value of Third Schedule development and that element of the scheme undoubtedly remains, with the assumption now limited to the two classes of development in Part I.

19. Reference was made in argument before us to the fact that successive General Development Orders up to the Town and Country Planning (General Development) Order 1977 had given permission for the rebuilding of war damaged buildings but that such permission was no longer contained in the 1988 GDO. We cannot see, however, that this can have any bearing on the construction of the 1961 Act or to its proper application.

20. Mr Taylor sought to place reliance on a Scottish Lands Tribunal purchase notice case, *Northern Metco Estates Ltd v Perth & Kinross District Council* 1993 SLT (Lands Tr) 28. That case concerned a site previously owned by British Railways Board on part of which two pairs of Victorian cottages had stood but had been demolished, it appears, between 1977 and 1983 (see at 29F-G, 31C). Compensation was claimed principally on the basis of the value of the site for leisure development, but there was an alternative claim on the basis that the landowner’s rights under the Sixth Schedule (the equivalent in the Town and Country Planning (Scotland) Act 1972 of the Third Schedule) would permit the rebuilding on the site of the four

former cottages with four modern houses on individual plots. The Tribunal rejected this contention. At 37H-I it said:

“On the facts in this case the Tribunal finds that at the date of the notice to treat the existing use was not residential. That had been abandoned. Development of the land for residential purposes would then require planning permission as a material change of use. The rights granted by planning permission or by permitted development attach not to any individual but to the land itself. The Sixth Schedule rights attaching to the reference subjects had been extinguished by abandonment, and any action by the owners of the land, such as making application for planning permission for residential use, will have no effect since their intentions are not indicative of the actual planning rights accruing to the land.”

21. In *Dutton v Blaby District Council* [2006] RVR 203 this Tribunal (N J Rose FRICS) said (at paragraph 27) that it did not find the decision of assistance because it did not appear that the Tribunal’s attention had been drawn to section 30(2) of the Town and Country Planning (Scotland) Act 1972, which provided (as in section 75 of the 1990 Act) that planning permission for a building carried with it planning permission for use of the building. Under section 75 the planning permission that is to be assumed under paragraph 1 of the Third Schedule would carry with it the right to use the building for residential purposes. A valid permission capable of implementation cannot be abandoned (see *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] 1 AC 132), so that there can be no question, in our judgment, of abandoning the planning permission that is required to be assumed for Third Schedule development under section 15(3). Nor can we read into the description of the development in the Third Schedule any implication that there must be some sort of continuity of use from the original development until the time of the assumed permission. It is of course the case that the assumed permission may be incapable of implementation. Thus in *Ivens & Sons (Timber Merchants) Ltd v Daventry District Council* (1975) 31 P & CR 480 this Tribunal (Douglas Frank QC) held that it was not possible under the paragraph 1 assumed permission to rebuild a house that had formerly stood on the land after spoil to the depth of 20 feet had been deposited on the land. But if (as in the present case) the planning permission for paragraph 1 development would be capable of implementation, there is in our judgment no reason for not giving effect to the assumption of such permission under section 15(3).

22. The result is that the claimant is entitled to compensation on the assumption that planning permission would be granted for the rebuilding of the terrace of houses and the commercial building and also for the rebuilding of the prefabs.

23. Both parties were keen to point out what they saw as the merits of the case. Mr Taylor stressed that the buildings in relation to which compensation was claimed had been demolished over 60 years ago, that the land had been in use for public open space purposes for approaching 30 years, had been refused planning permission for residential development on appeal and had been the subject of a nil certificate on appeal under section 18. It made no sense in these circumstances, he said, that someone who had bought the land for £30,000 in 2001 should now be paid compensation amounting to £1.6m. Mr Male pointed out that the Third Schedule rights attaching to this land were those that applied generally and that on the bombed site on the

opposite side of Orville Road fourteen terrace houses had been rebuilt following a determination by Wandsworth Borough Council in 1987 that such development was permitted under Class XI of the 1977 GDO. The council moreover had had the chance to buy the subject land when it was put up for sale by the London Residuary Body.

24. That the claimant should succeed in this claim is the inevitable result of the legislation, for the reasons that we have set out. It has undoubtedly achieved a remarkable windfall gain. This has arisen because the land was sold out of public ownership into a market that has substantially forgotten about the Third Schedule and the value attaching to Third Schedule rights. The fact is that the Third Schedule rights attaching to the subject land have given it a residential value throughout the time since the provisions of the 1947 Act came into force. It is clear, however, that not all those concerned with the land have been aware of this. The LRB appear to have been alive to the true position because they offered the land for sale as a potential residential development site, but the seller of the land in 2001 was presumably unaware of it, thus enabling the claimant to acquire the land at a bargain price. In its report “Towards a Compulsory Purchase Code: (1) Compensation” (Law Com no 286, December 2003) the Law Commission said this about Third Schedule rights, which it had discussed in an earlier consultation document:

“8.34 We commented that the survival of these rights in the 1961 Act seems an unnecessary complication. Our provisional proposal was simply to repeal section 15(3) and (4), without replacement. Only one respondent opposed this proposal, largely on the grounds that such rights were an established part of the ‘existing use’ value of land. However, we remain of the view that their historical value has been largely superseded, and that they are an unnecessary complication in a modern code.”

The facts of the present case and its outcome may be thought to add weight to that view.

25. We determine the compensation, therefore, at £1,600,000. That determination is made on the assumption that planning permission would be granted for the rebuilding of the 9 houses and the commercial building that stood upon the land on 7 January 1937 but were demolished after that date. If that assumption were not to be made but it was to be assumed that planning permission would be granted for the rebuilding of the four prefabs, the compensation would be £1,200,000. If neither assumption were to be made the compensation would be £15,000.

26. The parties are now invited to make submissions on costs, and a letter about this accompanies this decision, which will become final when the question of costs has been determined.

Dated 17 September 2007

George Bartlett QC, President

P R Francis FRICS