Compulsory Reading:

Water(worth) under the bridge?

What the Tribunal's decision in *Castlefield Property Limited v National Highways Limited* [2023] UKUT 217 (LC) tells us about their preferred approach to assessments of injurious affection

Source: https://www.flickr.com/photos/garstonian/14153488498

The Tribunal published its decision in the *Castlefield* case on 19 September 2023. There are three things this decision tells us might no longer be relevant when presenting an assessment of injurious affection:

1. Post-valuation date events - casting doubt on *Waterworth v Bolton MBC* (1979) 37 P&CR 104;
2. Evidence from specialists in the assessment of compensation; and
3. Valuations of development sites based on comparables.

Before getting into our thoughts on these issues, it is worth setting out briefly the facts of the case. National Highways ('NH') compulsorily acquired a parcel of land which previously provided the sole access from the A566 to the Cheshire Lounge, a new derelict pub, pursuant to the A555 (Knutsford to Bowden Improvement) Development Consent Order 2014 ('the Order'). NH took possession of the land on **10 November 2014** ('the Valuation Date'). In 2016, the claimant entered into a conditional purchase contract on 10 August 2016 with a view to redeveloping the pub. The purchase included any claim for compensation arising from the compulsory acquisition.

The original access was over a short stretch of public highway. The new access that was created is a significantly longer and less prominent route over the land of a neighbouring owner. The Order included compulsory acquisition powers over the land required for the new access. Before taking possession of the land, NH had informed the owner that it intended to complete the acquisition of the land required for the replacement access and execute a deed of easement granting legal rights

of way over the new access. That never happened even though the new access had been constructed in March 2017.

NH initially insisted that no further grant of rights was necessary and that the claimant could rely on the Order as providing the only legal right of way it needed. It's hard to understand how NH could have taken that position – a compulsory acquisition power in a DCO has no effect until it is implemented and in any event could not directly benefit a third party. Moreover, NH entered into a confidential agreement with the owner of the land (the Tatton Estate) that it would do its best to avoid acquiring any of the Estate's land. It then left the claimant to negotiate unsuccessfully with the neighbouring owner (the Tatton Estate) for a deed of easement over the new access.

Source: Amazon.co.uk

In July 2022 (more than seven years after the compulsory acquisition), NH agreed terms with the Tatton Estate for a tripartite deed of easement conferring rights over the new access on both it and the claimant. The terms were not agreed by the claimant and the deed was never executed. A further year later (two days before the commencement of the Tribunal hearing), with the intended development of the site still not having proceeded in the absence of certainty about rights and obligations relating to the new access, a draft deed of easement was agreed between the claimant and NH, although the deed had not been completed. NH also gave a written undertaking to acquire the neighbouring land over which the new access passes and to grant rights in the agreed terms to the claimant once it has vested that land in itself.

The Tribunal summarised the position as follows:

"Thus, when the hearing opened on 16 May 2023, more than nine years after the reference land was taken by and almost six years after the claimant had acquired the Cheshire Lounge, the claimant still had no documented right of way over the new access. That has not meant that it has been unable to make use of the access, which has been open and available for use since 2017, but it is now accepted by National Highways that it would not have been reasonable to expect the claimant to proceed with its intended development of the site without the certainty of an executed document recording its

rights and obligations over the new access. It is also accepted by the claimant that if the undertaking now offered by National Highways is recorded in an order of the Tribunal there is sufficient certainty about its rights over the access to remove that obstacle to development."

For an outsider reading the facts as set out by the Tribunal, this all seems rather bemusing. Having gone to the trouble of securing compulsory acquisition powers over the Tatton Estate's land purely in order to create a new access to the Cheshire Lounge, why did NH not use those powers instead of getting tangled up in expensive and time-consuming negotiations, litigation and an increased award of compensation. There must have been some reason but it is not apparent from the decision.

The main issue in the reference was the claimant's claim under section 7, Compulsory Purchase Act 1965 for compensation for the injurious affection caused to its retained land (i.e. the Cheshire Lounge) following the compulsory acquisition of its access land and as at the Valuation Date.

(1) Assessing compensation for injurious affection

Section 7 confers a right to compensation where land which has not been taken by an acquiring authority has nevertheless been adversely affected by being severed from other land which has been taken. It provides:

"In assessing the compensation to be paid by the acquiring authority under this act, regard shall be had not only to the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act"

This is a slightly modernised version of section 63 of the Land Clauses Consolidation Act 1845 and leaves all of the heavy lifting to the Courts. Although we often talk of "severance and injurious affection" as if it were a single phrase, they are quite different. Severance relates to reduction in value cause by the loss of a part of the claimant's land (in this case access land). Injurious affection is the loss of the value of the retained land caused by the scheme generally – e.g. increased, noise, visual intrusion etc.

The assessment of section 7 compensation is approached by utilising a "before and after" i.e. by assessing the "before" value of the retained land (i.e. on the valuation date but disregarding the effect of the acquiring authority's scheme, in a "no scheme world") and deducing from it the "after" value of the retained land (i.e. on the valuation date but taking into account the effect of the scheme and the effects arising from the loss of the acquired land). A before and after valuation should produce a total sum of compensation for the rule (2) and the section 7 element of the claim. There are some doubts as to whether the before and after approach is correct in law. Michael Barnes KC in "The Law of Compulsory Purchase and Compensation" is typically forthright in describing it as "the incorrect method" because rule (2) requires and assessment of the **market value** of the land acquired while section 7 requires the assessment of the **damage caused to the (actual) owner**. The analysis of Mr Barnes is supported by two Court of Appeal decisions (*South Eastern Rly Co v London CC* (1915) and *Hoveringham Gravels v Chiltern DC* (1978)). However, the Tribunal has held, nevertheless, that the before and after approach can be a useful shorthand approach provided its limitations are borne in mind. In *Castlefield* neither party nor the Tribunal raised similar concerns, perhaps because the rule (2) value of the land acquired was not controversial.

One of the issues that arose in the course of the *Castlefield* hearing was the extent to which post-valuation date events could be taken into account in assessing injurious affection. This is an issue

which crops up frequently and there is not any direct guidance from the appellate courts (at least in the UK) in relation to it. James Pereira KC, on behalf of the claimant, originally argued that the "after" valuation must take into account all matters arising out of the exercise of the compulsory acquisition and which are known to have occurred by the date of the hearing, notwithstanding the fact that they could not have been known at the valuation date. In this case, this would mean that it would be assumed that a notional purchaser at the valuation date knew that certainty over the new access would not be achieved for a period of at least seven and possibly as long as eight years. However, it would mean that the notional purchaser would discount the value of the site more heavily than the claimant itself had done when it purchased the site; the claimant had agreed the price of the site on the basis that the contract was conditional on it being satisfied with the access arrangements (paragraph 20).

In paragraph 21, the Tribunal sets out a *"general rule"* for assessing injurious affection. It states that it would always be wrong to value land as if with knowledge of the matters which were not known, and could not have been known, at the valuation date. The Tribunal stated that the 1979 decision in *Waterworth* was *"wrong in principle"*.

In *Waterworth*, the Tribunal applied the "*Bwllfa* principle" to the assessment of section 7 compensation. This is the principle, from *Bwllfa and Merthyr Dare Steam Colleries Ltd v Pontypridd Waterworks Co* [1903] AC 426, that a Tribunal should not be required to speculate when it knows and can use the benefit of hindsight. In the words of Lord Macnaughten: *"With the light before him, why should (the arbitrator) shut his eyes and grope in the dark?"*. In *Waterworth,* the Tribunal was asked to assess the injurious affection of retained land that was otherwise suitable for development but was deprived of access. Although of no assistance to the facts of the case because its effect depended on the unknown negotiating position of the adjoining owner because of the access issue, the Tribunal accepted the authority's argument that planning permission being granted some three years after the date of the acquisition could be taken into account.

The decision was appealed on various grounds but the Court of Appeal did not take a position on this aspect of the Tribunal's decision. However, the judgement of Lord Hoffman in the Court of Final Appeal of Hong Kong in *Penny's Bay Investment Co v Director of Lands* (2010) was clear that post-valuation events should not be taken into account in assessing compensation under section 7.

It appears to us, although we were not involved in the case, that the merits of the *Waterworth* were not debated during the course of the hearing. Mr Pereira KC did not rely on it and accepted in closings that the correct way to undertake the section 7 valuation was to have regard to all matters that were known of anticipated at the valuation date, or which would have been known or anticipated by a reasonably prudent and properly advised purchaser at the valuation date.

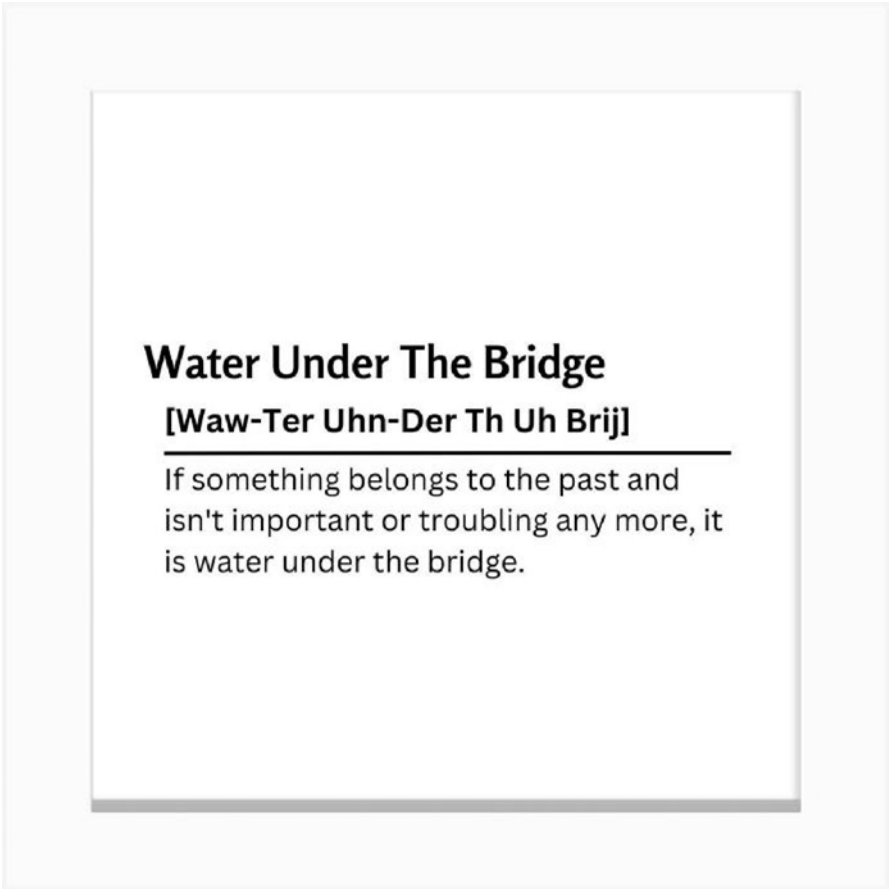
Clearly each case will be decided on its own facts and we anticipate that parties may continue to seek to take into account post-valuation date events in their assessments of injurious affection as indicators of what might have been known to a reasonable purchaser at the valuation date. This is particularly so in *Castlefield,* where there actually was a sale after the Valuation Date. However, the *Castlefield* decision is a clear marker of the Tribunal's preferred approach.

What did the Tribunal's decision mean with respect to the assessment of compensation under section 7? The Tribunal agreed with the Claimant's expert that the greater the prospect of delay in securing the easement, the greater the discount but was unable to accept the 90% discount put forward by that expert. On the other hand, NH's expert allowed only a 10% deduction. The Tribunal ultimately adopted a discount of 20% for the lack of a deed of easement. The discount appears to be based on the claimant had been reassured (as at the Valuation Date) that although it would have to

negotiate with the Tatton Estate in relation to the terms of the easement, NH would not allow the negotiations to become unreasonably prolonged. Specifically:

"[The claimant] proceeded with the acquisition on the basis of representation by Mr El-Rayes that the policy of National Highways, where it was responsible for acquiring a replacement access over land belonging to a third party, was to allow a period of up to two years for private negotiations between the displaced landowner and the third party before it would be prepared to "force the issue" by exercising its compulsory powers"

It therefore appears that the Tribunal applied its discount on the basis that injurious affection should be assessed assuming that a deed of easement would be secured after about two years and that it was necessary to disregard the fact that it took much longer in reality.



Source: https://www.iamfy.co/product/water-under-the-bridge-dictionary-definition-funny-quote-canvas-print

(2) Relying on evidence from compulsory purchase compensation surveyors

The Tribunal's part obiter dictum statement, part expression of frustration, at paragraph 70 of the *Castlefield* decision stood out to us:

"Rather than relying on the evidence of their experts in property valuation both parties looked to specialists in the assessment of compensation to assist the Tribunal in quantifying the claim. We question why this is thought to be a helpful approach. It almost invariably means that those who have been involved in negotiating on behalf of one side or the other (often for many years) are asked at the eleventh hour to clear their minds of the interests of their client and acquire qualities of

objectivity and impartiality which, in practice, are beyond them. Rather than providing expert evidence on issues of fact or judgment they are expected to be the mouthpieces through whom factual evidence of which they have no first-hand knowledge is presented and arguments on one side or the other are developed. We do not single out the witnesses in this case for criticism. They have done their best to be objective, but to a greater or lesser extent that state of mind has proved to be unachievable, as it almost always proves to be unachievable by experts in their situation."

Jeez, *"If you're gonna let me down, let me down gently"* (Adele, 2015). Here, the Tribunal seems to be questioning the value of evidence from experienced compulsory purchase compensation surveyors and even going further to suggest that they struggle to maintain objectivity and impartiality where they have acted for their clients over several years. Somewhat surprising is that the parties in *Castlefield* also called specialist hospitality experts and were not relying solely on the evidence of their compulsory purchase compensation surveyors, although we explain below that the Tribunal also found their evidence *"inconsistent and unsatisfactory".*

Source: https://m.soundcloud.com/lifeofbecktoria/adele-water-under-the-bridge

For what it's worth, we find that compulsory purchase compensation surveyors, many of whom start acting for their clients before or shortly after the relevant valuation date can bring hugely valuable insight. They also understand the very complex statutory framework that compulsory purchase compensation heads of claim are governed by and the assumptions that they have to make for the purpose of each valuation they are instructed to provide.

All members of the Royal Institution of Chartered Surveyors are required to comply with the professional guidance notes, including *"Surveyors acting as expert witnesses"* (4th edition, amended February 2023) and "*Surveyors advising in respect of compulsory purchase and statutory compensation"* (1st edition, published April 2017). We always refer experts to these in our instruction letters, which include various duties such as their duties to the Tribunal and to maintain professional

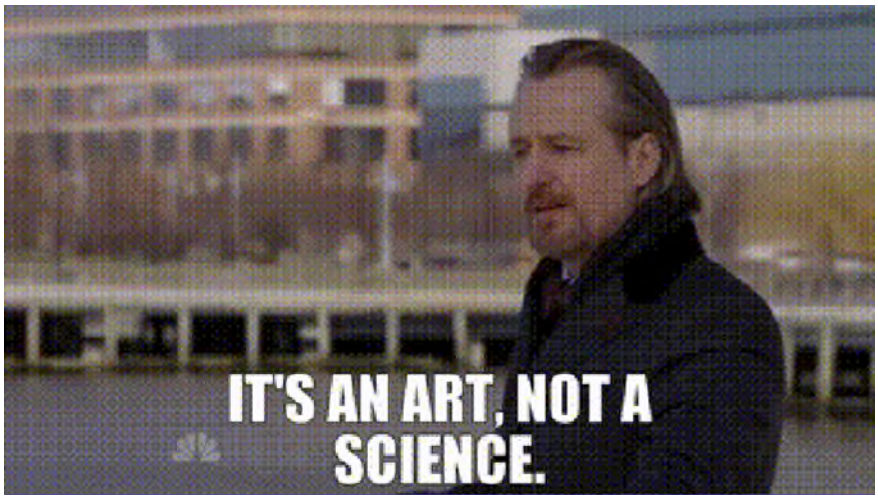
objectivity and impartiality throughout. There is also provision for instructing a single joint expert, which we don't usually find appropriate with valuations for compulsory purchase compensation, but we wonder if the next step for the Tribunal will be to start to encourage parties to consider this.

While we think parties should always consider instructing compulsory purchase compensation surveyors early in the process and keep them instructed when a reference is made to the Tribunal, for the purpose of giving evidence they should seek to instruct experts in the valuation of the type of property that is the subject of the claim. This can be challenging. Experts with real, recent expertise in transactions in a particular market rarely have the appetite to spend months and years developing expert reports and being cross-examined by unfriendly barristers. Nevertheless, it appears that is the only way to secure properly credible expert evidence. Those valuers can in turn draw on support from compulsory purchase compensation surveyors for relevant background and guidance.

(3) Use of residual valuations vs comparables

It's almost a trope amongst compulsory purchase specialists that the Tribunal doesn't like residual valuations based on various comments the Tribunal has made in the past. We've always thought this something of a generalisation. In assessing market value, one should approximate as far as possible the approach that the market would take. For development sites of any size or complexity, that is almost always some form of appraisal.

Neither of the hospitality experts that the parties called produced a residual valuation. The expert who gave evidence on behalf of the claimant relied on comparable evidence of *"unidentified sites and unverifiable transactions which was of no assistance to [the Tribunal] at all."* The expert who gave evidence on behalf of the defendant ignored development value altogether and adopted a speculative income-based valuation for the existing buildings; he did not know when the last rent payable at the Cheshire Lounge was agreed and had no knowledge of how it had traded before it closed, so also relied on comparables that the Tribunal said *"were not convincing"*.



Source: *https://getyarn.io/yarn-clip/8024a113-6a85-4036-b563-75c35a030607/gif*

Lots of talking points from this case. With so many compulsory purchase compensation cases settling before the Tribunal publishes their decisions, it is interesting to understand their current thinking about assessing injurious affection based on what a reasonable purchaser would have known at the valuation date, instructing specialist property valuers to give evidence (rather than specialists in the assessment of compensation) and relying on residual valuations for prospective development sites.

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