ACQ/209/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – compulsory acquisition of rights over riverbed, soil and airspace – application of statutory provisions – valuation – compensation determined at £50 - Land Compensation Act 1961 section 5 rule (3)

IN THE MATTER of a NOTICE OF REFERENCE

BETWEEN **PORT OF LONDON AUTHORITY** **Claimant**

and

TRANSPORT for LONDON **Acquiring Authority**

Re: Riverbed, soil and airspace at River Lea, Bow Creek, London E14

Before: P R Francis FRICS

Sitting at: Procession House, 110 New Bridge Street, London EC4V 6JL
On
30 and 31 October 2007

Christopher Lewsley, instructed by Port of London Authority Legal Department, for the claimant
Graeme Keen, instructed by Eversheds LLP, solicitors of London EC4, for the acquiring authority

The following cases are referred to in this decision:
Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565
Waters and Another v Welsh Development Agency [2004] 1 RVR 153

The following cases were also referred to in argument:
Mercury Communications Ltd v London and India Dock Investments Ltd) (1995) 69 P&CR 135
Railtrack PLC (In Railway Administration)v Guinness Ltd [2003] RVR 280
Trocette Property Co Ltd v Greater London Council and Southwark London Borough Council [1974] RVR 306

DECISION

1. This is a decision to determine the compensation payable by Transport for London ("TfL") to the Port of London Authority ("PLA") for the compulsory acquisition of rights over riverbed, soil and airspace at the River Lea at Bow Creek, London E14 (the subject land) under the A13 Trunk Road (Ironbridge to Canning Town Improvement) Compulsory Purchase Order (No PS 13) 1998 (the CPO).

2. Christopher Lewsley of counsel appeared for the claimant and called Edward Martin Sheard MA FRICS MRTPI MEWI of Matthews and Son, Chartered Surveyors of London WC1. He had produced a report and two supplementary statements dealing with valuation evidence and the statutory assumptions to be applied. Graeme Keen of counsel called Nicholas John Eden MRICS MCI Arb of Kinney Green, Chartered Surveyors of London EC2 who gave valuation evidence for the acquiring authority.

Background

3. The claimant is a self-financing statutory body whose primary purpose, under the Port of London Act 1968 (the PLA Act), is to provide, maintain, operate and improve port and harbour services in, or in the vicinity of, the River Thames including its tributaries and feeders. On its creation in 2000, TfL, the respondent, became the highways authority for a number of strategic roads in London, including the A13. Part of a scheme for the widening of that road involved the construction of two additional carriageways on new bridges on either side of the pre-existing bridges, known as the Canning Town Flyover, across the River Lea at Bow Creek.

4. The reference land comprises part of the River Lea, a non-navigable tributary of the River Thames that it joins about half a mile downstream. It is just over 4 miles east of Central London and about 1.75 miles south of Stratford centre. Canning Town underground, surface rail and Docklands Light Railway stations are nearby, and London City Airport is about 1.5 miles to the south-east.

5. The CPO was confirmed on 17 July 1998 and, following notices to treat and notices of entry, possession was taken on 8 January 2001, that being the valuation date for the purposes of this reference. The rights acquired (in perpetuity, but with freehold ownership of the riverbed and soil remaining with the claimant) were:

> Plot 31: The right to maintain a [pre-existing] bridge carrying the A13 (East India Dock Road) over 1,522 sq m of parts of the bed and banks of the River Lea (or Lee), Bow Creek, E14 and E16
>
> Plot 31A: The right to enter over 2,469 sq m of parts of the bed and banks of the River Lea (or Lee) Bow Creek including wreck on the north of the A13 (East India Dock Road) E14 and E16 for all purposes connected with the construction and maintenance of a bridge structure over an adjoining section of the River Lea (or Lea) [soil and airspace]

Plot 31B: The right to construct and maintain a bridge over 1,187 sq m on parts of the bed and banks...to the north of the A13... [airspace]

Plot 31C: The right to construct and maintain a bridge over 1.299 sq m on parts of the bed and banks...to the south of the A13.... [airspace]

Plot 31D: The right to enter over 2,023 sq m of parts of the bed and banks....including part of the bridge structure of the disused gas mains service bridge across the River Lea...on the south of the A13...for all purposes connected with the construction and maintenance of a bridge structure over an adjoining section of the /river Lea (or Lee) [soil and airspace]

None of the supporting piers for the now constructed bridges (including the pre-existing one) encroach upon the reference land, the bridges simply oversailing the creek. However, fendering has been installed to the reinforced riverbanks to protect both the original and new bridge structures. Plot 31 is the area of airspace occupied by, and below, the pre-existing bridge, and with no additional land or airspace acquired under this CPO within that plot, it was agreed that, with the only right being acquired being that to maintain the existing structure, compensation relating to that plot would be nominal.

The claim

6. PLA claimed compensation of £117,000, being the open market value of the rights acquired in plots 31A-D, calculated in accordance with section 5, rule (2) of the Land Compensation Act (referred to hereafter as "section 5"). The sum was assessed on the basis of 7 allegedly comparable transactions said to have been negotiated under either section 5 or in connection with River Works Licences applied for and granted under section 66 (and compensated under section 67) of the PLA Act, or both, it being the claimant's case that the valuation assumptions required under each of the statutory provisions effectively produced the same result. TfL, who agreed that the correct statutory provision for the assessment of compensation was section 5, said that on that basis compensation should be a nominal £50 as, in their view, the application of section 67 of the PLA Act, and consideration of settlements negotiated under it, was inappropriate in compulsory acquisition cases, as the valuation assumptions under the two statutory provisions were different. Furthermore, TfL said, any comparables based upon such settlements would be self-serving. The parties having failed to agree compensation by negotiation, PLA made a notice of reference to this Tribunal on 21 December 2006.

Issues

7. The following issues arise:

i. Whether or not there is a material distinction between valuations based upon the provisions of section 67 and those based upon section 5.

ii. The value of the subject rights.

In respect of (ii) the Tribunal is required, under Rule 50(4) of the Lands Tribunal Rules 1996 (as amended) to provide an alternative valuation should the decision in respect of (i), which is a point of law, be wrong.

The statutory provisions

8. Section 5 of the Land Compensation Act 1961 provides:

> "5. Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:
>
> (1) No allowance shall be made on account of the acquisition being compulsory;
>
> (2) The value of the 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;
>
> (3) The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers."

The relevant parts of sections 66 and 67 of the Port of London Act 1968 provide:

> "66(1)(a) The Port Authority may for a consideration to be agreed or assessed in accordance with section 67...grant to a person a licence to carry out, construct, place, alter, renew, maintain or retain works, notwithstanding that the works interfere with the public right of navigation or any other public right.
>
> (b) A works licence granted under paragraph (a)...shall be deemed to confer on the holder of the licence such rights in, under or over land as are necessary to enable the holder of the licence to enjoy the benefit of the licence.
>
> 67(1) The consideration for a works licence shall be such as may be agreed between the Port Authority and the applicant or as shall, failing agreement, be assessed in accordance with subsection (2) of this section by an arbitrator appointed on the application of either party, after notice to the other, by the President of the Royal Institution of Chartered Surveyors.
>
> 67(2) The consideration shall be the best consideration in money or moneys worth which, in the opinion of the arbitrator, can reasonably be obtained, having regard to all the circumstances of the case including the value of any rights in, under or over the land of the Port Authority deemed to be conferred by the licence, but excluding any element of monopoly value attributable to the extent of the Port Authority's ownership of comparable land.
>
> 67(3) The assessment of the consideration for a works licence shall not be referred to an arbitrator under this section until the other terms of the licence or, in the case of variation the other terms proposed to be varied, have been determined."

Claimant's case

9. Mr Sheard has over 30 years valuation experience, and his firm has advised the claimant on property matters, including the valuation of rights to cross the river Thames and its tributaries, and applications for river Works Licences, for a number of years. He said that whilst he and Mr Eden had agreed that compensation was to be determined on the basis of the open market value of the subject land at the valuation date in accordance with section 5, and that there were no truly open-market transactions, the fundamental difference between them related to whether the correct interpretation of the 1961 Act allowed assistance to be gained from the comparable settlements. Mr Sheard's view, in relying upon those comparables (some of which had been assessed under section 5, and some under section 67 of the PLA Act), was that, for all practical purposes there was, notwithstanding the difference in the statutory formulation of the valuation assumptions, no material difference in valuation terms between the two statutory provisions. Both, he said, had the same effect in reality and led to the establishment of open market value, with both requiring the consideration of a hypothetical transaction between willing parties in an open market.

10. Section 5, he said, required that the open market value be assessed disregarding the fact that the acquisition involved the exercise of compulsory purchase powers, any special suitability or adaptability of the land which could not be purchased other than in pursuance of statutory powers, and any additional value that may arise from that special suitability. Further, the valuation must disregard any increase (or decrease) in value which is entirely attributable to the acquiring authority's scheme underlying the acquisition (the *Pointe Gourde* principle) (*Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565). Mr Sheard said that the requirement in section 67 of the PLA Act to disregard any element of monopoly value had much the same effect as the *Pointe Gourde* principle, and therefore the comparables upon which he relied in determining the open market value under section 5 were good evidence. However, he did acknowledge in cross-examination that the monopoly disregard related to supply, whereas the special suitability/*Pointe Gourde* principle related to demand.

11. He produced a schedule of transactions that had occurred over an eleven-year period – from 6 years before the valuation date to 5 years after. However, his principal comparable, which related to the acquisition of similar rights to enable the construction of a bridge for the Channel Tunnel Rail Link, and relocation of a gas main over Rainham Creek (referred to hereafter as the Rainham Creek comparable), had a valuation date only one month before the subject land, and therefore required no adjustment. That transaction was also negotiated under section 5 (at £100,000 to include an area of land, but with £38,300 relating to the airspace) and equated, in respect of that airspace, to £20 per sq m. Applying that rate to the area taken for the new bridges at the subject land (Plots 31B&C totalling 2,486 sq m) produced £49,720. As to plots 31A&D, where the rights were acquired for the purposes of maintenance, Mr Sheard said that there was no comparable evidence as the situation of acquiring rights to riverbed, soil and airspace adjacent to but not actually occupied by the bridges, had not occurred previously. He said that value must exist to those areas where access for maintenance and improvement was allowed, and there would also be the potential for accommodating additional bridges, or

widening the existing ones in the future. Exercising what he described as "valuer's judgement", he applied a figure of £15 per sq m, being a 25% discount, to the agreed area of 4,492 sq m to give £67,380. These two figures produced compensation of £117,100, which he rounded to £117,000. The base figure upon which he had calculated the compensation due, £20 psm, from the Rainham comparable was, he said, supported by the other 6 relevant transactions that he had set out in his schedule.

12. The other comparable where compensation had definitely been agreed under section 5, in May 1998, related to the acquisition of similar rights over the River Roding at Barking Creek. The figures equated to £40 per sq m for foundations (or the footprint where bridge supports were to be constructed within the river), and £20 per sq m for airspace. Mr Sheard said that his analysis of all the comparables indicated a "unit rate" for airspace of about half that applicable for foundations, that relationship having been specifically agreed between the parties in that case, and in another, negotiated under section 67, at Leamouth Bridge in December 2005. There was some question as to how the consideration for the licence to provide footbridges on each side of the Hungerford Bridge over the Thames (at £95,480) was negotiated, it being possible that that transaction was, like all the remaining ones on his schedule, based upon a River Works Licence under section 67. Nevertheless, that was agreed on the basis of £35 per sq m for footprint, and £17.50 per sq m for airspace and supported, he said, his argument that to all intents and purposes, whichever of the two statutory provisions the agreements were negotiated under, made no difference in terms of value. He had received confirmation of the details of the settlement on Hungerford Bridge from Richard Cobb FRICS of G L Hearn (who had been unable to locate his files, but provided the information from memory), and it was Mr Sheard's view that when this and other settlements were actually being negotiated, the respective parties' professional advisers would not, realistically, have been thinking about what statutory provision applied, but would just "get on and complete the deal", on the basis of past settlements.

13. Although the comparables covered a wide time span, Mr Sheard said that no indexation needed to be applied to those upon which he was principally relying, as the transactions were all close to the relevant valuation date. He said that he had not had specific regard to what works had been done, other than the fact that 6 of the 7 comparables related the requirement to build bridges, and had not therefore made any distinctions relating to size or nature of construction.

14. In cross-examination, Mr Sheard acknowledged Mr Eden's suggestion that his comparables were self-serving, in as much that each of the settlements he had referred to would have taken account of the others. However, the two comparables upon which he principally relied were negotiated on the same basis as the claimed compensation for the subject rights, and the figures agreed for those, and all those negotiated under section 67, proved that there must be a value over and above the "nominal" sum that Mr Eden considered appropriate. Whilst it was accepted that there were no open market transactions as such, Mr Sheard said it was appropriate for his valuation to be informed by settlement evidence as this was all that was available. He pointed out that PLA granted 1,289 River Works Licences in 2006, producing revenue of £4.5 million (some 11% of its income), and that proved the existence of value in such cases. It was also submitted that it would not have been Parliament's intention, when drafting section 67, for licences to be granted at nominal value.

15. Mr Sheard did not accept Mr Eden's suggestion that location would affect value. The fact, for instance, that the Rainham Creek comparable was 8 miles away would be much less critical than if one were comparing, say, office buildings that far apart. Both the subject rights and Rainham Creek were East London river crossings, and the value of them related the ability to link roads or railways on each side of the river where the value of the riparian land on the riverbank did not come into the equation. Site specific considerations, he said, only come in to play when what is occurring on the bank may affect the positioning of the proposed crossing. He accepted that the location was better at the Hungerford and Millenium Bridges, but it did not appear to have affected the level of compensation agreed in comparison with other, less central, comparables. It was also noteworthy, it was submitted, that Mr Eden had not ventured any opinion of his own as to what affect locational differences should have on value.

16. Mr Sheard did acknowledge that section 67 does not refer specifically to open market value, but in his view the reference to "the best value that can be obtained" had the same meaning. However, he accepted that licence fees payable under section 67 could reflect the use to which the land was to be put, whereas in compensation cases that had to be ignored. He said that he had assumed a willing buyer in accordance with the requirements of the Land Compensation Act, and that whilst accepting there was no evidence of any demand in this specific location, absent the scheme, he pointed out that the number of licences granted and physical facts proved there was a demand, generally, for bridge crossings. He also assumed a willing seller (see *Mercury Communications Ltd v London and India Dock Investments Ltd)* (1995) 69 P&CR 135).

17. As to why he had applied a 25% discount for the airspace reserved for maintenance purposes each side of the new bridges, Mr Sheard said that whilst no such discount had been applied to similarly reserved airspace at Rainham Creek, and he was unaware of any other cases where it had, he just considered it to be "the right and fair thing to do". As such, he stressed, it served to reduce the value of the claimant's claim. In response to a question from me, Mr Sheard said he had found no evidence of any negotiated settlements for bridge crossings at nil or nominal value, and neither had Mr Eden. He accepted that there appeared to be a standard tariff for tunnels (indexed from 1994 on the basis of £1 per foot run), and that that had been described in correspondence between London Transport Property and the claimant as nominal, but felt the circumstances there would be very different from bridges in terms of demand from other parties.

Submissions

18. In his submissions on the statutory framework relating to section 5, Mr Lewsley set out in some detail relevant extracts from the principal authorities, although it was accepted as common ground that a willing seller and willing buyer were to be assumed, that the willing seller would seek the best price reasonably obtainable and the willing buyer would bid up to what he regarded as a reasonable price. It was also common ground, established during the hearing, that both section 5 and section 67 were based on open market value, but it was the assumptions by which that value was reached that differed. Mr Eden, in his evidence, had produced a comparison table that set out the differences between section 5 and section 67 in terms of the valuation assumptions.

19. As to the identity of the willing seller, it was accepted that that under section 5 the seller was hypothetical, and that under section 67 it was the PLA. Mr Lewsley said it was the claimant's case that under section 5 the hypothetical seller should be considered to be a reasonable Port Authority – that principal having been established in *Railtrack PLC (In Railway Administration)v Guinness Ltd* [2003] RVR 280. In that court of appeal decision, Railtrack's contention that the Lands Tribunal had failed to assume a sale by a willing seller, but had instead assumed a sale by a company regulated and subsidised by central government and subject to political pressures, was rejected. Carnwath LJ said, at para 28:

> "In the present case the tribunal had to assume a sale of access rights over a railway between a willing seller and a willing buyer. I agree with counsel for Guinness that it was not required to ignore the fact that, since these were access rights over a railway, the willing seller would by definition be a railway company. In any event the only 'political pressures' which could be relevant would be pressures to sell at a price less than that which would otherwise be obtained. Outside any special statutory or commercial context, any company (statutory or not) would normally be expected to seek the best price for its assets. It is not clear why a railway company should be any different. Not surprisingly, the tribunal found that, whatever the pressures, the hypothetical railway company 'would be concerned to extract a proper value for the rights that it granted'."

It was submitted that, in reality, the way the seller is described in the two sections should not make any difference as to value, and it was noteworthy that Mr Eden did not suggest any.

20. It was also accepted that under s.5 the buyer is abstract, but under section 67 he is known. However, save in exceptional circumstances that are not relevant to this case, PLA does not seek to include in section 67 settlements any amount derived from the particular proposals of the proposed purchaser (beyond the basic fact that he wants to acquire bridge rights). Again, Mr Lewsley said, it should be noted that there was no evidence, or even a suggestion by Mr Eden, that any of the comparables contained any additional value reflecting the particular proposals of the purchaser. On the subject of the buyer, the fact that there is only likely to be one in the market for the subject land at the valuation date does not lead to a nominal value. This is consistent with *Waters and Another v Welsh Development Agency* [2004] 1 RVR 153 where lord Brown, referring to *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* (the *Indian* case) [1939] AC 302, said at para 138:

> "What, of course, it established was that even where land has a particular value only for one potential purchaser, that purchaser will none the less be willing to pay for it."

21. Mr Lewsley said that "the best consideration...which can reasonably be obtained...in money or money's worth" in section 67(2) was the same concept as open market value that would be agreed between a willing seller and a willing buyer in the context of assessing compensation for compulsory purchase.

22. Turning to the fact that there is the requirement in section 67(2) that in calculating the consideration, regard shall be had to "all the circumstances of the case" (subject to the qualification that excludes any element of monopoly value attributable to the extent of the port authority's ownership of comparable land), whereas section 5 has no such requirement, it was submitted that compensation case law establishes that circumstances should be kept as near as

possible to reality. In *Trocette Property Co Ltd v Greater London Council and Southwark London Borough Council* [1974] RVR 306, Lawton LJ said, at p311:

> "The assessment of compensation in cases such as this is a most difficult task calling for the judicial use of fertile imagination. Assumptions have to be made (see ss 14, 15 and 16) and some realities disregarded (eg any increase in value which is entirely due to the scheme underlying the acquisition – the so called *Pointe Gourde* principle). It is important that this statutory world of make believe should be kept as near as possible to reality. No assumption of any kind should be made unless provided for by statute or decided cases."

So, Mr Lewsley said, in compensation for compulsory purchase, as under section 67, the valuation is based upon all the circumstances of the case subject to the stated qualifications.

23. He said that it was instructive to note that TfL, through Mr Eden, had provided no analysis, apportionment or opinion evidence of any value effects between the language of section 5 and section 67, beyond Mr Eden's assertion that the rights had "nominal" value. Mr Eden had said that he had "hunted for value" but had found none. It was submitted that the evidence was there in the comparables.

24. Finally, Mr Lewsley said that PLA accepted that the subject land is situated outside its navigational jurisdiction, that jurisdiction ending just south of the cable bridge located a little way downstream, and that section 67 applied only within the navigable area. However, it was the claimant's case that nothing in this reference turns on that fact, as section 67 settlements are supporting evidence of value both within the navigable limits, and beyond to the extent of the tidal limits over which PLA has ownership. Indeed, he said, the principal comparable at Rainham Creek was also outside the section 67 jurisdiction.

Acquiring authority's case

25. Mr Eden is senior partner of Kinney Green, and has been dealing with commercial property in London for some 30 years. In his view, the value of the rights acquired could only be nominal as there was no use to which they could be put in the absence of the requirement to build and maintain bridges. By virtue of rule 3 of section 5, he said the use and purpose to which those rights are to be put must be ignored for valuation purposes. There was also no evidence of demand for the rights, other than from the acquiring authority in connection with its scheme, Bow Creek being a tidal tributary about 1 mile upstream of the Thames and now appearing tired and down at heel. Its surroundings were industrial in nature and downcast and there were, in his opinion, no development opportunities such as for the provision of moorings or marina facilities. In what he described as his "hunt for value", he said that there was perhaps a chance of amenity use as part of an Ecology Park, but in any event, it was difficult to see what value airspace could possibly have in connection with such a proposal. In that regard, the existence of the original bridge, and the fact that part of the area was oversailed by power cables would be a further detraction. He concluded, therefore, that whilst the site had special suitability or adaptability for the required purposes (which had to be ignored under rule (3)) there was no other use that was likely to engender real value.

26. None of the comparable evidence produced by Mr Sheard could be considered reliable as in the majority of cases there were crucial differences, and the transactions to which he had referred were self-serving in that each settlement relied upon an earlier one. Whilst it was agreed that the valuation of the subject rights was to be on the basis of section 5, Mr Eden said any such assessment was wholly dependent upon the interaction or assumed interaction of supply and demand, whereas section 67 settlements had a fundamentally different basis of assessment. Most of Mr Sheard's comparables had their valuation basis under section 67, all the transactions involved special purchasers, and in none of the cases could it be said that there was a general market.

27. Looking firstly at Rainham Creek, the comparable upon which Mr Sheard had placed most reliance, he said it was "on the top of a tottery pile of evidence". He accepted that superficially it appeared to be useful in that compensation was settled under section 5, the valuation date was close, and the requirement was for similar purposes. However, the site was located some 8 miles away where geographical circumstances would be different, and reference to the correspondence between the valuers who negotiated the settlement showed that it was clearly a "horse deal" and that it was unlikely they had even considered the statutory provisions in coming to an accommodation at a price that fell precisely midway between their respective starting figures. Indeed, he said, in the confirmatory email responding to his request for information on the comparable, Mr Cobb of G L Hearn had said "Comparisons [we were making] were from earlier agreements with TfL, DLR and low grade land acquisitions in the locality under the CTRL scheme". Such a comment was clearly proof of his contention that the agreement was self-serving, and that the parties had not applied their minds to open market value.

28. As to the River Roding crossing at Barking Creek, which he acknowledged as being an acquisition made in connection with the same scheme, and compensation for which was agreed between two properly informed professional valuers, Mr Eden said that he could not state what evidence they had relied upon. He felt sure that the negotiations would have been influenced by section 67 settlements and as a result of this, the locational and time differences and demand implications, he could afford no weight to that comparable, or indeed any, where section 67 might have been a factor.

29. On the question of the Millenium and Hungerford bridges over the Thames in central London, he said that in addition to the fact that they were both likely to have been section 67 settlements (the situation in one of them being unclear), there were other characteristics that made them incomparable. Such matters as their location, where value could well be added to reflect the benefits created to land on either side, and the potential for income from related advertising hoardings could cloud the issue.

30. In summary, he said that in his view, in the absence of open market evidence, a convenient convention had arisen in the valuation of such rights, but that did not mean such a convention was right. The fact that, historically, sums exceeding nominal amounts in section 5 settlements (all of which, he thought, would have been made by reference to previous section 67 settlements) had been agreed, did not prove that the valuation assumptions to be applied were the same under the two statutory provisions. During cross-examination (and thus after examination in chief had been completed), he produced a schedule that outlined the differences

between the two statutory provisions, and upon which Mr Keen expanded in submissions. For instance, under section 67 it was necessary to take into account all the circumstances of the case, which would include the use to which the rights were to be put (the scheme), whereas under section 5 such circumstances were to be ignored (no account to be taken of the fact that the purchase was compulsory). Similarly, in his view, there was a difference, in terms of valuation, between the section 67 requirement that monopoly value was to be excluded, and the requirement under s.5 (Rule (3)) that the special suitability and adaptability of the land was to be ignored. The definition of open market value (section 5) and best price reasonably obtainable (section 67), he said, could only be interpreted to mean the same thing if all the other assumptions in the statutory provisions were the same.

31. Mr Eden accepted that there was, in reality, no evidence to indicate that settlements or transactions under either section 5 or section 67 were any different, and in connection with his own views, he admitted that he had not personally produced any evidence of settlements at nil consideration. He also confirmed that, prior to his involvement with this case, he had no previous experience of the issues that were before the Tribunal in this case.

Submissions

32. Mr Keen said that the approach adopted by the PLA was fundamentally flawed, relying as it did, on settlement comparables that were all either negotiated under section 67, or took section 67 settlements into account. PLA's comparables demonstrated evidence of demand by only one special purchaser in each case over an 11 year period, but none at the location of the reference land at the relevant valuation date. Put simply, in the absence of any demand, the rights must have only a nominal value. In the absence of the scheme, which is to be disregarded by virtue of rule (3) of section 5 and the *Pointe Gourde* principle, no other party would speculate the £117,000 claimed, or any other material amount, to acquire rights to construct and maintain landlocked bridges at such a location. In *Waters*, Lord Nicholls gave pointers as to the application of *Pointe Gourde,* the third of which was (para 63):

> "A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which are not being acquired."

There was no good reason, Mr Keen said, why anybody would pay £117,000 for the right to construct and maintain bridges which could not be built without acquiring land on either side of the river or creek.

33. The biggest difference between assessments made under section 5 and section 67, Mr Keen said, was the fact that under the latter, the taking into account of "all the circumstances" must include the scheme underlying the acquisition, and therefore the use and purpose to which the rights were to be put, rather than the inherent value of the land itself. He did not agree with the PLA that the exclusion of monopoly value attributable to its ownership of comparable land has the same effect as rule (3) and the *Pointe Gourde* principle. Under section 67, the PLA's ownership of the subject land can, and must, be taken into account. Where that land (or airspace) is required to, say, link two roads by a bridge, it is the only land that can be used for that purpose and the PLA are therefore in a position to ransom the land. If, at the valuation

date, the purchaser had a choice of changing its scheme and acquiring an alternative piece of PLA river, then this effect would need to be disregarded under that monopoly provision. On the other hand, it was submitted, if the purchaser had no such opportunity, then the element of monopoly value would not be disregarded because there could be no question of taking comparable land. However, *Pointe Gourde* requires that both such ransom elements (the acquisition land and comparable land) are to be disregarded altogether.

34. As to the claimant's submissions relating to *Guinness v Railtrack*, Mr Keen said that was not a compulsory acquisition, but an agreement by the parties to refer the case to the Tribunal. The agreed terms of reference, inter alia, specifically disapplied rule (3) and provided that the *Pointe Gourde* principal did not apply, so as to exclude consideration of the proposed development of land owned by Guinness. It was the nature of the airspace, being above a railway, rather than the nature of the actual seller that caused the Court of Appeal to state that the seller must be assumed to be a hypothetical railway company. The abstract seller in the present case cannot be clothed with the same characteristics as the PLA because it exists as the actual owner of adjacent areas. It would, as Mr Sheard had conceded, be odd for there to be two port authorities.

Conclusions

35. Although it was acknowledged by both parties that the sums at stake in this reference were not high, and the cost of pursuing the matter to the Lands Tribunal may be disproportionate to them, there was a matter of legal principle involved, which was of wide importance, and for which the assistance of the Tribunal was considered important.

36. It seems to me that, precisely as Mr Eden said, a convenient convention has built up over the years, and it is most unlikely that those negotiating settlements for River Works Licences, or the acquisition of rights under section 5 have ever really had the particular valuation assumptions to be made under the statutory provisions foremost in their minds. In respect of Mr Sheard's comparables, if I conclude that the valuation assumptions under section 5 and section 67 lead to the same result, whether or not the evidence is self-serving is of no consequence. I shall therefore return that question later.

37. In my judgment, there are indeed material distinctions between the assumptions to be made under each of the two statutory provisions, and I find the evidence of Mr Eden and the submissions of Mr Keen entirely persuasive. It was agreed that it is to be assumed that the transactions under both provisions are between a willing buyer and a willing seller, and I do not think that whether that person or company is abstract or known makes a material difference. The key differences, in my view, relate to the disregards – these being what Mr Lewsley stated as "qualifications". Under section 5, rule (3), the special suitability or adaptability of the land is not to be taken into account "if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers." To the extent that rule (3) does not apply so as to do so under the *Pointe Gourde* principle, the valuation must disregard any increase or decrease in value that is entirely attributable to the scheme. In section 67(2) the "best consideration" is clearly stated to have regard to "all the

circumstances of the case", including the value of any rights in, under or over the land to be conferred [in the licence]. That means that value (if indeed there is any) created by the applicant's proposal can and, indeed, must, be taken into account. Therefore, not only can the special suitability or adaptability be taken into account, but any additional value that is attributable to the scheme is also to be taken into consideration. I do not agree with Mr Sheard that the exclusion of any monopoly value attributable to the PLA's ownership of other land had much the same effect as the *Pointe Gourde* principle because, as he acknowledged, the monopoly question relates to the supply of land, and *Pointe Gourde* relates to demand.

38. The land acquired consists of the right to construct and maintain bridges in airspace owned by the claimant. It is clear that the airspace has a special suitability for the construction of the bridges because of its physical relationship to the A13 road. In terms of rule (3) it is appropriate, in my view, to treat this special suitability as belonging to the land acquired, even though formally the land acquired consists of a right over land rather than the airspace itself. It is evident that there is no market for the land for the purpose of constructing the bridges apart from the requirements of TfL, which is an authority possessing compulsory purchase powers. Indeed, as Mr Sheard acknowledged, nobody had been able to produce any evidence of open market transactions, all of the settlement evidence relied upon related to statutory undertakings with compulsory purchase powers (whether they were used or not), and there would be no demand for the right to build a bridge at this location other than from TfL.

39. Rule (3) thus applies in the present case, and it operates so as to exclude any value of the land to TfL by reason of its special suitability for construction of the bridges. *Pointe Gourde*, which only falls to be brought into play if needed to supplement the statutory provisions (see *Waters*), does not apply because rule (3) is effective in this instance to exclude any additional value due to the scheme. If applied, however, it would have had the same effect.

40. I conclude therefore that the valuation assumptions are different, and it is thus not possible to rely upon comparables that were either negotiated under section 67, or in section 5 cases, may have been settled "by convention" on the basis of earlier section 67 settlements. There being in my judgment no market for the subject rights in a "no-scheme world", I determine that the value is nominal, and accept Mr Eden's assessment of that figure at £50.

41. If I am wrong on this legal principle, and it should be held that to all intents and purposes, the valuation assumptions are the same, then the comparables upon which Mr Sheard relied, albeit that they relate to settlements in the absence of any open market transactions, must carry some weight. In my view the Rainham Creek comparable, in such circumstances, must be attributed the most weight due to its similarities. There was nothing to suggest that Rainham Creek was any better or worse in terms of geographic location and I am satisfied that this, together with the evidence relating to the Roding River crossing, support Mr Sheard's contentions as to value. With Mr Eden having produced no comparable evidence of his own, I accept Mr Sheard's evidence, and conclude that his figure of £117,000 should be applied in the alternative. The strength of the Rainham Creek comparable, albeit having been, as I accept, a "horse deal" outweighs the arguments about the increased value that could be expected to apply in locations such as where the Millenium Bridge exists. I would anticipate that, if the case were to be re-argued on the assumption that the statutory provisions were the same in terms of valuation assumptions, more evidence to argue locational differences would

be produced, and indeed I would expect the acquiring authority to produce comparables of its own.

42. I determine that the acquiring authority shall pay compensation to the claimant in the sum of £50. This determines the substantive issues in this reference, which will take effect as a decision when the question of costs is resolved. A letter is enclosed regarding the procedure for making written submissions on costs.

Dated 6 December 2007

Signed P R Francis FRICS