UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2020] UKUT 0305 (LC)
UTLC Case Number: ACQ/331-332/2019

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Compulsory Purchase – interest on a loan remaining unpaid following acquisition – claim of oral contract inconsistent with statement of case or pleadings – lack of evidence – standard of proof – mitigation of loss – claim dismissed

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

(1) DREAMLAND LEISURE CINEMA LIMITED **(2) PAVENHAM HOLDINGS LIMITED**	**Claimants**
and	
THANET DISTRICT COUNCIL	**Acquiring Authority**

Re: The Dreamland Cinema,
Marine Terrace,
Margate,
CT9 1XJ

Upper Tribunal Judge Elizabeth Cooke and Peter McCrea FRICS
29 September 2020 – 2 October 2020
Conducted by Skype

Richard Hanke and *Rebecca Clutten*, instructed by Gateley Legal, for the first claimant
Alexander Booth QC and *Phillip Patterson*, instructed by Sharpe Pritchard LLP, for the acquiring authority

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Introduction

1. Standing prominently on the Margate seafront, the Dreamland cinema ("the cinema") is a grade II* listed Art-Deco building, built in the 1930s to the design of noted cinema architects Leathart & Granger. The original configuration had a public bar on the ground floor, a 500-cover restaurant on the first floor, and to the rear a 2050-seat "super cinema". Sadly, its days as a cinema ended in 2007 following the opening of a new multiplex cinema at Westwood Cross. By 2013, most of the building was vacant but there was an amusement arcade occupying part of the ground floor.

2. The cinema and surrounding leisure-related properties were subject to the Thanet District Council (Land at Dreamland, Margate) Compulsory Purchase Order 2011 ("the CPO"). On 2 August 2013 Thanet District Council, the acquiring authority, made a general vesting declaration, under which the cinema vested in it on 3 September 2013, which is the valuation date.

3. Six references were made to the Tribunal as a result of the CPO. This is the Tribunal's decision in two of those references: ACQ/331/2019, where the claimant is Dreamland Leisure Cinema Limited (the registered freehold proprietor of the cinema), and ACQ/332/2019, where the claimant is Pavenham Holdings Limited (the holder of a registered charge over the cinema before it vested in the acquiring authority). The two references were conjoined and heard (by remote video platform) on 29 September to 2 October 2020. Since Pavenham Holdings Limited has taken no active role in the proceedings and was not represented at the hearing, we refer to Dreamland Leisure Cinema Limited as "the claimant" and to the second claimant as "Pavenham".

4. The claimant was represented by Mr Richard Hanke and Ms Rebecca Clutten of counsel, while Mr Alexander Booth QC and Mr Phillip Patterson appeared for the acquiring authority. We are grateful to them all for their assistance.

5. We heard expert valuation evidence from Mr James Dewey MRICS of Gateley Hamer for the claimant and Mr David Conboy MRICS of Newsteer Real Estate Advisers for the acquiring authority, and expert forensic accountancy evidence from Mr Tom Aslin FCA NEWI MAE of Moore Kingston Smith for the claimant and from Mr Gordon Hodgen FCA of Quantuma LLP for the acquiring authority. There were no witnesses of fact.

6. In the paragraphs that follow we first summarise the claimant's case on the one element of the compensation claim that we have to decide. We then set out the legal background (which is not in dispute) and the facts insofar as they are agreed, and then describe and make some findings about the documentary evidence. We look in detail at the expert evidence, and then explain our decision.

The claimant's case

7. The claimant in its Statement of Case claimed:

a. compensation for the freehold value of the cinema on the valuation date (rule 2 compensation; see paragraph 10 below),

b. loan interest,

c. pre-reference costs,

d. statutory loss and

e. interest on the final sum.

Since the reference was made, heads a, c and d have been settled – the value of the cinema has been agreed at £650,000. Item b, the claim for loan interest, remains, and therefore that is the only claim we have to decide (the parties having agreed the method for the calculation of item e, when that becomes possible once everything else is resolved).

8. The loan interest claim arises from the claimant's case that it was indebted to Pavenham in the sum of £475,000, that being the purchase price of the cinema in 2013 which Pavenham lent to it. It is said that there was an oral loan agreement, with interest payable at 10% per annum, compounded monthly; the claimant says that because compensation was not paid when the property was acquired, the loan has remained unpaid. It has been unable to use income from the property to discharge the interest and so the debt has been mounting up ever since. Therefore it claims compensation for the interest that it has had to pay on that loan since the valuation date insofar as that results from the failure to pay compensation.

9. The acquiring authority says that the claimant has not proved there was a loan agreement, but that if the Tribunal finds that there was one and that it placed the claimant under a legal obligation to pay interest, then the claimant has failed to mitigate its loss because it did not mention the claim for loan interest until it filed its Statement of Case in August 2019, nearly six years after the valuation date.

The law

10. There is no disagreement about the legal basis of the claim. Section 5 of the Land Compensation Act 1961 sets out the six well-known rules for the assessment of compensation, including rule 2 (under which the value of the property has been agreed) and rule 6 which relates to "compensation for disturbance or any other matter not directly based on the value of land".

11. The loan interest is claimed under rule 6. The parties agree that losses can be claimed under rule 6 where the claimant can demonstrate:

a. a causal connection between the acquisition and the loss;

b. that the loss is not too remote;

c. that the claimant has behaved reasonably.

12. Only the third of those conditions is in dispute. The acquiring authority accepts that if there was a loan agreement under which interest was payable by the claimant, then its inability to pay the interest was caused by the acquisition of the property and is not too remote. But it says that the claimant did not behave reasonably in that it has failed to mitigate its loss.

The agreed factual background

The acquisition of the property in 2013

13. The claimant is a private company incorporated on 22 March 2013, registered in England and Wales; its directors and equal shareholders are Mr Jeremy Godden and Mr Jordan Godden. Pavenham is a private company incorporated on 3 December 2012, registered in Gibraltar; its sole shareholder is Finsbury Holdings Limited and its director is Finsbury Corporate Services Limited.

14. In order to explain the background to this reference, we have to introduce two more companies, Margate Town Centre Regeneration Company Limited ("MTCRCL") and Margate Cinema Limited ("MCL"), a subsidiary company of MTCRCL. They are the claimants in two of the other four references relating to the rest of the complex to which we referred in paragraph 3 above, Pavenham being the claimant in the other two of the four).

15. On 30 July 2010 Close Brothers Limited ("CBL", described by Mr Aslin as a well-known UK merchant bank) granted a £6.5 million loan facility to MTCRCL. It was repayable upon demand. As a condition of that grant CBL took a guarantee from MCL, dated 24 November 2010. The guarantee made MCL liable for all MTCRCL's obligations under the loan facility. On the same date the cinema was transferred by MTCRCL to MCL, and on the same date MCL granted a legal charge over the cinema to CBL to secure the guarantee.

16. On 1 February 2013 MTCRCL, CBL and Pavenham entered into a "Deed of Novation of Loan Facility and Assignment of Security Documents", whereby Pavenham became the creditor under the loan facility and fourteen "security documents" were assigned from CBL to Pavenham, and the legal charge was assigned by CBL to Pavenham, in consideration of a payment by Pavenham to CBL of £3 million. Among the security documents assigned to Pavenham were both the guarantee by MCL and the legal charge made in CBL's favour by MCL.

17. On 28 March 2013, Pavenham made a formal demand to MTCRCL for immediate repayment of the loan facility in full. It was not repaid, and on 2 April 2013, relying on the guarantee, Pavenham made a similar demand to MCL. When that was not paid, on 16 April 2013 Pavenham appointed receivers under the legal charge, who appointed agents to market the property. Although there has been some dispute as to the validity of the demand addressed to MCL and of the appointment of the receivers, there is no dispute that these events happened, and their validity or otherwise is not material to what we have to decide, because it is not in dispute that on 26 April 2013 the claimant acquired the property from MCL subject to the legal charge. No money changed hands. A deed of variation was executed on that date, to which we refer below.

18. That purchase took place, of course, in the shadow of the CPO, and the cinema vested in the acquiring authority on 3 September 2013.

September 2013 and August 2019: correspondence, claims and payments

19. After the transactions of 2013 there was some without prejudice correspondence; on 29 December 2014 Mr Spacey FRICS of Porters, Chartered Surveyors, acting for the claimant, wrote to Mr Baldwin at GVA in Leeds who was advising the acquiring authority. The letter ("the Porters letter") is headed "without prejudice" and "subject to contract" and is in reply to an email from Mr Baldwin which we have not seen (nor have we seen any reply to the Porters letter).

20. The Porters letter described the cinema as having a floor area of about 70,000 sq ft; it detailed the former tenants who were paying £4-5 per sq ft in rent; and it outlined the history of the cinema's listing status, revised to Grade II* in 2008. It referred to an Urgent Works Notice served on MCL by the acquiring authority, which carried out extensive work to make it wind and watertight, renew the roof etc. Mr Spacey said that a rental value of £5 per sq ft would point to a value "close to £3 million"- a figure which he said was supported by the recent sale of a former cinema nearby, at £500,000 for 10,476 sq ft. Applied to the cinema, this sale price would result in a valuation of £3.245 million. What the Porters letter did not do is mention specifically that the claimant's claim was in this amount; nor did it request an advance payment.

21. For the claimant it was argued that the Porters letter was a claim. A "claim" is an important step in the compensation procedure; section 4 of the Land Compensation Act 1961 sets out the costs consequences of a claimant making or failing to make a claim, which according to section 4(1)(b) must

> "state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated."

22. The acquiring authority's position is that the Porters letter was an item of without prejudice correspondence and part of discussions between surveyors. Mr Dewey and Mr Conboy each accepted that neither has ever made a claim headed "without prejudice" and "subject to contract"; Mr Dewey said that the letter could have been submitted as part of a claim, but agreed that it was not an advance payment request. We find that it was neither a claim, nor an advance payment request.

23. On 28 January 2015 the acquiring authority made an advance payment of £25,000 to Pavenham. Mr Conboy explained that the payment was made in error; it was intended to be a statutory payment for occupier's loss, but since the claimant had not been in occupation for twelve months prior to the acquisition it need not have been made.

24. We were told that the acquiring authority wrote to the claimant on 3 April 2017 indicating that it assessed the rule 2 claim at nil.

25. Mr Dewey's firm was instructed to act for the claimant in February 2018. On 26 April 2018 they submitted a claim for compensation, and request for an advance payment. The claim was for £1.415m under rule 2, statutory loss of £75,000, with professional fees to be confirmed. There was no mention of loan interest.

26. By September 2018, the acquiring authority had a more cheerful view of the cinema's freehold value, and on 17 September 2018 it made a counter proposal of £545,000, comprising a market value under rule 2 of £500,000, statutory loss of £37,500, and professional fees of £7,500. Shortly after, on or about 5 October 2018, the acquiring authority made an advance payment to the claimant of 90%, at £490,500.

27. Following further discussion between the parties, on 16 July 2019 Gateley Hamer made a revised claim, in which the rule 2 claim was given as £1,260,000, statutory loss as £75,000 and professional fees pursuant to rule 6 as £45,928.20. No response was received, and on 28 August 2019 the references to the Tribunal were made – one from the claimant and one from Pavenham, with a Statement of Case covering both references.

28. At no point before the making of the references did the claimant indicate to the acquiring authority that it claimed loan interest. In their skeleton argument, Mr Hanke and Ms Clutten said that that claim was made for the first time in the Statement of Case, "the Claimant's advisors not having previously been aware of that head of loss."

The documentary evidence

29. No evidence of fact has been adduced by the claimant. Therefore we have not heard from any persons who made the claimed oral agreement (although, as we shall see, there is some hearsay evidence). The oral agreement is not pleaded; instead the loan interest is presented in the Statement of Case as accruing on the mortgage debt secured by the charge. Ms Clutten explained that the reason was that she was unaware of the existence of the oral loan agreement when she drafted the pleadings. Neither of the claimant's expert witnesses says that there was an oral agreement.

30. There is therefore an evidential gap; the claimant's case can only be discerned from the arguments of counsel and not from its pleaded case or from the evidence given by its witnesses. The Tribunal is asked to infer the existence of the oral agreement from the circumstances and from the documentary evidence. In the paragraphs below we discuss the documents that formed part of the transactions of 2010 and 2013, the statutory accounts of DLCL, Pavenham and MCL, and the 2020 correspondence exhibited by Mr Dewey.

The 2010 documents

31. The CBL loan agreement of 30 July 2010 offered the £6.5 million facility until 30 September 2010. Interest accrued daily on the total balance outstanding at a rate of 5% over the one-month LIBOR, subject to a minimum effective rate of 6% per annum, debited to the account and payable on the first of every month. The default rate was 6% over LIBOR with a minimum effective rate of 8% per annum. The agreement was amended in March or April 2011, extending the facility to £6.537 million, repayable by 31 December

2011, with each rate going up by 1% so that the default rate was a minimum effective rate of 9% per annum.

32. Mr Hanke explored the interest provisions with Mr Hodgen in cross-examination. It seems that the intention was for interest to be paid monthly. There was no express provision for compounding, but it appears that if an instalment of interest was late then the default rate of interest would be triggered, and interest would become payable on unpaid interest and so would in effect be compounded.

33. As we have seen, three documents record transactions on 24 November 2010; the guarantee by MCL, the transfer of the cinema to MCL, and the charge of the cinema by MCL to Pavenham.

The 2013 documents

34. In 2013 the arrangements set up by the 2010 documents were re-arranged, so that Pavenham instead of CBL became the creditor in respect of the loan facility and the holder of a large raft of security documents – of which we have information about only two, the guarantee and the legal charge.

35. On 26 April 2013 the cinema was transferred from MCL to the claimant, subject to the charge. The transfer in form TR1 set out the consideration as follows:

> "The Transferor transfers the Property to the Transferee subject to the Charge (as defined below) in consideration of the Transferee assuming responsibility for all the Transferor's obligations and liabilities (including for the avoidance of doubt the obligation to repay) under the Loan (as defined below)."

36. The capitalised terms are defined, "the Charge" as that dated 24 November 2010 which we refer to above, and "the Loan" as "all existing loan facilities in place between MCL and Pavenham".

37. As there was no loan facility in place between MCL and Pavenham, the wording of the TR1 might be understood to mean that the claimant took on MCL's liabilities under the guarantee, instead (and, as we shall see, Mr Aslin and Mr Hodgen (the expert forensic accountants called by the claimant and respondent respectively) both understood it in that way). However, Mr Hanke argued that what is said about consideration in the TR1 is incorrect, and that the claimant did not take on MCL's liability under the guarantee. And there is no document in evidence that shows the claimant taking on liability under the guarantee; there is only the reference in the TR1. There is insufficient evidence for us to decide whether what Mr Hanke says about that is correct.

38. Mr Hanke argued that the TR1 should be construed as referring to a loan from Pavenham to the claimant. We do not accept that. Whatever the TR1 meant in its statement about consideration, and whether what it said about consideration was true or not, it does not refer to a loan from Pavenham to the claimant. An assumption by the claimant of

responsibility for sums due under a loan from Pavenham to the claimant itself would make no sense at all as consideration to MCL for the transfer of the cinema.

39. What we do have is a Deed of Variation made between Pavenham and the claimant, dated 26 April 2013, which said this:

> "The parties hereto agree that the Mortgagor's Indebtedness to the Mortgagee under the Legal Charge shall not exceed the aggregate of
>
> a) The Principal Sum; and
>
> b) All costs charges and other expenses and other monies referred to in Clause 8 of the Legal Charge."

40. Pavenham is of course now the Mortgagee and the claimant the Mortgagor. The Deed of Variation defines "Legal Charge" as the charge of the cinema dated 24 November 2010, and also states that the term "Indebtedness" is to have the same meaning as in the Legal Charge. The "Principal Sum" is defined by the Deed of Variation as £475,000.

41. The Legal Charge defined the term "Indebtedness" at length to include:

> "… all moneys and liabilities which shall from time to time … be due owing or incurred to [CBL] ….whether as principal or surety including interest…"

and the deed then goes on to charge the property as security for the payment and discharge of the Indebtedness.

42. It was argued for the acquiring authority that the effect of the Deed of Variation was that the maximum Pavenham could recover against the property, under the charge, was £475,000, whether that sum comprised principal or interest, together with the costs of enforcement under clause 8. Mr Hanke did not formally accept that argument, and suggested that the Deed of Variation said nothing about interest; but he accepted that the Deed of Variation caps recovery against the property. We take the view that the acquiring authority's construction of the Deed of Variation is unanswerable. The effect of the Deed of Variation is to limit the sum charged on the cinema as the acquiring authority says. That does not mean, of course, that the claimant has no other liability to Pavenham, and whether it has is of course is what we have decide.

43. The claimant's case is that it bought the cinema for £475,000. That information has emerged very recently; the claimant's pleadings do not mention the purchase price and what the TR1 says about price is, as we have seen, quite different. As for the charge, what it secures is the liability under the loan facility; there is nothing in the charge to link the £475,000 to the purchase price of the cinema. Mr Dewey's report of 15 May 2020 comes close to mentioning the purchase price in saying that the property was purchased by the claimant as a result of a loan from Pavenham, and that the amount of the loan was £475,000. However, on 4 September 2020 the claimant disclosed to the acquiring authority

an undated SDLT return which refers to the purchase of the cinema (although it does not give the date of the transaction) and states that the consideration for the transfer, in money or money's worth, was £475,000. The tax payable is said to be £14,250; the source of the funds for that tax, and for the conveyancing costs, is unknown.

44. Mr Hanke in his skeleton argument has explained that "The price agreed for the Property was £475,000. This was wholly funded by a loan from PHL to the Claimant." However, money did not change hands; if Pavenham had advanced cash to the claimant, the purchase price would have been paid to the receivers and thence back to Pavenham. So the payment of the price was a paper transaction. Mr Hanke explained that the arrangement made for securing the loan was "clumsy", in that instead of creating a new charge the claimant took the property subject to the existing charge, and the Deed of Variation limited the claimant's liability under that charge so as to match what had been lent. The charge secured only £475,000 (plus the clause 8 costs as discussed above); but there was a personal liability under a separate oral loan agreement which charged interest on that sum. Whether there was such a loan agreement is, again, what we have to decide.

Statutory Accounts

45. The filed company accounts for the claimant and Pavenham merit attention particularly the level of liability to creditors in the claimant's accounts, and the level of debtors in Pavenham's.

46. The claimant's accounting year was the calendar year. There is no indication that the 2014 accounts were drawn up by accountants, but the accounts for the following years were. The figures for creditors are as follows:

Year ending	Creditors	Approved by the Board of Directors
31.12.2013	£494,336	Not known; figure taken from 2014 accounts
31.12.2014	£494,336	28 September 2015
31.12.2015	£619,476	31 March 2017
31.12.2016	£683,344	24 January 2018
31.12.2017	£756,002	7 September 2018
31.12.2018	£354,557	27 September 2019

47. The Pavenham accounts filed at the Companies Registry in Gibraltar, used a year end of 31 May. The 2014 accounts showed debtors of £1,000 and no other figures. The following years give more information:

Year ending	Debtors	Approved by the Board of Directors
31.5.2014	£1,000	11 August 2015
31.5.2015	£13,704,150	27 June 2016
31.5.2016	£16,513,840	31 May 2017
31.5.2017	£16,357,313	9 February 2018
31.5 .2018	£16,358,313	2 June 2020

48. The 2018 accounts gave the comparison figure for debtors in 2017 as £16,358,313, which is out by £1,000 and seems to have inadvertently added to the 2017 debtors figure the 2017 figure £1000 of cash in the bank; if that error was replicated in the 2018 figure then that suggests that there was no movement in the figure from 31 May 2017 to 31 May 2018.

49. The second joint statement made by the forensic accountancy experts records that "The 2014 accounts of neither PHL nor DLCL are consistent with an interest-bearing loan existing between PHL and DLCL." This is obvious; the 2014 accounts for the claimant show no movement in liabilities from 2013 to 2014, and those for Pavenham indicate debtors only of £1,000. The Pavenham accounts show debtors at a level far higher than the claimed loan interest debt, and so are not inconsistent with it. But it could not be said that the Pavenham accounts "directly reflect" the accruing loan interest as Mr Hanke submitted. The 2018 accounts for Pavenham are not consistent with an interest debt growing month by month, unless there was one or more other debts shrinking by the same amount over the year which is implausible.

50. Finally, we have been referred in Mr Hodgen's evidence to the statement of affairs produced for MCL when it went into liquidation in October 2018; the statement showed that MCL still owned the cinema, and that it was indebted to PHL in the sum of £928,685.00.

The 2020 correspondence

51. Mr Dewey exhibited the following correspondence to his report.

52. Between 16 and 22 April 2020 there was a series of emails. The correspondents are Mr Jeremy Godden, who is a director of the claimant; Mr Toby Hunter, a shareholder of MTCRCL, and Ms Bianca Daniell, of Finsbury Corporate Services, based in Gibraltar.

53. On 16 April, Mr Godden emailed Mr Hunter, confirming that at the time of purchase of the cinema, Mr Godden was a director of the claimant, and said:

> "I negotiated with Pavenham Holdings to provide a facility for the full purchase price at a rate of 10% per annum. My understanding was that the Pavenham rate was higher than the Close Brothers rate but in the circumstances, I was happy that it was a commercial reflection of the uncertainty surrounding the building with regard to the CPO and potential vesting dates."

54. Mr Hunter forwarded that email to Ms Daniell later the same day, adding:

> "Hi Bianca – Pavenham as I am sure you know lent £475k to Dreamland Leisure cinema upon purchase by them in 2013. My understanding is that a rate of interest of 10% was agreed. Please could I ask you to review the file and provide a letter from Pavenham or yourselves confirming the rate of interest agreed on the facility."

55. Ms Daniell replied on 20 April:

> "Following Mr Jeremy Godden's email, we confirm that Pavenham granted a loan amounting to £475,000 with interest charged at 10 per annum, the interest being accrued."

56. It is not known what prompted Mr Godden's email of 16 April 2020.

57. Ms Daniell wrote a letter dated 16 July 2020, "to whom it may concern", on Pavenham's headed paper, signed by herself on behalf of Finsbury Corporate Services Limited, Pavenham's director. She said that the latter company was satisfied that the ultimate beneficial ownership of the claimant is not the same as that of Pavenham, and that she had verified this with Mr J Godden by telephone. Turning to the loan facility, she said:

> "a business opportunity arose which was commercially favourable to Pavenham hence it agreed to provide a facility to the claimant."

58. Her final paragraph is of note:

> "The terms of the loan had been agreed verbally at the time and this was open ended due to the uncertainty of the Compulsory Purchase Order and recoverability. It was suggested that the interest be set at a 10% flat rate accrued until the Compulsory Purchase Order took place or compensation was awarded by the process of the claim".

The expert evidence

59. In large measure what the Tribunal is being asked to do is to infer from the documentary evidence that the claimant's case is correct. However, as we said above, the parties called expert valuation and forensic accountancy evidence in order to provide an analysis of the documents and opinion evidence as to their import.

60. It will be helpful, before we analyse the expert evidence, to set out the various ways in which the claim for loan interest has been calculated, since those calculations are the work of the claimant's expert witnesses. Having done that, we consider first the evidence of the valuers for the existence of the loan and then the evidence of the forensic accountants on that issue, postponing for now the evidence and arguments about mitigation.

The calculations of the claim for loan interest

61. We set out at this point the various calculations of the interest claim that the claimant has offered, because they were largely the work of the expert witnesses and will be referred to in the narrative that follows.

62. In its Statement of Case the claimant said that at the valuation date the outstanding loan amount was £497,279.45, and that the loan was "continuing to accrue interest at a fixed rate of 8% per annum;" that "further compound loan interest costs" of £267,112.50 had been incurred since then, and that the outstanding loan balance was estimated at £294,608.75 at that date. Mr Dewey in his report states (at paragraph 3.1) that the claim in the Statement of Case was for £267,112.50; it is not clear why he regarded that as the claim rather than the higher figure and the Statement of Case does not say which is claimed.

63. In its reply to the acquiring authority's statement of case the claimant said that it had supplied the acquiring authority with a spreadsheet explaining the calculation of the loan interest, under cover of a letter dated 28 February 2020. Mr Dewey explained that he had been provided with figures by the claimant (he did not say which individual provided it) which he then used to produce the February spreadsheet. The February spreadsheet calculated the interest compounded monthly, and gave the total accrued interest as at 28 February 2020 as £290,140.00. The calculation commenced at the date of the acquisition of the property, but showed no interest as accruing between the valuation date in September 2013 and the date of the Porters' letter in December 2014; Mr Dewey explained that he took the view that the accrual of interest was not caused by a failure to pay compensation until it had made a claim, and he regarded the Porters letter as a claim (it will be recalled that we have found that it was not, in paragraph 22 above).

64. We note that the figures for interest outstanding at 31 December 2015, 2016 and 2017 in the spreadsheet supplied to Mr Dewey by the claimant (on the basis of which he produced the February spreadsheet) match the figures for liabilities given at those dates in the claimant's accounts. But those for the years ending 2013 and 2014 do not.

65. The next version was in Mr Dewey's first report of 15 May 2020; he calculated the interest then outstanding as £379,608, on the basis that the interest at 10% per annum was compounded quarterly.

66. In Mr Aslin's first report he set out two calculations of the interest then outstanding, one at an annual rate of 9% compounded annually and one at 10%. He provided a corrected version of both calculations in his second report, arriving at a figure of £333,476 on the basis of the 10% rate, again compounded annually.

67. In their skeleton argument Mr Hanke and Ms Clutten stated that the interest was at a rate of 10%, compounded annually.

68. On the second day of the trial the Tribunal was shown a letter from the claimant's solicitors to the acquiring authority's solicitors stating that the references to annual compounding both in the skeleton argument and in Mr Aslin's evidence was incorrect, and that the claimant had agreed to pay interest at 10% compounded on a monthly basis.

69. At the same time the claimant produced, at the Tribunal's request, a spreadsheet, ("the claim spreadsheet") setting out the total claimed as at 1 October 2020. It compounded interest on a monthly basis, charged none until the date of the Porters letter, and took into account the advance payments which had discharged some of the interest. The total claim for interest was said to be £258,378. Less than that sum was said to be now outstanding on the loan because the principal of £475,000 and some of the accrued interest had been discharged by means of the advance payments, but of course the whole of the interest incurred as a result of the delay in payment is claimed (we note that neither Mr Dewey nor Mr Aslin made this distinction in their calculations; each set out the amount then outstanding, without accounting for the fact that the advance payments, most of which had been passed on to Pavenham, were made by the acquiring authority on account of the rule 2 claim and do not reduce the claim for interest).

The valuation evidence: Mr Dewey's evidence for the claimant

70. Mr Dewey provided a report dated 15 May 2020 and a supplementary report of 20 July 2020. In his first report he described the property, went through the negotiations and advance payments in the years leading up to the making of the reference, and then turned to the events and transactions of 2013 and the documents we have described. He said that the Deed of Variation "confirmed that the Claimant's indebtedness to PHL, as secured by the charge, would not exceed £475,000 together with costs", and went on:

> "Whilst I have not seen a copy of a loan agreement, it is clear from the deed of variation that the claimant was indebted to PHL. Furthermore, I consider it highly unlikely that the Claimant would have agreed to be subject to a legal charge if it had not received a loan from PHL in that amount."

71. The existence of the loan, he said, was confirmed in correspondence, and he exhibited the 2020 correspondence (see paragraphs 51 to 58 above). "The applicable loan interest rate is also confirmed in that correspondence as being 10% per annum."

72. Mr Dewey went on to set out in tabular form the interest rate calculation for the loan at 10% compounded quarterly, to arrive at a cumulative figure of £379,608 as of 12 May. This represented the total outstanding on the loan, allowing for the October 2018 advance payment (from which £469,783.20 was set against loan interest) but made no allowance for the advance payment of £25,000 to Pavenham in January 2015. He took comfort from the fact that his figures for the amount outstanding at the end of each year were tolerably close to the year-end figures in the claimant's statutory accounts from 2015 to 2018 (see paragraph 46 above), although the 2014 figure was at variance with the figure in the accounts for December 2014. In cross-examination he explained that he had compounded quarterly because that was the formula used in another spreadsheet he happened to have to hand; he agreed that he should have calculated the interest monthly, as did the February 2020 schedule, and offered no explanation as to why he did not do so. Furthermore, his calculation took no account of the concession in the February 2020 spreadsheet by which no interest was claimed before the Porter's letter was sent; Mr Dewey agreed in cross-examination that he should have made that concession in his calculation and again could not explain why he had not done so.

73. Mr Dewey attached as an appendix to his report the accounts for the years ending December 2015 – 2018, and of course the figures for 2014 are seen in the December 2015 accounts. He said in cross-examination that he obtained the accounts from Companies House. When asked why he had not exhibited the accounts for the year ending December 2014 (which showed the figures for 2013, with no change in the amount of liabilities from 2013 to 2014), he confirmed that he had obtained those accounts too, and offered no explanation for their omission.

74. In his supplementary report of 20 July 2020, Mr Dewey said that since his first report he and the claimant had become aware of the £25,000 advance payment to Pavenham. He argued that this showed that the acquiring authority accepted that there was a loan from Pavenham; and he took the view that the fact that the claimant was unaware of the payment helped to rebut Mr Conboy's suggestion of a close relationship between the two companies (see paragraph 83 below). Inexplicably, he did not then recast his figures to allow for that advance payment, instead stating that his view had not altered since his first report.

75. Within Mr Dewey's supplementary report was this comment at his paragraph 3.15:

> "In this case [Pavenham] were fully aware of the compensation provision as recognised in the Equitable Assignment document date[d] 13 February 2013, which confirms that compensation payments should be made to PHL to recover the debt."

76. Mr Dewey's point, at his 3.14 and 3.15, was that after the compulsory acquisition the claimant could only repay Pavenham from compensation. The Equitable Assignment document does not appear in the bundle and the Tribunal has not seen a copy of it. The acquiring authority asked for it to go in the bundle; the claimant's solicitors asked for an explanation; the acquiring authority replied that it was a document referred to in the claimant's expert's report; and the claimant's solicitors did not respond and did not put the

document in the bundle, but did not inform Mr Hanke or Ms Clutten. In cross-examination Mr Dewey did not disagree with Mr Booth QC's suggestion that the Equitable Assignment assigned a number of claims for compensation to Pavenham, and that that might explain why Pavenham did not take from the claimant a contractual liability to pay interest.

77. Finally, we should add that the claim spreadsheet (paragraph 69 above) was Mr Dewey's work. Mr Booth QC said that he was not going to cross-examine Mr Dewey on it because he was not an accountant and the calculation lay outside his expertise. We do not think that one has to be an accountant to use Excel for this sort of calculation, and we are content to take the spreadsheet as a statement of the claimant's case as it now calculates it. But it is a statement, not evidence; the fact that the calculation has been made is not evidence of a liability of the claimant to Pavenham.

78. What we take from Mr Dewey's evidence is that, in his opinion, there must have been a loan to the claimant from Pavenham because that would explain the existence of the charge. He exhibited correspondence about the loan, whose authors have chosen not to give evidence to the Tribunal. He did not suggest that he had been instructed orally by either of the directors of the claimant that there was a loan.

79. Mr Dewey calculated the interest due under the loan on the basis of its being compounded quarterly, and therefore nearly consistent with the accounts for 2015 – 2018, despite the fact that he had to hand a calculation from the claimant (see paragraph 69 above) that compounded monthly and matched the figures for the company's liabilities, in its accounts, in December 2014 to 2018. We were disappointed that Mr Dewey chose not to exhibit the accounts for the year ending December 2014, which are inconsistent with the existence of the loan.

80. Mr Dewey's evidence was therefore incomplete and inconsistent. His treatment of the accounts, and of the interest calculations, was at best careless. Nothing in Mr Dewey's evidence amounts to direct evidence for the existence of an oral agreement or an interest-bearing, unsecured loan for an open-ended term at an alarmingly high rate of interest. He referred, perhaps inadvertently, to a document that might well offer an explanation as to why there was no such agreement.

81. At best Mr Dewey's evidence for the existence of the loan is no more than inference from documents. In view of the nature of his evidence we cannot ascribe any weight to his opinion; it adds nothing to our own perception of what can and cannot be inferred.

The valuation evidence: Mr Conboy's evidence for the acquiring authority

82. Mr Conboy's first report was dated 15 May 2020; his supplementary report was dated 17 July 2020 with an addendum of 20 July 2020. In his first report Mr Conboy went through the events of 2010 and the documents, and argued that the existence of the loan was not proved. He raised five points of particular concern:

a. Mr Conboy said that he regarded the 2020 emails as insufficient evidence of any agreement, in the absence of formal documentation showing the loan period, the interest rate, payment terms and so on.

b. He pointed to the inconsistency between the Statement of Case which gave an interest rate of 8% and the later assertion of 10%.

c. He noted that the accounts for the year ended December 2014 were inconsistent with the claimant's case because they showed no change in the liabilities figure.

d. He noted that there was no record of any payments by the claimant to Pavenham until the advance payment from the acquiring authority (which even then was not transmitted in full), nor

e. of any demands by Pavenham to the claimants.

83. Mr Conboy observed that the absence of a formal loan agreement between the claimant and Pavenham suggests that they may not have transacted at arms' length but that they might have overlapping ultimate beneficial owners.

84. The rest of Mr Conboy's first report was about mitigation, to which we return.

85. Mr Conboy was not cross-examined on his evidence about the existence of the loan; Mr Hanke noted that Mr Conboy's evidence on this issue was not accepted but chose to cross-examine Mr Hodgen only, on the basis that Mr Hodgen picked up and developed all the points that Mr Conboy made. We appreciated this economical approach.

The forensic accountancy evidence: Mr Aslin's evidence for the claimant

86. Mr Aslin confirmed that he was an independent expert, instructed a few weeks before he made his first report. He made two reports, dated 20 July 2020 and 14 August 2020. He explained that he had had email contact with both Jeremy and Jordan Godden, and that he had had a lot of information from Mr Dewey.

87. Whereas Mr Dewey took the view that there was a loan agreement which imposed an obligation to pay interest, which he had not seen, Mr Aslin's explanation of the interest claim was quite different. In his view the claimant's obligation to pay interest arose from and could be discerned in the CBL Facility letter, as amended, the Deed of Novation, the Legal Charge, and the Deed of Variation. He referred to the TR1 (see paragraph 35 above), and explained that the consideration for the claimant's acquisition of the cinema was its assumption of all MCL's liabilities to Pavenham under the loan facility. He accepted that that was inconsistent with MCL's accounts (see paragraph 50 above) but was untroubled by that. He agreed that the Deed of Variation limited the principal payable to Pavenham, and said that the objective of that was to ensure that if the claimant recovered more than £475,000 consideration it would be able to keep the balance; but he maintained that the claimant was liable to pay to Pavenham the interest payable under the facility letter. He

maintained that view in his supplementary report (see in particular paragraphs 2.3.2 and 2.3.3) and regarded that as the answer to Mr Conboy's concerns about the absence of a loan agreement.

88. He regarded it as reasonable and to be expected that Pavenham would seek to maximise recovery, having paid £3 million to acquire a debt, and that therefore it would charge interest. The rate of interest under the loan facility rose to a default rate of 9% (paragraph 31 above), but Mr Aslin said that it would have been reasonable for Pavenham to charge 10% because it was taking on a risky debt. He confirmed in cross-examination that his report made no mention of an oral loan agreement (although we note that he was aware of the reference to a verbal agreement in Ms Daniell's letter of 16 July 2020), and maintained his position that the liability for interest arose from the 2013 documents.

89. Mr Aslin provided some commentary on the transactions of 2013, noting that CBL might well have been willing to accept £3 million in payment for the novation of the loan facility, preferring cash in hand to the recovery of an uncertain amount in the future because the impending compulsory purchase would have jeopardised the value of the security. Pavenham, on the other hand was acquiring distressed debt at a discount, and that might have been attractive to a private investor with a portfolio of high-risk, but potentially high-return, debt.

90. Addressing Mr Conboy's observation about beneficial ownership, Mr Aslin expressed confidence in the Finsbury companies which are regulated by the Gibraltar Financial Services Commission, and in Ms Daniell's letter of 16 July 2020 (paragraph 57 above). He regarded it is unremarkable that Pavenham was not prepared to provide any further information about its beneficial ownership. His own research revealed that Pavenham is owned, via some intermediaries, by five individuals whose names he listed. They are not the same as the shareholders of the claimant. In cross-examination Mr Aslin accepted that those individuals might be nominees. And he said that he would not be surprised if there were some business or professional relationship between Pavenham and the claimant, because the transactions between them were not such as one would expect with one of the major banks.

91. Mr Aslin set out in his first report two calculations of the interest now due from the claimant to Pavenham, one on the basis of a rate of 10%, compounded annually, and one on the basis of 9% compounded annually. He took the view that the rate payable was a matter of construction of the legal documents and was therefore a matter for the Tribunal, but his view was that 10% would have been an appropriate rate for Pavenham to charge. In his supplementary report he corrected his calculations, again using the two alternative rates of 9% and 10% compounded annually, this time taking into account the payments on account of £25,000 in January 2015 and of the payment on account in October 2018; as we noted in paragraph 66, he calculated on that basis that £333,476 was outstanding at 20 July 2020.

92. Mr Aslin noted that his interest figures differed from Mr Dewey's, which he noted were provided to Mr Dewey by the claimant. He explained that he chose to compound on an annual basis because that would be a prudent way to calculate the interest. He took comfort

from the claimant's accounts from 2015 to 2018, and regarded the figure in the 2014 accounts as a mistake. Similarly he regarded the 2014 accounts for Pavenham as being mistaken, and he suggested that the inconsistency in the 2018 accounts might have arisen because the debt was regarded as irrecoverable. But as he explained in cross-examination, he was unconcerned by inconsistencies in the creditor's accounts because the liabilities arose from the 2013 documents in any event. He regarded the absence of demands from Pavenham to the claimant for payment as explicable by the fact that the claimant could make no payment until compensation was paid.

The forensic accountancy evidence: Mr Hodgen's evidence for the acquiring authority

93. Mr Hodgen also made two reports, dated 17 July 2020 and 14 August 2020. He examined Mr Dewey's evidence, and commented on the absence of a documented loan agreement, the inconsistency of the claimant's 2014 accounts with the claimant's case, and the inconsistency of PHL's 2014 accounts with the claimant's case since they show no financial activity in the year. He commented that the debtors shown in PHL's later accounts are said to be "due and payable within one year", which does not describe the arrangement the claimant seems to say that it made and that has continued already for seven years. The debtors in the 2018 accounts for Pavenham are unchanged from 2017, which is inconsistent with an accruing debt for interest (unless some other debt had decreased in an equivalent amount, which is most unlikely).

94. In Mr Hodgen's supplemental report he drew attention to the inconsistency between Mr Dewey's account of the source of the interest liability and Mr Aslin's opinion, and to their different views as to the amount of interest accrued. Much of Mr Hodgen's supplemental report was taken up with an analysis of the Deed of Variation, as to which we have set out our findings in paragraph 42 above. He commented on MCL's accounts, which he said did not support the claimant's version of events (see paragraph 50 above).

95. Mr Hanke put it to Mr Hodgen in cross-examination that there was nothing wrong with an oral loan agreement. It was not going to cause any difficulty, he suggested, because there was no problem recalling the detail if there was simply a loan of £475,000 with interest at 10% compounded monthly – perhaps a surprising point to put in a case where the claimant has had so much difficulty in settling on the terms of the interest liability and the sum it claims. At any rate Mr Hodgen maintained his view that an oral loan agreement would be unusual and impracticable, and commented that the meaning of a "flat rate" of interest as stated in Ms Daniell's email of 20 April 2020 was unclear. In his view it was very odd that it was the debtor who had to calculate what was owed; had he been acting for the claimant he would have approached the creditor, Pavenham, and asked what the interest liability was. And he would have asked his client if it was sure there really was a legally enforceable obligation to pay interest.

96. Mr Hodgen was asked in cross-examination about the significance of the Deed of Variation. He agreed that the limitation of liability under the charge would have no effect upon liability under a separate loan agreement, but was unshaken in his view that the evidence does not support such an agreement. He refused to speculate as to what might

have been the arrangement between PHL and the claimant or about the motivation of the two companies.

97. Mr Hanke put it to Mr Hodgen that it would be implausible for Pavenham not to charge interest on the loan. Mr Booth QC, when he cross-examined Mr Dewey about the Deed of Equitable Assignment (see paragraph 75 above) suggested that this cross-examination had been improper because that Deed suggested that there might be good reason why PHL had no need to charge interest. We accept that Mr Hanke, when he cross-examined Mr Hodgen, did not know anything about the Deed of Equitable Assignment and that therefore there was nothing improper in the cross-examination; we are surprised that Mr Hanke and Ms Clutten's client placed them in that position.

98. Mr Hodgen rejected Mr Hanke's suggestion that he had highlighted evidence that did not support the claimant's case and ignored evidence that did, and in the Tribunal's view he was right to do so; as he said, it is where the claimant's accounts are consistent with its case that is unsurprising, but the fact that the claimant's and Pavenham's accounts for 2014 are inconsistent with the claimant's case is highly significant.

99. In short, Mr Hodgen was entirely unshaken by cross-examination.

Conclusion: was there a loan?

100. Mr Hanke in opening for the claimant said that the documents before the Tribunal put it beyond question that there was a loan agreement between Pavenham and the claimant. We disagree.

101. The 2013 documents, namely the Deed of Novation and Assignment, the transfer of the cinema to the claimant, and the Deed of Variation, make no mention of any loan agreement, and the existence of a loan agreement cannot be inferred from them. By themselves, the narrative they provide is that the claimant acquired the cinema in return for the assumption of MCL's liabilities to Pavenham, and that the Deed of Variation then limited the extent to which the claimant's liability could be enforced under the charge.

102. According to Mr Hanke, that is not what happened. The purchase price was lent to the claimant by Pavenham, and there was an oral loan agreement which charged interest at 10% per annum compounded monthly. The claimant's liability under that loan agreement was secured, only to the extent of £475,000, by the charge over the cinema. The cinema was acquired, of course, in the shadow of the CPO, and the parties knew that the security might soon be taken away, and therefore (said Mr Hanke in opening) the personal liability under the oral agreement was particularly important. And there is no dispute between PHL and the claimant that there was a loan agreement, and PHL expects the claimant to meet its liabilities.

103. The Tribunal's difficulty with that case is encapsulated in the words "according to Mr Hanke", because Mr Hanke and Ms Clutten are the lone voices speaking to the claimant's case. The claimant's pleadings are inconsistent with it, since the Statement of Case says that the liability for interest arose from the charge. It is impossible to discern or even infer

that case from the 2013 documents. Not one witness gave evidence that is consistent with that case. There is no evidence at all from PHL itself as to what, if anything, it regards as due under the loan.

104. Mr Dewey in effect says that there must have been a loan agreement although he has not seen it, because why else would the claimant have taken the property subject to the charge, but has no positive evidence to offer. He exhibits the 2020 correspondence in which one email (from Ms Daniell on 20 April 2020) refers to a verbal agreement. But it gives no date for that agreement, nor does it tell us where it was made or between whom. Mr Godden in his email of 16 April 2020 wrote that he made an agreement on behalf of the claimant but does not say which individual or individuals he spoke or corresponded with in order to do so. The 2020 emails raise more questions than they answer; we make no suggestion of fraud or dishonesty, but we cannot be assisted by these emails when we have not heard evidence from the writers giving some detail of the circumstances they refer to. We can neither form a view about the accuracy of the writers' recollection nor make a legal judgment as to whether what they say happened amounted to an enforceable loan agreement.

105. As we said above, the quality of Mr Dewey's evidence was such that we were not able to place any reliance upon it. Our difficulty with Mr Aslin's evidence is its inconsistency both with Mr Dewey's evidence and with the claimant's case as put by counsel. We are puzzled by the apparent absence of instruction or information given to Mr Aslin by any officers of the claimant. He put forward a basis of liability for interest, namely the loan facility letter, which the claimant disavows. He has been left to speculate about the motivations of his client and of Pavenham, so that many of his expressions of opinion were prefaced by "I would expect that…". He was even left to speculate about the rate of interest chargeable and the period of compounding. Essentially Mr Aslin had no knowledge of the oral loan agreement on which the claimant relies and his evidence does not support its existence.

106. We make no findings about the ultimate beneficial ownership of the claimant and Pavenham; the only evidence we have about this is the letter of 16 July 2020 from Ms Daniell. In the absence of evidence from Ms Daniell we are unable to attribute any weight to that letter and accordingly we cannot come to any conclusion about beneficial ownership.

107. We do not speculate as to what exactly was the deal between MCL, Pavenham and the claimant in 2013. We have no basis on which to say whether the statement of consideration in the TR1 is true. If it is not, there are many possible reasons for and bases on which the claimant took the property subject to the Legal Charge other than the existence of a loan agreement in the background. What we do have is the Deed of Novation and Assignment which schedules a raft of "security documents" assigned to Pavenham, and an enigmatic reference to a Deed of Equitable Assignment which we have not seen. Clearly a great deal was going on of which the Tribunal has no knowledge, and we do not need to descend into guesswork.

108. Nor do we speculate as to the reason why the accounts of the claimant from 2015 to 2018 are consistent with one version of its claim (see paragraphs 64 and 72 above). We are

concerned that the accounts of 2014 are inconsistent with it, as are the accounts of Pavenham for the year ending 31 May 2014. The rest of Pavenham's accounts are no more consistent with the claimant's case being correct than they are with its being incorrect, and we may perhaps be forgiven an expression of surprise at Mr Hanke's view that they "directly reflect" the debt. They do nothing of the sort.

109. There is nothing that comes close to an evidential basis for us to find on the balance of probabilities that the claimant made an oral loan agreement with Pavenham when it purchased the cinema, either on terms of 10% interest per annum compounded monthly or on any other terms. Therefore the claim for loan interest fails.

Mitigation

110. That being the case we do not need to make any finding about whether the claimant failed to mitigate its loss by raising the claim for interest at the last moment, in its Statement of Case, and anything we say about that will be obiter. Essentially the acquiring authority's case is that if it had been told of the interest liability back in 2013 at the time of acquisition, and at a time when a relatively small sum had accrued, it could and would have taken a commercial decision to pay it off at that point, even it felt that it was probably not a valid claim. Moreover, disclosure of the interest liability in 2013 would have involved disclosure of the purchase price of the property, about which the authority was kept in the dark until a few weeks before the trial; armed with that information the authority could have been expected to reach an agreement about the compensation for the property much earlier, which would have cleared the loan even it had not been settled straight away.

111. The claimant in answer says that the interest claim was made late because the claimant did not realise that it was claimable; the matter was raised in conversation between Mr Dewey and Mr Hunter while the case for the Tribunal was being prepared. The claimant's argument is that since the authority expressed the view in 2017 that the value of the property was nil, it was hardly likely to have been any more benign either about the value of the property had it known the sale price, or about interest had it known of that claim in 2013. The claimant was unable to bring the authority to an agreement until relatively recently because some of the comparables upon which it relied were not available in 2013. Moreover, as Ms Clutten pointed out when cross-examining Mr Conboy, the acquiring authority has itself been very tardy with advance payments and has still not made the full payment of the value of the property even though the sum was agreed months ago.

112. The argument about mitigation is a speculation about a counter-factual. If an interest liability had been mentioned earlier, what do we suppose the acquiring authority would probably have done? Certainly the failure to mention the loan until the eleventh hour deprived the authority of the chance of sorting out the liability earlier, but would it have taken that chance? We think it likely that it would have done so, particularly since disclosure of the claimed oral loan agreement would probably have involved disclosure of the purchase price of the cinema, and that would have moved matters along far more effectively than did the comparables produced years later.

113. Had we found that there was a loan agreement and an interest liability, we would have found that the claimant's failure to mention it until August 2019 was a significant failure to mitigate its loss, and we would have awarded, at most, only the interest that accrued after that date. But as we have not been able to find that there as a loan agreement we need not proceed any further down that road.

Conclusion

114. Accordingly the claimant fails on the one issue that remains in dispute, namely the loan interest. The parties have agreed the method for the calculation of statutory interest on the whole of the claim insofar as it was successful and there is therefore nothing left for us to determine.

Judge Elizabeth Cooke Peter McCrea FRICS

Dated: 17 November 2020