UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2017] UKUT 0405 (LC)

Case No: ACQ/5/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – COMPULSORY PURCHASE – lessees permitting companies of which they were directors to conduct scrap metal businesses from land – history of repeated business failures – leasehold land taken for Crossrail project – claim by directors for loss of personal remuneration for unexpired term of lease – whether any loss suffered

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

(1) NIGEL ELSTON BISHOP

(2) MAXIM ALEXANDER BISHOP

Clai

- and -

Acq

TRANSPORT FOR LONDON

Aut

Land and Buildings at

Lake Avenue,

Slough,

Berkshire SL1 3BZ

Martin Rodger QC, Deputy Chamber President and P D McCrea FRICS

Royal Courts of Justice, London WC2A 2LL

6, 7, 10, 11 and 13 July 2017

Mark Warwick QC, instructed by Gordon Dadds LLP, for the claimants

Guy Williams, instructed by Pinsent Masons LLP, for the acquiring authority

The following cases are referred to in this decision:

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111

Wrexham Maelor Borough Council v MacDougall (1995) 69 P&CR 109

Introduction

1.
For more than 90 years four generations of the Bishop family have carried on business from land known as Bishop's Yard at Lake Avenue in Slough adjacent to the main Great Western railway line. Since the late 1940s the family business has focussed on dealing in scrap metal and since 1962 it has been conducted through a number of companies owned by family members.

2.
The greater part of the land, extending to 4,659 m^2 (about 1.15 acres) ("the Reference Land"), was held under a series of leases from Network Rail and its predecessors. The last such lease was granted to the claimants, Nigel and Max Bishop, on 29 October 2012 for a term expiring on 22 December 2031 at an open market rent to be reviewed at five yearly intervals.

3.
On 4 February 2014 the Reference Land was compulsorily acquired by Transport for London ("TfL") under powers conferred by section 6 of the Crossrail Act 2008. Members of the Bishop family continued trading for a short period from a smaller part of the Yard in their freehold ownership, but Metal Recycling Services (UK) Ltd ("MRS"), the company of which the claimants were directors and which had traded from the Reference Land, did not relocate to other premises and discontinued its business within three months of receiving TfL's notice of entry on 13 May 2013. MRS subsequently went into liquidation with substantial unpaid debts.

4.
The claimants now seek compensation totalling £4,177,782, principally representing the remuneration which they say they would otherwise have received from MRS in the period from their quitting the Reference Land on 13 September 2013 until the contractual date of expiry of their lease in 2031.

5.
TfL says that the claimants are entitled to nothing in compensation because they cannot show that, had the Reference Land not been taken, MRS would have generated profits sufficient to pay them the income they claim to have lost, or any income at all, except at the expense of their creditors.

The claim

6.
As will be apparent from the brief outline above, this is an unusual claim formulated in an unusual way. No claim for compensation has been brought by the claimants for the value of their leasehold interest in the Reference Land, nor for any diminution in the value of the parcel of adjacent freehold land which was occupied by the business in conjunction with the Reference Land and which the claimants retained. Nor has any claim been made by the liquidators of MRS for a disturbance payment to compensate it for any loss sustained by the company as a result of having to give up its occupation of the Reference Land.

7.
There is no dispute over the claimants' entitlement in principle to make a claim in their own right for the value of future remuneration which they will not receive because the land from which they had hoped their company would conduct a profitable business has been taken from them. It might have been thought that the more reliable basis on which to compensate them for the income they could realistically have expected to derive from a business carried on from a leasehold site with the benefit of planning permission for use as a scrap yard would have been to ascertain the value of the lease itself, including any element of key money. A conventional open market valuation on that basis would have taken into account all of the many contingencies to which the receipt of such an income would be vulnerable, but in this case no valuation evidence was relied on by either party and TfL did not challenge the manner in which the claim was formulated. It was agreed that a claim for lost remuneration may be brought under rule 6 in section 5 of the Land Compensation Act 1961, which permits compensation to be paid "for disturbance or any other matter not directly based on the value

of land". The principle that such a claim is sustainable was established by the decision of the Court of Appeal in Wrexham Maelor Borough Council v MacDougall (1995) 69 P&CR 109.

8.
In Wrexham Maelor the tenant of business premises, Mr MacDougall, permitted them to be used by a family business in which he was a shareholder. He had a service agreement with the company which entitled him to a salary and other benefits until the age of 70. The premises were compulsorily acquired and, as a result, the business was extinguished and the service agreement was terminated. Mr MacDougall claimed compensation for the loss of the service agreement. The Court of Appeal upheld the decision of the Lands Tribunal that he was entitled to be compensated and that the true basis of his claim was for loss consequential on the acquisition of his tenancy which was recoverable under rule 6 as a loss "not directly based on the value of land". That loss was measured by the annual value of the rights secured by the service agreement for the remainder of its term subject to an adjustment for risk.

9.
It is also agreed that, to succeed, the claimants must satisfy the Tribunal that the claim is within the three general conditions for the assessment of compensation referred to in the speech of Lord Nicholls in Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111, 126. Thus the loss for which compensation is claimed must be causally connected to the relevant acquisition of land; it must not be too remote; and the claimant must have taken such steps as a reasonable person in the same position would have done to eliminate or reduce the loss.

10.
On this basis the claimants claim lost income from the date of cessation of the business carried on by MRS on 13 September 2013 until the expiry of their lease, which they estimated at £4,024,260 in the statement of case served with the notice of reference lodged with the Tribunal on 28 January 2016. That figure was based on a joint five year weighted average income for the claimants of £277,861 discounted by 2% a year to reflect early receipt, but without any discount or allowance for risks.

11.
Mr Warwick QC, who represented the claimants, did not open his case as a claim for the specific sum pleaded in the statement of case, but instead invited the Tribunal to find that the claimants were entitled to a "substantial capital sum" to compensate them for the loss of the income stream they would have continued to receive.

12.
The pleaded claim for lost remuneration was not supported by the claimants' forensic accountancy expert, Mr Norman Cowan, nor by Mr Warwick in his closing submissions. Mr Cowan proposed an alternative joint annual income of £187,740, discounted at 2% for the remaining term of the lease, while Mr Warwick QC invited the Tribunal to find such figure for annual income as appeared reasonable to it on the totality of the evidence, to which it should apply a multiplier of its own choosing to reflect all relevant risks (Mr Warwick suggested a multiplier of four).

13.
The claimants also claim three additional sums: loss of income prior to 13 September 2013 of £43,206; expenses incurred in vacating the reference land of £56,513 (plus VAT); and a loss £53,803 sustained as a result of the early disposal of equipment. The total value of the pleaded claim was £4,177,782 which was reduced by Mr Warwick QC in closing to an unquantified (but nevertheless substantial) sum.

Witnesses

14.
The claimants are brothers and were referred to throughout the proceedings as Nigel and Max; both gave evidence in support of the claim. Further evidence was given by one of Max's sons, also Max Bishop (known as Max Jr), and by Mr Mark Bowler, a business advisor to the Bishop family, and Mr Michael Wevill, who had worked as a self-employed representative of MRS between September 2012 and June 2013.

15.
Expert evidence on waste management issues was given by Mr Duncan Wemyss, formerly a director of the British Secondary Metal Association and Secretary of the Motor Vehicle Dismantlers Association, on behalf of the claimants, and by Mr Rainer Zimmann MCIWM, CEng, an Associate Director of Ove Arup & Partners Ltd, on behalf of TfL. Forensic accountancy evidence was given for the claimants by Mr Cowan, a partner in Wilder Coe LLP, Chartered Accountants and Forensic Accountants, and for TfL by Mr Mark Jennings ACA, a Senior Manager with RGL Forensics.

Bishop's Yard

16.
Bishop's Yard comprises the Reference Land itself and an adjoining freehold property at 69 Lake Avenue.

17.
The Reference Land is located about a mile from the centre of Slough at the rear of 69 Lake Avenue. It comprises a long, roughly rectangular parcel of land bounded on the north by the residential properties on Lake Avenue and on the south by the main Paddington to Reading railway line; to the west is the Slough Trading Estate and to the east are some railway sidings. The surface of the land is concrete hard standing and relatively level.

18.
The only access to the Reference Land is from Lake Avenue from which a roadway adjacent to number 69 runs to the north-west corner of the site. 69 Lake Avenue is a conventional residential house with an area of land at the rear which would originally have been a garden but which for many years has been occupied by the Bishop family as part of Bishop's Yard. The claimants own the freehold in 69 Lake Avenue and the land immediately to the rear and used the house as offices in connection with their business.

19.
The freehold land at the rear of 69 Lake Avenue included the entrance to the yard and was the site of two weighbridges and various out-buildings used in connection with the family business.

The family business

20.
Bishop's Yard was first occupied by members of the Bishop family in the 1920s when Edwin Bishop, the claimants' grandfather, took a lease of some part of the Reference Land from the railway company and used it as a builder's yard. The business came to focus more on scrap metal in the late 1940s under the direction of the claimants' father, Bruce Bishop, who had three sons (the claimants and Bruce Jr) all of whom worked full time in the business from an early age. By April 2013 there were 17 individuals on the pay roll, including Nigel and Max.

21.
On 1 November 1962 the scrap metal business was incorporated, under the name Bruce Bishop & Sons Limited ("BBS"). When the claimants' father died in 2000 at the age of 79, his three sons became equal joint shareholders in BBS.

22.
The claimants' brother, Bruce Jr, died in 2007 and his interest in BBS passed to his widow. We were told by Max that a bitter shareholder dispute ensued with their brother's widow. No documents relating to this dispute were produced and we were given no further details of it or of how, or at what cost, it was resolved.

23.
The Reference Land was occupied by the Bishops under a series of leases. The last but one of these was granted to BBS by Railtrack on 15 May 1995 for a term of 15 years. The final lease was granted by Network Rail Infrastructure Ltd on 29 October 2012, this time to the claimants personally.

24.
The rent under the claimants' 2012 lease was £70,000 a year, subject to review at five yearly intervals for a term of almost 20 years expiring on 22 December 2031. This term was subject to a number of break clauses in favour of the landlord, Network Rail, allowing it to terminate the lease and recover possession if the Reference Land was required for redevelopment or for the purpose of its undertaking. The parties contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954.

25.
The lease prohibited subletting without the consent of the landlord but, it is agreed, permitted the claimants to share occupation of the Reference Land provided no relationship of landlord and tenant was created. The claimants were therefore in a position lawfully to share occupation with their own companies.

26.
Bishop's Yard operated as a metal recycling site with the benefit, in later years, of a waste management licence from the Environment Agency. The first such licence was granted to BBS in March 1998. The licence permitted the use of the Yard for "keeping, treating and recycling 75,000 tonnes of waste in any financial year". In fact, the site operated well within this limit in the years preceding the compulsory acquisition, at between 10,000 and 20,000 tonnes a year between 2008 and 2012.

27.
The business conducted by BBS was a traditional metal recycling operation on a medium scale involving the collection, sorting, processing, bulking and onward sale of ferrous and non-ferrous metal waste. Waste, including "end of life vehicles" ("ELVs"), was collected from customers using the company's own fleet of up to eleven lorries or was delivered to the site by the public or trades. Scrap arriving at the site was weighed in over a weighbridge and purchased by BBS at an agreed rate per tonne which varied depending on the type of metal and the price prevailing on the London Metal Exchange.

28.
BBS ceased trading on 2 August 2011. Its bankers, the Royal Bank of Scotland, demanded repayment of a sum in excess of £440,000 and, when this demand was not met, appointed administrative

receivers on 16 September 2011. BBS subsequently entered compulsory liquidation in November 2011 on a petition presented by HMRC.

29.
The November 2011 report of the administrative receivers of BBS records that the directors of the company (the claimants) attributed its insolvency to the decline in the UK manufacturing sector which had resulted in significantly lower volumes of scrap materials being available for BBS to purchase. The business was said to have experienced cash flow difficulties for some time and for "the past couple of years" had entered into a "time to pay" arrangement with HMRC. After the first quarter of 2011 HMRC had refused to continue this arrangement and BBS had been unable to sustain the demands on its immediate cash flow, causing it to cease trading.

30.
In 2009 the family business had diversified by focussing to a much greater extent on the "de-pollution" and processing of ELVs. On 1st April 2009 Slough ELV Centre Limited ("SELV") was incorporated by the claimants (its only shareholders) and began to operate from Bishop's Yard alongside BBS. SELV took advantage of the government sponsored "scrappage" scheme which was announced in the April 2009 budget and ran until March 2010 and encouraged the public to dispose of older vehicles. The company subscribed to a national "Car Take Back" scheme to which it was required to pay a commission. Un-depolluted ELVs were acquired through the scheme and brought to Bishop's Yard, where specialist equipment was used by SELV to drain the vehicles of fuel and other pollutants. Once depolluted the vehicles were dismantled and valuable components removed. A specialist baler was then used to crush and bale the vehicles before they were sold on in bulk for re-processing.

31.
In July 2011, a few days before BBS ceased trading, the Environment Agency licence for the operation of the site was transferred from BBS to SELV. On the day after BBS ceased trading the majority of its employees were re-employed by SELV which also purchased plant and machinery belonging to BBS from the administrative receivers. For about a year SELV then carried on the whole of the enterprise conducted at Bishop's Yard.

32.
SELV entered into a creditors' voluntary liquidation in July 2012. The directors' report prepared for a meeting of creditors on 27 July 2012 provided an account of the history and failure of the company. SELV was said to have grown quickly through the recovery of valuable scrap metal from ELVs. After a time, however, the Car Take Back scheme doubled its commission and competition between dealers within the scheme increased. The public also became more aware of the value of recyclable vehicle components and began removing them before consigning their vehicles to the scheme with the result that income from ELV processing almost halved. At the same time SELV faced increasing costs for the purchase of plant, transportation and other expenses and after taking professional advice its directors concluded in June 2012 that it was insolvent.

33.
At about the time SELV was placed into liquidation a further generation of the Bishop family became involved in the family business. Max Jr graduated from university in June 2012 and became an employee of MRS with the title of contract manager.

34.

MRS was incorporated in November 2011, although it appears not to have traded until June 2012. In that month the Environment Agency licence for the operation of the site was transferred by SELV to another family company, Benton Plant Ltd, but all trading from Bishop's Yard was then undertaken by MRS. Max Bishop described this phase as "moving the business away from car-dominated ELV scrappage to a more varied, multiple metal approach". In reality it appears to have involved a return to the traditional approach to scrap metal dealing which had prevailed in the time of BBS but with a rebranding involving a new website, new software, a new logo and new signage (including on the 11 lorries used by the business).

35.
This work was overseen by Max Jr and by Mark Bowler, whom the family trusted. Mr Bowler had formerly worked as an independent financial adviser and had advised the brothers in that capacity since the 1990s. In 2010 Mr Bowler became closely involved in a golf club project with which the claimants were concerned. In about August or September 2012 he was asked to assist with the relaunch of the business as MRS. His major contribution was to devise a new business model involving the recruitment of self-employed representatives whose task it would be to identify new customers and bring in new supplies of scrap metal and who were wholly dependent for their income on commission paid on the waste materials they sourced. This model was similar to that with which Mr Bowler had been familiar in his financial services career, but we had the clear impression that it was a novel one for a scrap metal business.

36.
For most of the period which has been surveyed above the day to day management of Bishop's Yard and the businesses conducted from it was the responsibility of two employees, Mike and Pauline Reid. During a career with the Bishops which appears to have begun in the 1980s Mr Reid had various titles: contracts manager, director, and operations director, but it is apparent that he had the main managerial role. Mrs Reid was responsible for banking, administration and paper work. Mr and Mrs Reid left the employment of MRS in August and June 2013 respectively, and neither was called to give evidence.

The claimants' part in the business

37.
Both Nigel Bishop (who was aged 67 when the Reference Land was taken) and Max Bishop (then aged 56) began working in the family scrap metal business as soon as they were old enough to do so, and it has been their livelihood all of their working lives. They each informed us that they worked full time in the business at Bishop's Yard, for five and a half days a week, including in the later years when the business was undertaken by SELV and MRS. Neither of them was terribly specific about the functions they performed.

38.
In his witness statement Max said that he and his brother took management roles and that he was in charge of marketing and keeping the business "modern" while Nigel worked in the yard. In his oral evidence he explained that he worked from two offices at the yard, was responsible for health and safety, dealt with incidents in the yard and made himself available to be consulted by Mr and Mrs Reid. He had very few dealings with customers and had no real familiarity with the financial side of the business which he left to the company accountant.

39.

Nigel Bishop confirmed that he had worked in the yard itself and from an office by the weighbridge; he looked after machinery and kept production moving but had nothing to do with paperwork or accounts.

40.
The very clear impression we were given was that the claimants depended very heavily on others, particularly the Reids, for the management and direction of their companies.

41.
Despite their full time engagement in the business neither Nigel nor Max had a written contract of employment or any formal service agreement. Each was paid a salary by the various companies, but Max told us that he left decisions on the amount of that salary to the accountant and he was unable to explain the basis on which their remuneration was determined. Nigel, on the other hand, explained that he and his brother decided between them how much they ought to be paid from time to time: if the business was doing well, they would do well; conversely, if the business was down, their incomes also went down. We do not fully accept either Max or Nigel's evidence on these points. Plainly the brothers decided how much they should be paid, and did not leave it to the undirected discretion of their accountant, but in doing so they appear to have had very little regard for the performance of the business.

42.
The result of the claimants' remuneration decisions was that over a period of five years from April 2008 to March 2013 the claimants received payments totalling £1,619,755 from the various companies operating from Bishop's Yard. They received similar, though not identical sums, with Max taking home about £55,000 more than Nigel over the five year period. Their combined income was subject to significant annual variations: in 2008/09 totalling £650,697; in 2009/10, £126,517; in 2010/11, £308,158; in 2011/12, £332,210; and in 2012/13, £202,173.

43.
When expressed as a weighted average the claimants' employment income in the five years before the acquisition of the Reference land was £277,861 a year. For the three years before the acquisition it was £263,183 pa. The calculations behind these figures were agreed and they were used by the claimants as the basis of their pleaded claim, but they were not seriously advanced by Mr Cowan or Mr Warwick as a realistic projection of the claimants' future income. Mr Cowan calculated a more conservative figure of £187,740 as a maintainable income, but it was not clear to us on what that figure was based.

44.
The annual accounts of the three companies were drawn up to 30 June each year and so do not precisely overlap with the claimants' tax returns from which their remuneration figures are derived, but the accounting experts agreed that the periods were sufficiently close to permit useful comparison. In almost the same five year period, from July 2008 to June 2013 the three companies sustained total aggregate losses before tax of £1,111,719. Performance fluctuated somewhat, with profits being made in two of the five years, as follows: in 2008/09, a loss of £286,388; in 2009/10, a profit of £108,375; in 2010/11, a profit of £41,776; in 2011/12, a loss of £171,118; and finally in 2012/13, a loss of £804,364.

45.
Since the reference periods do not coincide no precise comparison between the income of the brothers and the performance of their companies is possible; it must also be acknowledged that about

six weeks of the accounting year 2012/13, in which the largest loss was made, fell after the date on which notice of entry was served by TfL. Nevertheless, precision is not necessary to enable the broad conclusion to be drawn from these figures that the remuneration which the claimants chose to pay themselves was unrelated to the profitability of the enterprises carried on from Bishop's Yard.

The compulsory acquisition of the Reference Land

46.
TfL was authorised to acquire the Reference Land compulsorily by section 6 of the Crossrail Act 2008. On the evidence presented to us the first step in that acquisition involved the service on MRS on 19 October 2012 of a notice requiring it to provide information regarding the ownership and occupation of the site. The notice referred to the 2008 Act and to the availability of compulsory purchase powers. Max recalled receiving it but he felt there was only a remote possibility of something serious occurring. He told us that, although there was a lot of activity related to Crossrail in the area, he had not thought it was likely to affect his family.

47.
Notices to treat and notices of entry were served on MRS and on Max and Nigel personally on 13 May 2013. The land to be taken was limited to the Reference Land and did not include the freehold land at the rear of 69 Lake Avenue. The notices stated that after the expiry of three months TfL was authorised to and would enter on and take possession of the Reference Land. The earliest date on which entry could be taken was therefore 13 August 2013.

48.
Together with the notice of entry TfL supplied the claimants with a list of professional advisers qualified to assist them in making a claim for compensation. The claimants appointed one of those on the list, Mr Ian Mackenzie of Mackenzie Associates, as their agent.

49.
Mr Mackenzie's first action was to contact TfL seeking agreement on his fees and information on the date that possession of the Reference Land would be likely to be required. From the email reply he received on 17 May 2013 from Mr Steven Wilkinson, a Principal Surveyor with TfL, Mr Mackenzie appears to have emphasised that relocation of the business from Bishop's Yard would require a long lead in time. Mr Wilkinson acknowledged "the lead in time required to relocate the business should that prove necessary" and informed Mr Mackenzie that he was awaiting an update on when possession would be required but that the last date he had been given was January 2014.

50.
Mr Mackenzie responded to Mr Wilkinson's email of 17 May 2013, by an email of his own (the date of which is not known). He referred to a telephone conversation which had taken place between them and recorded his understanding that "in view of the impact on my client's business, Crossrail will now reconsider whether the land is required for the scheme". Clarification was expected in about two weeks but in the meantime Crossrail did not want Mr Mackenzie's clients to start a full scale search for alternative premises. The two had agreed to meet on site on 8 July.

51.
On 30 May 2013, less than three weeks after the notice of entry, Mr Mackenzie submitted a form of claim to TfL on behalf of the claimants and MRS, in which compensation totalling £7.4m was claimed, including £6.6m for "disturbance". We infer from the size of the claim that it was based on an anticipated total cessation of the business of MLS. That inference is consistent with the evidence of

Max Bishop that he and his brother decided to cease trading and put MRS into liquidation “very soon after receiving the notice of entry”. The decision to close MRS was said to have been made on the advice of accountants.

52.
The claimants’ intention was that the family business would continue trading from the freehold land at the entrance to Bishop’s Yard under a previously dormant company, WeBuyAnyScrapMetal.com Ltd (“WBASM”), but on a much smaller scale. This was intended also to be a generational change with responsibility for running the continuing business passing to Max Bishop Jr. Consistent with that intention the claimants resigned from their directorships of WBASM.

53.
The claimants informed their staff that MRS would be closing shortly after the notice of entry arrived in May 2013. Mrs Reid left to take up a new job in June and Mr Reid was made redundant in August. We were also told by Max Bishop Jr that almost immediately MRS began to turn away new business as it prepared to run down its stocks of metal at the Yard.

54.
By July 2013 TfL had reassessed its requirements and on 5 July Mr Wilkinson informed Mr Mackenzie (by email) that TfL’s project team were now “very confident that they will not need to take possession of your client’s land interest”; final confirmation of this was said to be expected in early August but it was not until 22 August that Mr Wilkinson informed Mr Mackenzie that it was not currently anticipated that the Reference Land would be required and that a formal process leading to the withdrawal of the notices of entry had commenced.

55.
In his oral evidence Max Bishop said that before deciding to cease trading the claimants had asked Mr Mackenzie when possession of the Yard was likely to be required and had been told by him that it was possible that the notice of entry might be withdrawn. That evidence was almost immediately retracted by Max Bishop who then said that Mr Mackenzie’s advice had been vague and that the claimants had never been aware of the possibility that possession might not be required. We do not accept that evidence as we can see no reason why Mr Mackenzie, who was not called to give evidence, would not have kept his client informed of what he was being told by TfL (as Max Bishop originally recalled him having done).

56.
By December 2013 Mr Mackenzie was insisting on his clients’ behalf that TfL proceed with the acquisition of their property as soon as possible, as the business had been discontinued yet the claimants’ liability for rent under the Lease continued. Possession was finally taken on 4 February 2014, although we were informed that no use has been made of Bishop’s Yard in connection with the Crossrail project and that it has remained vacant.

57.
We are satisfied that within a few days of the service of the notice of entry in May 2013 doubt had been cast by TfL on whether it would require possession of Bishop’s Yard at all. The claimants were aware of that uncertainty when they decided to place MRS in liquidation, a decision which had been taken by the end of May. By July 2013 it had been decided by TfL that it had no need for possession but by that time, on the advice of the company’s accountants, decisive steps had been taken to run down the business, with experienced staff been allowed to leave and stocks being sold off and not replenished. Whether those steps could have been reversed in July was not investigated in evidence,

but by August, when Mr Reid was made redundant, we think it unlikely the business could have been revived.

58.
It should be remembered that no claim has been brought on behalf of MRS by its liquidators. Had such a claim been before the Tribunal we think it likely that we would have been asked to consider whether the company had taken reasonable steps to mitigate any loss it had suffered by remaining in possession of Bishop's Yard, which might have resulted in such loss being reduced or avoided altogether. TfL has not put its case in that way, we assume because the only claims it faces are by the claimants as directors of MRS for lost remuneration and other personal losses. Nevertheless, the lack of interest shown by the claimants in continuing the business of MRS at Bishop's Yard, when it would have been apparent to them when they opted for liquidation that that was at least a possibility, is relevant to their personal claims. Whether and for how long MRS, or some other company to which its business could have been transferred, would have been in a position to continue to remunerate the claimants to the degree to which they had become accustomed, are the critical issues in the reference.

The rival approaches to the assessment of compensation

59.
The principal disagreement between the parties concerned whether, at the date of acquisition of the Reference Land, there was any sustainable business capable of supporting the payment of a continuing income to Max and Nigel.

60.
Mr Warwick QC, on behalf of the claimants, argued that although the family businesses had had various ups and downs, there was a history of many decades of continuous and successful use which had provided a significant income to the brothers. If the Lease had not been compulsory acquired those businesses would have continued in one form or another, as would that income. Bishop's Yard was well located and had the benefit of a waste management licence which rendered it of particular value. The claimants were, Mr Warwick submitted, canny businessmen who had adapted to changing circumstances and by 2012 had the benefit of the enthusiasm, intelligence and new ideas brought by Max Jr. But for the CPO, the business would have thrived.

61.
The picture presented on behalf of TfL was rather different. Mr Jennings, the respondent's accountancy expert, described the claimants' mode of operation as one in which the underlying scrap metal operations had continued throughout but had been punctuated by the liquidation of the companies which had carried on the trade followed by the transfer of that trade to successor phoenix companies. That is a fair characterisation which was not seriously disputed by Mr Warwick. He nevertheless submitted that, but for the acquisition of the Reference Land, the pattern noted by Mr Jennings would (at worst) have continued, resulting in the claimants' continuing to receive an income from one company or another for the remaining term of the Lease, or at least for some part of it. The assessment of future loss was always difficult, Mr Warwick submitted, but that was no reason for awarding no compensation or only a nominal sum.

62.
Mr Williams challenged the cornerstone of the claimants' case, that the history of payments made in the past could be used with confidence to predict the future. On the contrary, he argued, the brothers' previous remuneration had been paid by different companies in different trading circumstances, so

the past could not be viewed as a reliable guide to their future income. Moreover, the drawings made by the brothers from the various businesses had contributed to the successive failures of their companies each of which had been pursued by HMRC. They had no contractual entitlement or agreement for the payment of any particular sum, and it was therefore for them to demonstrate by credible evidence that the future performance of MRS or some flock of phoenix companies would have been sufficient to remunerate the brothers at all.

63.
While Mr Williams is correct in principle that it is for a claimant before the Tribunal to prove the loss claimed, it is important that the evidential hurdle should not be fixed at an unrealistic height. Loss is to be proven on the balance of probability. Where the loss depends on the notional performance of a business which has been discontinued, the Tribunal must do its best to assess what is more likely to have happened had the circumstances been different. That cannot be a precise exercise, but that it not a reason for awarding nothing and it is irrelevant that the necessary assessment involves an element of speculation. At the end of his submissions Mr Warwick invited the Tribunal to award a lump sum, which he did not quantify but invited us to assess, which would take into account all of the risks and contingencies and would reflect the value to the claimants of the opportunity to continue to run businesses from the Yard. We accept that it is open to us to take that approach, which relates closely to the approach the market would have taken to the value of the lease had it been offered for sale following the discontinuance of the business. We do not accept Mr Williams' submission that it is necessary for the claimants to establish precisely what sums they would have received, for what services, from whom and for what period, before they can be entitled to any sum in compensation.

The claim for lost remuneration

64.
Although we received a very substantial amount of detailed evidence concerning the performance of the claimants' companies it is not necessary for us to describe it in detail; nor is it necessary for us to consider the significance of the claimants' inability, or failure, to produce much of the accounting information that both experts agreed was required. The need for a detailed autopsy of the claimants' businesses was largely overtaken by an agreement reached between the accountancy experts, Mr Cowan and Mr Jennings that, as at 13 May 2013, the date on which the notice of entry was delivered, MRS would not have been able to continue to trade without successfully implementing a turnaround plan devised by Mr Bowler. In his closing submissions Mr Warwick acknowledged, as had Mr Cowan in cross-examination, that by the time the notice of entry was received MRS was set to go into liquidation.

65.
The basis for this consensus can be summarised briefly.

66.
The total liabilities of BBS at the point of liquidation in October 2011 are unknown, but by that time it had extended its overdraft facility to £441,000 and the renewal of its time to pay arrangement had been refused by HMRC.

67.
Between April 2009 and July 2012 SELV built up debts to HMRC of £385,000 and total liabilities of £690,000 before it too went into liquidation.

68.

Despite having acquired the assets of the business conducted by BBS and SELV, while escaping their liabilities, in the year ending June 2013 MRS made an operating loss of £804,364. The family's original core trade in general ferrous and non-ferrous metal had been in decline since before 2009, and SELV's participation in the car scrappage venture had been an unsuccessful attempt to diversify away from it. When MRS attempted to refocus on the former core business it was no longer available and the annual quantity of waste received at the Yard declined from 18,400 tonnes in 2011 to 12,500 tonnes in 2012 and to 2,200 tonnes in the first quarter of 2013. The proportion of non-ferrous waste metal received at the site (which provides greater potential profit margins) also declined from 22% in 2008 to 15% in 2012.

69.
The unsustainability of three successive companies and the consensus between the accounting experts that MRS could not have continued to trade without successfully implementing a major turnaround enables us substantially to accept the thrust of TfL's case that the previous ability of BBS, SELV, and MRS to fund the claimants' remuneration cannot be regarded as evidence that sufficient funds would continue to be generated at Bishop's Yard into the future. BBS in September 2011 and SELV in July 2012 had both failed for reasons entirely unconnected to the acquisition of the Reference Land, while MRS was on the brink of failure when the notice of entry was received. A wholly different operating model would have been required to enable the business (or any comparable business) to trade successfully from the Yard into the future.

70.
That model or "turnaround plan" was described in the evidence of Mr Cowan. He attributed it to Mr Bowler who had first become involved in the business of MRS in about September or October 2012. Mr Cowan understood the plan to have had two elements, comprising the acquisition of additional sources of scrap metal through the efforts of a commission remunerated "sales force" (although their task was to buy scrap metal rather than to sell it) and an overhead reduction programme. He believed that the need to control and reduce costs had not initially been part of Mr Bowler's brief and, as far as Mr Cowan was aware, he did not become involved in that aspect of the business until after the departure of Mr and Mrs Reid (in June and August 2013).

71.
For his part Mr Bowler regarded the transformation of MRS as comprising a corporate rebranding exercise designed by Max Bishop Jr and implemented in August or September 2012, with which he was not particularly involved, and the expansion of the supply of scrap metal by the recruitment of new representatives. He confirmed that he had had no previous experience of the scrap metal business and described his participation as "high level stuff – not day to day involvement". He had not produced a business plan or any other document describing or explaining the measures he hoped to implement and the only document we were shown for which he had been responsible was a presentation intended for use in the recruitment of the new reps. The only evidence of active involvement by Mr Bowler was in the selection of those reps.

72.
The intended size of the new team of reps remains unclear; Mr Bowler suggested 10 while Max Jr thought 25. Mr Bowler told us that he had expected that it would take twelve to eighteen months from his arrival in September 2012 before the success of his new commission driven model could be assessed. A new rep might, as Mr Bowler put it, "knock on doors for six months before getting any business". That was confirmed by the evidence of Mr Michael Wevill, who had been recruited by Mr Bowler as a rep for MRS and worked in that capacity from about September 2012 until June 2013. He

confirmed that there was strong competition for commercial sources of waste and business was very slow in 2012. His earnings had peaked at £1,000 in one month in 2013 and £600 in another (this represented his sole remuneration from MRS, from which he was expected to meet his own expenses). After less than a year he found another job and left, although his departure seems to have been unrelated to the compulsory acquisition of the Yard, of which he had been unaware.

73.
Such steps as may have been taken under the guidance of Mr Bowler and Max Jr to address the performance of MRS before the notice of entry were unsuccessful. The reliance on self-employed reps to source new business certainly had not produced any improvement in the throughput of scrap metal at Bishop's Yard as reported quarterly to the Environment Agency by the time MRS went into liquidation. Throughput declined in every quarter from Q4 2011, and between Q3 2012 (before the commission model was introduced) to Q4 2012 (after) it fell from 2,818 tonnes to 2532 and then to 2,204 in Q1 2013.

74.
Detailed monthly profit and loss accounts exist for July to November 2012 together with annual accounts for the year to 30 June 2013. These show that average monthly sales were declining while costs and average monthly losses increased. The average monthly wage bill was £43,867 in the five months to November 2012 but had risen to £58,736 for the twelve months to June 2013. Net liabilities accrued at an average rate of £48,760 in the five month period but this increased to an average of £67,030 for the full year.

75.
Mr Bowler made no mention in his own witness statement or oral evidence of any involvement on his part in devising a cost reduction programme in 2012 or 2013. At a much later date he had collaborated with Mr Cowan in identifying costs which might have been reduced, but that was solely for the purpose of preparing evidence for use in these proceedings.

76.
It was clear to us that little or no serious consideration had been given to the achievement of any reduction in costs before the service of the notice of entry on 13 May 2013 and that the sole focus of the claimants and their staff after that date was on running the business down. Thus, while the turnaround plan described by Mr Cowan included substantial cost reductions, those reductions were notional and their identification was a theoretical exercise undertaken by Mr Cowan and Mr Bowler.

77.
We are entirely satisfied that the measures introduced by Mr Bowler to source additional supplies of scrap metal had brought no improvement in the business of MRS by May 2013. The proposition that the company, or a successor, would have been able to continue to remunerate the claimants at the rate of £187,740 a year suggested by Mr Cowan, or at some different rate, is therefore wholly dependent on the evidence of Mr Cowan about the prospective performance of the business but for the service of the notice of entry.

78.
One fundamental difficulty with Mr Cowan's evidence on the future performance of the business was that, as he acknowledged, he has no operational experience of the scrap metal industry and was dependent on the completeness and accuracy of the information provided to him; as he himself said in oral evidence "I am just an accountant putting some figures together, Mr Bowler had the knowledge". Mr Cowan relied on Mr Bowler for his assessment of savings which could have been made and

additional income which could have been generated but Mr Bowler himself had very little direct experience in the scrap metal business (and none before September 2012) and he offered no evidence of his own in support of the assumptions made by Mr Cowan. The foundations of Mr Cowan's assessment were therefore never established by credible evidence.

79.
Mr Cowan's approach, based on his discussions with Mr Bowler, was to adjust the accounts for the year to June 2013 by assuming additional income of £150,000 and a reduction in costs of £776,294 to produce a notional swing of £926,294 from loss to profit. Revenues were then assumed to grow by 5% a year for the first five years and to continue growing at a slower rate for the remainder of the Lease.

80.
The apparent justification for adding £150,000 to the income actually achieved in the last year of trading was that the Yard had closed to new business almost immediately on receiving the notice of entry; had this not occurred, an additional month's income could have been generated before the year end on 30 June 2013. As Mr Williams pointed out, and Mr Cowan agreed, a notional increase in income ought to have been accompanied by an increase in the cost of sales, but none was made. Mr Cowan was unable to comment on the amount by which the cost of sales would have had to increase to produce £150,000 in additional income, but he acknowledged that some allowance was required. He reiterated that he would look to Mr Bowler for such "inside knowledge". Mr Williams, relying on Mr Jennings' evidence, suggested that an additional month's costs (at 82% of turnover) would add £122,850 to the costs side of the assessment, producing a net improvement of £27,150 rather than the £150,000 assumed by Mr Cowan.

81.
The assumption of 5% growth in turnover per annum from July 2013 was said by Mr Cowan to have been provided to him by Mr Bowler. To project growth of 27% over 5 years against a background of a real fall in the combined revenues of all the family businesses of 33% in 2011-2012 and a further 20% in 2012 – 2013 was optimistic and there was nothing in the evidence of Mr Cowan or Mr Bowler to suggest to us that it was remotely achievable. It is true, as Mr Zimmann's evidence demonstrated, that some scrap metal sites within a 50km radius of the Reference Land which might be regarded as the claimants' competitors for commercial waste, succeeded in increasing their throughput, but the general picture, as he explained, was that scrap metal prices (particularly for light iron, the staple of the claimants' intended core business) were in significant decline from 2011. Overcapacity in Chinese steel manufacturing, led to dumping of steel in Europe with a resulting drop in the value of scrap material for recycling. Nothing in the evidence we heard suggests that the claimants were equipped to prosper in that environment.

82.
Mr Cowan's projections included even more startling costs savings totalling £776,294 per annum. Once again these were based on discussions with Mr Bowler, but were not supported by any evidence given by Mr Bowler. As these adjustments were entirely theoretical we do not need to consider each of them in detail but will refer to two examples.

83.
Mr Cowan assumed that it would have been possible to reduce the annual wage bill by £362,331 (from £791,473). He said that this would be achieved by making Mr and Mrs Reid redundant without any replacement, despite them being in day to day control of the Yard and the administration of the business, while the number of staff working in the Yard would be reduced from ten to five with other

redundancies “at managerial level”. Mr Cowan had no independent view of his own on the figures he had been given by Mr Bowler, beyond suggesting that they “did not seem unreasonable”, but the evidence of the waste management experts suggested that a reduction on this scale would have been impossible. Mr Wemyss’s evidence was that 20-25 employees would be appropriate for a facility the size of the Bishop’s yard while Mr Zimmann thought 20 staff would be sufficient. Mr Cowan’s assumption that the business could increase its turnover with fewer than half that number was baseless.

84.
Mr Cowan also deducted the sum of £4,495 paid as commission to the self-employed reps in 2012-13 in his projected accounts and made no allowance at all for the commission which MRS would have had to pay under Mr Bowler’s operating model. The reps were recruited on the basis that they could receive commission of £50,000-£80,000 a year, but even assuming this to have been hopelessly optimistic (as Mr Wevill’s experience suggests), there was bound to be a significant obligation to pay commission if projected growth in revenue was to be achieved. When this was put to him Mr Cowan responded that, as the commission would be a proportion of the cost of metal purchased, it was not necessary to add it as an employment expense, but he acknowledged that he had made no such adjustment to the costs of purchases. He also suggested that the commission would be related to the margin which the reps achieved below the maximum price they were permitted to pay, but this was at odds both with the presentation prepared by Mr Bowler and the experience described by Mr Weevil.

85.
Many other examples of unjustified or unexplained assumptions were canvassed by Mr Williams in cross examination and itemised in his closing submissions. We accept his submission that the adjustments made by Mr Cowan to the historic performance of MRS purportedly as a result of Mr Bowler’s turnaround plan were not supported by reliable evidence and the prosperity Mr Cowan predicted for the company and its directors was not credible. Nothing in the evidence on behalf of the claimants gave us any reason to believe that, but for the compulsory acquisition of the Reference Land, MRS could have survived beyond its actual date of liquidation in September 2013, let alone until the expiry of the lease in 2031.

86.
Nor do we consider it credible to suggest that on the inevitable insolvency of MRS in 2013 having made a loss of £804,000 in the year to 30 June (the third such insolvency in little over three years), the claimants would simply have been able to continue trading behind the veil of yet another company - “Bishop Newco” as Mr Warwick described it in his closing submissions. Mr Cowan’s assumptions about the future performance of MRS ignored its accumulated liabilities, and have been shown even on that basis to be unsupportable; there is no reason to think some other corporate wrapper around the same imaginary enterprise would have been any more successful. In any event, as Mr Warwick acknowledged, repeated insolvency is not a risk free option for company directors. HMRC were creditors of MRS for unsatisfied VAT, corporation tax and PAYE liabilities totalling £145,000; the comparable liabilities of SELV had totalled almost £385,000; the indebtedness of BBS to HMRC is not known but it was the Revenue’s refusal to allow yet more time to pay which precipitated its collapse. In view of that very recent history of repeated insolvency the brothers would at the very least have been at risk of investigation for possible breaches of their fiduciary duties as directors in causing or allowing their companies to trade while unable to meet their liabilities.

87.

Max Bishop told us that the brothers decided to cease trading on the day they received the notice of entry on 13 May 2013. MRS was insolvent at that point and made no further payments to the brothers after June 2013 despite disposing of all of the stocks of scrap metal at the Yard. There is no evidence to suggest that, but for the CPO, any further payments could properly have been made.

88.
In summary, in later years at least the very substantial remuneration which the claimants had drawn from their failed businesses was at the expense of the creditors of those businesses and no credible evidence has been provided to explain how any business conducted from the Yard could have continued to sustain those drawings. We were invited by Mr Warwick to assess a sum we considered to be fair compensation for the claimants' loss of remuneration. As we are satisfied that the claimants could not have continued to authorise payments to be made to themselves for longer than they actually did without being in breach of their duties as directors we assess that sum at nil. The claimants' loss of remuneration was not caused by the acquisition of the Reference Land (the first of the Shun Fung requirements). Their business was both unprofitable and unsustainable long before the notice of entry was given.

89.
We have not yet found it necessary to say anything about mitigation of the loss of remuneration. Mr Williams suggested that there was no evidence that any serious search had been made for alternative premises from which to conduct the business, but since the business was unsustainable we do not think that matters. Max Bishop gave evidence of perfunctory inquiries which he had made with local property agents when the notice of entry was received, but no evidence was led by TfL to suggest that alternative sites were available, nor did it argue that the claimants should have remained in possession of the Reference Yard when they had the opportunity to do so in July 2013.

90.
Mr Williams cross-examined the claimants on their failure to seek alternative employment or directorships. Since the liquidation of MRS Max Bishop has worked for one day a week as a consultant to a company in which he and his brother have an interest and which runs a golf club, but has not otherwise sought to replace the time he formerly spent in the family business with remunerative work. If Max had had a sustainable claim for lost remuneration from the Reference Land, credit would have had to be given against it for the income he received from the consultancy he took up, which he acknowledged he would have been unable to do had he continued at the Yard. Nigel Bishop, who was 68 in 2013, has not sought alternative employment. Given their age and their reliance on others (the Reids and Mr Bowler) to manage their businesses we do not think it likely that a more determined search by the claimants would have provided additional employment opportunities capable of replacing the income they had previously derived from Bishop's Yard. They chose to hand over the opportunity to continue a business on the adjoining freehold land (about 13% of the total area) to Max Jr and his cousin, but it was not a success in their hands. We can see no reason why it would have been more successful in the hands of the claimants.

Other claims

91.
The claimants made three other claims.

92.
The first claim was in respect of expenditure of £39,013 (plus VAT) said to have been incurred in vacating the Reference Land. This claim was supported by invoices, all but one of which were

addressed to Max and Nigel Bishop (the exception was addressed to Mr Bowler and related to the removal of equipment which is the subject of the final head of claim). The fact that costs of that order had been incurred was not in issue, as Mr Williams agreed in his closing submissions; the question for the Tribunal was whether the costs had been incurred by the claimants or by one of their companies.

93.
In a preliminary joint statement signed by Mr Cowan and Mr Jennings on 9 December 2016 they agreed that further information was required to enable them to consider whether the costs of vacating the site had been incurred by the claimants personally or by some other entity. Mr Cowan agreed to obtain that information, but appears not to have been successful. In their final joint statement dated 19 May 2017 Mr Cowan and Mr Jennings agreed that no evidence had yet been provided to them demonstrating that the claimants had incurred the claimed costs. That remained the position at the close of the claimants' case, no further evidence having been given in support of this element of the claim by either of the claimants or anyone with relevant knowledge.

94.
Although the evidence in support of this claim is therefore limited to the invoices addressed to the claimants themselves, which are agreed to have been paid, we are satisfied that the claim has been made out. Most of the invoices were addressed to the claimants personally and the were paid between December 2013 and February 2014, after MRS had gone into liquidation. The evidence indicates that Max and Nigel Bishop were anxious to clear the site and hand it over to TfL, before pursuing the £7.4m claim for compensation which had already been submitted on their behalf by Mr Mackenzie. Mr Warwick suggested that the claimants had been wary that TfL might look for ways to avoid taking possession or paying compensation, and we can see that that might well have encouraged to the claimants to clear the site. Had the business simply gone into liquidation in the middle of 2013 without the notice of entry having been served, there would have been no such incentive for the claimants to spend their own money on exiting the site. On balance we are prepared to accept that the cost of clearance was met by them, and we therefore allow this element of the claim totalling £46,815 (inclusive of VAT).

95.
The second additional claim relates to the quarter's rent which fell due pursuant to the Lease on 29th September 2013. This was £17,500 plus VAT, a personal liability of the claimants which they paid. The claimants were not in a position to make any beneficial use of the site after the discontinuance of business by MRS, but possession was not finally taken by TfL until February 2014.

96.
This part of the claim fails for the same reasons as the claim for lost remuneration. The business of MRS would have failed in any event, and losses which are the consequence of that failure were not caused by the compulsory acquisition. The company was not in a position to reimburse the claimants' expenditure on rent in September 2013, and the fact that the continuing liability was brought to an end by TfL's subsequent entry does not mean that the loss represented by that expenditure was caused by the entry.

97.
The final claim is in respect of a loss said to have been made on the sale of assets belonging to the claimants which had been used in the business of MRS and had had to be disposed of to a dealer, JMC Recycling Systems Limited ("JMC"). These assets were described in a schedule from JMC as a depollution rig and tanks, a depollution tower, a 995 litre petrol tank (which we take to have been

used in the depollution process) and an Orca car baler. The sale price of the first three pieces of equipment, which had been sold, was said to be £52,000 as against an estimated value of all four items of £104,350. After allowing for sale costs the claimants claimed a total loss of £53,803.50.

98.
The evidence in support of this claim was weak. Neither Max nor Nigel Bishop gave any evidence about the ownership or disposal of the equipment. Mr Cowan explained that the assets of BBS had been sold to SELV in October 2011 for £80,000. The assets of SELV were sold to Max Bishop in March 2012 for £40,000. It is not known whether these included the items which subsequently appeared in the JMC schedule. It is known that an Orca car crusher and equipment described as a "depollution system" were listed in the September 2013 register of fixed assets of another family company, Benton Plant Ltd ("BPL"), as having been acquired by it in August 2010 and April 2009 respectively. This caused Mr Cowan to conclude that all of the plant and machinery held at Bishop's Yard belonged either to Max Bishop or to BPL.

99.
Evidence was also given about the equipment by Mr Wemyss who said that JMC had sold the Orca baler to Australia and the depollution equipment to Turkey. No source was given for this information, which appears in part at least to contradict the information provided by JMC to the claimants (that the Orca car baler had not been sold). When it was suggested to him that JMC would have obtained the market value for the equipment it sold Mr Wemyss agreed.

100.
In our judgment the claimants have failed to establish any loss arising from the sale of the plant and machinery for two reasons. First, because it has not been established that any of the assets belonged to Max or Nigel. The evidence suggests all four items belonged to BPL, and the highest the claimants are able to put their case is that it belonged either to Max Bishop or to BPL. Secondly, it has not been established that the assets were sold at a loss. Mr Wemyss and Max Jr agreed that JMC were experienced brokers who were best placed to achieve full value for the equipment. The sale was not forced by the need to vacate the yard (so as to result in a diminished price), since the equipment was removed by JMC to its own premises in August 2013 where it was stored (and the Orca baler reconditioned) until a buyer was found during 2014. There is therefore no reason to believe that either of the claimants sustained any loss under this head of claim.

Conclusion

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

102.

This decision is final on all matters other than the costs of the reference. The parties may now make submissions on such costs, and a letter giving directions for the exchange and service of submissions accompanies this decision.

Martin Rodger QC Peter McCrea FRICS

Deputy Chamber President Member

18 October 2017

ADDENDUM ON COSTS

103.
Submissions have now been exchanged on the issue of costs.

104.
On 8 February the acquiring authority made a sealed offer of £378,000 plus costs. On 14 July, after the conclusion of the hearing but before the decision, that offer was withdrawn. The sum awarded by the Tribunal was less than the sum offered on 8 February and on normal principles applying section 4 of the Land Compensation Act 1961, the claimants should be responsible for the costs incurred after the offer.

105.
The parties agree that the claimants should be ordered to pay the acquiring authority's costs for the period between 8 February 2017 and 14 July 2017. The claimants submit that, having been awarded £39,013 plus VAT, they must be regarded as the successful party in the reference in respect of the period up to the date on which the sealed offer was made. The acquiring authority submits that the sum awarded was so small, representing less than 1% of the claim, that the claimants cannot be regarded as having achieved any meaningful success. The authority also says that it was willing at all times to accept responsibility for the claimants' losses subject to proof of causation and loss, and points out that the additional information required by the experts to enable them to be satisfied of the costs of vacation claim was never produced. It had also warned the claimants that the claim for future remuneration was hopeless.

106.
Looking at the reference as a whole, rather than dividing it into periods, we are satisfied that the acquiring authority is the successful party. It has fought off a claim in excess of £4 million by defeating all elements of it except for one worth less than £50,000 in total. It secured protection for its own costs of the reference after 8 February 2017 which will include the hearing costs. In the event, the sum which the claimants were awarded will provide a small down payment towards the costs payable to the authority. The claimants succeeded only to a very modest extent.

107.
On the other hand, the authority took a risk that the claimants would be unable to prove any part of their claim and, having put the claimants to proof, cannot claim to have achieved complete success when the claimants managed to prove part of the claim. The usual rule that the successful party should recover its costs from the unsuccessful party is subject to modification where a different order is justified. In respect of the period before the sealed offer a different order is appropriate. Although comparatively modest, the sum the claimants were awarded was not insignificant. The acquiring authority could have protected itself against the risk that the claimants might succeed in part by making an earlier offer. It is no answer that the acquiring authority considered it had not yet seen

enough evidence to justify making such an offer. The claimants could not have secured the award they did without bringing the reference. A discount should therefore be made in the sum which the claimants are required to pay. In our judgment that discount should be 20%, which is not a proportion based on any precise assessment of the costs of the issue on which the claimants succeeded, but is a reflection of the three factors we have already identified.

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

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

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

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

Martin Rodger QC Peter McCrea FRICS

Deputy Chamber President Member

8 January 2018