



Hilary Term

[2017] UKSC 12

On appeal from: [2015] EWCA Civ 540

JUDGMENT

Homes and Communities Agency (Respondent) v J S Bloor (Wilmslow) Ltd (Appellant)

before

Lord Neuberger, President

Lord Clarke

Lord Sumption

Lord Carnwath

Lord Hughes

JUDGMENT GIVEN ON

22 February 2017

Heard on 12 January 2017

Appellant

Martin Kingston QC

Richard Kimblin QC

(Instructed by DWF LLP)

Respondent

Michael Humphries QC

Alexander Booth QC

(Instructed by Eversheds LLP)

LORD CARNWATH: (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Hughes agree)

Introduction

1.

This appeal concerns the assessment of compensation for compulsory acquisition of two parcels of grazing land, amounting in all to 26.85 acres (10.86 ha) (“the reference land”), formerly owned by the present appellant (“the claimants”). They were part of a much larger area of some 420 acres (170ha) acquired under the North West Development Agency (Kingsway Business Park, Rochdale) Compulsory Purchase Order 2002 (“the CPO”), for the development of the so-called Kingsway Business Park (“KBP”). Responsibility for payment of compensation now rests with the Homes and Communities Agency, the respondent to this appeal (“the authority”).

2.

An initial claim was made for £2,593,000 compensation, on the basis that the land had significant hope value for residential development, independently of the scheme of acquisition. The authority contended that the claim should be limited to the existing use value, giving a figure (rounded) of £50,000. The Upper Tribunal agreed with the claimants in part, awarding compensation of £746,000. On the authority's appeal, the Court of Appeal declined to accept the argument of either party, and remitted the matter to the tribunal to re-determine compensation on what it considered to be the correct basis. The valuation date was 4 January 2006, being the date when the reference land vested in the acquiring authority under a general vesting declaration.

The facts

3.

The facts are set out in detail in the Upper Tribunal's decision. A summary will suffice. The order lands lie about one mile east of Rochdale town centre, on the north-west side of the M62 motorway, close to Junction 21. The reference land, shown as Plots 13 & 14 on the CPO plan, comprises two adjoining parcels of land towards the north east part of the order lands, close to, but not immediately adjoining, a road to the south-east known as Buckley Hill Lane. The claimants relied on the prospect, in the absence of the scheme, of planning permission for residential development being permitted with access from Buckley Hill Lane through an intervening plot known as "the Nib" (also in their ownership but not subject to the CPO).

4.

The area has a long planning history. Its potential for development of some form had been recognised since the 1960s. In 1999 developers published a "KBP Development Framework", in support of an application for planning permission. The framework included a master plan within which the reference land was shown for development of various kinds (including some residential) within phase 5. Planning consents linked to the master plan were granted on 19 December 1999. As the tribunal found (para 13) they had been commenced and were extant at the valuation date.

5.

At the time the CPO was made (in 2002) the reference land was owned by members of the Nall family. A planning application had been submitted on their behalf for residential development on part of the reference land and the Nib, but it was refused on 18 January 2002 as piecemeal development. The land, together with the Nib, was acquired by the claimants in May 2003 for a total price of £1.3m (para 18). Their objection to the CPO was rejected, principally on the grounds that the land was needed for the comprehensive development of the KBP scheme (para 19).

6.

The Statutory Development Plan at the valuation date comprised the regional guidance (RPG13) approved in March 2003 and the Rochdale Unitary Development Plan ("the 1999 UDP") adopted in March 1999. The KBP was listed in RPG 13 as one of 11 Strategic Regional Sites. The KBP site was allocated under policy EC/6 of the UDP, subject to certain criteria including provision for vehicular access to be obtained "from the A664 Kingsway and from Junction 21 of the M62 Motorway only"; for any individual development to be "compatible with the overall objective of a strategic business park development"; and for "limited residential development ... provided it is part of a comprehensive development scheme for predominantly business uses ..." (para 23). Similar policies were reproduced in policy EC/7 of the draft replacement UDP which was "well under way" by the valuation date, and was agreed to be material to a hypothetical planning application made at that time (paras 24-30). It

was common ground that a limited residential development on the reference land with access from Buckley Hill Lane would not have been recommended for refusal on highway grounds (para 31).

7.

In August 2006 the claimants made an application to Rochdale MBC for a Certificate of Appropriate Alternative Development (see para 15 below) in respect of the reference land, for various classes of development including residential development of 74 dwellings. The officers' report recommended refusal on the grounds (inter alia) of non-compliance with policy EC/6 of the UDP. Following sight of the report, the application was withdrawn before formal determination.

The law

The no-scheme rule

8.

The appeal raises questions concerning the so-called Pointe-Gourde rule (*Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565), or "no-scheme" rule: that is, the rule that compensation for compulsory acquisition is to be assessed disregarding any increase or decrease in value solely attributable to the underlying scheme of the acquiring authority. The law is to be found in the [Land Compensation Act 1961](#) as explained and expanded by judicial interpretation. The particular issue concerns the relationship between the general provisions for the disregard of the scheme, and the more specific provisions relating to planning assumptions.

9.

The rule has given rise to substantial controversy and difficulty in practice. In *Waters v Welsh Development Agency* [2004] 1 WLR 1304; [2004] UKHL 19, para 2 ("Waters"), Lord Nicholls of Birkenhead spoke of the law as "fraught with complexity and obscurity". In a report in 2003 the Law Commission conducted a detailed review of the history of the rule and the relevant jurisprudence, and made recommendations for the replacement of the existing rules by a comprehensive statutory code (Towards a Compulsory Purchase Code (1) Compensation Law Com No 286 (Cm 6071)). Since that report aspects of the rule have been subject to authoritative exposition by the House of Lords in *Waters* itself, and more recently in *Transport for London v Spirerose Ltd* [2009] 1 WLR 1797; [2009] UKHL 44 ("Spirerose").

10.

Although the Law Commission's recommendations for a complete new code were not adopted by government, limited amendments to [the 1961 Act](#) in line with their recommendations were made by the [Localism Act 2011 section 232](#) (relating to planning assumptions) Further proposed amendments, dealing with the no-scheme principle more generally, are currently before Parliament in the Neighbourhood Planning Bill 2016-17. The purpose of the latter is said to be that of "clarify[ing] the principles and assumptions for the 'no-scheme world', taking into account the case law and judicial comment" (Explanatory Notes para 70). The present appeal falls to be decided by reference to [the 1961 Act](#) as it stood before the 2011 amendments.

11.

Section 5 rule 2 established the general principle that the value of land is taken to be "the amount which the land if sold in the open market by a willing seller might be expected to realise". In applying this general principle, it is necessary for present purposes to take account of two other groups of provisions, relating first to "disregards" of actual or prospective development (section 6 and Schedule 1), and secondly to "planning assumptions" ([sections 14-16](#)).

Disregards

12.

Section 6 (headed “disregard of actual or prospective development in certain cases”) has been treated by the courts as a statutory but not exhaustive embodiment of the Pointe Gourde principle (see Waters paras 49-54). So far as relevant to this appeal it provides:

“1 ... no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if -

(a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of the land; ...”

Part I of the First Schedule sets out in tabular form a number of “cases” with the corresponding “development”, the prospect of which is to be left out of account. The first case is:

“Where the acquisition is for purposes involving development of any of the land authorised to be acquired.”

The corresponding development is:

“Development of any of the land authorised to be acquired, other than the relevant land, being development for any of the purposes for which any part of the first-mentioned land (including any part of the relevant land) is to be acquired.” (emphasis added)

Although this paragraph in terms applies the statutory disregard to land “other than” the “relevant land”, that is the land subject to acquisition, the Pointe Gourde rule has been treated by the court as requiring the same approach to be applied also to the subject land itself (see *Camrose v Basingstoke Corpn* [1966] 1 WLR 1100, Waters para 52. Note that “relevant land” is defined by reference to the notice to treat, actual or, in the case of a vesting declaration, “constructive”: [section 39\(2\)](#); [Compulsory Purchase \(Vesting Declarations\) Act 1981, section 7](#)).

Planning assumptions

13.

[Section 14](#) is the first of a group of sections headed “assumptions as to planning permission”. In valuing the “relevant interest” the valuer must make such “one or more of the assumptions” mentioned in sections 15 or 16 as are applicable to all or part of the “relevant land” ([section 14\(1\)](#)). Such assumptions are to be in addition to any planning permission in force at the date of service of the notice to treat ([section 14\(2\)](#)). Although the tribunal noted the existence of extant permissions for the KBP scheme, they do not appear to have been relied on by the parties for valuation purposes. [Section 14\(3\)](#) makes clear that these provisions are not to be construed as requiring it to be assumed that planning permission would necessarily be refused for development not covered by the statutory assumptions.

14.

Section 16(3) applies to land forming part of an area shown in the current development plan as an area allocated primarily for a range of two or more uses specified in the plan. It was common ground that the reference land was within such an area. It is to be assumed that planning permission would

be granted for development for purposes falling within that range of uses, which is development for which planning permission “might reasonably have been expected to be granted” in respect of the reference, if no part of that land “were proposed to be acquired by any authority possessing compulsory purchase powers” (section 16(3)(b), (7)). For the purpose of this exercise it has to be assumed that the scheme of acquisition in respect of the reference land was cancelled on the date of the notice to treat (the “cancellation assumption”: see *(Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment [2000] 2 AC 307)*).

15.

Section 17 (certification of appropriate alternative development) provides a means by which an application can be made to the local planning authority to determine the forms of development if any which would have been permitted if the land had not been proposed for compulsory acquisition. As already noted, such an application was made in the present case, but withdrawn before determination.

The scope of the no-scheme rule

16.

One of the difficulties presented by these two groups of provisions in their unamended form arises from the distinction drawn between the application of the rule, on the one hand to the “relevant land” alone, that is in this case the reference land itself; and on the other to land comprised in the compulsory purchase order as a whole; or, more broadly still, to land comprised in the same scheme of development, which may for example include land already in the ownership of the authority, or land acquired by agreement.

17.

Thus, the rules relating to assumed permissions ([sections 14-16](#)) are based on cancellation of the scheme solely in respect of the reference land. In the Court of Appeal, Patten LJ summarised the effect of the “cancellation assumption” in the present case:

“... It operates to limit the scope of any assumed planning permission to a counter-factual scenario in which the KBP scheme has been cancelled in respect of, but only in respect of, the reference land: ie as if the landowner had succeeded at the public inquiry in persuading the Inspector to omit Plots 13 and 14 from the CPO. There is no requirement to assume that the CPO would not have gone ahead in respect of the remainder of the order land or that the development of the KBP would not have proceeded ...” (para 26)

By contrast, as noted above, section 6 taken with the Pointe-Gourde rule itself requires disregard of the scheme of acquisition in relation to the whole of the order land.

18.

The Upper Tribunal spoke of the consequent need for them to consider “life in at least two parallel universes: the ‘cancellation assumption’ universe and the ‘disregard the scheme’ universe (called ‘no KBP’ for short)” (para 52). As will be seen below, the distinction drawn by the tribunal between these two “universes” is critical to the understanding of their later reasoning.

The proceedings below

The Upper Tribunal

19.

The tribunal (HH Judge Mole QC and Paul Francis FRICS) began by summarising the law in respect first of “planning assumptions” and secondly of “disregards”, in terms which have not been materially challenged. They mentioned the importance of not “eliding” the two stages (para 46). They noted (following the Upper Tribunal decision in *Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC)) that for the purposes of [sections 14-16](#) the cancellation assumption was to be applied, not to the whole scheme, but to only so much of it as affected the reference land (paras 42-43). Under the heading “disregards” they set out the statutory provisions, noting that (in the light of *Waters*) the no-scheme principle was to be treated as extending to the subject land as well as to other land within the same acquisition (paras 47-48).

20.

Under the heading “the nature of the exercise”, having identified the two “universes” which required to be considered, they summarised the respective positions of the parties:

“53. Both parties focused in their evidence and submissions upon the prospects of a purchaser obtaining a residential permission on the reference land in those two different situations. The ‘cancellation universe’ assumed that the compulsory purchase orders on the reference land had been cancelled but that access could be obtained through the KBP. In that situation it was broadly agreed that the reference land might indeed have some potential hope value for residential development.

54. The claimant said it would be substantial. The acquiring authority maintained that any such hope value would be much reduced, probably to nil, because the planning authority would not be prepared to grant a permission that did not conform with the master plan requirements for phasing, which would delay residential development, or make a very substantial financial contribution to the infrastructure of the KBP. Finally, the acquiring authority submitted, any such value that remained should be disregarded as a matter of law.

55. The second situation was postulated in order to consider what value the reference land might have if the law required that the whole of the KBP proposals had to be left out of consideration. That situation was chiefly one where permission was being sought for a development with access from Buckley Hill Lane, although we do not think the claimant completely abandoned the possibility that in the ‘no KBP’ universe a purchaser would still contemplate the development of a business park by another scheme.”

21.

There followed a lengthy review and discussion by the tribunal of the evidence and submissions relating to both planning assumptions and the disregards (paras 56-100). For present purposes it is sufficient to refer to the critical findings, first relating to the application of the “cancellation assumption” under section 16, and secondly to the wider considerations under section 6.

22.

As to the former the assumed position on the ground was described as follows:

“The cancellation assumption requires the Tribunal to imagine all the facts on the ground and all the planning permissions, plans and potentialities as they were at the valuation date but to assume that the compulsory purchase order on the reference land, and only on the reference land, had been cancelled. That, of course, can have a significant effect upon some of the planning assumptions. In the present case it is to be assumed that the KBP had been begun in accordance with the Master Plan. The junction with the motorway, the central spine road and part of the southern loop road were built or in the course of construction, and some development had already begun. Part of the northern loop

road at the western end had also been started. It was too late for the developer to pull out of its commitments to build out the KBP according to the master plan.” (para 80)

23.

Having reviewed a number of suggested alternatives the tribunal concluded:

“89. We think that simply on the cancellation assumption there would have been a reasonable prospect of some residential development on the reference land with access from a northern loop. However, it would seem that such an increase in the value of the relevant interest would have to be disregarded. It would be unequivocally attributable to the development of part of the land authorised to be acquired other than the relevant land, and it would not have been likely to be carried out in the absence of the acquiring authority’s proposals to acquire the land for such a road.”

24.

Turning to section 6 and the Pointe-Gourde rule, the tribunal noted that that this was not a case where the latter rule had “anything much to add” to the statutory code, given that the “other land” included in the compulsory purchase order “encompass(ed) all the land that could be described as ‘the scheme’” (para 91). They accepted that, even if the KBP scheme itself had failed, the planning policies would have continued to support it, and the authorities would have done their best to bring forward another scheme, but a prospective purchaser of the reference land would have regarded it as “a long shot”. It would not in itself have added much if anything to the existing use value of the reference land (para 92).

25.

They continued:

“The only development that would produce an increased value on the reference land which would not have to be disregarded under the statute would be a ‘likely’ development that took no part of the ‘other land’. In other words that would have to be a development which took its access from the existing Buckley Hill Lane.” (para 93)

The statute required to be left out of account “any increase or diminution” (their emphasis) attributable to the acquisition of the other land for the purposes of the order. For this purpose it was necessary “to visualise a ‘no KBP’ universe” (para 94).

26.

In such a universe it was necessary to leave out of account both the benefits of the KBP scheme, such as improved access due to its infrastructure, and also any disadvantages, such as potential traffic objections based on over-use of existing highway capacity. Broader policy objections based on possible prejudice to a future KBP scheme would also be “very different in weight” to the situation where the planning authority was relating such objections “to a specific scheme which is just starting to get off the ground” (para 95). For similar reasons, the tribunal attached little weight to the refusals of the Nall application in 2002 or to the fate of the section 17 application, the reasons for both of which relied on policy EC/6 and the need for a comprehensive KBP scheme. In a no-scheme universe “those reasons for refusal would have to be very carefully reconsidered and might carry much less weight”. Other possible objections would have to be balanced against “the extensive policy support for residential development on part of the reference land”, leading in their view to “a reasonable argument ... in favour of permission ...” (para 96).

27.

They concluded on this aspect:

“97. It was evident from our site visit that there has been development off Buckley Hill Lane in the comparatively recent past on its eastern side. The long history of the identification of the land of which the reference land forms part for substantial development would weaken a PPG 3 greenfield objection to a residential development on the west side of the lane, incorporating the Nib. It was agreed between the highway witnesses that a substantial number of houses could take an access on to Buckley Hill Lane although the witnesses differed as to whether the maximum would be 60 or 74. For the reasons we have just given we think we should give less weight, in considering the prospects of this hypothetical permission, to an objection based upon policy EC/6 or emerging policy EC/7 and no weight to a highway objection based upon traffic flows from the KBP development. On the other hand the motorway junction itself was a fact on the ground at the valuation date. It was not part of the compulsory purchase order and it does not seem to us that it would be right to extend the definition of the scheme to include it.

98. Taking all those matters into consideration and doing the best we can to make sense of a number of assumptions of varying solidity, in our judgement the hypothetical purchaser would have considered that the reference land would have had some extra hope value of a permission for residential development. However we would not put a percentage better than 50/50 on the chances of success.”

28.

In summary they considered that there would have been “a 50/50 chance of planning permission being obtained on the reference land in a no KBP world”, and they thought it “realistic to assess the period of deferral at five years” (para 117). Having considered the valuation evidence, and taking account of other factors, they arrived at a figure of £746,000, as the amount which a hypothetical purchaser would pay for the reference land, and accordingly determined compensation in that amount (para 123). There is no challenge to the valuation aspects of their decision.

The Court of Appeal

29.

The authority appealed to the Court of Appeal. They did so principally on the grounds that the tribunal had misapplied the statutory disregards under section 6 and Schedule 1. In the leading judgment Patten LJ summarised their primary submission:

“32. HCA’s primary submission is that the UT has done the very thing which ... they had said was to be avoided: namely eliding the identification of the planning status of the reference land with its valuation. They submit that once the planning status is determined by the application of [sections 14-16 of the 1961 Act](#) the valuation exercise has to proceed on that basis and that the application of the section 6 disregards does not involve any further alteration in the assumed planning permissions or policies which have previously been determined to apply ...”

30.

Having reviewed the tribunal’s reasoning and the relevant case law, he identified the “real issue” as whether the Upper Tribunal had “struck the balance between the ‘no KBP universe’ and the planning actualité in the right place”. He continued:

“Mr Kingston QC (for the claimants) submits that the [Upper Tribunal] was right not to assume the total abandonment of policy EC/6 or emerging policy EC/7 but to regard them as modified to the point at which a planning application for an independent development via the Nib would be assessed on its

own planning merits relative to location and housing need. Mr Humphries' primary position remained that the application of the disregards did not entitle the [Upper Tribunal] to assume any modification of the planning status determined in accordance with [sections 14-16](#)." (para 37)

31.

Neither argument appeared correct to him (para 38). Having further discussed the respective submissions, he concluded:

"40. In my view, the [Upper Tribunal] was right to hold that the planning status of the reference land did have to be modified for the purposes of valuation in accordance with the 'no KBP universe' methodology. But it was wrong to do so by simply downgrading the strict application of the existing and emerging development plan but otherwise leaving the allocation of the land for development in place. What it should have done was to consider the planning potential of the reference land without regard to the development scheme and its underlying policies and therefore its effect on value. In that no scheme world it should have examined what wider no scheme specific policies (including but not necessarily limited to PPG3) would have applied to a planning application at the valuation date had there been no KBP and so struck a fair balance between the public interest and those of the claimant in relation to the valuation of the reference land. The assumption relied on in both parties' submissions that policy EC/6 and developing policy EC/7 continued to apply was based on a wrong application of section 6(1) and the valuation calculated on that basis must be set aside."

He accordingly held that the assessment of compensation should be remitted to the Upper Tribunal "to be decided without regard to the scheme of development as defined in this judgment" (para 44).

32.

In a concurring judgment, Sales LJ similarly rejected what he took to be Mr Humphries' principal submission that -

"... once one has gone through the [section 14](#) exercise the question of the planning status of the reference land must be taken to be immutably fixed when calculating the valuation of the land for the purposes of compensation." (para 47)

However, he was unable to support the tribunal's reasoning:

"52. In the present case ... the [Upper Tribunal] erred by still giving weight ... to the planning policies in relation to the KBP site, including in particular the part of the historic, current and emerging policies to promote the development of a business park which contemplated that there should be residential development on the site as part of that development (what the [Upper Tribunal] called 'the extensive policy support for residential development on part of the reference land': para 96). In this respect, the [Upper Tribunal] failed to apply the section 6(1) disregard correctly and appears to have overvalued the reference land for the purposes of compensation."

Jackson LJ agreed with both judgments.

Issues in the appeal

33.

In this court, Mr Kingston for the claimants submits in short that the Court of Appeal was wrong to adopt a line of reasoning which had been supported by neither party; and in doing so to interfere with a matter pre-eminently for the judgment of the expert tribunal, that is the assessment of the weight to be given in the no-scheme world to the policies in the development plan. Contrary to the

understanding of the court, the tribunal had ample evidence of the prospect of development in the absence of the KBP scheme, and properly took it into account.

34.

For the authority Mr Humphries renews his primary submission, rejected by the Court of Appeal. That relies on a strict division between two stages of the process: first, the assessment of “planning status” by reference to the statutory assumptions in [sections 14-16](#) of the Act; and secondly the valuation of the land with the planning status so determined, at which stage the disregards under section 6 come into play. On this approach it is not permissible for the decision-maker at the second stage to use the valuation disregards to revisit and revise the planning status of the reference land as determined pursuant to the planning provisions at the first stage. As an alternative submission he supports the reasoning of the Court of Appeal. In particular the tribunal was wrong in effect to allow the claimant to have the benefit of the allocation of the land for development in policy EC/6, while treating the policy as modified so as to allow independent access.

Discussion

35.

With respect to the Court of Appeal, Mr Kingston’s criticisms of their reasoning appear to me well-founded. As already noted, it had not been supported by either party in argument before them. As I read Patten LJ’s judgment (para 31 above) he seems to have treated the required disregard of the KBP scheme as extending also to all the policies, past and present, which supported development on this land. The planning potential of the reference land was to be assessed “without regard to the development scheme and its underlying policies”. Similarly Sales LJ (para 32 above) thought that the tribunal had erred by taking account of the “historic, current and emerging policies” promoting a business park, or “the extensive policy support for residential development” on the reference land.

36.

In my view the tribunal were clearly entitled to regard the underlying policies, including the allocation in the development plan, as potentially relevant also to the prospect of development apart from the KBP scheme. The assessment of their significance in the no KBP universe was pre-eminently a matter for them. Mr Humphries does not argue otherwise. As the very experienced members of a specialist tribunal, who had also visited the area, they were well equipped for that task. Their approach appears most clearly in their concluding passage at para 96 (see above). There they properly took account of the pattern of development as seen by them on the ground, and the long history of identification of this land for substantial development. They did not ignore potential policy objections, such as under PPG3 or policy EC/6, but took the view that they would not have sufficient weight to rule out the possibility of development in the absence of the KBP scheme. That reasoning discloses no error of law.

37.

I turn to Mr Humphries’ principal submission, that the tribunal erred in not treating the planning status of the land as conclusively fixed by reference to their applications of [sections 14](#) to [16](#) of [the 1961 Act](#). In my view the Court of Appeal were right to reject this submission, which is supported neither by the statutory provisions nor by authority. Indeed, the principle that the statutory assumptions are not exclusive is confirmed by [the 1961 Act](#) itself in [section 14\(3\)](#). That provides in terms that the statutory planning assumptions do not imply any presumption against development which might otherwise fall to be taken into account. The statutory assumptions work only in favour of the claimant, not against him. They do not deprive him of the right to argue for prospective value under other provisions or the general law.

38.

The right to claim for potential development value is long-established. As Lord Collins of Mapesbury said at the beginning of his leading judgment in *Spirerose* (para 65), it has been accepted “from the earliest days of the law of compensation” that the value of the land taken should include -

“... not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied.” (para 65, citing *R v Brown* (1867) LR 2 QB 630, 631)

Since the introduction of general planning control in 1947, and the restoration of market value compensation in the 1950s -

“... development value has been an important element in the assessment of compensation, because the value of land in the open market may depend on what planning permission exists or could be obtained for development on the land.”

In *Spirerose* itself there was no suggestion that the specific statutory provisions relating to planning assumptions precluded account being taken under the general law of the prospect of permission for valuable development. The only issue was whether such a prospective permission should be valued as a certainty (as the tribunal had held) or merely as a hope, as the House ruled.

39.

It is in any event well-established that the application of the *Pointe Gourde* rule itself may result in changes to the assumed planning status of the subject land. Thus in *Melwood Units Pty Ltd v Main Roads Comr* [1979] AC 426, where land was acquired for an expressway, the Privy Council accepted that compensation should reflect the fact that but for the expressway project permission would have been obtained to develop the whole area for a drive-in shopping centre (p 433). That case, although decided under a different statutory code, has long been accepted as authoritative in this jurisdiction. It was cited without criticism in *Spirerose* (see paras 110ff per Lord Collins). Nor is there anything in section 6 to indicate that a more restrictive approach should be applied under the statutory disregards. In saying that the two stages should not be “elided” (para 19 above), the tribunal as I understand them were doing no more than emphasising the difference between the statutory tests.

40.

It has also long been accepted that application of the general law may produce a more favourable result for the claimant than the statutory planning assumptions. A striking illustration noted by the Law Commission (loc cit p 206-7) is provided by the two *Jelson* cases, relating to the same strip of land acquired for a road: *Jelson Ltd v Minister of Housing and Local Government* [1970] 1 QB 243, *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020. The refusal in the first case of a section 17 certificate for residential development, was held in the second not to prevent the tribunal taking account of the prospect of residential development under the *Pointe-Gourde* rule (or [section 9 of the 1961 Act](#)). The difference lay in the criteria to be applied. Under section 17 attention was directed at the position as at the date of the deemed notice to treat, by which time development on either side of the strip had made further development impossible. Under the *Pointe-Gourde* rule it was possible to look at the matter more broadly. Again this decision was cited without criticism in *Spirerose* (paras 105ff per Lord Collins).

41.

Mr Humphries relies on a passage in the concurring speech of Lord Neuberger of Abbotsbury in *Spirerose* (para 55), in which he referred to the distinction drawn in some authorities between the

effect of the scheme on the value of the owner's interest, as opposed to "the characterisation of that interest ..." (see *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 253, approving a dictum of Russell LJ in *Minister of Transport v Pettitt* (1968) 67 LGR 449, 462). However, those comments must be read in context. As already noted, *Spirerose* proceeded on the premise that the prospect of permission for development could be taken into account under the *Pointe-Gourde* rule. The use of the rule for that purpose was not in issue. The question was how it should be valued. The dicta mentioned by Lord Neuberger were directed to the ascertainment of the nature of the relevant interest in land, not its planning status. It is true that in *Myers v Milton Keynes Development Corpn* [1974] 1 WLR 696, 702 Lord Denning MR (apparently with the agreement of counsel) seems to have equated the two, relying on the same dicta. However, the legal basis for that approach was not discussed in detail, and it was not followed in later cases.

42.

As it happens, at an earlier stage of the proceedings in *Spirerose*, a similar argument had been advanced for the claimant by Mr Barnes QC (who appeared also in the House of Lords), but it was not pursued in the higher courts. The Court of Appeal commented ([\[2008\] EWCA Civ 1230](#)); [2009] 1 P & CR 20):

"24. We mention in passing Mr Barnes' argument before the tribunal (see para 61), not pressed in this court, that the no-scheme rule had nothing to do with planning assumptions, being 'a principle of valuation and not planning status'. This argument was based on some comments of Lord Denning MR in *Myers v Milton Keynes Development Corpn* [1974] 1 WLR 696, and of Carnwath LJ in *Roberts v South Gloucestershire Council* [2003] RVR 43. He was right in our view not to pursue the point. The observations in *Roberts* were certainly not intended to support such an argument. It is also inconsistent with the reasoning of Lord Denning himself in the second *Jelson* case, and with one of the leading cases in the Privy Council, *Melwood Units Pty Ltd v Main Roads Comr* [1979] AC 426 (assumed permission for a shopping centre)."

Conclusion

43.

The Upper Tribunal's decision in the present case is a powerful illustration of the potential complexities generated by [the 1961 Act](#) in its unamended form. It is to be hoped that the amendments currently before Parliament will be approved, and that taken with the 2011 amendments they will have their desired effect of simplifying the exercise for the future. It is no criticism of the tribunal if parts of their reasoning may appear obscure at first sight and require some unpicking. However, once that is done, I am satisfied that the criticisms made by the Court of Appeal and in this court by the respondents are misplaced. Overall, the tribunal's application of these difficult provisions to the complex facts of this case is in my view exemplary. I find no error of law.

44.

For these reasons I would allow the appeal and set aside the order of the Court of Appeal. In the result, if my colleagues agree, the award of the tribunal will be restored.