Neutral Citation Number: [2021] EWCA Civ 651

Case No: C3/2020/0976

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Mr Martin Rodger QC, Deputy Chamber President and Mr Andrew Trott FRICS
[2020] UKUT 0037 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th May 2021

Before :

LORD JUSTICE LEWISON
SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE MOYLAN

- -

Between :

SECRETARY OF STATE FOR TRANSPORT	**Appellant**
- and -	
(1) CURZON PARK LIMITED	**Respondents**
(2) QUINTAIN CITY PARK GATE BIRMINGHAM LIMITED	
(3) THE EASTSIDE PARTNERSHIP NOMINEE COMPANY LIMITED	
(4) BIRMINGHAM CITY UNIVERSITY AND BIRMINGHAM CITY COUNCIL	

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Mr Neil King QC & Mr Guy Williams (instructed by **DLA Piper UK LLP**) for the **Appellant**
Mr James Pereira QC & Ms Caroline Daly (instructed by **Town Legal LLP**) for the **1st Respondent**
Mr David Elvin QC & Mr Richard Moules (instructed by **BCLP LLP)** for the **2nd Respondents**
Mr David Elvin QC & Mr Richard Moules (instructed by **Ashurst LLP)** for the **3rd Respondents**
Mr Richard Glover QC (instructed by **Mills & Reeve LLP)** for the **4th Respondents**

Hearing dates : **21st & 22nd April 2021**

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Approved Judgment

Lord Justice Lewison:

Introduction

1. Where land is acquired compulsorily, compensation is assessed on the basis of a hypothetical sale in the open market. The legislation requires that hypothetical sale to be assessed on the basis of certain counter-factual assumptions; in particular assumptions about planning permission. The issue that arises on this appeal is how those assumptions mesh with the real world.

2. The context of the appeal is the determination by the Upper Tribunal (Martin Rodger QC, Deputy President and Mr Andrew Trott FRICS) of a preliminary issue formulated as follows:

> "Whether, and if so how, in determining an application for a certificate of appropriate alternative development under section 17 [Land Compensation Act 1961] ("CAAD") the decision-maker in determining the development for which planning permission could reasonably have been expected to be granted for the purposes of section 14 LCA 1961 may take into account the development of other land where such development is proposed as appropriate alternative development in other CAAD applications made or determined arising from the compulsory acquisition of land for the same underlying scheme."

3. The UT answered that question at [66] of their decision as follows:

> "… our answer to the preliminary issue is that in determining the development for which planning permission could reasonably have been expected to be granted for the purposes of section 14(4)(b), the decision maker is not required to assume [that] CAAD applications or decisions arising from the compulsory acquisition of land for the same underlying scheme had never been made. The decision maker must treat such applications and decisions as what they are, and not as notional applications for, or grants of, planning permission. They are not material planning considerations. Subject to those boundaries, it is for the decision maker to give the applications and decisions such evidential weight as they think appropriate."

4. Their decision is at [2020] UKUT 37 (LC), [2020] RVR 154.

The facts

5. In 2018 the Secretary of State for Transport compulsorily acquired four contiguous sites for the construction of a new terminus in Birmingham for the HS2 high speed railway. The four sites are close to the main campuses of both Aston University and Birmingham City University. The acquisition was implemented by separate general vesting declarations; and the valuation date for the purpose of compensation was the date on

which each site vested in the Secretary of State. Those dates all fell in a period of approximately six months between 16 March 2018 and 26 September 2018.

6. Each site was a substantial potential development site in its own right. The sites were all cleared for development in anticipation of the eastward expansion of the city centre, but the emergence of HS2 saw them earmarked for the new station. They have been referred to as Sites 1, 2, 3 and 4.

7. Site 1 was known as City Park Gate; and until its acquisition on 17 July 2018 it was owned by the third Respondent, Quintain City Park Gate Birmingham Ltd ("Quintain"). It was the most westerly of the four sites. An outline planning permission had been granted for it and other land in 2007 for the construction of a major mixed-use development. Site 2 lies to the east of Site 1 and was held by Birmingham City University ("BCU") on a long lease from Birmingham City Council, the freeholder, until its acquisition on 16 March 2018. Planning permission was granted in 2009 for the development of a new university campus on the site, phased over 11 years, and that permission remained extant at the valuation date. Site 3 was known as Curzon Park and was owned by Curzon Park Ltd until its acquisition on 30 August 2018. It was the largest of the four sites. Planning permission was granted in 2008 for a development on Site 3 of up to 130,000 sqm including offices, residential, a hotel, retail, a medical centre and leisure uses. Site 4, the most easterly of the sites, known as Curzon Gateway, was owned until 26 September 2018 by two nominee companies. In 2007 planning permission had been granted for a canal-side development providing 260 residential units and 748 student bed spaces with other ancillary uses.

The applications for CAADs

8. Under the legislation governing compensation for compulsory acquisition, a landowner is entitled to apply to the local planning authority for a certificate of appropriate alternative development (a "CAAD"). The function of a CAAD is to identify every description of development for which planning permission could reasonably have been expected to be granted (either on the valuation date or at a later date) if the land had not been acquired compulsorily. Where such a certificate is granted, it is to be assumed for the purposes of assessing compensation that planning permission for that development has been granted.

9. Each of the landowners in this case applied to the Birmingham City Council, as planning authority, for CAADs.

10. Quintain made a CAAD application to the Council on 12 February 2019 in relation to Site 1, and on 10 May it appealed to the Tribunal against non-determination. The Council subsequently purported to grant a CAAD for a mixed-use development of up to 99,490 sqm including residential, office, hotel and retail uses, together with student accommodation comprising up to 1,940 bedrooms. Because an appeal had already been begun the parties agreed that the Council had no power to grant that CAAD; but it was indicative of the Council's view. BCU made its CAAD application in relation to Site 2 on 28 December 2018; and on 31 July 2019 the Council granted a certificate for a flexible development of up to 88,829 sqm, including up to 895 dwellings, a maximum of 38,580 sqm of offices, a theatre and a concert hall, a hotel, car parking, and a maximum of 66,187 sqm of student accommodation providing 2,279 beds. Curzon Park made its CAAD application for Site 3 on 18 April 2019. The Council granted a CAAD

on 18 June 2019 for a series of buildings of between 7 and 41 storeys comprising up to 181,260 sqm of residential, office, retail and educational uses, a hotel, and up to 37,013 sqm of purpose built student accommodation providing 1,716 beds. An application for a CAAD in relation to Site 4 was made on 22 February 2019, but it remained undetermined and the appeal was against non-determination. In their CAAD application for Site 4 the landowners proposed development of up to 44,000 sqm including retail, financial and professional uses, café and restaurant, office, residential and student accommodation (of 929 beds) including tall buildings of up to 25 residential storeys.

11. The UT described the approach that the Council took to the applications at [9]:

> "Each of the CAAD applications was self-contained, in that it was restricted to development of the applicant's site alone and did not take into account development on the other three sites. If a local planning authority was faced with four contemporaneous applications for planning permission for sites close to each other the cumulative effects of the proposed development would be a material consideration in deciding whether to grant or refuse permission in each case. But the respondents contended, and the Council accepted, that in determining each of the four CAAD applications (which are not applications for planning permission) it should disregard the other applications. As a result, the Council considered each of the applications in isolation, and those which it determined before an appeal was lodged were granted in full."

12. The Secretary of State's concern is that if applications for CAADs are considered in isolation one from another, the cumulative effect of the grant of such certificates may result in the assessment of compensation on the basis of the grant of planning permissions which would have been cumulatively unachievable in the real world. By way of illustration, take the case of student accommodation. The combined total of units of student accommodation proposed by the four landowners was 6,864 beds. But a planning policy contained in the development plan (Policy TP33) requires a demonstrated need for such development, where the development is to take place off campus. A need for that quantity of off-campus student accommodation might not have been demonstrated in the real world.

The legislation

13. The basic rules for assessing compensation are set out the LCA 1961, as amended by (among others) the Localism Act 2011. Further amendments have since been made by the Neighbourhood Planning Act 2017, but they are not relevant to our case. Section 5 sets out the basic rules. Rule (2) is that:

> "The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise."

14. Section 14 deals with planning permission. It relevantly provides:

> "(1) This section is about assessing the value of land in accordance with rule (2) in section 5 for the purpose of assessing compensation in respect of a compulsory acquisition of an interest in land.
>
> (2) In consequence of that rule, account may be taken—
>
> (a) of planning permission, whether for development on the relevant land or other land, if it is in force at the relevant valuation date, and
>
> (b) of the prospect, on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, of planning permission being granted on or after that date for development, on the relevant land or other land, other than—
>
> (i) development for which planning permission is in force at the relevant valuation date, and
>
> (ii) appropriate alternative development."

15. Under section 14 (2) (b) (ii) "appropriate alternative development" is excluded from the assessment of the prospect of the grant of planning permission. But section 14 goes on to provide:

> "(3) In addition, it may be assumed—
>
> (a) that planning permission is in force at the relevant valuation date for any development that is appropriate alternative development to which subsection (4)(b)(i) applies, and
>
> (b) that, in the case of any development that is appropriate alternative development to which subsection (4)(b)(ii) applies and subsection (4)(b)(i) does not apply, it is certain at the relevant valuation date that planning permission for that development will be granted at the later time at which at that date it could reasonably have been expected to be granted.
>
> (4) For the purposes of this section, development is "appropriate alternative development" if—
>
> (a) it is development, on the relevant land alone or on the relevant land together with other land, other than development for which planning permission is in force at the relevant valuation date, and
>
> (b) on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, planning permission for the development could at that date reasonably have been expected to be granted on an application decided—

> (i) on that date, or
>
> (ii) at a time after that date.
>
> (5) The assumptions referred to in subsections (2)(b) and (4)(b) are—
>
> (a) that the scheme of development underlying the acquisition had been cancelled on the launch date,
>
> (b) that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme,
>
> (c) that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers, and
>
> (d) if the scheme was for use of the relevant land for or in connection with the construction of a highway ("the scheme highway"), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet."

16. The launch date is defined by section 14 (6). In essence it is the date upon which the potential use of compulsory powers becomes public. It is common ground that "the launch date" in our case was 26 November 2013.

17. Section 5A deals with "the relevant valuation date". It provides:

> "(1) If the value of land is to be assessed in accordance with rule (2) in section 5, the valuation must be made as at the relevant valuation date.
>
> (2) No adjustment is to be made to the valuation in respect of anything which happens after the relevant valuation date."

18. In the case of land acquired by means of a general vesting declaration, section 5A (4) provides that the relevant valuation date is the earlier of:

(a) the vesting date, and

(b) the date when the assessment is made.

19. The expression "relevant land" is defined by section 39 (2) as follows:

> "In this Act, in relation to a compulsory acquisition in pursuance of a notice to treat, "the relevant interest" means the interest acquired in pursuance of that notice, "the relevant land" means the land in which the relevant interest subsists, and "the notice

> to treat" means the notice to treat in pursuance of which the relevant interest is acquired."

20. Section 7 of the Compulsory Purchase (Vesting Declarations) Act 1981 provides that where land is acquired by general vesting declaration, the LCA 1961 applies as if notice to treat had been served on the relevant landowners on the vesting date. Section 39 (8) of the LCA 1961 provides that references in the Act to a notice to treat include references to notices to treat that are deemed to have been served. In our case, therefore, the "relevant land" is the land in which each individual landowner has an interest; not the aggregate of their collective ownership.

21. As the UT pointed out, the effect of sections 14 (3) and 14 (4) is that in relation to land where there was only the *prospect* of the grant of planning permission, if that prospect amounts to a reasonable expectation, the reasonable expectation is transformed, for the purposes of assessing compensation, into a certainty. The launch date in this case was 26 November 2013. The relevant valuation date was different for each of the sites: the earliest was 16 March 2018 and the latest was 26 September 2018. In each case, the application for the CAAD was made after the last of the relevant valuation dates.

22. The question posed by section 14 (4) (b) is what planning permission could at the relevant valuation date reasonably have been expected to be granted "on an application" decided on or after that date. The application to which section 14 (4) (b) refers is clearly a hypothetical application for planning permission. In considering such an application the local planning authority would have been required to decide it by reference to the development plan and any other material considerations. The presumption would have been a decision in accordance with the development plan unless material considerations indicated otherwise: Town and Country Planning Act 1990 s 70 (2); Planning and Compulsory Purchase Act 2004 s 38 (6). In *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307, 324 Lord Hope said that:

> "The fact that applications for certificates of appropriate alternative development are made to the local planning authority lies at the heart of the matter. It supports the view that the determination as to the contents of the certificate should be arrived at by applying ordinary planning principles to the existing circumstances, not by assessing what may or may not have happened in the past."

23. Unlike its predecessor section which the House considered in *Fletcher*, section 14 does not prescribe who is to decide whether there was appropriate alternative development on the valuation date. But no one suggested that the approach should be different.

24. Section 17 deals with the application to the planning authority for a CAAD. It applies where "an interest in land is proposed to be acquired by an authority possessing compulsory purchase powers." Article 3 (2) of the Land Compensation Development (England) Order 2012 provides that a local planning authority must issue a certificate within two months after the application is made. There is no time limit within which the application must be made, except that an application cannot generally be made after a reference to determine the amount of the compensation has been made to the UT: section 17 (2). The local planning authority has no obligation to advertise the application. Although a person with an interest in the land (other than the applicant)

may request a copy of the certificate (2012 Order art 5 (1)), there is no general provision for public participation in the decision. Subject to an appeal to the UT, the issue of a CAAD by the local planning authority is conclusive: section 17 (6) and (7).

25. Section 18 provides for an appeal to the UT. Section 18 (1) provides:

> "(1) Where the local planning authority have issued a certificate under section 17 in respect of an interest in land—
>
> (a) the person for the time being entitled to that interest, or
>
> (b) any authority possessing compulsory purchase powers by whom that interest is proposed to be, or is, acquired,
>
> may appeal to the Upper Tribunal against that certificate."

26. On such an appeal, the UT must deal with the application for a CAAD as if it had been made to the UT in the first place.

General principles

27. The Secretary of State relies on a number of general principles which, he says, should govern the interpretation of the statutory provisions. Lord Collins summarised them in *Transport of London v Spirerose Ltd* [2009] UKHL 44, [2009] 1 WLR 1797 at [89] to [95]:

    i) The underlying principle is that fair compensation should be given to the owner claimant whose land has been compulsorily taken. The aim of compensation is to provide a fair financial equivalent for the land taken. The owner is entitled to be compensated fairly and fully for his loss, but the owner is not entitled to receive more than fair compensation.

    ii) The basis of compensation is the value to the owner, and not its value to the public authority.

    iii) One plainly relevant element in the value to the owner is the prospect of exploiting the property. The price which the land in question might reasonably be expected to fetch on the open market at the valuation date would be expected to reflect whatever development potential the land has.

28. As Scott LJ put it in the well-known case of *Horn v Sunderland Corporation* [1941] 2 KB 26, 42, the first of the leading features of the legislation is that:

> "… what it gives to the owner compelled to sell is compensation - the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater."

29. Mr King QC, for the Secretary of State, emphasises the first of these features, called the principle of equivalence, as being the lodestar by which to approach the third

principle stated by Lord Collins. He referred us to the advice of the Privy Council in the opinion of Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111, 125:

> "The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail."

30. He referred also to the decision of the UT in *Section 14 (5) of the Land Compensation Act 1961* [2018] UKUT 62 (LC), [2018] 2 P & CR 6. At [26] the UT formulated the principle of equivalence in conventional terms; and at [56] said that the legislature:

> "… should not be taken to have encroached upon the principle of equivalence, or fair compensation, unless clear words were used to show that that was the intention of the legislature."

31. Mr King stressed the proposition that the principle of equivalence was as much concerned with not overcompensating the landowner as with undercompensating him.

32. Applying this touchstone, Mr King argued that a result that puts the dispossessed landowners in a better position than that which they could have achieved in the real world shows that something has gone wrong in the interpretation of the statutory provisions. Lord Nicholls returned to this point in *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 1304 at [18]:

> "When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to *increase* the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power." (original emphasis)

33. But as Lord Nicholls also said in *Shun Fung* at 126:

> "The overriding principle of fairness is comprehensive, but it suffers from the drawback of being imprecise, even vague, in practical terms."

34. To similar effect, the House of Lords cautioned against the application of a general notion of fairness in *Spirerose*. Lord Walker said at [36]:

> "There is a lacuna in this case only if your Lordships conclude that the underlying aim of fair compensation—compensation neither obviously in excess, nor obviously falling short, of what the claimant would have received in a no-scheme world—is not met by applying the terms of the 1961 Act, as amended, in their natural meaning. If your Lordships conclude that the natural meaning would produce an unfair result, some other construction may be called for. But that would be a matter of applying recognised, purposive principles of statutory construction, not invoking some judge-made rule which operates outside recognised principles of statutory construction."

35. He added at [41]:

> "But Parliament has enacted a statutory code of some complexity demonstrating that it does not regard all these cases as "materially similar". For the court to try to correct the code in accordance with its perception of what is fair would amount to judicial legislation. It would upset the balance of the code which Parliament must be supposed to have considered carefully."

36. Lord Neuberger said at [56]:

> "I do not consider that it is right to invoke the *Pointe Gourde* principle, or any other principle developed by the courts, for the purpose of adding a wholly new assumption to the statutory assumptions which have been laid down by the legislature:"

37. At [59] he said:

> "… anomaly, and hence unfairness, are very suspect grounds for justifying the addition of a non-statutory assumption to the valuation assessment."

38. Lord Collins said at [131]:

> "I accept TfL's fundamental point that it is not the role of the court to rewrite legislation by adding additional assumptions of planning permission. As Lord Denning MR said in *Jelson Ltd v Minister of Housing and Local Government* [1970] 1 QB 243, 250, whichever date was taken there would be anomalies: "So much so that I think we must go simply by the construction of the statute." There is a difference between legitimate purposive construction and impermissible judicial legislation."

39. Even if the legislation gives rise to surprising (or even unintended) results, the court is not free to depart from it by reference to a general principle such as that of equivalence: see *Greenweb Ltd v Wandsworth London Borough Council* [2008] EWCA Civ 910,

[2009] PTSR 902 for a particularly stark example, in which this court was impelled to reach a conclusion which was "highly regrettable" (Thomas LJ) or even "utterly deplorable" (Buxton LJ).

40. There is another fundamental principle of valuation which must also be given effect. That is the principle, often referred to as the reality principle, which requires the valuation to take place against the background of the real world, except in so far as specified hypotheses (which may be statutory or contractual) otherwise require. As Lord Neuberger put it in *Spirerose* at [50]:

> "First, if a statute directs that property is to be valued on an open market basis as at a certain date, one would not expect any counter-factual assumptions to be made other than those which are inherent in the valuation exercise (such as the assumption that the property has been on the market and is the subject of a sale agreement on the valuation date) or those which are directed by the statute. To put the point another way, the courts below appear to have inserted a judge-made assumption into a statutory formula, which seems to be complete and self-contained."

41. Moreover, at [52] he described the presumption of reality as "much the same thing as the principle of equivalence".

42. I expanded on the reality principle in *Harbinger Capital Partners v Caldwell* [2013] EWCA Civ 492. Although mine was a dissenting judgment, I do not think that my colleagues (Mummery and Beatson LJJ) disagreed with my statement of principle. They disagreed with the application of the principle to the particular provision under consideration. What I said was this:

> "[22] There are many areas of the law in which an amount is to be ascertained by postulating a hypothetical transaction of one kind or another. Rating is perhaps the oldest example, for which purpose rateable value was measured by postulating the hypothetical grant of a tenancy from year to year. But hypothetical transactions abound in other areas of the law: for example compulsory acquisition, taxation and rent review clauses. Sometimes the hypothesis is statutory and sometimes it is contractual. The courts have developed a well-established set of principles that apply to both kinds of case. The most important of these is that things are to be taken as they are in reality on the valuation date, except to the extent that the instrument postulating the hypothetical transaction requires a departure from reality. In the old cases this is summarised in the Latin phrase *rebus sic stantibus*. In the more modern cases it has been described as the principle of reality: *Hoare v National Trust* (1998) 77 P & CR 366.
>
> [23] The following points amplify the reality principle:
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> i) The hypothesis is only a mechanism for enabling one to arrive at a value of particular property for a particular purpose. It does

> not entitle the valuer to depart from the real world further than the hypothesis compels: *Hoare v National Trust*, 380 (Schiemann LJ). The various hypotheses must be taken no further than their terms make strictly necessary: *Cornwall Coast County Club v Cardgrange Ltd* [1987] 1 EGLR 146, 152. It is necessary to adhere to reality subject only to giving full effect to the hypothesis: *Hoare v National Trust*, 387 (Peter Gibson LJ).
>
> ii) Giving effect to the hypothesis may require a legal impediment to the implementation of the hypothesis to be ignored or treated as overridden; but only to the extent necessary to enable the hypothesis to be effective: *IRC v Crossman* [1937] AC 26; *The Law Land Company Ltd v Consumers' Association Ltd* [1980] 2 EGLR 109; *Walton v IRC* [1996] STC 98 .
>
> iii) The world of make-believe should be kept as near as possible to reality: *Trocette Property Co Ltd v GLC* (1972) 28 P& CR 408, 420 (Lawton LJ); *Hoare v National Trust*, 386 (Peter Gibson LJ). Reality must be adhered to so far as possible: *Cornwall Coast County Club v Cardgrange Ltd*, 150 (Scott J). The valuer should depart from reality only when the hypothesis so requires: *Hoare v National Trust*, 388 (Peter Gibson LJ).
>
> iv) Where the hypothesis inevitably entails a particular consequence, the valuer must take that consequence into account: *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109, 132.
>
> v) But there is a clear distinction between hypotheses expressly directed to be made and assumptions allegedly consequential on the express hypotheses. Where the alleged consequence is not inevitable, but merely possible (or even probable), then the consequence cannot be assumed to have happened: *Cornwall Coast County Club v Cardgrange Ltd*, 149 (Scott J).
>
> vi) The reality principle applies as at the valuation date. Events which postdate the valuation date cannot generally be taken into account. But the purchaser will have regard to future possibilities, and it is his perception of the future possibilities that matters. There is, in this respect, a clear difference between events before and after the valuation date. What has happened before the valuation date is either known (because it really happened) or is required by the hypothesis to be assumed to have happened. But the future is unknowable. Assumptions about the future should not be made. Nor can a tribunal make findings of fact about the future. So all that a purchaser (and by extension a valuer) can do is assess the effect on current value of future possibilities."

43. In my judgment, therefore, the starting point is the real world, modified either by an express statutory assumption, or by what is necessarily inherent in the concept of an

open market valuation. If there is ambiguity in an assumption that the statute requires to be made, then the principle of equivalence may assist in resolving the ambiguity, but it is not an overriding independent and free-standing principle.

The cancellation assumption

44. Before the UT the landowners took a point about the effect of the cancellation assumption contained in section 14 (5). The three relevant parts of the assumption are that the scheme of development underlying the acquisition had been cancelled on the launch date; that no action has been taken by the acquiring authority for the purposes of the scheme; and that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers. The triggering event which enables an application for a CAAD to be made is that an interest in land is proposed to be acquired by an authority possessing compulsory purchase powers. If (as must be assumed) the scheme underlying the acquisition has been cancelled and there is no prospect of its revival, it must follow in the "no scheme world" that no interest is proposed to be acquired by an authority possessing compulsory powers and that therefore no one could have made an application for a CAAD. No application for a CAAD would have been legally possible, because the precondition to making such an application in section 17 (1) could not have been satisfied. It followed, therefore, that in considering an application for a CAAD on any particular site, the existence of applications for CAADs on other sites had to be disregarded. The UT rejected that argument; but it has been revived by Respondents' Notices.

45. The UT accepted at [44] that the assumption in section 14 (5) (a) required the whole scheme to be assumed to have been cancelled including those aspects of it that required the acquisition of adjoining land. It is common ground that in that respect the UT were correct. (I note, in passing, that this is a more comprehensive assumption than that found by the House of Lords under a previous iteration of the compensation code in *Fletcher*). They went on to say at [45] that the assumption in section 14 (5) (b) required it to be assumed that no action had been taken by the acquiring authority for the purposes of the scheme; and that that assumption extended to all action taken for that purpose including the acquisition of adjoining sites. But they said that neither of those assumptions required the additional assumption that CAAD applications were not made on adjoining sites. As they put it at [46]:

> "It is true that all four CAAD applications were a consequence of the scheme, and that, but for the scheme they would not have been made. But in the absence of a statutory direction that is not a good enough reason to assume them away or disregard them. If the assumption in section 14(5)(a) was intended to require not only that the scheme itself be taken to have been cancelled, but that all consequences of the scheme should be assumed not to have happened, there would have been no need for the additional assumption in section 14(5)(b) that no action had been taken by the acquiring authority wholly or mainly for the purposes of the scheme."

46. I do not find these reasons convincing. In the memorable words of Lord Asquith in *East End Dwellings* at 132:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. … The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

47. It is not merely that the applications for CAADs "would" not have been made, but that they *could* not have been made. An essential precondition for the making of such an application (namely a proposal for compulsory acquisition) did not exist in the "no scheme world". It seems to me, therefore, that it is the inevitable consequence of the cancellation assumption that no CAAD applications could have been made. Second, I do not consider that giving effect to the assumption in this way means that the assumption in section 14 (5) (b) is superfluous. As Mr Elvin QC pointed out, in relation to many large scale proposals for regeneration the relevant authority may begin the process of site assembly long before any decision to resort to compulsory powers has been made, let alone before it has been made public; and hence long before the launch date. Merely to assume that the scheme had been cancelled on the launch date would not deal with such a case.

48. In my judgment, the landowners' point is well-founded. In my judgment the UT was wrong to reject it. I consider that the cancellation assumption requires it to be assumed that no CAAD applications on other sites have been made. It follows, therefore, that in considering an application for a CAAD on one particular site, applications for CAADs (or the issue of CAADs) on different sites must be disregarded.

49. That is not to say, as all the landowners accepted, that the local planning authority must disregard actual planning permissions that were in existence on other land. They are facts in the real world, and there is nothing in the statute to magic them out of existence. Mr King submitted that it would be unsatisfactory if regard could (and should) be had to planning permissions that existed in the real world, but notional permissions in the AAD world could not. Unsatisfactory or not (at least from the perspective of the acquiring authority), that is, in my judgment, the inevitable consequence of the cancellation assumption.

Is an application for a CAAD on an adjoining site to be treated as an application for planning permission?

50. In view of my conclusion on the first point, the remaining questions do not strictly arise. But since we have heard full argument I will deal with them.

51. That a CAAD is no more than a mechanism for determining land value has been stated on the highest authority: *Grampian Regional Council v Secretary of State for Scotland* [1983] 1 WLR 1340, 1343; *Fletcher Estates Ltd v Secretary of State for the Environment* [2000] 2 AC 307, 316. It has no other effect in the real world. In particular a CAAD, unlike a planning permission, cannot alter land use in the real world. *Ex hypothesi*, the land in question has been or is to be acquired by an authority possessing compulsory powers for a particular scheme. What is covered by the CAAD is

alternative development (i.e. development alternative to that which has been or is to be carried out in order to implement the scheme).

52. In the real world, there were not competing applications for planning permission. If there had been, no doubt the planning authority would have considered them in the round. So Mr King's task is to find in the legislation an assumption that requires an application for a CAAD (a) to be treated as an application for planning permission and (b) to be considered together with any other application for a CAAD that happens to be made. Mr King accepted that he could not point to any statutory provision that made a positive assumption to that effect. Rather, his position was that the question was whether the statute precluded taking CAADs (or applications for CAADs) on other land into account.

53. The first problem that Mr King's argument faces is that each application for a CAAD must be determined by reference to what planning permission could reasonably have been expected to have been granted on the valuation date; and by reference to what was known to the market at that time. As noted, events that post-date the valuation date cannot generally be taken into account. That is reinforced in this case by section 5A (2) which positively forbids any adjustment to the valuation as a result of anything that happens after the relevant valuation date. But all the applications for CAADs were made after the relevant valuation date applicable in each case. Indeed, the first of the applications for a CAAD was made after the last of the valuation dates. That such applications existed could not have been known to the market on the various valuation dates. So not only does Mr King's argument require it to be assumed that each application for a CAAD (in the real world) was an application for planning permission (in the no scheme world); it also requires an assumption that each application had been made earlier than it in fact was. The latter assumption would be contrary to the reality principle, and directly contradictory of section 5A (2).

54. Mr King sought to counter this point by reference to the decision of the UT in *Bishopsgate Parking (No 2) Ltd v Welsh Ministers* [2012] UKUT 22 (LC), [2012] RVR. 237. What was relevantly in issue in that case was whether in assessing the value of land, evidence of comparable transactions that post-dated the date of valuation was admissible. The UT held that it was. Having referred to the decision of the Privy Council in *Melwood Units Pty Ltd v Commissioners of Main Roads* [1979] AC 426 they said at [62]:

> "The clear acceptance in *Melwood* of the potential relevance of post valuation date transactions has not in our judgment been rendered of no application in claims for compensation under the 1961 Act by the recent insertion of section 5A . Subsection (2) does not say that anything that happens after the valuation date "shall not be taken into account" (cf rule (3) in section 5). This is what it could, and no doubt would, have said if the intention had been to achieve the effect for which Mr Humphries contends. What it says is that no adjustment is to be made to the valuation in respect of anything which happens after the valuation date. "Adjustment" we take to imply an increase or decrease in value. What is excluded, therefore, is any increase or decrease in the value that the land would have had if a post valuation date event had occurred before the valuation date. If

> the value of the land, or an element of that value, can only be established by reference to the knowledge that the market would have had at the valuation date, post valuation date events are necessarily excluded. Thus hope value, a value based on the hope of a future event occurring, cannot be established by reference to post valuation events showing whether such hope was, or became more likely, to be fulfilled (see eg *Swansea City and County Council v Griffiths, sub nom v Griffiths v Swansea City and County Council*, [2004] RVR 111). To take such events into account could cause the valuer to increase or decrease the hope value that the land in fact had on the valuation date."

55. If the value based on hope cannot be established by reference to a post valuation date event, it seems to me that the hypothetical grant (or refusal) of planning permission cannot be established by a post valuation date event either. Indeed, that is the very error which this court made in *Spirerose*. The admissibility of post valuation date comparables is different to the admissibility of post valuation date events. That distinction emerges clearly from the decision of Hoffmann J in *Electricity Supply Nominees Ltd v London Clubs Ltd* [1988] 2 EGLR 152. What was in issue in that case was the admissibility of confidential profit and loss accounts for the purposes of assessing the rent of a casino. Hoffmann J held that they were inadmissible because the market could not have known about them. He then said:

> "The cases in which post-review-date transactions are admissible seem to me to stand on quite a different basis. An open market transaction at a later date may, by applying the presumption of continuity, afford a legitimate basis for an inference that a transaction on similar terms would have taken place at an earlier date. Of course the presumption may be rebutted by showing that the market, at the later date, was possessed of information not previously available. But there is no reason in principle why relevant inferences cannot be drawn from subsequent events. But this is not the kind of reasoning upon which the tenants in this case want to rely."

56. There is no similar presumption of continuity in this case.

57. Mr King also submitted that section 5A (2) was only concerned with an *adjustment* to a valuation and not to the ascertainment of value in the first place. In my judgment, however, the process which he argued for is indeed an adjustment to the valuation. If the value of a particular site at the valuation date is £x, but the subsequent post valuation date lodging of a CAAD application on a different site means that its value is only £75%x, that is a decrease in value by reference to something that happened after the valuation date. Consistently with the decision in *Bishopsgate*, that is an "adjustment" to what would otherwise have been the value of the site.

58. The second problem is that if, as appears to be the position in this case, there was room for some permitted development consisting of student accommodation, but not as much as the cumulative total of all the CAADs, how is that permitted development to be allocated in a way that is fair as between the various landowners? The UT considered

that this argument would lead to a "first come first served" allocation. But in my judgment it is difficult to reconcile that with the required statutory assumptions.

59. Suppose that the application for a CAAD in respect of Site 4 had been the earliest in time. The valuation date for that application would have been 26 September 2018. The local planning authority determines that, as at that date, planning permission would have been granted for a specified quantity of student accommodation which would have exhausted demonstrated demand. Subsequently, an application for a CAAD is made in respect of Site 2, for which the valuation date was 16 March 2018. The local planning authority would have been required to determine what planning permission would have been granted on that date. But since the valuation cannot be affected by anything that took place after the valuation date, the grant of a CAAD in respect of Site 4 cannot affect the valuation of Site 2 for which the valuation date is earlier. It must therefore follow that in determining the application in relation to Site 2, the local planning authority must ignore its decision in relation to Site 4.

60. In those circumstances, it seems to me that "first come first served" could only work (if it works at all) if it is assumed that all the landowners applied for CAADs in the strict order of valuation date applicable to each parcel of land. That, to my mind, is a radical assumption, which finds no traction in the words of the statute.

61. Another possibility is some form of *pro rata* sharing of development potential. In the case of bed spaces for student accommodation, that might be theoretically possible if a number of non-statutory assumptions were made. One of Mr King's examples was that of a motorway service area (an "MSA") where there were four potential sites, but a requirement for only one MSA. It is difficult to see how it would be possible to certify that each landowner would have obtained planning permission to build a quarter of an MSA. That would make no sense at all.

62. Mr King's preferred solution in a case like that would be for the local planning authority to consider all applications for CAADs together, and to certify in favour of the most suitable of the competing sites. There are, in my judgment, a number of difficulties with that solution. In the first place, as I have said, it requires the local planning authority to take into account matters that have happened after the valuation date applicable to each relevant interest. Second, since the local planning authority is obliged to issue its decision within two months after the application is made, and there is no limit within which the application itself must be made, it can hardly be supposed that Parliament intended the local planning authority to wait indefinitely until all possible applications for CAADs had been received. Moreover, as Mr Elvin QC submitted, some landowners may choose to apply for a CAAD; others may choose to have the compensation determined by (confidential) arbitration without applying for a CAAD; others may choose to have the question decided by the UT; while yet others may reach agreement with the acquiring authority. Third, the local planning authority is not required to advertise an application for a CAAD; and one landowner has no input into a decision affecting his neighbour. Mr King accepted that the sole purpose of a CAAD is to assist in the valuation of the land in respect of which it is given. If, therefore, a CAAD is given in relation to Site A in order to assess the value of Site A, I do not see it as unfair that the value of Site B is unaffected by it. As Mr Glover QC put it: "if the outcome of my neighbour's application for a CAAD may affect the value of my land, I must be able to influence the decision." The lack of any such procedure points strongly to the conclusion that applications for CAADs on other land should be ignored. Fourth, if the

local planning authority is considering competing applications for planning permission in the real world, it will reach its decision based on matters known to it at the date of the decision. By contrast, in considering applications for CAADs, the local planning authority will consider matters as at each of the valuation dates, which are fixed by statute, and which may be long before the decision is made. Fifth, section 14 (2) (b) allows account to be taken of the prospect of development on "the relevant land or other land". This allows for hope value on third party land. By contrast, section 14 (4), defining appropriate alternative development, is confined to considering development on "the relevant land alone or on the relevant land *together with* other land". That makes it clear that other land is only to be considered if it is part of the same notional planning application as that on the relevant land. In all other respects ("otherwise") the local planning authority may only take into account what was known to the market at the valuation date. Sixth, suppose that there are four competing landowners, one of whom is given a positive certificate by the local planning authority while the other three receive negative certificates. None of the three disappointed landowners is entitled to appeal under section 18 against the grant of the positive certificate to their competitor. For practical purposes, therefore, on Mr King's approach that means that the local planning authority's decision is unappealable. All these factors militate against that solution.

63. Take a different situation, in which there are four landowners (as in the present case) but the acquiring authority only proposes to acquire land belonging to three of them. They apply for CAADs, and let it be supposed that a positive CAAD is granted to one of them, certifying that appropriate alternative development consists of building student accommodation. Now suppose that the landowner whose land is *not* to be acquired, applies for planning permission to build student accommodation. In the real world, that is the only application for planning permission to build student accommodation, and the demand for it (in the real world) can be demonstrated. I cannot see how the local planning authority would be justified in refusing planning permission because they had already granted a CAAD to an adjoining owner. The prior grant of the CAAD would, quite simply, not be a material consideration. Mr King, as I understood him, agreed. That, to my mind, shows that it is not possible to mix and match a planning permission on the one hand and a CAAD on the other. But if the prior grant of a CAAD would not have been a material consideration on a real application for planning permission, how can it be a material consideration on a hypothetical application for planning permission? I do not see the answer to that question.

Return to equivalence

64. The principle of equivalence has two further facets which I have not yet mentioned. The first is that what is to be compensated is not necessarily the interest in land as it exists in the real world. That is made clear by rule (2) itself which provides that "subject as hereinafter provided" it is the open market value of the land that is the measure of compensation. Section 14 is one of those provisions. Second, the object of the principle of equivalence is to assess the value of the land to the owner, not to the acquiring authority. In *Shun Fung* Lord Nicholls said at 125:

> "Fair compensation requires that [the owner] should be paid for the value of the land *to him*, not its value generally or its value to the acquiring authority. As already noted, this is well established." (Emphasis added)

65. Similarly, in *Spirerose* Lord Collins said at [90]:

> "Second, the basis of compensation is the value *to the owner*, and not its value to the public authority." (Emphasis added)

66. One of the fundamental difficulties in the Secretary of State's reliance on the principle of equivalence is that, as Mr Pereira QC submitted, he cannot point to any individual landowner and say that that particular landowner has been overcompensated. The potential for overcompensation can only be the cumulative effect of the grant of all four CAADs, for hypothetical cumulative development which would not have been permitted in the real world.

67. In the real world, if all four landowners had sold their land at the respective valuation dates without having first applied for planning permission, the market would no doubt have valued each parcel on the basis of hope value. It would be necessary for a purchaser to assess the likelihood of planning permission being granted for that particular parcel of land. The price paid would have reflected that assessment. In the real world more than one landowner could have had a reasonable expectation of the grant of planning permission for rationed development, even though only one of them would have actually achieved that. But what section 14 of the LCA does is to convert a reasonable expectation of planning permission into a certainty. It is not surprising that converting four reasonable expectations of planning permission into four certainties may have the cumulative effect of increasing the overall compensation payable to a level beyond that which would have been achieved in the real world. That, to my mind, is a clear encroachment on or modification of the principle of equivalence (as Mr King accepted), to which the courts are bound to give effect.

68. In my judgment, therefore, even if the UT were right to reject the landowners' primary argument, they were still right to reject the Secretary of State's case.

Answer to the preliminary issue

69. As I have said, however, I have accepted the landowners' primary argument (which the UT rejected). I would therefore answer the preliminary issue as follows:

> "In determining the development for which planning permission could reasonably have been expected to be granted for the purposes of section 14(4)(b) in relation to a particular parcel of land, the decision maker is not entitled to take into account CAAD applications or decisions relating to other land arising from the compulsory acquisition of land for the same underlying scheme. They are not notional applications for planning permission and are not material planning considerations."

70. Subject to that variation, I would dismiss the appeal.

The costs appeal

71. Section 17 (10) of the LCA provides:

> "In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account

> any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person's favour)."

72. It is common ground that this is the applicable statutory provision. The order made by the UT was that the expenses reasonably incurred by the Respondents in connection with the determination of the preliminary issue "shall be *payable*" by the Secretary of Sate as part of the compensation. Secretary of State objects that an order that costs should be "payable" goes further than an order that they should be "taken into account".

73. Rule 10 (6) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 gives the UT power to make an order for costs in proceedings "for compensation for compulsory purchase." In *Leech Homes Ltd v Northumberland CC* [2021] EWCA Civ 198 this court held that proceedings "for compensation" did not include an appeal against a CAAD. That conclusion coincides with that of the UT (consisting of the same constitution as in this case) in *Trustees of Boulder Bridge Land Trust v Barnsley MBC* [2017] UKUT 81 (LC). In that case, the UT declined to make an order for costs, but instead directed that the landowner's costs were "to be taken into account" as part of the compensation payable.

74. The point in *Leech* was essentially one of cashflow. That is why the difference between an immediate order to pay costs and a direction that they be taken into account when the compensation was determined had some significance. The real ground of complaint in this appeal is more elusive.

75. The Secretary of State submitted that the correct order was that the expenses reasonably incurred by the landowners should be taken into account and that:

> "In taking such expenses into account regard shall be had to the extent to which the preliminary issue was determined in the Respondents' favour."

76. The UT's order requires the Secretary of State to pay the Respondents' reasonable costs as part of the compensation. In my judgment, that leaves open the question whether costs were reasonably incurred, as well as the question whether they were reasonable in amount. It is still open to the Secretary of State to argue that costs were not reasonable (e.g. because it was not necessary for all the landowners to be separately represented; or because charging rates were too high). It may also be open to him to argue that the incurring of costs on a particular issue was not reasonable. I can see no error in the UT's decision in this respect.

77. In the course of his oral address, Mr King changed tack and argued that the UT should not have made any costs order at all; but rather should have let section 17 (10) take its course. But (a) in circumstances in which all parties urged the UT to deal with the question of costs, and (b) because this was not a ground of appeal (which would have needed permission), I would decline to entertain this argument.

78. I would therefore dismiss the costs appeal.

The Senior President of Tribunals:

79. I agree that the appeal should be dismissed, for the reasons given by Lewison L.J.. His analysis, in my view, reflects a true reading of the relevant statutory provisions, and is consistent with the relevant jurisprudence. It shows why the Secretary of State's argument is mistaken and why, on both main questions, the preliminary issue must be decided as the respondents propose. I add these observations only to reinforce, for the benefit of the Upper Tribunal when determining claims for compensation, one of the main themes in Lewison L.J.'s conclusions.

80. In its modern form, the statutory code for compulsory purchase compensation has evolved in several stages (see the speech of Lord Scott of Foscote in *Waters*, at paragraphs 84 to 101, and Lewison L.J.'s judgment here, at paragraph 13). This process has been carried forward in successive reforms of the legislation by Parliament. Some of the amendments to the code have been made in response to what the courts have said when deciding issues that have arisen in particular cases, where shortcomings in the legislation have become apparent. But reform of the legislation is not the work of judges. The court's role, and the tribunal's, is only to interpret and apply the statutory provisions as they are, not as they might have been or as they might yet become.

81. The general principle that the court should not seek to rectify legislative anomalies where the language of the statute is clear is well established (see, for example, the judgment of Lord Esher M.R. in *The Queen v The Judge of the City of London Court* [1892] 1 Q.B. 273, at p.290, the speech of Lord Atkinson in *Vacher & Sons Ltd. v London Society of Compositors* [1913] A.C. 107, at p.121, the judgment of Lord Parker C.J. in *Fisher v Bell* [1961] 1 Q.B. 394, at p.400, the speech of Lord Diplock in *Duport Steels Ltd. v Sirs* [1980] 1 W.L.R. 142, at p.157, and the discussion of the "Plain meaning rule" in Bennion, Bailey and Norbury on Statutory Interpretation (eighth edition), at section 11.9. Thus, for example, in *Stock v Frank Jones (Tipton) Ltd.* [1978] 1 W.L.R. 231, Viscount Dilhorne said (at pp.234 and 235):

> "It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it "according to the intent of them that made it" (Coke 4 Inst. 330).
> If it were the case that it appeared that an Act might have been better drafted, or that amendment to it might be less productive of anomalies, it is not open to the court to remedy the defect. That must be left to the Legislature.
> …
> "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do" said Lord Mersey in *Thompson v. Goold & Co.* [1910] A.C. 409 , 420. "… we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself" said Lord Loreburn L.C. in *Vickers, Sons & Maxim Ltd. v. Evans* [1910] A.C. 444, 445."

82. A lesson to be drawn from authority at the highest level in this area of the law is that the court and also the tribunal must refrain from creating, and introducing into the identification of "appropriate alternative development" at the valuation date, any counter-factual assumption not specified in the statute or necessarily implicit in that

exercise. They must not venture into the territory of expanding or refining the statutory language. There is a distinction between, on the one hand, an appropriately purposive interpretation of the words used by Parliament in formulating the statutory provisions, and, on the other, a resort to "judicial legislation", which reads into the statute provisions that are not there. The first approach is legitimate; the second is not.

83. In *Spirerose*, conscious of the "principle of equivalence" and the underlying aim of "fair compensation", the House of Lords unanimously and firmly rejected an approach in which perceived anomalies in the statutory code were seen as justifying the addition of non-statutory assumptions to the assessment. Their Lordships were wholly unattracted by the Court of Appeal's attempt to overcome what it regarded as an unsatisfactory feature of the legislation, whose effect was, in its view, to produce an unfair outcome.

84. The Court of Appeal had done this by adding an assumption of its own to those specified in the statute (see the speech of Lord Walker at paragraph 36). In Lord Walker's view, it had gone "too far", having "assumed that a case in which the owner was unable to take advantage of any statutory assumption … was an anomaly to be remedied in the interests of fairness" (paragraph 41). In a similar vein, Lord Collins said it was "not the role of the court to rewrite legislation by adding additional assumptions of planning permission" (paragraph 131).

85. Lord Neuberger expressed his view in more forceful terms. He described the Court of Appeal's conclusion, and the tribunal's, that the land was to be valued on the basis that it actually had planning permission for residential development, as "a very surprising result …" (paragraph 50). He pointed out that a "judge-made assumption" may render statutory assumptions "redundant", and that, if the decision appealed were correct, one of the statutory assumptions would become "pointless, indeed almost absurd" (paragraph 51). He said the "principle of equivalence" was "at the root of statutory compensation … save … where the legislation otherwise provides" (paragraph 52). He recognised the inevitability of imperfection in the notional world in which compensation is assessed, observing that "there are anomalies whichever date [for considering whether planning permission might reasonably have been expected to be granted] was chosen" (paragraph 59). And he saw no warrant for judge-made assumptions on the basis that the result reflects common assumptions and practice. Such an approach, he said, "cannot justify an erroneous interpretation of the [Land Compensation Act 1961]" (paragraph 63).

86. Those are salutary comments, which this court – and the tribunal – must heed. They are a stern warning against assumptions being inserted where they do not appear in the 1961 Act. The statutory code is self-contained and ought to be seen as complete. Neither the court nor the tribunal should try to enhance it.

87. Here, therefore, in the interests of consistency and predictability in the assessment of compensation, it is necessary to adhere to the statutory language, and to construe section 14 of the 1961 Act as it is drafted, without reading into it provisions it does not contain.

88. In his skilful submissions for the Secretary of State, Mr King has denied any intention to fill gaps in the legislation. As Lewison L.J. has shown, however, the argument runs against the statements of principle underscored in *Spirerose*. The Secretary of State's position is similar to the claimant's in that case. Before the tribunal and now before this

court, he has invoked the "principle of equivalence" and the aim of "fair compensation" to overcome a perceived anomaly or lacuna in the statutory code. This, in my view, is not the right approach.

89. If the preliminary issue is approached as it should be, four things seem clear.

90. First, as a matter of principle, there can be no basis for including any counter-factual consideration in the statutory exercise of identifying "appropriate alternative development" at the valuation date unless this is expressly required by statute or necessarily implicit in the exercise itself. It is not for the court, or the tribunal, to adjust the statutory code.

91. Secondly, in fixing the scope of the valuation assessment, Parliament has recognised the relevance of development potential. The statutory code explicitly addresses that concept, and does so to the extent that Parliament has decided. It is significant that in 2011 and 2017, after the House of Lords' decision in *Spirerose*, Parliament revisited the code and introduced amendments to the 1961 Act. No amendments of the kind implied by the Secretary of State's argument in this case were made.

92. Thirdly, the relevant statutory provisions are not ambiguous. They do not call for a purposive construction to establish for them a clear and practical meaning. In truth, however, the Secretary of State is not merely asking for a purposive construction, but for a judge-made addition to the legislation. His argument seeks to revise Parliament's view of the necessary assumptions. That is the effect of his assertion that the "cancellation assumption" in section 14(5)(a) allows or requires other CAADs to be taken into account.

93. Fourthly, there is no need to add any further assumption or consideration to the statutory provisions for "appropriate alternative development" as they stand. As the Respondents have submitted, the Secretary of State's argument depends on the counter-factual assumption that there has been an application for, or a grant of, planning permission for development on an adjacent site, when in fact the only application or grant is for a certificate that itself subsists merely in the world of the "scheme" and has no utility or, indeed, existence in the "no scheme world". That assumption is, in principle, inappropriate. The contention that a CAAD must be treated as if it were a planning permission is unsustainable. And it is contrary to the "reality principle". As Mr Glover submitted, the counter-factual assumptions set out in subsection (5) are all assumptions involving the removal of factors, not their addition. But the Secretary of State's argument seeks to import a further step, the effect of which would be substantially to enlarge the statutory assumptions. And as Lewison L.J. has demonstrated (in paragraphs 51 to 63), it leaves unexplained how one can read into section 14 the counter-factual assumptions one would have to make to carry out a comparative assessment, or an assessment of the cumulative effects, of hypothetically competing proposals that are assumed to have been, though were not in fact, the subject of applications for planning permission before the local planning authority for determination at the same time, but were merely applications for, or grants of, a CAAD at various times. That scenario, I think, is not realistic. It is distinctly unreal. Neither the "principle of equivalence" nor the aim of "fair compensation" compels a different conclusion.

Lord Justice Moylan:

94. I agree with both judgments.