UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0303 (LC)

UTLC Case Number: ACQ/70/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – COMPULSORY PURCHASE – Business extinguished by CPO – separate car showroom building not acquired – claim for lease breakage – whether evidence sufficient to show loss – pre-reference costs determined at £198,959.65 – section 5, Land Compensation Act 1961

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

STEWART CHRISTOPHER CHIVERS (1)

PRESTIGE MOTORS DIRECT LTD (2) **Claimants**

and

ST HELENS BOROUGH COUNCIL **Acquiring Authority**

Re: Land at Alfred Street,

Newton-le-Willows

St Helens

WA12 8BH

DETERMINATION BY WRITTEN REPRESENTATIONS

Peter McCrea FRICS FCIArb

Introduction

1.
Newton-le-Willows in the borough of St Helens is a market town in the north of England, midway between Liverpool and Manchester. The town's railway station has been redeveloped to create a new transport interchange including a park-and-ride facility and enhanced cycle parking. To facilitate the redevelopment, on 2 November 2015 St Helens Borough Council ("the acquiring authority") made the St Helens Borough Council (Land South of Newton-le-Willows Railway Station and off Alfred Street) Compulsory Purchase Order 2015 ("the CPO") which was confirmed by the Secretary of State on 16 November 2016, and implemented by way of a general vesting declaration dated 10 February 2017.

2.
There are two claimants in this reference. The first is Mr Stewart Chivers. The second is a car sales company, Prestige Motors Direct Limited ("PMDL"). While not a director of PMDL, Mr Chivers was a

person of significant control, owning PMDL's holding company. As will be evident, there was a degree of fluidity between the two claimants, to the extent that in the claimants' original statement of case they were treated as one.

3.
Two parcels of land are relevant to this reference. The parties call them Plots B and D. Prior to being acquired under the CPO on 1 April 2017, Plot B was owned by Mr Chivers. It was a former plant sales site at the end of the cul-de-sac of Alfred Street, adjacent to the original railway station. At the time of acquisition, it was used for the storage of cars.

4.
Plot D lay to the west of Plot B, with corner frontage to Alfred Street and Mill Lane. There is a single building on Plot D, which was used as a car showroom. Separately from the CPO, the acquiring authority owns the freehold interest, and lets the plot on a long lease to a Mr Deane Arslanian. The showroom on the plot was occupied by Mr Chivers with Mr Arslanian's permission. I discuss the nature of that occupation below.

5.
After the vesting date, by agreement the claimants (it is not necessary to decide which or both of them) remained in occupation of Plot B for a further eight weeks until the authority's development partner, Merseytravel, took possession on 5 June 2017. The claimants then relocated on a temporary basis to another, smaller, plot of land owned by Merseytravel. That agreement originally expired on 30 November 2017 but was the subject of three extensions. During this time, the relocation of PMDL's car sales business was explored by the claimants' agents, and some 49 sites were discussed with the acquiring authority and Merseytravel. None of these proved viable and in the end the parties agreed levels of compensation both for the extinguishment of PMDL's car sales business, and for the value of Mr Chivers' freehold interest in Plot B.

6.
The remaining loose end was Mr Chivers' personal liability for rent under the sublease of the showroom on Plot D, which forms the first issue in this reference. The second issue is pre-reference professional costs.

The reference

7.
To provide a context to the determination of the outstanding issues, it is convenient to set out a brief history of the reference.

8.
The notice of reference was made on 24 August 2018, in which the claimant was said to be "Stewart Christopher Chivers (trading as Prestige Motors Direct Limited)". The accompanying statement of case identified the heads of claim as follows:

1)
The market value of Plot B (under rule (2) of section 5 of the Land Compensation Act 1961)

2)
Basic loss and occupier's loss

3)

Disturbance compensation, based on the total extinguishment of PMDL (under rule (6))

4)
Professional fees

5)
Statutory interest

9.
Compensation for the extinguishment of PMDL was claimed at £3,264,461, including £610,196 for the cost of breaking the lease of the showroom.

10.
Upon the Registrar querying the nature of the claimants – said to be an individual "trading as" a limited company – on 19 October 2018 the claimants' solicitor clarified that the claimants were both Mr Chivers and PMDL, and the reference proceeded on that basis, although no application to amend the claimants' statement of case was made at that stage.

11.
The acquiring authority's statement of case, filed in final form on 19 November 2018, noted that "the Claimant [still at that stage described as Mr Chivers t/a PMDL] also holds the lease of Plot D, a showroom and motor repair workshop…..the Claimant seeks in excess of £600,000 believed to be in excess of six years rent to facilitate surrender of the lease. Any value in relation to this has not been quantified. The Claimant has to our knowledge not considered any further options. No negotiation has yet taken place with the Claimant's superior landlord."

12.
Following a stay to allow the parties to pursue ADR, on 26 April 2019 the Tribunal was informed that "a mediation took place on 11 March which was (in respect of all heads of claim, save for the Claimants' professional fees) successful – the parties agreed a settlement, the terms of which are in the process of being documented." The reference remained stayed throughout summer 2019, yet despite reassuring messages from the parties, settlement was not documented. On 4 September, the Tribunal was informed that the engrossments of the settlement agreement had been issued for signing. On 18 October 2019, the claimants' solicitor informed the Tribunal that "at the eleventh hour the acquiring authority has raised an entirely new point on the agreement" but that the parties were still working towards settlement.

13.
Settlement of the reference remained elusive, and at a case management hearing on 20 February 2020, the "entirely new point" was explained in a case summary prepared by Mr Ian Ponter, counsel for the claimants, as this:

"On 20 September 2019, the Acquiring Authority requested (for the first time and apparently on behalf of Merseytravel) information from the Claimants including sight of the original version of a lease (in respect of the car showroom referred to in the Reference), evidence of rental payments made under that lease, and proof of registration of the lease. On 24 September 2019 a copy of the requested lease was sent by the Claimants' solicitors to [Merseytravel]."

14.
Accordingly, while the parties had agreed the quantum of Issue 1 at £450,000 as part of the mediation, this assumed that the lease was in force in the way contended for by the claimants.

The Issues

15.
Following a case management hearing, the parties agreed that I should determine the remaining two outstanding issues by written representations. It is relevant to note that the agreed wording of those issues was:

1.
the capacity of either of the claimants to make a claim for losses as a consequence of lease breakage in respect of the car showroom located [on Plot D].

2.
the quantum of professional fees incurred by the claimants and recoverable by the claimants from the acquiring authority.

Issue 1 - lease breakage of the car showroom on Plot D

16.
Although issue 1 has been framed by the parties as one of “capacity”, what they mean by that is entitlement. By “lease breakage” the parties mean a negotiated surrender of the lease of the showroom and the compensation claimed is a sum which Mr Chivers anticipates he will be required to pay to secure his release from his obligations under the lease. No such sum has yet been paid by Mr Chivers, nor has a surrender of the lease been negotiated. The sum of £450,000 agreed by the parties is not based on any agreement with Mr Arslanian that he will accept a surrender of the lease in return for receipt of that amount. Nor, if the amount is paid, will Mr Chivers be under any obligation to surrender his interest in the showroom. I understand the issue to be whether either of the claimants is entitled to compensation for losses arising out of a prospective surrender of the lease of the showroom.

17.
The reference to “either of the claimants” in issue 1 stems from the way in which the reference was first made; a significant element of the acquiring authority’s original written submissions sought to explain why PMDL could not claim for lease breakage. It is common ground, now, that issue 1 relates to the entitlement of Mr Chivers to make a claim.

18.
In short, Mr Chivers’ case is that while compensation has been agreed for the compulsory purchase of Plot B, he remains the sub-leaseholder of Plot D, and bases his claim on the amount he would have to pay Mr Arslanian to accept an early surrender of the lease.

19.
Mr Chivers said that following a managed winding up, PMDL ceased trading and its business was extinguished at the end of December 2018; but since the sublease was in his name, Mr Chivers remained liable for rent. In support of his claim Mr Chivers submitted a witness statement prepared by Mr Arslanian who said that “pending the conclusion of negotiations to agree an early surrender of the lease, it remains in place and Mr Chivers is under an ongoing obligation to pay rent. This is the case notwithstanding the fact that Mr Chivers is no longer in occupation of the Car Showroom Site following the closure of PMDL and a cessation of all trading at the end of December 2018”.

20.

I take the reference in the evidence of Mr Arslanian to Mr Chivers no longer being in occupation of the showroom to mean simply that Mr Chivers is no longer carrying on business from the showroom or allowing PMDL to do so. There is nothing in the evidence suggesting that Mr Chivers is prevented from making use of the showroom, and indeed the basis of his claim is that the showroom is still subject to a lease in his favour.

The sublease and rental payments

21.
Mr Chivers submitted a copy of a lease document dated 23 December 2010, made between D G Arslanian and S Chivers. The document is signed by both parties. The contractual term is said to be 20 years from 23 December 2014, but with a rent commencement date of 23 December 2010, at an initial annual rent of £90,000, payable quarterly in advance, subject to review on 23 December 2015 and five yearly thereafter. The tenant can assign or sublet, subject to conditions, but there are no break clauses by either landlord or tenant.

22.
In their witness statements, both Mr Chivers and Mr Arslanian said that the reference to 23 December 2014 as the term commencement date was a mistake – the date of the lease, the rent commencement date and the term commencement date were all 23 December 2010 – and confirmed that the annual rent was £90,000. The opportunity for a rent review in 2015 appears not to have been taken advantage of by Mr Arslanian.

23.
Mr Chivers has provided two sets of documents to show the payment of rent under the lease. The first set is a series of rental statements, addressed to “SC Chivers – Prestige Motors”, from J D Estates, a letting company acting for (or possibly owned by) Mr Arslanian, covering the period 25 December 2010 to 25 December 2019. Mr Chivers said that they were “prepared and issued by my landlord”. They do not appear to be contemporaneous annual rental statements: the documents covering 2011 to 2016 are undated, and the statement period from January 2016 onwards appears to have been created on 4 December 2019. No contemporaneous rent demands have been submitted in evidence.

24.
The second set of documents comprises a series of largely redacted RBS bank statements, dating from February 2013, from an account which Mr Chivers said he opened in the name of PMDL.

25.
There are some discrepancies between the rental statements and the bank statements, which I outline below. There are also notable inconsistencies between the arrangements that these documents appear to show and the contractual obligations under the lease.

26.
The rental statement covering the period December 2010 to March 2012 shows an initial six month rent-free period, followed by six months at half rent, so that the rent apparently demanded and paid in the first year was £22,500 excluding insurance. These arrangements contrast with the lease, which shows no rent free period and rent due quarterly, not monthly.

27.

From June 2011, both sets of documents show monthly rental payments, by standing order, of £3,903.83, which aggregate to an annual rent of around £46,850. The bank statements describe the standing order as “D Arslanian Proper” (which I have assumed to be a shortening of “Property”).

28.
These monthly payments were apparently topped up by other sporadic lump sum payments, ranging from £10,000 to £45,000. The documents showing these payments paint a curious picture. For example:

a)
On 16 August 2013 there is a payment of £27,000 to “J [not D] Arslanian 42 DA BMW X6”, against which Mr Chivers has handwritten “£25k taken for rent, £2k fee”.

b)
On 20 December 2013 against a payment of £10,102.31 Mr Chivers has written “PMDL Rent” although on the JD Estates account this credit is shown as £10,000.

c)
On 10 June 2014, against a payment of £24,000, which matches the figure on the JD Estates statement, Mr Chivers has written “PMDL Rent” but the bank statement shows the payment to J D Estates and the reference “JAY 3V”.

d)
On 16 February 2015, against a payment of £28,000 to J D Estates with a reference “SMA”, Mr Chivers has written “£21k allocated to PMDL rent”.

e)
On 18 November 2015, against a payment on the bank statement to Deane Arslanian of £80,020, Mr Chivers has written “£45k allocated to PMDL rent”.

f)
The bank statements show a payment on 5 October 2016 to “Deane Arslanian” for £16,700 (which also shows on the J D Estates statement) but the line immediately below Mr Arslanian’s name has been redacted.

g)
A payment of £40,000 is shown on the bank statement on 26 April 2017, with the payment reference of “contra”. Against this Mr Chivers has written “PMDL Rent”. However, the corresponding entry on the JD Estates statement is £44,000 – against which Mr Chivers has written “£40k BACS, £4k TBC”.

h)
On 1 February 2018 there is an entry on the bank statement, for which the amount has been redacted, but the entry was for “J D Estates Contra BCA Loan”.

i)
On 11 December 2018 the bank statement shows an amount of £50,000 being debited from the account (which appears on the J D Estates statement as rent). The bank statement says “Deane Arslanian Loan Repayment”, but Mr Chivers has written “PMDL rent”.

29.
I conclude from these documents that the association between Mr Chivers and Mr Arslanian was more fluid than simply a conventional landlord and tenant relationship: some of the payments include

references to what I assume are car registration numbers, and there is one reference to a loan repayment. No explanation of the payment arrangements was offered by either Mr Chivers or Mr Arslanian in their witness statements. Mr Chivers simply referred to the documents he had produced as showing the rental payments under the lease.

30.
The acquiring authority made several observations. First, the grant of a sublease of a term of 20 years is a registerable disposition, but the lease was not registered, (although the authority subsequently received a copy of an application to register the lease made on 4 December 2019). Secondly, the authority's headlease with Mr Arslanian prevents him from subletting the whole without the authority's consent. No request to sublet had been made, and since the sublease had not been registered with the land registry the authority had had no notice of it. Thirdly, owing to the inconsistencies as to rental payments which I outlined above, the authority submitted that there was doubt as to whether the terms in the lease are the terms under which Mr Chivers occupied the showroom, and there was doubt as to whether the claimant and Mr Arslanian had discussed surrender terms.

31.
Mr Chivers said that it was his former solicitor's responsibility to register the lease, but this was overlooked at the time. However, an application for registration had now been submitted. Everything was in place to complete the registration of the showroom lease subject to the payment of stamp duty land tax, which Mr Chivers said he would "action" when in funds. He had hoped to meet these costs using the instalment of compensation due to be paid to him in respect of lease breakage.

Conclusions on Issue 1

32.
I received evidence on several other aspects of the claim, including the circumstances in which Mr Chivers took the lease of Plot D, but it is unnecessary for me to go into those as they do not shed any light on the way in which Mr Chivers and Mr Arslanian have conducted their landlord and tenant relationship. The onus is on the claimants to prove that on the balance of probabilities Mr Chivers will be required to pay a capital sum to Mr Arslanian to dispose of his liabilities under the lease by a surrender. In my judgment the evidence falls far short of that threshold, and having considered all the evidence I am left with significant doubts that the lease reflects the true relationship between Mr Chivers and his landlord. The fact that the lease wasn't registered at the land registry, that it was entered into without the Council's consent, and that stamp duty was not paid are all strikingly unusual features. The lease does not appear to be a home-made document, and it was drawn up with the assistance of solicitors, yet no explanation has been provided why it was not completed by registration or stamp duty paid. Those omissions might not in themselves be fatal to the suggestion that Mr Chivers will be held to the terms of the lease by Mr Arslanian and will be required to make a substantial capital payment to obtain his release if the rest of the evidence showed that the terms of the lease had been treated as binding. But the evidence points to an entirely more flexible arrangement, with transactions apparently involving motor cars, loans, and "contra" payments which have not been explained.

33.
There is no contemporaneous evidence of rent demands or statements. The statements which have been produced are either undated or, in respect of the period covering 2016 onwards, were produced in December 2019, presumably as part of the reference. Mr Chivers' witness statement confirms that

he “is required to make an annual rent payment in the sum of £90,000”, but there is no evidence that this amount was actually paid specifically as rent to meet the obligations under the lease. The lack of attention to some of the most important and routine steps required to formalise a landlord and tenant relationship (landlord’s consent, registration, stamp duty) suggests that the lease was not a particularly important document. The reference to the same sum of £50,000 as rent in the rental statement and as a loan repayment in Mr Chivers annotated bank statements suggests that the relationship between landlord and tenant was anything but conventional.

34.
I therefore have significant doubt that the lease, in the form presented in evidence, is a true reflection of the arrangement under which Mr Chivers occupies Plot D. All the evidence points to an entirely more fluid situation.

35.
Even if that were not the case, there are some significant questions about the claim itself. I am not persuaded that Mr Chivers has actually suffered a loss. I accept that whatever leasehold interest Mr Chivers holds may be inconvenient or less useful to him now that he does not have Plot B, but he has still had the use of the property since the vesting of Plot B in the acquiring authority. His evidence is not that he has agreed a surrender premium, let alone made a substantial payment. There is no evidence of surrender negotiations, or any payment being agreed. There is therefore no evidence that Mr Chivers will incur any substantial payment to get out of whatever leasehold interest he has. He appears to be waiting for an award from the Tribunal, before he and Mr Arslanian then agree how they wish to proceed. Whether the whole sum will be paid to secure a surrender, whether it will be divided between them on some basis, or whether Mr Chivers will keep the compensation and retain the lease are all matters of speculation.

36.
In summary, I am not satisfied that the claimant has proved his claim to be entitled to compensation to reflect the cost to him of surrendering the lease, and accordingly, I find Issue 1 in favour of the acquiring authority and dismiss this element of the claim.

Issue 2 – Pre-reference costs

37.
The second issue in this reference is the professional fees which the claimant claims as pre-reference costs. It is useful to again note that the date of reference to the Tribunal was 24 August 2018.

38.
The claimant claims £253,890.75 comprising the following professional fees:

Professional advisor	Discipline	Amount
Roger Hannah and Co	Valuation advice	£43,891
Shoosmiths	Lawyers	£22,925
Mr Ian Ponter	Counsel	£3,000
EY	Forensic Accountants	£99,521
Gryphon	Management Consultants	£49,643.75
Jackson Associates	Accountancy and Taxation	£35,000

39.

The acquiring authority did not dispute that in principle the claimants are entitled to be compensated for costs and expenses incurred in taking advice upon and formulating their claims prior to the reference being made, providing that those costs were reasonably incurred, but distinguishable from costs of the reference.

40.
The claimant's submissions on Issue 2 took the form of two witness statements from the claimants' solicitor, Ms Samantha Grange of Shoosmiths. In her first witness statement dated 20 March 2020, Ms Grange said that the claimants' pre-reference costs amounted to £341,980.75, of which the claimants had received £30,000 in connection with a compromise agreement that the parties entered into on 23 July 2016 in respect of the claimants' objections to the CPO. She confirmed that following a request submitted on 15 November 2019, an advance payment of £153,000 was made by the acquiring authority.

41.
By the time of her second witness statement, dated 3 April 2020, the amount claimed was £355,880.75. However, Ms Grange said that of this total, pre-reference costs amounted to £253,908.75.

42.
In its response to her first witness statement, the acquiring authority said that £207,000 had already been paid in professional fees. These comprised the £30,000 paid on completion of the compromise agreement, a further sum of £24,000 paid towards professional fees, and the £153,000 advance payment. This latter figure represented 90% of the acquiring authority's estimate of professional fees, which I assume was £170,000. The authority therefore said that the amount in dispute was approximately £118,000 (£341,980, less £30,000, £24,000 and £170,000).

43.
In her second witness statement, Ms Grange disputed that the sum of £24,000 should be deducted. This was advance compensation, payable under the terms of the compromise agreement, which was deducted from the overall settlement figure. Accordingly, a deduction should not be made a second time. I cannot rule on that from the evidence submitted. I have not seen the compromise agreement, nor should I do so. I have determined below what I consider to be reasonable professional costs in each case.

44.
I now turn to the individual heads of professional fees. VAT has been ignored throughout, as it is not claimed.

Roger Hannah and Co – valuation advice

45.
The acquiring authority does not dispute that the claimants can recover the costs incurred engaging Roger Hannah and Co to prepare a heads of claim report, advise on market value, and negotiate on behalf of the claimants. The authority noted that the claimants had submitted the firm's original fee proposal (but no engagement letter) timesheets for the period between 8 June and 27 June 2018, and invoices (but no receipts). The authority commented that the terms of engagement changed after the reference was made since the invoice history suggests that a fixed fee was paid for advice at that stage.

46.
However, as the claimants observed in response, the authority did not raise any substantial objections to this element of the claim, and that little by way of dispute on this element existed. The claimants' solicitor submitted a copy of an email from Mr Cooper of Ardent, acting for Merseytravel, dated 13 May 2019, in which Mr Cooper said "we review[ed] RH&Co's time to Spring last year. The rate is not disputed. Provided that time can be evidenced [in] support of the claim and is proportionate."

47.
The claimants have submitted seven invoices from the firm, totalling £43,890.90, and a supporting time sheet covering work from 8 June 2015 to 27 August 2018

48.
In my view the evidence submitted by the Claimants is sufficient to justify the amounts claimed, and I am satisfied that these costs have been reasonably incurred and are reasonable in amount. However, the amount I award is £43,890.90, rather than £43,891 which was a figure that resulted from an Excel spreadsheet rounding.

Shoosmiths – legal fees

49.
In Ms Grange's first witness statement, she said that the claimants had incurred £95,325 in legal fees and costs between 22 January 2016 and 26 February 2020. In her second witness statement, Ms Grange said that allowing for the payment of £30,000 referred to above, of the remaining £65,325, Ms Grange said that £22,925 were pre-reference costs.

50.
Again, there is little by way of substantial objection from the acquiring authority. In its original submission the acquiring authority noted that the information provided initially included advice relating to the CPO, the CPO inquiry and estimated fees similar to those ultimately paid at the time a compromise agreement was completed. Ms Grange's second witness statement dealt with most of those objections. The authority also complained that there was little narrative detail.

51.
I have not been able to reconcile the amount claimed with the 12 invoices and invoice narratives submitted. For the period up to the date of reference, these covered the period from 25 May 2016 to 31 August 2018, and aggregated to £67,385.68 including disbursements.

52.
The narrative attached to each invoice is comprehensive. While I have some sympathy for the acquiring authority's point that some individual items lack detail, overall the picture painted supports the amounts included in each of the individual invoices. Even allowing for the £30,000, the overall aggregate of the invoices exceeds the balance claimed of £22,925, assuming, which I do from her witness statements, that Ms Grange's firm has not been paid the £24,000 referred to above. From the limited evidence provided, I am satisfied that the amount claimed is reasonable in amount and was reasonably incurred as pre-reference costs, and I award it to the claimants.

Counsel

53.
The claimants claim £3,000 for counsel's fees. The acquiring authority's initial objection was to counsel attending the mediation referred to above, but of course the cost of that does not form part of

the pre-reference costs. The invoices submitted indicate counsel's fees to be in excess of £9,125 up to the date of reference. Again, on the limited evidence provided, with little further explanation of how the sum of £3,000 is arrived at, the sum appears to me to be reasonable for counsel's involvement in a substantial claim for compensation, and I award it to the claimants.

EY (Ernst and Young) – Forensic Accountants

54.
The claimants claim £99,521. This is the aggregate of four invoices for £12,500 (dated 9 August 2016); £54,811 (27 September 2017); £20,000 (9 January 2018); and £12,210 (27 November 2018). Ms Grange said that EY were initially instructed to quantify compensation in the event of extinguishment of PMDL, but the firm's instructions evolved into an assessment of four separate trading scenarios and assessing the claimant's loss for each, with a view to mitigating loss. Ms Grange submitted an analysis prepared by EY which outlined the work carried out.

55.
The firm provided four reports: an initial report assessing the extinguishment claim; an updated report incorporating new information; a third report assessing three separate trading options, the viability and claim under each; and a fourth report incorporating the permanent use of Plot C as an option, with a revision of options from the previous report. Ms Grange submitted a statement from Mr Dougill which supported the claim for EY's costs, explaining why their work was necessary.

56.
The acquiring authority's position, as stated to Ms Grange in an email of 18 March 2019 from Merseytravel, is not that the appointment of a forensic account was in itself unreasonable; but it queries whether it was necessary to appoint one of the "top 4" firms. The authority considers the amounts charged per hour as excessive; it says that much of the content of the reports was heavily reliant and dependent on assumptions and views provided by the client, and questions why 16 fee earners were involved in the instruction.

57.
In correspondence with the Merseytravel's agents, Ms Grange responded that the claimants are entitled to appoint the forensic accountant of their choice. That is undoubtedly true, but it does not follow that an acquiring authority should necessarily be responsible for the costs involved. I am conscious that this was a substantial claim, in excess of £3 million, and that considerable work was required by EY under the various evolving scenarios, with total extinguishment only being agreed at the mediation. However, in my judgment there is force in the acquiring authority's scepticism that it was necessary to appoint a "top 4" firm, and that it was necessary to use 16 fee earners in the instruction. Again, there is lack of detail in the material before me, but taking a broad brush approach based on the limited evidence provided, I reduce the amount claimed by approximately 25%, and award £75,000 to the claimants.

Gryphon Management Consultants

58.
The claimants say that Mr Mark Dougill of Gryphon Management Consultants acted as the primary interface between them and the acquiring authority, allowing Mr Chivers to concentrate on the day to day running of his business.

59.

Ms Grange submitted copies of six invoices from Gryphon, covering the period April 17 to September 2018. While the amount claimed is £49,643.75, the invoices aggregate to £49,143.75 (£3,600; £1,800; £9,450; £12,150; £9,425 and £12,718.75). The invoices are supported by a breakdown of hours per week and a summary of the work which Mr Dougill carried out. In the early period, Mr Dougill spent 8 hours a week on the CPO, but this increased over the period so that in the later weeks he was spending up to 24 hours a week. His hourly rate was £56.25, which increased to £68.75 in January 2018.

60.
It seems from the evidence that in essence Mr Dougill dealt with all aspects of the CPO, freeing Mr Chivers to concentrate on his day to day business. Mr Dougill's various activities included liaising with the professional team whose fees are also claimed in this reference, attending various meetings and providing information to the various other consultants.

61.
The acquiring authority accepted that Mr Dougill acted as a shadow director from around November 2016 onwards, charging for his services through Gryphon. But the authority noted that aside from the brief narratives attached to each invoice, no further evidence has been provided.

62.
I accept that it was appropriate for the claimants to appoint a professional to deal with the fallout from the CPO, leaving Mr Chivers to concentrate on his day job. The amounts charged per hour by Mr Dougill are reasonable, and a pattern of his involvement increasing as the matter went on is also plausible. While he has not provided much if anything of a breakdown of what he actually did each week, I can imagine when looking at the picture as a whole that he was kept busy. Stepping back, it seems to me that a charge of just under £50,000 for running the CPO for the claimant for nearly 18 months seems a reasonable amount. I award to the claimants the aggregate of the invoices, viz. £49,143.75.

Jackson Associates

63.
The claimants claim compensation for the fees incurred in employing Jackson Associates to provide specialist taxation advice in contemplation of the CPO and its impact upon PMDL. They have submitted a copy of the firm's terms of engagement letter dated 1 November 2016 to Mr Chivers and PMDL which confirms their retention as "your business and tax advisors in relation to the compulsory purchase order of the site of Prestige Motors at Newton Le Willows".

64.
The attached Schedule of Services indicated that Jane Jackson of the firm would represent Mr Chivers' financial interest in all aspects of the project by providing "high level management input and support, financial expertise and input, financial negotiations as and when required, project management input and support". It went on: "Jane Jackson will be required to facilitate and lead meetings with other professional advisers feeding back to Mr Chivers as to the progress of such meetings. Jane Jackson will work in conjunction with Mark Dougill offering additional support in specialist areas such as finance and tax."

65.

In her second witness statement, Ms Grange said that Ms Jackson attended meetings with the acquiring authority, with Mr Dougill, reviewed the reports prepared by EY and advised on the tax implications of the potential future trading scenarios for PMDL.

66.
The amount claimed is £35,000, supported by three invoices for work done on account: 28 August 2017 (£5,000); 31 March 2018 (£15,000); and 31 December 2018 (£15,000). While the latter invoice covers work up to 31 December 2018, Ms Grange submitted, without any explanation as to why, the fees are considered to properly form pre-reference costs. A two-page table outlines the number of hours incurred each month, between November 2016 and December 2018. There is no narrative up to April 2018, but from that date the work undertaken is sparingly described as “various emails phone calls and meetings”. While the total amount said to have been accrued in fees of £62,400, £35,000 is claimed.

67.
In correspondence with Ms Grange, the acquiring authority complained that despite numerous requests, no timesheets had ever been submitted. In its submissions, the authority questioned which claimant the firm was acting for – the engagement letter suggests both, but the primary role was to represent Mr Chivers’ interests. It was not clear why fees incurred on advice provided to a shareholder of the second claimant in its conduct of compensation negotiations, in which the shareholder’s interests were represented by PMDL’s statutory directors and Mr Dougill, are reasonably recoverable.

68.
I have some sympathy for the authority’s view, but Mr Chivers was also the claimant in respect of Plot B. However, the main reasons for doubt about this head of claim are firstly the opaque nature of the evidence, and secondly there seems to me to have been a degree of overlap between the work that Ms Jackson and Mr Dougill appeared to carry out, and possibly some overlap between the work of Ms Jackson and EY. I accept that some taxation advice might have been required, but otherwise I do not find this head of claim made out. Again doing the best I can on the evidence, I award £5,000 to the claimants.

Summary

69.
In my judgment the following amounts are properly recoverable as pre-reference costs:

Professional advisor	Compensation awarded
Roger Hannah and Co	£43,890.90
Shoosmiths	£22,925
Mr Ian Ponter	£3,000
EY	£75,000
Gryphon	£49,143.75
Jackson Associates	£5,000

70.
The total amount of compensation as pre-reference costs is therefore £198,959.65. The claimants have not asked me to apportion compensation between them, and I do not do so.

71.
The parties will need to agree how the above determination should be adjusted to allow for advance payments already made, and what those payments represented. In the absence of agreement, they should apply to the Tribunal for further directions if they wish me to determine that aspect.

72.
This decision is otherwise final on Issues 1 and 2. The parties are now invited to make submissions on the costs of the reference, and a letter outlining a timetable accompanies this decision.

		P D McCrea FRICS FCIArb
	Dated:	9 November 2020

Addendum on Costs

73.
On 9 November 2020 the Tribunal gave its decision on the two outstanding issues in this reference, dismissing the claim in issue 1 (“lease breakage”), but allowing the majority of the claim in issue 2 (pre-reference costs). I have now received the parties’ submissions and replies on costs.

74.
In summary, the claimants claim their costs of the reference at £82,650, plus the Tribunal’s determination fee of £3,979.19. Referring to the Tribunal’s Practice Directions dated 19 October 2020, the claimants submit that in the normal course of events, the costs incurred by a claimant in establishing the amount of compensation to which they are entitled following the compulsory acquisition of their land should be met by the acquiring authority. The claimants submit that neither of the periods referred to in Practice Direction 24.14 (any period before which a sufficiently detailed notice of claim was given to the acquiring authority, and any period after a reasonable time for the acceptance of an offer made by the acquiring authority) apply. The acquiring authority was fully aware of the details of the claim from an early stage and did not at any time make an offer to settle.

75.
The claimants submit two documents not available to the Tribunal in the substantive proceedings. The first is a joint agreement between the parties to market Mr Chivers’ sub-leasehold interest, with the payment of £450,000 for “lease breakage” if an assignee/sublessee could not be found. The second is the heads of terms from the mediation agreement, from which it is apparent that the total amount of compensation agreed (including £450,000 for “lease breakage” and £60,000 for “car showroom holding costs”), was £3,248,614.

76.
The acquiring authority’s primary position is that the Tribunal should depart from the general rule, and instead order that the claimants should pay the authority’s costs of £49,219.92, which it invites me to summarily assess. It argues that the claimants only properly particularised the “lease breakage” issue in their amended statement of case on 9 June 2020, and the Tribunal ultimately dismissed that element of the claim, which was speculative, and which greatly inflated the total claim. The authority submits that the claimants acted unreasonably, causing the authority to incur unnecessary costs. As regards pre-reference costs, the Tribunal disallowed £55,000 or 22% of the total claimed. The amount claimed was greatly exaggerated and had the claimants adopted a more realistic approach at an earlier stage the need for the reference would likely have been avoided.

77.

Alternatively, in the event that I determine that the claimants should recover at least some of their costs, the authority submits that the claimants should not recover their costs connected with issue 1, which was rejected by the Tribunal, nor with the claimants' belated correction to their statement of case. It points out that it paid the car showroom holding costs of £60,000, and incurred costs on the marketing campaign of the sub-leasehold interest – both of which it transpired were premised on an incorrect factual basis. The authority also raises some discrepancies on quantum.

78.
In response, the claimants accept that their statement of case was amended as described but submit that this did not materially alter the basis of the claim. The acquiring authority was fully aware of the nature of the claim in issue 1, as evidenced by correspondence between the parties from 2015 onwards. As regards pre-reference costs, in the light of the Tribunal's award the claimants have largely succeeded, being awarded 100% of their legal, surveyors and management consultancy pre-reference costs, together with a significant proportion of the costs of their forensic accountants.

79.
My starting point is that aside from their claim in issue 1, the claimants have secured substantial compensation. They can therefore be considered the successful party and should ordinarily recover their costs of the reference. The acquiring authority's approach to costs is unrealistic, having paid nearly £3 million in compensation after the reference commenced. Had they wished to protect themselves against the costs incurred in resolving the issues which were not agreed at the mediation, they should have made a sensible offer. Having failed to do so the award of costs against them follows almost as a matter of course.

80.
However, there is force in the acquiring authority's submissions that they were the successful party on issue 1. In my judgment an adjustment in the costs recoverable by the claimants is required to reflect the Tribunal's rejection of this part of their case, which formed a large part of the reference after the mediation. The authority had agreed in principle to pay this element of the claim, and as it points out incurred costs in a joint marketing campaign and, apparently, also paid holding costs to Mr Chivers in the interim, but those are not costs of the reference. The mediation took place in March 2019, at which heads of terms were agreed, including the marketing campaign, jointly underwritten, and which if unsuccessful would result in the authority paying £450,000 for lease breakage. In the event, of course, the heads of terms did not mature into a binding agreement on all points. Ms Grange, for the claimants, says that engrossments were circulated on 2 September 2019, but from that point the authority's advisors questioned the validity of the showroom lease and rental payments and the lease breakage claim was removed from the settlement and left to be determined by the Tribunal. Having ultimately failed on that part of its claim it would not be fair for the claimants to recover all of their costs of the reference.

81.
The parties' submissions are sufficiently detailed to enable me to summarily assess the claimants' costs. The costs have been broken down by reference to the different professionals involved, but I have also been provided with invoices and other more detailed information. The total bill, at £82,650, does not appear disproportionate to the total sum recovered in the reference, which exceeded £3 million. I can therefore consider, on quite a broad basis, whether any element of the costs claimed appears unreasonable in amount. Separately I will consider what allowance to make to reflect the claimants' lack of success in one element of the claim.

Roger Hannah and Co - £10,000

82.
The claimants have submitted an invoice from the firm of surveyors in the amount claimed, for “time incurred from 1 December 2018 to 4 March 2019, preparation for and attending the mediation, liaising with [Mr Chivers] and attending meetings with Counsel. Fee as agreed £10,000.” As the authority notes, there is no breakdown of the time spent, but an hourly rate of £150 would suggest 66 hours. The authority submits that 20 hours would be reasonable, allowing one day for the mediation and one day for preparation, so £3,000. I agree that the amount claimed is unsupported by detail but consider that the firm would have had more work to do than the level suggested by the authority. In the absence of any further detail of what was involved, I consider that the costs reasonably incurred in relation to the mediation ought to have been the equivalent of 30 hours work - £4,500 – which I award to the claimants.

Gryphon Management - £5,500

83.
In my substantive decision I awarded nearly £50,000 of pre-reference costs incurred by the claimants in employing Gryphon Management. While a small proportion of those costs was for work carried out for a short period after the notice of reference was made on 24 August 2018, I accepted that they properly formed part of the pre-reference costs.

84.
This is an additional costs claim for assistance in coordinating the claim, which the acquiring authority doesn’t challenge in principle. The amount claimed as costs of the reference are substantiated by an invoice, with a time sheet showing that the work involved was carried out from 8 October 2018 onwards, so there is no double counting with costs already awarded. The amount claimed is reasonable and I award it to the claimants.

Shoosmiths - £52,150

85.
The amount claimed is supported by invoices and invoice narratives.

86.
I am satisfied that the claimants should recover their reasonable reference costs up to and including those incurred in connection with the mediation. These total £22,500 in the first four invoices submitted (including the £4,000 balance of the invoice dated 31 August 2018, not included in pre-reference costs). I also allow the claimants to recover their costs included in the next two invoices (30 April 2019, in the sum of £5,000, and 30 September 2019 in the sum of £8,000) because the narratives suggest that the work done concerned the mediation and settlement agreement.

87.
That leaves four invoices totalling £16,650, for work done in the period beginning 2 October 2019. The narrative attached to those invoices suggests a shift in emphasis to the Tribunal proceedings, and the costs were incurred in resolving issues 1 and 2. Although the claimants were unsuccessful on issue 1 the costs would not have been halved if they had not raised it at all. Some allowance is also appropriate to reflect costs incurred by the respondent in achieving success on that issue. Without analysing each item, I allow the claimants to recover one third of the aggregate, to reflect the Tribunal’s rejection of the claim in issue 1.

88.
I therefore award £41,050 in solicitor's fees, being £35,500 incurred up to the breakdown of the settlement negotiations plus one third of the £16,650 incurred thereafter.

Counsel - £15,000

89.
The claim comprises counsel's fees incurred between 29 October 2018 and 5 June 2020, the balance having been awarded as pre-reference costs, and is supported by a fee note. There is no challenge to the amount of the fee but the authority argues that the £7,500 incurred after March 2019 should not be payable. Adopting a similar approach to that above, I reduce the amount of counsel's fees by £5,000, and award £10,000 to the claimants.

90.
Accordingly, I award the following amounts to the claimants as costs of the reference:

Roger Hannah and Co: £4,500

Gryphon Management: £5,500

Shoosmiths: £41,050

Counsel: £10,000

Total: £61,050

91.
The claimants make an application to recover the determination fee of £3,979.19 from the acquiring authority. The Tribunal has the power to make such a determination under Rule 10(14) of the Tribunal's 2010 Procedure Rules. Since the reference results in the claimants recovering the bulk of their claim, it is appropriate for me to make such an order. I therefore direct that in addition to their reference costs of £61,050, the acquiring authority shall pay to the claimants the determination fee of £3,979.19.

92.
The claimants should also have their costs of the submissions on costs and I invite the parties to agree these and to submit a draft order recording this decision and any terms they agree concerning time to pay.

P D McCrea FRICS FCIArb

Dated: 11 February 2021