

DISTURBANCE & BUSINESS LOSS – COMPENSATION IN THE CREDIT CRUNCH

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Introduction

1. In the context of compensation for compulsory purchase ‘Disturbance’ is a broad topic which covers a variety of different potential losses. The aim of this paper is not to undertake a comprehensive trawl of the subject, but rather to focus on the principle aspects of ‘business loss’ and consider them in the particular context of the present economic climate – a look at ‘Compensation in the Credit-Crunch’.
2. Accordingly, after some initial observations regarding the nature of claims for business loss in a time of recession, the paper considers the distinction between ‘relocation’ and ‘extinguishment’ of business, before turning to the matter of evidence in a claim involving business loss.

Preliminary – the nature of ‘business loss’

3. The essential premise of a business loss claim is straightforward; accordingly, this paper does not include a detailed discussion of it. Put briefly, section 5 of the Land Compensation Act 1961, rules (2) and (6), combine to enable a landowner or tenant who operates a business from premises which are the subject of compulsory purchase, to recover such losses as are reasonably incurred by the business, and which are attributable to the compulsory acquisition. Rules (2) and (6) provide, respectively, that:

The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise;

and

The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

4. Having regard to these statutory provisions, one point familiar to compulsory purchase practitioners which it does no harm to underscore, is that losses in respect of disturbance are only recoverable by parties whose interest in land has been compulsorily acquired¹. This point is well established - in Horn v Sunderland Corporation [1941] 2 KB 26 Scott LJ, (although referring to an earlier statutory framework), noted that:

“...there is...no express provision giving compensation for disturbance...If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken, (1) for the value of the land, and (2) for injurious affection to his other land, it is plain that the judicial eye

¹ This paper is not concerned with losses occasioned by off-site works, as considered in section 10 of the 1965 Act.

which has discerned that right in the Act must inevitably have found it in (1), that is, in the fair purchase price of the land taken”².

5. In this way, it is clear that compensation for disturbance is precisely that – compensation payable in respect of losses which have arisen because a party has been ‘disturbed’ from their occupation of land or premises.
6. However, it is as well to note at this juncture the importance of adhering to the correct terminology when considering the issue of business loss. Rule 6 is concerned with disturbance and “*other matter[s] not directly based on the value of the land*”. Accordingly, it is not right to equate ‘business loss’ with ‘business disturbance’, since losses which one would categorise as ‘business losses’ may be recoverable notwithstanding they do not form part of a disturbance claim³.
7. The relationship between rules (2) and (6) in the context of business loss has been the subject of judicial comment on various occasions, notably in the leading case of Director of Building and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111, where Lord Nicholls stated⁴:

“Land may, of course, have a special value to the claimant over and above the price it would fetch if sold in the open market. Fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority. As already noted, this is well established. If he is using the land to carry on a business, the value of the land to him will include the value of his being able to conduct his business there without disturbance. Compensation should cover this disturbance loss as well as the market value of the land itself. The authority which takes the land on resumption of compulsory acquisition prevents the claimant from continuing his business on the land. So the claimant loses the land and, with it, the special value it had for him as the site of his business...In practice it is customary and convenient to assess the value of the land and the disturbance loss separately, but strictly in law these are no more than two inseparable elements of a single whole in that together they make up the value of the land to the owner”.

8. Accordingly it is clear that business loss is, for the purposes of compensation, merely one aspect of the loss which the claimant suffers when he is dispossessed of his interest in land. The loss which is the subject of compensation is merely part of the value of the land to its owner⁵.

Business Loss in recession – some general comments

9. A claim for business loss is in many senses no different to other claims for loss arising out of compulsory purchase; as such it is subject to the same general principles as are applicable to other types of claim. Chief among these is the ‘principle of equivalence’,

² At page 43 of Horn. However, in this context one should be aware of decisions such as that in DHN Food Distributors Ltd v Tower Hamlets LBC (1976) 32 P&CR 240, which concerned a disturbance claim by a company occupying premises owned by its subsidiary, where the occupying company was deemed to have an irrevocable licence.

³ In this context, see for example, MacDougall v Wrexham Maelor BC [1993] RVR 141.

⁴ At page 125 of Shun Fung.

⁵ Further comment is provided in Hughes v Doncaster Metropolitan Borough Council [1991] 1 AC 382, per Lord Bridge at page 392.

as expounded in Horn v Sunderland and in many cases since, that a dispossessed owner “*shall be paid neither more nor less than his loss*”⁶.

10. A claim for business compensation should also be capable of satisfying the three criteria identified by Lord Nicholls in Shun Fung as being “*useful guidelines*” for assessing “*fair and adequate compensation*”⁷.
11. These criteria require, firstly, any losses claimed must have been caused by the compulsory purchase. Secondly, such losses must not be too remote; and thirdly, in order to recover a claimant must have acted reasonably and sought to mitigate his loss. Notwithstanding their familiarity, it is nevertheless worthwhile revisiting these criteria in light of current circumstances, since the present recession has the potential to cast them in a different light.

Causation

12. As regards ‘causation’, the term itself needs no explanation. Unless a claimant can establish a sufficient nexus between the compulsory purchase order and the loss suffered, that loss will not be recoverable⁸. A recent case in which this issue proved significant is the 2006 decision in Essex County Showground Group Ltd v Essex County Council 2006 RVR 336, where the claimant sought substantial compensation for prospective profits which it alleged were lost as a result of the acquisition of its land for the construction of a bypass. The claimant had alleged that his plans to develop a racecourse, complete with entertainment and gambling facilities, was frustrated by the compulsory purchase. In rejecting this aspect of the claim in its entirety, the Tribunal found that there was:

*“no causal connection between the taking of the claimant’s land and the loss of any profits that might be derived from [the proposed racecourse] development”*⁹.

13. As one looks to the future, it is easy to see how the issue of causation may become more important in compensation litigation. In recent years, proving ‘causation’ has often proved relatively straightforward for a reasonable claimant with an established business, which has well-documented financial records. The economy has been buoyant, as the UK has enjoyed a period of strong economic expansion. As a consequence, where businesses have been able to point to years’ of consistent growth in profits prior to a compulsory purchase order, acquiring authorities have often found it difficult to attribute subsequent losses on the part of those businesses, to causes other than the compulsory purchase order.
14. However it may be that in the present economic climate, the position becomes very different. Now a dip in profits or turnover may no longer be solely attributable to a ‘scheme’. Indeed, it may be argued by acquiring authorities that losses have very little to do with the compulsory purchase order, and everything to do with falling markets and collapsing prices.
15. As yet, I am not aware of any decisions handed down by the Tribunal involving businesses impacted by the full force of the economic downturn. However, it is

⁶ At page 49 of Horn.

⁷ At page 126 of Shun Fung.

⁸ See, inter alia Harvey v Crawley Development Corporation [1957] 1 QB 485 at page 494.

⁹ See paragraph 228 of Essex County Showground.

anticipated that there will be increasing scope for dispute regarding causation in compensation claims in the coming years; accordingly the issue is one that parties will need to have increasing regard to in preparing their evidence, of which more later.

Remoteness

16. In Harvey v Crawley Development Corporation [1957] 1 QB 485 the Court of Appeal stated that there must come a point after which an acquiring authority cannot reasonably be held accountable for losses allegedly flowing from compulsory purchase. The thrust of Lord Denning's judgement on this point was that an authority should not be held liable for what were effectively commercial decisions, often taken by a claimant some way along the chain of events following the making of a compulsory purchase order. The decision remains one of the leading authorities on this issue, and was relied upon by Lord Nicholls in Shun Fung, when he noted that:

*“fairness does not require that the acquiring authority shall be responsible ad infinitum”*¹⁰.

17. A recent case in which 'remoteness' was a live issue is Azzopardi & Express Homes Ltd v London Development Agency ACQ/484/2007, which came before the Lands Tribunal in March 2009 and in which a decision is due shortly. On the facts of that case, the claimant sought compensation for temporary loss of profits in respect of his property management business, which he alleged had been partially extinguished as a result of the compulsory purchase of properties in the area, including the property occupied by the business. Some time after the alleged extinguishment, the claimant was lent a significant sum of money. However, the claimant did not use the funds to purchase another property management business, but chose instead to invest them in fitting out and establishing a care home. The claimant then sought to recover 'temporary loss of profits' for the period subsequent to the date of acquisition of the business premises, until a notional date on which it was anticipated that the care home would begin to generate a profit. Relying on the judgement of Denning LJ in Crawley, the acquiring authority resisted the claim, maintaining that the loss of profits period should only continue until the point at which the claimant had access to the new funds, on the basis that he could have used those monies to purchase another, similar business which would have generated an immediate return. It was, the authority argued, the claimant's choice to invest in a business which would only generate a 'delayed' profit, and the consequences of his decision to invest in the care home as opposed to another venture were too remote from the compulsory acquisition for the acquiring authority to be held financially accountable. The decision may prove to be of some interest.
18. However, returning to the recession as the focus of this paper, the depressed economic situation would not appear to have much bearing on this requirement that, if they are to be recoverable, losses not be excessively 'remote'. It may be that claimants will be increasingly ambitious as the economic climate worsens, with the result that authorities will need to be alive to 'tenuous' claims which overreach those losses fairly attributable to compulsory purchase. However neither the legal principles applicable, nor evidential requirements are likely to be much affected.

Reasonable Behaviour

¹⁰ See page 126 of Shun Fung.

19. It is well established that a claimant in compulsory purchase proceedings must at all times act ‘reasonably’, and in particular must take such steps as are reasonable to reduce or eliminate his loss¹¹ - albeit that if an acquiring authority wishes to contend that a claimant has not taken such reasonable mitigation measures, the burden of proof is on the authority to prove as much¹².
20. This requirement as to reasonable conduct is another which may prove to be increasingly contentious in the current economic climate.
21. In times when markets are steady and predictable, the question of what constitutes reasonable conduct in a particular set of circumstances may be relatively straightforward. For example, there may be little dispute as to when it is appropriate for a claimant to cease investing in a business, or whether he/she acted reasonably in relocating that business in advance of a compulsory acquisition¹³.
22. However, where businesses are struggling to stay afloat, it may well be that this question of what would constitute reasonable conduct becomes more difficult. The question of whether the owner/management of a particular business ought to have put more fight and perhaps a greater financial commitment into keeping that business alive – as opposed to surrendering, and embracing its extinguishment – is perhaps complicated by the gloomy financial outlook.
23. In particular therefore, it would seem there is potential for much debate as to the extent to which a reasonable businessman would genuinely seek to relocate a business, at a time when other companies in the surrounding area are being compelled to close by the recession. Accordingly, This issue of ‘mitigation’ and ‘reasonable behaviour’ is central to consideration of the debate regarding ‘relocation’ as opposed to ‘extinguishment’, as addressed in the following section of this paper.
24. A relatively recent decision of the Court of Appeal which may be of some interest in this context is that of Faraday v Camarthenshire County Council [2004] RVR 236. The matter concerned losses sustained by Mr Faraday in the course of his estate agency business, which it was agreed by the parties had suffered adversely by reason of the compulsory acquisition of its premises. However, in determining compensation, the Tribunal elected to reduce the loss of profits award so as to reflect the fact that, as the Claimant’s business deteriorated by reason of the compulsory purchase order, the time which the Claimant would otherwise have spent working at his estate agency business had been “freed up” – so that he could have put that time to some other profitable activity. It was, the Tribunal suggested, reasonable to expect the Claimant to have mitigated his loss by pursuing other business ventures.
25. The Court of Appeal disagreed. Noting that this issue had not been raised in the course of the Hearing, - that no submissions/evidence whatsoever had been offered to the Tribunal in respect of it - the court overturned the Member’s decision to ‘reduce’ the compensation award.

¹¹ See Shun Fung at page 126.

¹² See Lindon Print Ltd v West Midlands County Council [1987] 2 EGLR 200

¹³ A recent decision where a claimant was found by the Tribunal not to have undertaken sufficient efforts to find alternative premises, and so failed to have adequately mitigated his losses, is Welford v EDF Energy Networks (LPN) Plc [2006] RVR 245.

26. However, in so doing the court accepted that in principle there was no reason why it would not be reasonable to expect a claimant whose business was adversely affected by a compulsory purchase order, to mitigate his loss by pursuing other ventures in the time ‘freed up’ by the demise of its existing business. Peter Gibson LJ’s support for the proposition was somewhat tentative – commenting that an instance where the principle was applicable was “*likely to be an exceptional case*”¹⁴. However Sedley LJ observed:

*“So long as it is not supposed that freed-up time is a new way of reducing the compensation payable on compulsory purchase, and so long as proper regard is had to the ordinary principles of mitigation of loss, or notice, of evidence and of proof, the kind of issue the member had in mind here may legitimately arise where the facts warrant it. I would not for my part wish to say that such a case will necessarily be exceptional...”*¹⁵.

27. The decision may be of some assistance to acquiring authorities, since it offers another potential means of maintaining that a claimant has failed to act reasonably in mitigating his/her loss. However, the court’s emphasis on the need to establish a comprehensive evidence base in order to substantiate this line of argument should be noted.

Relocation and Extinguishment

28. In any case where a business is forced to vacate premises by reason of their being compulsorily acquired, questions will arise as to whether compensation is payable in respect of that disturbance, and presuming that it is, the basis on which that compensation should be assessed. Integral to any such assessment of compensation, is the determination of whether the business has been extinguished, or instead merely compelled to relocate. The distinction is an important one, since the compensation payable may vary substantially depending on the answer.

29. Often, particularly where the business is well established, extinguishment will result in significantly greater losses than relocation. However, this is by no means always the case. Indeed, Shun Fung itself involved a compensation claim by a company wishing to relocate, in circumstances where the costs of such relocation far outweighed the value of the business. It is worth noting that in Shun Fung the case on behalf of the Crown was put on the basis that compensation for relocation of a business could never be recovered in circumstances where relocation costs exceeded the value of the business. However, the Privy Council determined that¹⁶:

“The conclusion to be drawn, in a case where the cost of moving the business to another site would exceed the present value of the business, is that this is not of itself an absolute bar to the assessment of compensation on the relocation basis. It all depends on how a reasonable businessman would behave in the circumstances”.

¹⁴ See Faraday at paragraph 24.

¹⁵ See Faraday at paragraph 32.

¹⁶ See page 128 of Shun Fung.

30. As to whether a business has been extinguished or relocated, there are no absolute rules to fall back on. Resolution of the issue will always be a matter of fact and degree, and each every case will turn on its particular circumstances¹⁷.

Relocation

31. In Shun Fung, Lord Nicholls stated:

*“Most businesses are capable of being relocated, but exceptionally this may not be practicable”*¹⁸.

32. Very often, a starting point for assessment of business loss will involving determining whether or not it was practicable for relocation of the business in question to take place. The answer to this question will depend on the facts of each individual case – indeed, on any number of variables. These will include, for example, the nature of the business. Was it a retail enterprise which depended on the goodwill it had built up in the local community? Or was it a manufacturing venture which could serve its customers from Birmingham just as well as from Brighton?
33. Of course, an entitlement to compensation based on relocation is not itself something which any claimant should assume. There are various evidential hurdles which must be cleared before the Tribunal will accept that compensation is recoverable on this basis. In particular, the claimant must demonstrate that there is a business in existence at the subject premises the valuation date¹⁹, and moreover that the business would have had a legal right to remain at those premises but for their compulsory acquisition.
34. However, proceeding on the assumption that the right to compensation on the basis of relocation is established, one can turn to the items of claim in respect of which compensation is recoverable, at first blush it may be thought that these are relatively narrow. Significantly, there is a rebuttable presumption that the cost of acquiring replacement premises is not recoverable, on the basis that the claimant is deemed to have obtained value for money in terms of the bargain which it strikes over the new premises. As Bridge LJ stated in Service Welding Ltd v Tyne and Wear County Council (1979) 250 EG 1291²⁰:
- “What the authorities ...very clearly establish, however, is that when an occupier, whether residential or business, does, in consequence of disturbance, re-house himself in alternative accommodation, prima facie he is not entitled to recover, by way of compensation for disturbance or otherwise, any part of the purchase price that the pays for the alternative accommodation...The reason [being] that ...the claimant has received value for money”*²¹.
35. Further, the costs of such works which a party undertakes to replacement premises in connection with fitting them out for occupation may also be unrecoverable, since such

¹⁷ The dilemma facing a Tribunal where there is a dispute regarding this issue was helpfully illustrated by Lord Nicholls in Shun Fung, where he considered the hypothetical example of the restaurant which is compelled to close, only to re-open some time later under the same management, employing the same staff at p.128..

¹⁸ See page 128 of Shun Fung.

¹⁹ In this context, it is noteworthy that in Welford (see above), the Tribunal accepted that the claimant was entitled to make a disturbance claim in respect of a waste transfer business that had not had been operating on the valuation date, on the basis that costs had been incurred preparing the site so as to enable commencement of the activity, and that a related business concerned with skip hire was operating from the premises at the relevant time.

²⁰ See Service Welding at page 1292.

²¹ In this context, see also J Bibby & Sons Ltd v Merseyside CC (1977) 34 P&CR 101.

works are generally also assumed to represent value for money. Again in Service Welding, Bridge LJ noted that it was only in circumstances where a claimant:

“must expend money on adapting [premises] in a way which will not enhance their value [would] the cost of adaptation [be] properly recoverable”²².

36. In addition, it is now established that the cost of providing financing for replacement premises is not a loss which is recoverable, although costs incurred in undertaking a search for those premises may be recovered²³.
37. There is a long list of ‘minor’ expenses associated with the dispossession of the business which may be recoverable, depending on the facts of a particular case. Such losses would include the rent payable on the vacant property during any period of dual overheads, the cost of transferring stock and/or equipment to the replacement premises, and the costs of commissioning new stationary and signage for those premises.
38. However, these items of claim will generally be overshadowed by a larger claim for loss of profits. Prior to Shun Fung there was some doubt as to whether pre-acquisition losses were recoverable. However, it is now well established that compensation is potentially payable in respect of periods both before and after the acquisition of a premises takes place.
39. As regards the former, there may be some debate as to when the business began to suffer as a result of the proposed compulsory purchase order, as opposed to any other reason (such as the economy – see above). However, such losses should be relatively easy to quantify.
40. As regards the latter, there may remain a question of when the relocated business can be expected to regain its pre – acquisition level of profitability. If it is anticipated that an element of turnover will never be regained, then the question will arise as to whether there has been a partial extinguishment of the business (however, once again the impact of the wider economic situation will now need to be considered).
41. A claim for losses of this type will need to be supported by robust evidence – a matter discussed in the following section of this paper.

Extinguishment

42. As already stated, while businesses are generally thought to be capable of being relocated, a claimant may demonstrate that such relocation was not feasible on the particular facts of a case. In these circumstances, the claimant will be entitled to compensation which reflects the fact that his business has been extinguished.
43. There may be all manner of reasons why the Tribunal might accept that relocation of his business was not a reasonable option for a claimant. It may be that there were no suitable alternative premises available²⁴, or that the costs inherent in effecting relocation to such premises were disproportionate. Alternatively, in the case of a claimant aged over sixty years old, there is a statutory entitlement to compensation for

²² See Service Welding at page 1292.

²³ Again, see Service Welding at page 1292

²⁴ As suggested by Lord Nicholls at page 128 of Shun Fung.

business disturbance on the basis of extinguishment where the business is of modest size, by virtue of section 46 of the Land Compensation Act 1973²⁵.

44. In any event, where a business has been extinguished, the chief matter at issue then becomes the basis on which the value of that business should be calculated.
45. Firstly, as with relocation, there will need to be an assessment of past loss, that is to say losses incurred prior to the date of acquisition (if that is the date on which it is asserted/agreed the business was extinguished²⁶).
46. However, the parties – failing which, the Tribunal – will also need to ascertain the value of the business at the point of extinguishment.
47. Of course, it is long-established that the value in question will be the value of the business to the owner²⁷. This may or may not exceed its market value, though in practice it is extremely difficult to quantify with any accuracy the additional value which a business may have to its ‘owner’, over and above the price which an open-market purchaser would pay.
48. This value of the business, or ‘Goodwill’, has historically been quantified by the application of a multiplier, representing the yield/years’ purchase, to a multiplicand comprising the average of the last three years’ profits. However, following the decision in Optical Express v Birmingham City Council [2005] 2 EGLR 141 it appears that the Tribunal prefers a more forensic approach to the somewhat arbitrary selection of a YP multiplier²⁸.
49. Nevertheless, the question of whether or not it is proportionate to adopt a forensic, as opposed to a ‘broad-brush’ approach to valuation, will depend on the facts and the value of any particular claim. This question is more a matter of evidence, and is the subject of comment later in this paper.

Hypothetical Relocation

50. The foregoing paragraphs describe the issues relevant to a determination of whether a business has/should have been relocated or extinguished, and the basis on which losses are recoverable in either instance. However, a dispute as to compensation can arise between claimant and acquiring authority where the former has wound up his business and is seeking compensation on the basis of extinguishment, in circumstances where the latter maintains that relocation was possible.
51. This scenario is one which I anticipate may be of particular interest in the current economic climate. After all, It is easy to conceive that businesses may be tempted to view their dispossession as something of a life-raft in a storm, and be only too willing to close down in the expectation of receiving compensation for their value, calculated

²⁵ The statutory provision includes various caveats, including a requirement that the claimant must not have sold the goodwill in the subject business, and be prepared to give an undertaking not to so dispose of it in the future, so as to avoid double recovery.

²⁶ In practice, the date of extinguishment will very often precede the date when the subject premises are acquired, perhaps by some months.

²⁷ See the earlier references to Horn and Hughes in particular.

²⁸ In Optical Express the acquiring authority provided a ‘traditional’ valuation, which the Tribunal chose not to rely on. See the later section in this paper concerning matters of evidence.

having regard to historic accounts which reflect a pattern of trade in a healthier economic climate.

52. In these circumstances, it may be that the Tribunal will reach the conclusion that the 'reasonable businessman' would have sought to relocate his enterprise, and so award compensation on the basis of relocation in circumstances where relocation has not taken place, and where it is no longer possible.
53. In Lamba Trading Company Ltd v City of Salford ACQ/78/1998, it was asserted by the claimant that it had wished to relocate, but had been unable to do so due to the absence of an available alternative site. The Tribunal rejected this submission, concluding that a suitable alternative was available, and that a reasonable businessman would have relocated the business.
54. The Tribunal took a similarly robust view of the claimant's actions in Kwik Save Stores Ltd v Stockton on Tees Borough Council ACQ/132/2002, determining that the claimant had been afforded a reasonable opportunity to relocate its business to premises which the acquiring authority had volunteered, and had unreasonably declined to avail itself of that opportunity.
55. In light of these decisions, and given the mere fact that extinguishment has taken place will not be sufficient to ensure that the Tribunal assesses compensation on the basis of extinguishment, it is important that in economically uncertain times potential claimants seek the counsel of professional advisors early in the process, so that important decisions regarding the future of a business are taken with the benefit of an understanding as to the prospects of recovery of compensation.

Disturbance Claims and Negative Equity

56. As already noted, the principle of equivalence requires that a party whose land is acquired should receive compensation which reflects the value of the land to him – no more, no less. In a case involving a claim for business disturbance, this value will include not only the market value of the claimant's interest in land acquired, but also the losses incurred by the business - whether it is extinguished or merely forced to relocate.
57. However, in the current economic climate, many leasehold interests will in fact have a negative value. Far from being able to generate a profit rent, a leaseholder may find itself tied to rents significantly above the market rate. In such circumstances, the compulsory acquisition of its interest provides the fortunate leaseholder with an opportunity to extricate itself from an unfavourable lease.
58. In these circumstances, the question arises as to whether the financial benefit to the leaseholder which the surrender of the lease represents, can and should be had regard to in the assessment of any claim for compensation in respect of disturbance. For example, if a business will incur costs in relocating to new premises, but will thereafter be more profitable by reason of the fact that its overheads (i.e. rent) will be lower at the new premises than at those which have been compulsorily acquired, must the Tribunal not take account of that fact in determining compensation?

59. There is no authority on this point of which I am aware. Moreover, there are arguments which a claimant might employ to resist an acquiring authority which sought to reduce its liability in this fashion. However, it remains the case that any award of compensation which ignores a commercial benefit to a claimant in one context, while reimbursing that same claimant for losses suffered in another, does not fairly apply the principle of equivalence, - at least not in its purest form. Indeed, depending on the facts of a particular case, a refusal on the part of the Tribunal to accept submissions of this nature made by an acquiring authority, could conceivably result in a compensation award wholly at odds with this principle, which is at the very heart of the law relating to compulsory purchase. As Lord Nicholls stated in Shun Fung:

“...a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail”²⁹.

60. It will be interesting to see whether the issue is the subject of argument before the Tribunal or the courts in the years to come, and if so, the reception it is given.

Evidence

61. In order to recover or resist a claim for business loss successfully, a party to compensation litigation must prepare and present a sufficient body of evidence. In the first instance, the evidential burden lies with the claimant, which must make out its claim with sufficient precision and substance in order for the Tribunal to consider that compensation is payable. One might think this a point not worth making, however Nazar v Pendle Borough Council ACQ/2/2007 is one recent example of an instance in which the evidence relating to disturbance was so scant that that aspect of the claim was rejected in its entirety. Compensation was sought in respect of losses incurred due to the forced sale of stock, and costs incurred in searching for replacement premises. However, the claimant omitted to adduce any substantive evidence whatsoever in respect of these heads of loss, with the result that the claim was wholly rejected.

Expert Evidence

62. Expert evidence can of course take many forms, and be provided in many different disciplines. However, there is an increasing tendency to support claims for business loss with evidence given by forensic accountants. On its determination in 2005, Optical Express (Southern) Ltd v Birmingham City Council [2005] 2 EGLR 141 was hailed as something of a watershed. The case, which concerned a claim for compensation arising out of the acquisition of an optician’s premises in Birmingham city centre, was noteworthy due to the fact that both parties elected to call evidence from forensic accountants in order to ascertain the value of the business which had been extinguished. The respective accountants adopted differing methods of assessment (one favoured an EBITDA multiple, while the other relied upon a Price/Earnings multiple), but neither thought it appropriate to rely on the historic method of assessment, which involved capitalising the value of a business with reference to a notional years’ purchase figure.

²⁹ See Shun Fung at page 125.

63. Tribunal welcomed this new approach, and indeed the Member made some forthright criticism of the basis on which businesses had traditionally been valued, stating:

“The particular difficulty with this approach is the YP figure. There is a lack of market evidence and the figure of YP is usually fixed by reference to settlements and decisions of the Tribunal, which become self-perpetuating within a particular range without any guidance or check from the market”.

It was on this basis that practitioners predicted a new chapter in the assessment of compensation for loss of profits.

64. This ‘evidential evolution’ is perhaps unsurprising – techniques of analysis and computer technologies have advanced so dramatically in recent years that a more ‘modern’ approach to calculation of business loss was inevitable. However, it should be noted that these ‘new’ methods of assessment must still be proved by evidence, with reference to market comparables.
65. Some four years since the decision in Optical Express, only a relatively small number of business disturbance claims have reached the Tribunal. However, it is noteworthy that even claims concerned with relatively small sums have sometimes involved the participation of forensic accounts and discussion of earnings based approaches to valuation. Yusuf Saglam v Docklands Light Railway ACQ/182/2006 is one such case, where the acquiring authority’s accountant succeeded in undermining the EBITDA valuation undertaken by the claimant’s surveyor, with the result that the total award in respect of disturbance amounted to a mere £5,400.
66. Clearly, the Tribunal will only be able to adopt the more ‘sophisticated’ accountant’s approach in preference to the ‘traditional’ years’ purchase valuation, in circumstances where at least one party has provided evidence on the former basis. However, it seems that even in small claims, parties should be alive to the need to call expert financial evidence in order to make out their claim.
67. Furthermore, it should not be assumed that presentation of evidence in business disturbance cases has reached its ultimate refinement in the Optical Express decision. Doubtless there is evolving financial methodology which has yet to be tested before the Tribunal, but which parties will resort to in future cases. In this context, it is perhaps worth noting that in Azzopardi and Express Homes, the accountant appearing on behalf of the claimant, when calculating the compensation payable in respect of the claimant’s loss of profits claim, sought to rely on ‘The Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases’, perhaps better known as the Ogden Tables. As already stated, having calculated a ‘loss of profit’ period running from the date of dispossession to a notional future date on which the claimant’s new business venture was expected to return a profit, the claimant’s expert adopted as his multiplier the relevant figure from that section of the Ogden Tables concerned with pecuniary loss for term certain. This multiplier was then applied to a multiplicand representing the annual loss of earnings, in the manner of a personal injury claim.
68. Whether or not the Tribunal was attracted to this approach will only become apparent when the decision is published. However, regardless of whether this bid to re-cast the rules governing assessment of business loss proves to be successful, it points to an

increasing inventiveness on the part of claimants and their representatives seeking to formulate claims for business loss.

Evidence of Fact

69. In preparing a disturbance claim it is tempting to focus on the expert evidence of either surveyor or accountant, at the expense of the evidence of fact. Such temptation should be avoided. Each case will of course turn on its particular circumstances, however only in a very few cases will there be no need to present robust evidence of fact to underpin the expert evidence presented to the Tribunal.
70. The individual(s) providing this factual evidence may well have little experience of litigation, far less any experience of giving evidence in a forum such as the Tribunal. They may be unused to the formalities applicable, and the rules governing the submission of documentary evidence. Accordingly, above all, it may be important to impress upon them at an early stage the need to supply any documents which they consider may help to substantiate their claim.
71. Lay witnesses should also be made fully aware of important role that their evidence has to play in substantiating a claim. Expert witnesses express their opinions on the basis of not only documents such as records and accounts, but also on such evidence – for example, relating to the day to day running of a business – as is provided by the officers and employees of that business. Accordingly, the case as advanced by an expert witness will very often be dependant on the evidential platform established by witnesses of fact.

Bwllfa – Evidence post the Valuation Date

72. In the context of the current economic climate, the rule established, in Bwllfa and Merthyr Dare Stream Collieries (1891) Ltd v Pontypridd Water Works Company [1903] AC 426, is one that may take on added significance in claims coming before the Tribunal.
73. Bwllfa itself was of course not a case involving compulsory acquisition, but rather the sterilisation of coal reserves following service of a statutory notice by a water authority pursuant to section 22 of the Waterworks Clauses Act 1847. By the time at which the question of compensation came to be assessed by the court, evidence as to the price which the coal would ultimately have fetched in the event that it had been mined, was available to the court and to the parties. In those circumstances, it was determined that the court could and should have regard to that evidence, notwithstanding it was evidence not available at the date when the notice was served.
74. The approach taken by the court in Bwllfa has been adopted – subject to various stringent limitations – to assist in assessment of certain forms of compensation arising out of the compulsory purchase of land. The broad thrust of what has come to be known as ‘the Bwllfa Principle’ is that in determining compensation, the Lands Tribunal can have regard to real events after a valuation date³⁰, as opposed to artificially ‘speculating’ about what may have actually happened.

³⁰ There has historically been some uncertainty as to when the valuation date is fixed for the purposes of a claim which involving business disturbance. However, there now appears to be a broad consensus that the relevant date is identical to that on which the acquisition of the interest in land takes place (see, inter alia Optical Express).

75. The principle has of course been the subject of various decisions, which have restricted its application. However, there is no question but that it is relevant to assessments of compensation for business loss, pursuant to Rule 6 of section 6 of the 1961 Act.
76. It is easy to see how in the present economic climate, such post-valuation date evidence may prove to be extremely significant in assessing compensation. In particular, evidence of falling prices may prove invaluable to acquiring authorities seeking to limit their liabilities.
77. Indeed, depending on the nature of the business the subject of the claim, it might be thought that an acquiring authority was currently best served by delaying a hearing before the Tribunal, in the hope that an increasingly depressed market for the product/services offered by that business might result in a significant reduction in the compensation payable.

Close

78. Quite how long and painful the recession will prove is of course uncertain. It may be that things improve as quickly as government ministers promise they will. However, whatever the damage and whatever the rate of recovery, what is clear is that the assessment of compensation for compulsory purchase – and in particular compensation in respect of business losses – may be significantly affected by the current economic climate in the coming years and months.

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