Aslam v South Bedfordshire District Council [2000] APP.L.R. 12/21

CA on appeal from Land Tribunal before Nourse LJ; Chadwick LJ; Hale LJ. 21st December 2000

LORD JUSTICE CHADWICK:

1. This is an appeal by way of case stated under section 3(4) of the Lands Tribunal Act 1949 against a decision of the Tribunal on a reference to determine the compensation payable to the appellant, Mr Mohammed Aslam, by South Bedfordshire District Council under provisions formerly contained in section 170 of the Town and Country Planning Act 1971 in consequence of a discontinuance order made in respect of a slaughterhouse at the rear of 6 Market Square, Toddington, Bedfordshire. The appeal is brought with the permission of this Court (Lord Justice Mantell) granted on 11 February 2000.

2. The underlying facts may be stated shortly. Use of the premises at the rear of 6 Market Square, Toddington, as a slaughterhouse commenced many years ago. It had become an established use for the purposes of the planning legislation long before any interest in the premises was acquired by the appellant. In May 1988 Mr Aslam went into possession as tenant under an agreement for a lease the term of which was to be fifteen years from 24 June 1988. On 6 September 1988 he commenced the slaughtering of sheep by the Hal Al method. On 14 October 1988 the District Council, as the local planning authority, made an order - the South Bedfordshire District Council Discontinuance Order (No. 1) 1988 - under what was then section 51 of the Town and Country Planning Act 1971 (now section 102 of the Town and Country Planning Act 1990) requiring discontinuance of the use of the premises as a slaughterhouse. By virtue of what was then section 51(4) of the 1971 Act (now section 103 of the 1990 Act) the order did not take effect until confirmed by the Secretary of State. Mr Aslam, having at first submitted an objection to the order, later withdrew that objection and, in May 1989, moved his slaughtering business elsewhere. The Secretary of State confirmed the order by letter dated 26 July 1989; and the order became effective on 7 August 1989.

3. Section 170 of the 1971 Act was in these terms, so far as material:

   "(1) The provisions of this section shall have effect where an order is made under section 51 of this Act, requiring a use of land to be discontinued . . .

   (2) If, on a claim made to a local planning authority within the time and in the manner prescribed by regulations under this Act, it is shown that any person has suffered damage in consequence of the order by depreciation of the value of an interest in the land to which he is entitled, or by being disturbed in his enjoyment of that land, that authority shall pay to that person compensation in respect of that damage."

4. The 1971 Act was repealed by the Planning (Consequential Provisions) Act 1990. The provisions formerly contained in section 170 were re-enacted, in substance, in section 115 of the Town and Country Planning Act 1990 ("the 1990 Act"). The effect of section 2 of the Planning (Consequential Provisions) Act 1990 is that, since 24 August 1990, compensation in respect of a discontinuance order made under section 51 of the 1971 Act has been payable under section 115(2) of the 1990 Act - rather than under section 170(2) of the 1971 Act. But nothing turns on that.

5. Mr Aslam submitted a claim for compensation under section 170(2) of the 1971 Act on the grounds that he had been disturbed in his enjoyment of the slaughterhouse premises. Negotiations as to the amount of the compensation to be paid took place between his advisors and the relevant officers at the District Council. It proved impossible to reach agreement. On 20 October 1994 Mr Aslam referred what had, by then, become a question of disputed compensation to the Lands Tribunal for determination pursuant to section 118 of the 1990 Act.

6. The Member selected to deal with the reference, under section 3 of the Lands Tribunal Act 1949, was Mr M StJ Hopper FRICS. He heard the matter, intermittently, over a period from June 1996 to November 1997. His written decision was signed on 9 November 1998; but, there being a subsequent addendum as to costs, it has been treated as made on 15 December 1998.

7. The amount of the compensation payable to Mr Aslam by the District Council was determined by the Member at a figure of £417,904.72. That amount comprised three elements: (a) loss of future business profits - £400,000; (b) accrued interest on the claimant's business development loans - £14,365; and (c) loss on forced sale of fixtures - £3,539.72. No point arises in relation to the third of those elements - the amount was an agreed sum. But Mr Aslam seeks to challenge each of the first two elements - loss of business profits and interest. It is necessary, therefore, to examine the basis upon which the Member arrived at the amounts which he attributed to those elements.

8. The amount attributed to loss of business profits (£400,000) has been rounded up from the more precise figure of £398,809. The computation by which the Member reached that figure may be summarised as follows:

Loss of annual net profit of £105,000 for the period 23 June 1989 to 31 December 1995 after deducting additional costs to be incurred in the years 1993, 1994 and 1995 Discounted to present value as at 23 June 1990	£403,197
Loss of annual net profit of £158,000 over the period 1 January 1996 to 23 June 2003 (the remaining term of the lease) following necessary redevelopment works (to be completed by 31 December 1996) and after deducting additional costs in each of the years 1996 to 2003 Discounted to present value as at 23 June 1990	£ 43,707
Further discount in respect of the period 1 January 1996 to 23 June 2003 to reflect 30% chance that planning permission for necessary redevelopment works would be obtained	£ 30,595
	£ 13,112
	£416,309
Further discount to reflect 70% chance that expenses and other liabilities would be incurred on closure of business in the event that planning permission for necessary works of redevelopment were not obtained	£ 17,500
	£398,809

[Note: (i) The discounted cash flow computations which give rise to the figures in respect of the periods 23 June 1989 to 31 December 1995 and 1 January 1996 to 23 June 2003 are set out in Appendix 15 to the Member's determination.

(ii) The hypotheses adopted by the Member were that works of redevelopment would be necessary to enable the business to continue; that the chance of obtaining the planning permission required to carry out those works was 30%; that, if permission were obtained, there would be no income during 1996, while the works were carried out; and that, if the works were carried out, there would be an increased throughput of sheep which would give rise to an increase in annual net profit.

(iii) Cash flow was discounted to present value (as at 23 June 1990) at a rate of 20% per annum]

9. The projected annual net profit for the period to 31 December 1995 (£105,000) has been rounded down from the more precise figure of £105,152. That figure was computed as follows:

Average gross income per sheep:	
Killing fee £3.50	
Skins £3.75	
Other parts £1.00	
	£8.25
Annual gross income based on annual killing rate of 29,900 sheep 29,900 x £8.25	£246,675
Average cost of sales per sheep:	
Labour £2.10	
Inspection charge £0.65	
Meat and Livestock Commission Levy £0.42	
	£3.17
Annual cost of sales 29,900 x £3.17	£ 94,783
Annual profit before charging fixed costs (overheads)	£151,892
Annual fixed costs (overheads)	£ 46,740
Annual net profit	£105,152

10. A similar computation, based on an increased annual killing rate of 40,300 sheep but with the figures otherwise unchanged, gives an annual net profit of £157,984 (rounded up to £158,000) in respect of the period from 1 January 1997 when, on the hypothesis adopted by the Member, the necessary redevelopment works would have been completed (if planning permission were obtained).

11. The only challenge pursued on this appeal, in relation to the amount of compensation attributed to loss of business profits, is to the figures which the Member adopted in respect of the average income per sheep from skins (£3.75) and other parts (£1.00). The other figures in the computation of lost business profits were either agreed at the time of the hearings, or have since been accepted.

12. Mr Aslam's primary claim in relation to interest was that interest should be awarded on the amount of compensation from the date of the loss - June 1989. The Member rejected that claim. He was, however, more sympathetic to a claim based on the interest actually paid by Mr Aslam on a business development loan. He accepted that one effect of the discontinuance order was that Mr Aslam had been unable to repay the loan as he had intended; and that, in consequence, he had incurred interest charges which he would not have incurred but for the order. The amount which he attributed to interest charges on this basis (£14,365) was made up of three elements:

Interest accrued on the business development loan as at 7 November 1997 (immediately before the final hearing of the reference)	£10,396.82
Interest from 8 November 1997 to 31 October 1998 (immediately before the Member signed his determination) at the daily rate of £4.12	£ 1,474.96
Interest paid from claimant's current account in respect of the business development loan during the period August 1989 to August 1990	£ 2,493.71
	£14,365.49

The challenge on this appeal, in relation to interest, is to the Member's decision that interest on the amounts attributed to lost business profits (£400,000), and (I think) to the loss on a forced sale of fixtures (£3,539), should not be included in the determination of the total amount of compensation payable in consequence of the discontinuance order. It is not clear - at least, not clear to me - whether Mr Aslam contends that, if interest on those amounts were included in the computation, he would also be entitled to the amount (£14,365) in respect of accrued interest payable in respect of the business development loan.

13. It is important to keep in mind, as Lord Justice Mantell pointed out when giving permission to appeal to this Court, that an appeal under section 3(4) of the Lands Tribunal Act 1949 lies only in so far as it can be said that the decision of the Tribunal is erroneous in point of law. It is not for this Court to substitute its own view on questions of fact for that of the Tribunal. Parliament has entrusted the determination of facts to the Lands Tribunal and has enacted that the decision of the Tribunal shall be final.

14. In the light of the guidance which is to be found in the judgment delivered by Lord Justice Mantell on 11 February 2000, Mr Aslam has refined the issues upon which he seeks the decision of this Court under the case stated procedure prescribed by section 3(4) of the 1949 Act. Those issues may now fairly be restated as follows:

(1) Whether the Lands Tribunal erred in law when, in determining the correct level of income per sheep from the sale of sheep skins, it applied a deduction of 25% in respect of wastage to an average skin price of £5, rather than to an average skin price of some amount between £5 and £10.

(2) Whether the Lands Tribunal erred in law when, in determining the correct level of income per sheep from the sale of sheep parts other than skins, it concluded that the rate of wastage would have been near to 49%.

(3) Whether the Lands Tribunal erred in law in concluding that interest was not payable on the compensation to be paid as a result of the discontinuance order under the law applicable prior to the enactment of the Planning and Compensation Act 1991.

It is convenient to address those issues in turn.

The first issue: average skin price

15. It was not in dispute that the actual gross income generated during the short period that Mr Aslam was trading at the premises represented an average of £5.40 per sheep. But, as the Member accepted at page 61 lines 26-28 of his determination: *"This income was earned during a period when the claimant's business was starting up and operating under the threat of discontinuance. On the evidence I am satisfied that the business would have produced a higher income from July 1989 onwards in a no-order world."*

16. The first question, therefore, was how that notional higher income should be assessed. Evidence was given on behalf of the District Council by Mr Colin Smith FRICS IRRV, a partner in the firm of Bruton Knowles, based in Gloucester. Mr Smith's report, dated June 1995, had adopted the historic figure of £5.40 per sheep, based on the actual trading. On that basis, Mr Smith had not found it necessary, in his report, to analyse that figure into component parts - killing fee, skins and other parts. But, faced with the fact that, in the light of agreement that the killing fee was £3.50, his figure of £5.40 per sheep would allow only £1.90 per sheep for skins and other parts (together), Mr Smith was prepared, in the evidence which he gave orally at the hearing, to increase his figure for average gross income per sheep from £5.40 to £6.00:

"In order to err on the side of caution and give the claimant the benefit of the doubt" . . . and . . . *"to reflect the agreed killing charge of £3.50, plus the sales of such skins and parts as became the claimant's property and were capable of being sold, having regard to quality, condition, demand and viability of the operation."* [Determination, page 56 line 46 to page 57 line 2]

The Member found that "there was no particular basis" for Mr Smith's increase of 60p per sheep, and that it was necessary to approach the matter, as the claimant had done, by seeking to reach a figure for average gross income per sheep from an analysis of the component elements from which income could be derived.

17. Those who gave evidence on behalf of Mr Aslam included Mr Allen Matthews FRICS, a partner in the firm of Weatherall, Green & Smith, based in Chancery Lane, and Mr Brian Graham FCA, a partner in the firm of Moores Rowlands, based in Clifford's Inn. Mr Graham advanced the following figures for average gross income per sheep:

Killing charge	£ 3.50
Skin price	£ 5.00
Other parts	
Liver and Heart	£0.54
Brain	£0.35
Tongue	£0.075
Intestines	£0.65
Feet (4 x £0.16)	£0.64
Tripe	£0.40 £ 2.655
Allow for wastage at 10%	£ 0.265 £ 2.39
Average gross income per sheep	£10.89

18. The Member considered, first, whether it was appropriate to proceed on the assumption that ownership of all the skins was retained by the slaughterer for resale. He accepted that what he described as the "relatively modest" killing fee would have been agreed on the basis that Mr Aslam did retain the skins. He went on, at page 62 lines 4 to 11:

"I accept that the price obtainable for skins was dependent upon age, quality and condition and quantity and was liable to fluctuation. Mr Smith said that, in 1989, a skin in good condition fetched between £5.00 and £10.00, but he thought that 20% to 30% of any skins the claimant retained would not be saleable.

Taking into account all the evidence on this aspect of the matter I find that 75% of the skin[s] would have been saleable at an average price of £5.00 per sheep, producing an overall average of £3.75 a sheep killed."

Once it had been accepted that Mr Aslam's claim should be determined on the basis that he retained, and was entitled to sell, the skins of all the sheep which he slaughtered, there were two distinct questions which the Member had to consider: (i) what proportion of the retained skins were saleable and (ii) what was the average price at which a saleable skin could be sold.

19. Mr Smith's evidence that a skin in good condition fetched between £5.00 and £10.00 could not, of itself, support a finding that the average price of a saleable skin was £5.00. It is necessary to consider, therefore, whether there was other evidence to support that finding. In the absence of other evidence the finding was one which, as a matter of law, was not open to the Member. It was that which led Lord Justice Mantell to grant permission to appeal on what has become the first issue - see paragraph 9 of the judgment which he delivered on 11 February

2000. But the two questions identified in the preceding paragraph - (i) what proportion of the retained skins were saleable and (ii) what was the average price at which a saleable skin could be sold - although distinct are evidentially interconnected. It is, I think, necessary to consider, also, whether, as a matter of law, the Member could properly reach the conclusion that only 75% of the retained skins were saleable.

20. The Member reached the conclusions which he did on the first issue (average skin price) after taking into account, as he said, "all the evidence on this aspect of the matter". The evidence to which he referred in his written determination may be summarised as follows:

(1) Evidence from Mr Aslam that: *"The price for skins could vary dependent upon their condition (damaged or without wool) and did fluctuate throughout the year. The average price was confirmed at about £6 a skin by his own invoices and a letter dated 10 May from Mullins (Dudley) Limited. There was also supporting evidence from Derby Hide & Skin Company, Palmers Wholesale Butchers Limited and Welshpool [Hide &] Skin Limited."* [Page 50 lines 1-5].

(2) Evidence from Mr Matthews that: *". . . the skins of older sheep were not so valuable as those of younger sheep. Mr Smith's suggestion that the majority of Hal Al demand was for mature sheep was not the case. Mr Matthews produced a letter dated 29 September 1995 from the [Hal Al Food Authority], which stated that of red meat supplies in the Hal Al trade 95% was good ewe `young sheep' hogget (last year's lambs) and only 5% were from plain sheep and rams (older animals)."* [Page 51 lines 16-21]

(3) A letter produced by Mr Matthews, dated 8 February 1988, from Mullins (Dudley) Limited which stated that their price for hogget skins was £6.70 and their price for skins of ewes was £6.30. These prices were said to be for the week ending 12 February 1988 only and subject to revision on a weekly basis, due to fluctuations within the market. [Page 51 lines 38-42]

(4) A further letter from Mullins dated 10 May 1989 confirming the purchase from the claimant of 975 skins for a total of £5,707.11, an average of £5.85 per skin. [Page 51 line 42 to page 52 line 2]

(5) Evidence from Mr Matthews that: *"Skins of plain sheep could be as little as £1.50, but [he] thought private killing would not involve plain sheep."* [Page 52 lines 17-18]

(6) Evidence from Mr Graham that he had seen: *". . . four invoices from Mullins (Dudley) Limited to the claimant trading as Ali Hadid Hal Al Meat on dates in February and March 1989 for the supply of between 22 and 148 skins at total prices ranging from £4.91 to £5.54 a skin, and averaging £5.02 a skin".* [Page 53 lines 11-13]

(7) Evidence from Mr Graham that: *"[He] assumed that all skins would be suitable for sale. He adopted an average price of £5 against a range of actual sale prices between £2.30 and £6.70. The average was based on a small proportion of throughput, but he thought it reasonable, taking account of the contracts. If the Hal Al trade was a lot of plain sheep, his figure could be too high; he did not know how far plain sheep were used."* [Page 54 lines 33-37]

(8) Evidence from Mr Smith that:

"The average price per skin claimed was based on evidence of only a very small number of skins sold by the claimant, in relation to the total number of sheep slaughtered.

He agreed with Mr Graham that skin prices could be subject to wide market fluctuations. Payment reflected the age and size of the animal, the quality, condition and quantity of what was on offer. Quality and condition were both affected before, during and after slaughter. Some skins would be worth nothing at all.

[His] firm, Bruton Knowles, operated Gloucester and Cirencester markets; they sold about 50,000 cull ewes annually; 70% went to the Hal Al trade. . . . Invoices showed that most of the claimant's purchases were cull ewes. On the Tribunal's inspection of the Westoning abattoir [to which Mr Aslam had moved his business in May 1989] [he] had seen that the Hal Al carcasses were virtually all cull ewes." [Page 56 lines 4-19]

and, in the course of cross-examination, that:

"In February and March 1989 skins had been sold to an average of £5, but this covered less than 20% of the animals killed; not every skin could be sold because of disease or damage during slaughter; Mr Graham knew some skins were sold for £1.50 each.

Knowledge of the Mullins (Dudley) invoice, showing an average of £5.85 each skin was paid for 975 skins in early 1989, was one of the reasons why he had increased his £5.40 to £6.00 a head.

The average Mullins price did not surprise him. Nationally between 17,000,000 and 18,000,000 skins were processed out of a total of 20,0000,000 sheep killed; in 1989, in good condition, a skin could fetch between £5 and £10. [He] agreed that skins had a value, but not other parts; the claimant had achieved an income from skins, but this did not arise from private killings." [Page 57 lines 21-29]

and, further, in answer to a question put by the Member at the end his evidence - that is to say, after cross-examination and re-examination: *"Some proportion of the skins would not be saleable, probably 20% to 30%."* [Page 58 lines 12-13]

21. That final answer, given by Mr Smith, as I have said, in response to a question put by the Member, was the first occasion (so far as appears from the material before us) on which it had been suggested by anyone that 20% to 30% of the skins would not be saleable. In a document put before this Court on behalf of Mr Aslam in support of his application for permission to appeal, there is some indication of the context in which that answer was given: "Mr Smith in the witness box was asked by the Tribunal Member *do you accept the £5.00 price for the skin claimed by the Claimant*. Mr Smith replied *There is wastage*. The Tribunal Member asked how much wastage, Mr Smith replied *I do not know*. The Tribunal Member asked *give me a rough figure* Mr Smith replied *20% to 30%*."

That account has not been challenged. At the least, it seems clear that the basis upon which Mr Smith volunteered the figure for wastage of 20% to 30% was not tested at the oral hearing.

22. The basis for that figure was, however, challenged by Mr Aslam's solicitor in a letter to the District Council dated 2 June 1997:

"Following the last hearing, enquiries have been made as to the sale of skins. It is not accepted that 25% to 30% of the skins have no value at all, as alleged in the evidence given by your expert. If your expert is not prepared to withdraw such evidence then:-

(a) We require your expert to provide names and addresses of abattoirs supporting the evidence (if any) together with documentary proof thereof.

(b) We put you on notice that we will be calling evidence to rebut same. We understand that such evidence will show that all sheep skins have a value but that such value does, of course, vary according to the condition of the skin."

23. That letter was followed by a further letter from Mr Aslam's solicitor to the Council, dated 15 August 1997. The relevant paragraphs, under the heading "Skins", are set out below:

"We understand the purport of Mr Smith's evidence was to suggest to the Member that in making the calculation as to what should be allowed for the value of skins, there should be a deduction of between 20% -30% of the total value of the skins because they were unsaleable. It is that evidence that is being challenged and by way of rebuttal, we are enclosing the following letters:

(i) A L Courtenay - 24th February 1997. Mr Courtenay makes it clear that all skins have a value irrespective of where they have come from or their condition.

(ii) R G Meats (Wholesale) Limited - 12th February 1997. Mr Carr states that he gets paid for every skin regardless of whether it is Halal kill, Kosher kill or private kill.

(iii) Palmers Wholesale Butchers Limited - 18 March 1997. Mr Palmer states that every skin has a value which is dependent upon its condition.

Accordingly we once again ask you whether Mr Smith is prepared to withdraw his evidence or change his view in the light of the evidence that we are now producing. Please let us know whether you require us to call the writers' of these letters or whether you accept the evidence contained in them."

The letters described there, under (i), (ii) and (iii), do contain the statements attributed to the authors.

24. The response to that letter of 15 August 1997 is contained in a letter from the District Council dated 18 September 1997. The solicitor to the Council wrote: *"The Council maintains its position regarding its evidence given in relation to skins and more particularly by Mr Smith in his comments given in response to the Member. However, I can confirm that we do not require the evidence of Messrs Courtney, Carr or Palmer to give evidence in relation to the matters set out in their respective letters. We consider this can be adequately dealt with by way of submission."*

As the final sentence of that passage indicates, there was to be a further hearing before the Member, for the purpose of making oral submissions to him. That hearing took place on 12 and 13 November 1997.

25. It is plain, from the way in which the submissions made on behalf of the parties are set out by the Member in his determination (at pages 58-61) that the question of wastage in relation to skins was debated. It is, to my mind, inconceivable that that debate could have taken place without reference to the correspondence which I have just set out. The purpose of the correspondence was to get before the Member evidence on that point; a point which, as it must have appeared to those advising Mr Aslam, had been raised without warning at a late stage at the previous oral hearing and which had taken them by surprise. The District Council had indicated that it did not challenge the evidence of Mr Courtenay, Mr Carr or Mr Palmer. But, nowhere in his determination does the Member refer to that evidence. I am driven to the conclusion that he failed to take it into account. I cannot see how, if he had taken that evidence into account, the Member could have reached the conclusion that 25% was an appropriate figure to take as the proportion of unsaleable skins - in the absence of any opportunity for Mr Aslam's advisers to test the basis upon which Mr Smith had formed the opinion which he volunteered in response to the Member's question.

26. It follows that I am satisfied that the Member's conclusion that only 75% of the skins were saleable was reached as the result of an error in law. The error, as it seems to me, lies in the failure to take account of the whole of the evidence on the point.

27. I turn, therefore, to the other question which the Member had to consider in relation to skins: what was the average price at which a saleable skin could be sold?. The Member was bound to take the view that the evidence to be obtained from the invoices - which tended to support a figure in excess of £5.00 per skin - was evidence as to the price of saleable skins. But he was not bound to conclude that the invoices were, necessarily, representative of the trade. He had to consider whether the number of lower quality, but saleable, skins (which, on the evidence, would fetch less than £5.00 per skin) would be substantial in relation to the number of better quality skins (which, it was accepted, would fetch more than £5.00 per skin). On that question the evidence - in particular, the evidence of Mr Matthews and Mr Smith - was in conflict. The Member was entitled to prefer the evidence of Mr Smith, which was to the effect that a substantial proportion of sheep sent for slaughter in the Hal Al trade were cull ewes; of which the skins were of relatively low value.

28. The conclusion that the average price of saleable skins was £5.00 per skin received support from the evidence given by Mr Graham, to which I have already referred: "He [Mr Graham] adopted an average price of £5

against a range of actual sale prices between £2.30 and £6.70 . . . If the Hal Al trade was a lot of plain sheep, his figure could be too high; . . . " [emphasis added]

29. I am satisfied that the Member was entitled, on the material to which he referred in his written determination, to reach the conclusion that the average price of saleable skins was £5.00 per skin. It follows that I am not persuaded that the Member's conclusion on that point has been shown to be erroneous in law. But, for the reasons which I have already given, I have reached the view that he was in error in discounting the average price per skin to £3.75 in order to allow for unsaleable skins. He ought to have reached the conclusion, on all the evidence before him, that in arriving at the average price of £5.00 per skin, sufficient account had been taken of the fact that some skins (as was common ground) would be of very little or no value.

The second issue: average price for other parts

30. Mr Smith advanced no separate figure in respect of those parts of the sheep (other than skins) which were retained by the slaughterer for resale. Mr Graham's figure for "other parts" - reached on the basis which I have already set out - was £2.39 per sheep. But Mr Graham's figures for liver and heart were based on the assumption that 10% of those parts would be unsaleable; and the overall figure of £2.39 per sheep allowed for a further discount of 10% in respect of wastage. Adding back the allowances for unsaleability of liver and heart and for overall wastage, Mr Graham's base figure was £2.715 per sheep - as the Member pointed out at page 62 lines 15 to 17 of his determination.

31. It was from that base figure of £2.715 per sheep that the Member reached the conclusion that the average income per sheep from "other parts" should be taken as £1.00. He set out the basis for that conclusion in the following passage:

"Taking all the evidence into account I find that the rate of wastage would have been higher and near the 49%, which was the percentage of sheep actually condemned in part during the claimant's operation. I find that 45% should be allowed from the figure of £2.715 producing £1.49, say £1.50 per sheep. To allow for the possibility that the claimant may not have retained all the other parts, and because of some doubt as to the price for intestines in the light of Mr Matthews concession in cross-examination, I reduce this to £1.00 per sheep. [Page 62, lines 19-24]

32. Mr Aslam's challenge to that conclusion, as in his skeleton argument, is directed to the Member's finding that the rate of wastage would be much higher than the 10% which Mr Graham had allowed - and nearer to the 49% which was the historic figure experienced during the period of actual trading. The evidence to support that figure is referred to by the Member in his determination, first at page 52, lines 31 to 32: *"Of 8,681 sheep slaughtered by the claimant, 4,212 had parts condemned,..."* and, later, at page 55, lines 15 to 16: *"During the period the claimant killed and processed 8,681 sheep, of which 31 were condemned in whole carcass and 4,212 were part condemned."*

It could not be disputed that in computing the average income to be received from the resale of "other parts", some allowance had to be made for wastage - to reflect the evidence that, during the period of actual trading, a substantial proportion of the sheep slaughtered had parts which were condemned. The Member's task was to determine what that allowance should be. There was evidence upon which he could reach the conclusion that wastage would be as high as 45%. I understand why Mr Aslam takes the view that that figure is too high; there is force in his contention that the Member was too ready to assume that no part of a sheep which was "part condemned" would be saleable. But I am not persuaded that the conclusion that wastage in respect of "other parts" would be as high as 45% can be said to be erroneous in law. It is important for this Court, on an appeal under section 3(4) of the Lands Tribunal Act 1949, to respect the fact finding role that has been entrusted to the Tribunal; and to resist any invitation, or temptation, to substitute its own view as to the conclusion which it might have reached on the evidence for that which the Member did reach.

33. For my part, I have more difficulty in accepting that, having reduced the average income to be derived from the sale of "other parts" from £2.715 per sheep to £1.50 per sheep by the allowance of wastage at the rate of 45%, the Member was entitled to deduct a further £0.50 per sheep: *"To allow for the possibility that the claimant may not have retained all the other parts, and because of some doubt as to the price for intestines in the light of Mr Matthews concession in cross-examination"* [Pages 62, lines 22-24]

34. The price which Mr Graham had allowed for intestines was £0.65 per sheep. The evidence to support that figure is described by the Member at page 53, lines 41 to 46: *"As to intestines, Mr Graham had seen a letter dated May 1989, a copy of which was produced, from CRM Casings at Loughborough to the claimant offering to purchase intestines from the latter at 65p for quantities of 1,500. Later a copy of a notice form Rehan Animal By-Products of Ashton-under-Lyne headed `To whom it may concern' was produced; this stated that, in 1988/1989, they regularly collected Hal Al sheep runners [a trade description for intestines] priced at 65p per piece from the claimant."*

35. In the course of cross-examination Mr Matthews made a concession which the Member recorded in these terms: *"As to intestines the letter from CRM Casings specified a price of 65p for quantities in a collection of over 1,500. On reflection he should have taken a price of less than 50p."*

36. If, in reliance on that concession, the Member felt it appropriate to reduce the figure of £0.65 per sheep, taken by Mr Graham as a component in reaching his overall figure for other parts (£2.715) - in order to reflect the possibility that intestines would be collected in quantities of less than 1,500 - that reduction should have been made before applying the wastage discount of 45% to the overall figure. If that is not done, then the reduction has a disproportionate effect on the average income per sheep. To illustrate the point: a reduction of, say £0.15

per sheep, in respect of the income from intestines, made before applying the wastage discount would have the effect of reducing the average income per sheep from £1.49 to £1.41: the same reduction, £0.15 per sheep, if made after applying the wastage discount, would have the effect of reducing the average income per sheep from £1.49 to £1.34. I have taken a reduction of £0.15 per sheep as an illustrative figure only; but the illustration shows that no reduction that could sensibly be made to reflect the possibility that intestines would be collected in quantities of less than 1,500 would have the effect, of itself, of reducing the average income per sheep, after allowing for wastage at the rate of 45%, from £1.50 to £1.00.

37. The other element relied upon by the Member to support a reduction in the average income derived from the resale of "other parts" from £1.50 to £1.00 per sheep was "the possibility that the claimant may not have retained all the other parts". But there was no evidence that Mr Aslam did not retain the "other parts" during the period in which he actually traded at the Toddington premises; and no evidence that he would not have retained the "other parts" for resale if trading had been allowed to continue there. The evidence pointed to the conclusion that the slaughterer did retain for resale the "other parts" as well as the skins. The Member's accepted that what he described as the relatively modest killing fee justified the conclusion that the slaughterer was entitled to keep the skins. That conclusion is, to my mind, impossible to reconcile with a conclusion that the slaughterer was not entitled, also, to retain the "other parts".

38. It follows, for the reasons which I have set out, that I am satisfied that the decision to reduce the income from "other parts" to a figure as low as £1.00 per sheep is properly to be regarded as erroneous in law. I have considered whether it is open to this Court to give any effect to that conclusion in the light of the issues formulated by Mr Aslam in his skeleton argument. It is a feature of the case stated procedure - at least, as it has been applied in the present appeal - that there is no notice of appeal and no formal grounds of appeal. Notwithstanding that that element in the Member's reasoning which led him to make a reduction in the income from "other parts" per sheep from £1.50 to £1.00 was not the subject of specific challenge in Mr Aslam's skeleton argument, I am satisfied that the need to support that element was identified in the course of the hearing of the appeal, and that the District Council had a proper opportunity to address it. In my view it would not be right to refuse Mr Aslam relief from the effect of what I regard as an erroneous decision on this aspect of the matter on the ground that he had not, himself, identified the point to which his challenge ought to have been directed.

The third issue: interest

39. Mr Aslam's primary claim was to interest on the amount of the compensation from the effective date of the discontinuance order to the date of payment. The Member summarised the basis on which that claim was advanced by counsel on behalf of the claimant in a passage at page 151 line 44 to 152 line 13 of his written determination:

"He [the claimant] was entitled to compensation in respect of damage suffered in consequence of the order. It was agreed in principle that he was entitled to a sum in respect of the loss of the opportunity to earn future profits from the use of the subject property. He was entitled to that sum from the date the order was confirmed; he had not been paid a penny eight and a half years later. The council had had the benefit of the use of whatever sum was due for that period. The true value of the compensation was reduced by at least a half by reason of the delay. Put another way, the council had, in practice, halved the real value of the compensation which they were statutorily due to pay. The question was whether the claimant could recover his true loss or any part of it.

Ordinary commonsense suggested that compensation ought to be payable to the claimant for being kept out of his money for eight and a half years. If a person was entitled to £X in 1989 and got it in 1998, he did suffer the loss of the use of the money in the intervening years. The loss of the use of the money was `damage in consequence of the order' and the `authority should pay to (the claimant) compensation in respect of that damage' under the language of section 115(2) of the 1990 Act." . . .

40. The Member rejected that claim. He recognised the force of the submission *that "ordinary commonsense does suggest that the claimant should receive interest on the award from the date of his loss"* -see page 153, lines 46 to 47. He noted that the award would have carried interest under section 80 of the Planning and Compensation Act 1991, had that provision been applicable in the present case. But he went on, at page 154 lines 13 to 15, to say this: *"I prefer the view that the 1991 Act was passed in order that interest would become payable because, under the existing law, it could not be recovered as part of the claim for compensation following a discontinuance order".*

41. Section 80(1) of the 1991 Act is in these terms, so far as material: *"Compensation payable under any provision mentioned in column 1 of an entry in Part I of Schedule 18 to this Act shall carry interest at the rate for the time being prescribed under section 32 of the Land Compensation Act 1961 . . . from the date shown against that provision in column 2 of the entry until payment."*

42. Part I of schedule 18 to the 1991 Act contains an entry in respect of section 115 of the 1990 Act (there referred to as *"the principal Act"*) and, against that entry, in column 2, a date described as *"Date damage suffered or expenses incurred"*. Section 80 of the 1991 Act (in so far as it applies to England and Wales and subject to an exception not here material) was brought into force on 25 September 1991 by the Planning and Compensation Act 1991 (Commencement No 1 and Transitional Provisions) Order 1991 (SI 1991/2067). But the transitional provisions contained in Part II of schedule 2 to the 1991 Order have the effect that compensation payable under section 115 of the 1990 Act does not, by virtue of section 80(1) of the 1991 Act, carry interest where the date of the discontinuance order was earlier than 25 September 1991 - see paragraph 6(26) in Part II of schedule 2.

43. It follows that section 80(1) of the 1991 Act has no application in the present case. But it does not follow that interest cannot be awarded on compensation payable under the provisions of section 115(2) of the 1990 Act in respect of a discontinuance order made before 25 September 1991. It is important to note that, where section 80(1) applies, its provisions are imperative: interest must be paid on the amount of compensation for the prescribed period and at the prescribed rate: there is no discretion in the Tribunal to refuse interest, or to award interest in respect of some lesser period or at some other rate. It is, to my mind, not at all surprising that, when provisions in that form were brought into effect by the 1991 Order, it was thought inappropriate that they should apply, retrospectively, to compensation in respect of existing discontinuance orders. But that throws no light on the question whether, under the law as it stood before the enactment of section 80(1) of the 1991 Act, interest from the date of disturbance could be awarded on compensation payable under section 115(2) of the 1990 Act.

44. The question whether the Lands Tribunal had power to award interest on compensation payable under statute was considered by this Court (Sir John Donaldson, Master of the Rolls, Lord Justice Nourse and Lord Justice Glidewell) in *Knibb and another v National Coal Board* [1987] 1 QB 906. The claim for compensation in that case was made under section 1(4) of the Coal Mining (Subsidence) Act 1957. The Court held (Lord Justice Nourse dissenting) that, on a reference under section 13(3)(b) of that Act, the Lands Tribunal had power to award interest on the amount of compensation in respect of the period from the date on which the damage occurred to the date of the award. But, as I have indicated, Lord Justice Nourse took the contrary view; and, in the course of agreeing with the judgment of Sir John Donaldson, Master of the Rolls, Lord Justice Glidewell made it clear that, in his view, the decision was limited to the particular statute (the Coal Mining (Subsidence) Act 1957) which was before the Court. He emphasised, at page 919C, that the decision in that case was not to be taken as a decision that the Lands Tribunal was entitled to award interest in every case of disputed compensation from the date on which the right to compensation arises.

45. The decision in the ***Knibb*** case turned on the fact that the relief sought from the Lands Tribunal on the reference made to it included a claim to damages under section 13(3)(b) of the Coal Mining (Subsidence) Act 1957. It was that claim which enabled Sir John Donaldson, Master of the Rolls, and Lord Justice Glidewell to hold that, by analogy with the powers of a consensual arbitrator (as explained by Lord Brandon of Oakbrook in ***President of India v La Pintada Compania Navigacion SA*** [1985] AC 104, at page 119A-C), the Lands Tribunal could exercise the power to award interest conferred on courts of record by section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 in proceedings for the recovery of a debt or damages. The point appears clearly in the judgment of Lord Justice Glidewell, at [1987] 1 QB 906, 919D-E: *"By analogy with the powers of an arbitrator appointed by agreement between the parties, the Lands Tribunal is required to apply English law, including, where appropriate, section 3 of the Law Reform (Miscellaneous Provisions) Act 1934. It is appropriate to apply that section in the present case because: (a) as Sir John Donaldson M.R. makes clear, the claimant's claim in their reference was for "compensation by way of damages" under section 13(3)(b) of the Act of 1957; and (b) the question the statute requires the Lands Tribunal to determine is wide enough to comprehend the determination and award of interest on such damages."*

46. In my view, properly understood, the decision in the ***Knibb*** case does not lead to the conclusion that, as the law stood before the enactment of section 80(1) of the 1991 Act, interest from the date of disturbance could be awarded on compensation payable under section 115(2) of the 1990 Act. The reasoning in each of the judgments in that case leads to the opposite conclusion. It is unnecessary to extend this judgment by a more detailed analysis of that reasoning. Put shortly, I am satisfied that the proceedings before the Lands Tribunal on a reference under section 118(1) of the 1990 Act cannot fairly be regarded as proceedings "*for the recovery of any debt or damages*". They are proceedings for the determination of questions of disputed compensation. The obligation to make payment arises under section 115(2) of the 1990 Act, not under section 118(1) of that Act. Section 118(1) does not - as section 13(3)(b) of the Coal Mining (Subsidence) Act 1957 had done - enable the tribunal to award damages. It empowers the tribunal to determine disputes.

47. It is unnecessary to extend this judgment by a more detailed analysis because, following the *Knibb* case - and perhaps as a result of observations made in that case - a general power to award interest has been conferred on the Lands Tribunal by rules made under section 3(6) of the Lands Tribunal Act 1949. Lord Justice Glidewell pointed out in the *Knibb* case, [1987] 1 QB 906 at page 919E, that the Administration of Justice Act 1982 had given power to a consensual arbitrator to award simple interest "for such period ending not later than the date of the award as he thinks fit". He went on, at page 919F: *"If it be thought that the Lands Tribunal should have the same power to award interest for a period before the date of its award, this could be achieved by an amendment of the Lands Tribunal Rules 1975 to add section 19A to those sections of the Arbitration Act which already apply to proceedings in the tribunal. "*

48. Section 19A of the Arbitration Act 1950 - introduced by section 15(6) of, and Part IV in schedule 1 to, the Administration of Justice Act 1982 - was in these terms:

> *"(1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, award simple interest at such rate as he thinks fit - . . . (b) on any sum which he awards, for such period ending not later than the date of the award as he thinks fit.*

49. The suggestion made by Lord Justice Glidewell in the ***Knibb*** case was given effect by the Lands Tribunal Rules 1996 (SI 1996/1022). Those rules which came into force on 1 May 1996. Rule 32, in the rules as originally

made, was in these terms: *"The following provisions of the Arbitration Act 1950 shall apply to all proceedings as they apply to an arbitration - . . . (e) section 19A (power of arbitrator to award interest);"*

It was provided by rule 57 of the 1996 Rules that: *"The Rules shall apply to proceedings commenced before the date on which they come into force as well as to proceedings commenced on or after that date. "*

50. Part I of the Arbitration Act 1950 (in which section 19A is to be found) was repealed by the Arbitration Act 1996 - see section 107(2) and schedule 4. Section 19A of the 1950 Act was replaced by section 49 of the 1996 Act. Rule 32 of the Lands Tribunal Rules 1996 was amended and replaced by SI 1997/1965; but only in relation to proceedings commenced in the Lands Tribunal on or after 1 September 1997. It is accepted by Mr Anthony Anderson QC, on behalf of the District Council, that the position on 15 December 1998, when the Member made his determination of the amount of compensation payable by the District Council to Mr Aslam under section 115(2) of the 1990 Act, was that, by virtue of the relevant transitional provisions, the power to award interest under section 19A of the Arbitration Act 1950, introduced by rule 32 of the Lands Tribunal Rules 1996 as originally made under SI 1996/1022 continued to be exercisable, notwithstanding the enactment of the 1996 Act and the making of the amending statutory instrument.

51. The power to award interest under section 19A of the Arbitration Act 1950 was not drawn to the attention of the Member in the course of the hearings before him; and it appears that he overlooked the fact that rule 32 of the Lands Tribunal Rules 1996 had taken the form that it did when those rules came into force in May 1996. That was, perhaps, understandable - in that, by the time the Member made his determination in December 1998, the rule had been replaced following the enactment of the Arbitration Act 1996 - but it was unfortunate. It is clear that the Member to give effect to what, as he recognised, the application of "*ordinary commonsense*" required; namely, that the claimant should be compensated for the fact that he had been kept out of the payment to which he was entitled under section 115(2) of the 1990 Act for some eight years or more.

52. Mr Anderson QC, while accepting that there was power in the Lands Tribunal to award interest at the time when the Member made his determination, points out, correctly, that the exercise of that power lay in the discretion of the Member. In a case where the power conferred by section 19A of the Arbitration Act 1950 is exercisable by the Lands Tribunal at all - that is to say, in a case where the exercise of that power is not excluded by the mandatory provisions as to the payment of interest on compensation contained in section 80(1) of the Planning and Compensation Act 1991 - the power is to be exercised "if [the Member] thinks fit". He points out, further, that there was no application before the Member for interest under section 19A and rule 32. He submits that, if there had been such an application, the District Council might have wished to put before the Member material which would have led him to refuse to exercise the power to award interest; or, at the least, might have led him to exercise it by awarding interest over some lesser period than the whole period from the coming into force of the discontinuance order until the making of the award. In those circumstances, he submits, it is now too late for Mr Aslam to invite this Court to interfere. In the absence of material which might have been put before the Member - and which is not before this Court - this Court should not exercise the discretion itself. Nor should this Court remit the matter to the Lands Tribunal for further consideration: Mr Aslam had the opportunity to ask for interest under section 19A and rule 32 and (at a time when he was represented by experienced counsel) he chose not to take that opportunity.

53. I might find those submissions persuasive if it were not for the fact that I can see no basis upon which it could be proper, in the circumstances of the present case, to refuse to add interest to the amount of the compensation payment. Mr Anderson QC has not identified, even in the most general terms, what additional material might have been put before the Member on this point; and I am unable to envisage any material which could affect what, as it seems to me, is so plainly the appropriate course as a matter of principle. I will explain why I take that view.

54. Section 170(2) of the Town and Country Planning Act 1971 (now section 115(2) of the 1990 Act) requires that, if it is shown that a claimant has suffered damage in consequence of a discontinuance order made under section 51 of that Act by being disturbed in his enjoyment of the land to which that order relates, the local planning authority shall pay to the claimant *"compensation in respect of that damage*". The task of the Lands Tribunal, under section 118(1) of the 1990 Act) is to determine "*any question of disputed compensation"*.

55. In the present case the effect of the Bedfordshire District Council Discontinuance Order (No 1) 1988 on the claimant's enjoyment of the land to which that order related was that Mr Aslam was unable to continue to trade at the premises of which he was tenant. So the damage which he suffered in consequence of the discontinuance order included the loss of the profits that he would have made from the trade which he would have been able to carry on at those premises if the order had not been made. He was entitled to be paid compensation in respect of that damage.

56. The task, therefore, which the Member was required to address under the reference made to the Lands Tribunal was to determine the disputed question: what compensation should be paid to the claimant in respect of the lost profits? That required, first, a decision as to the basis upon which compensation for the loss of profits should be assessed. The District Council contended for what may conveniently described as the "years' purchase" basis - that is to say, the capitalisation of projected profits by applying a multiplier to the average level of annual profits. The claimant contended for the discounted cash flow basis - that is to say, the capitalisation of projected profits by discounting a future income stream (representing future profits) to a present value. The conceptual foundation

of the discounted cash flow basis was explained in the speech of Lord Nicholls of Birkenhead, when delivering the advice of the Judicial Committee in ***Director of Buildings and Lands v Shun Fung Ironworks Ltd*** [1995] 2 AC 111 - see, in particular, at page 132. The Member was satisfied that, in the circumstances which he had to consider, it was appropriate to adopt the discounted cash flow (DCF) basis, although he recognised that, correctly applied, both methods should produce the same answer - see page 144 lines 10 to 14 in his written determination.

57. Application of the DCF method of capitalisation required (i) the identification of the period over which it was to be assumed that the claimant would have received the projected income stream, (ii) an assessment of what the income stream would have been over that period and - in particular - an assessment of what income would have been received on what dates and (iii) a decision as to the discount rate (or rates) to be applied.

58. The first of those requirements presented no difficulty. The discontinuance order took effect on 7 August 1989, following confirmation by the Secretary of State. But, recognising the inevitability that the order would be confirmed, Mr Aslam had ceased trading at the Toddington premises in May 1989. The Member took the view that a convenient date from which to commence the computation in respect of lost profits was 24 June 1989 - that being the nearest anniversary of the commencement date of the 15 year term under the tenancy. There is no complaint about that. Nor is there complaint as to the Member's decision to restrict the period over which profits from the trade should be treated as having been lost in consequence of the order to the remaining contractual term of the tenancy - that is to say, to a period ending on 23 June 2003. It was accepted by counsel who appeared for Mr Aslam, in his submissions to the Member, that it was not appropriate, in this case, to make any assumption that the tenancy would have been renewed at the end of the contractual term, whether under the provisions of Part II of the Landlord and Tenant Act 1954 or otherwise - see page 139 line 46 to page 140 line 4 in the written determination.

59. The second of those requirements required an assessment of what the net profits would have been in each of the years from 24 June 1989 to 23 June 2003. It was that exercise which gave rise to the need to attribute an average income per sheep to the sales of skins and other parts.

60. In reaching a decision on the third of those requirements - the discount rate to be applied - there can be no doubt that the Member was referred to, and took into account, the observations of Lord Nicholls in the ***Shun Fung*** case, at page 132 C-E: *"In this calculation the discount rate, or capitalisation rate, comprises the rate at which an amount of money payable at a future date should be reduced to arrive at its present value. Its present value is the price which a person would pay now for the right or prospect of receiving the amount of money in question at the future date. Three ingredients can be identified in the discount rate. One is the rate of return the potential purchaser would expect on his money, assuming that the payment to him at the future date is free of risk. A second ingredient is the allowance the potential purchaser would make because of the likely impact of inflation. He is buying today, in today's currency, the right to be paid at a future date an amount which, when paid, will be paid in tomorrow's depreciated currency. The third ingredient is the risk factor. The greater the risk that the purchaser will not receive in due course the future payments he is buying, the higher the rate of return he will require."*

61. The Member adopted a discount rate of 20%. He did so for the reasons which he gave at page 146 lines 11 to 18 of his written determination: *"The next issue is what discount rate should be applied to the estimated net cash flow. Mr Matthews adopted 12%; Mr Smith initially took 15% prior to a hypothetical redevelopment and 20% thereafter but later said, if he had used unfettered hindsight, he would have adopted 20% throughout and he made calculations on that basis. I accept that, in accordance with the principle in the* ***Bwllfa*** *case [The* ***Bwllfa and Merthyr Dare Steam Collieries (1891) Limited v The Pontypridd Waterworks Company*** *[1903] AC 426], it is right to use unfettered hindsight. Having regard to the substantial risks attached to the income from what was a hypothetical business, without any established track record and facing an uncertain future due to stricter regulation, I find that a discount rate of 20% should be applied throughout."*

The Member recorded, at page 146 line 26, that the parties had agreed not to discount the first year's income. Accordingly, as his calculation at Appendix 15 to the determination makes clear, he discounted to a present value as at 23 June 1990.

62. There is no challenge on this appeal to the Member's decision to adopt the DCF method of capitalisation; nor to his decision to adopt a discount rate of 20%; nor to his decision to discount the projected income stream to a present value as at 23 June 1990. The purpose of setting out, in this judgment, the basis upon which the Member thought it appropriate to proceed is not to question any of those decisions. The purpose is to demonstrate that the effect of proceeding on that basis is that the Member treated the question before him as if it were: "what sum of money should have been paid to the claimant on 23 June 1990 in order to compensate him for the damage which he suffered by reason of the loss of the profits which he would have received by continued trading at the Toddington premises during the period from 24 June 1989 to 23 June 2003?" In answering that question, the Member applied a discount to the income stream which (on the hypotheses made) the claimant would have received over the period of thirteen years from 24 June 1990 in order to reflect the value to the claimant of receiving those monies early, on 23 June 1990. That discount ought to have included not only the third element identified by Lord Nicholls in the passage in *Shun Fung* case to which I have referred - that is to say, an element of discount to reflect what the Member recognised as "the substantial risks" that the future income might never be received at all - but also the first element identified by Lord Nicholls - that is to say, discount to reflect the rate of return to be expected on an amount laid out on the purchase of a risk free payment to be made at a future date. It ought not, in the present case, to have included the second element identified by Lord Nicholls - that is to say,

discount to reflect the likely impact of inflation. The reason why the second element should not be included, in the present case, is because the income stream to which the discount was applied was itself measured in "real-value" money - that is to say, the projected income to be received in, say, 1997 was expressed in money having a 1989 value. The amounts of the projected income to be received in future years took no account of inflation; and so there was no basis for the inclusion of an element to allow for inflation in the discount rate. What was required was a "real" and not a "nominal" discount rate - for the reasons explained by Lord Nicholls in the *Shun Fung* case, [1995] 2 AC 111 at page 132G. There is no reason to think that the Member did not appreciate the principles applicable to the determination of the appropriate discount rate; and so it may be assumed that the rate which he chose did include not only an element to reflect risk (to which he referred) but also an element to reflect the "real" rate of return to be obtained on money laid out in the purchase of a future risk-free return.

63. It follows that the discount rate itself reflected, in part, the advantage to the claimant of receiving monies sooner rather than later. If, as in the event happened, the monies were not to be received (at the earliest) until after the Tribunal had made its determination in December 1998, that advantage was lost to the claimant. But, in addition, he suffered a further disadvantage. The award was expressed in money having a 1989 value. The effect of inflation between 1989 and 1998 was that the *"real"* value of the award, when paid in money having a 1998 value, would be less than it would have been if the compensation had been paid, as the statute required, at the time when the damage was suffered - in 1989. So an award of compensation in 1998, based on 1989 values, which did not carry interest could not fulfil the statutory objective set out in section 115(2) of the 1990 Act; the amount would not compensate the claimant adequately for the damage which he had suffered as a consequence of the discontinuance order.

64. It was, no doubt, considerations of that nature which led the Member to observe, at page 153 lines 46 to 47 of his written determination, that *"Ordinary commonsense does suggest that the claimant should receive interest on the award from the date of his loss . . ."* I agree. Where compensation has been determined on the basis that the amount payable in respect of income receivable in, say, 1997 is reduced on the basis that the recipient is to be treated as if he had enjoyed the advantage of receiving payment in 1990 in lieu of that income, it defies common-sense to take no account of the fact that, in the events which have happened, he will not receive that payment until the end of 1998. Where the reason why the claimant will not receive that payment until the end of 1998 is that, without any fault on his part, determination of a claim to compensation first advanced in 1989 (when the discontinuance order was made) was not resolved until December 1998, the refusal, or inability, to take account of that fact does not only defy common-sense; it leads to a result which, in my view, can properly be described as manifestly unjust.

65. An award of interest avoids that result. Interest at a conventional rate - or, as Lord Nicholls described it in the ***Shun Fung*** case, a *"nominal rate"* - includes an element in respect of the *"real"* rate of return which an investor could expect to receive on a risk-free investment and an element to allow for inflation. The point was explained by Lord Diplock in ***Wright v British Railways Board*** [1983] 2 AC 773, at page 782. As he put it, at page 783A: *". . . that element of risk which is presented by inflation is taken care of in a rough and ready way by higher rates of interest obtainable as one of the consequences of it."*

66. For the reasons which I have sought to explain, I have no doubt that it was a necessary consequence of the Member's decision to make a determination of the amount of compensation payable by discounting projected future income (taken at 1989 values) to a date in 1990 that he was required to award interest from 1989 until the date of the award if the Lands Tribunal Rules permitted him to do so. An exercise of his discretion to refuse interest would have been plainly wrong. It follows that, notwithstanding that the point was not raised before the Member, I would allow the appeal on the third issue.

67. If Mr Aslam is to receive interest from 24 June 1989 on the whole amount of the award in respect of lost profits and the loss on the forced sale of fixtures - as I think he should - it cannot be right for him to receive, also, that element of the award (£14,365) which represented accrued interest on his business development loan. The reason is this. The purpose of adding interest to the amount which ought to have been paid to him in June 1989 as compensation is to put him in the position that he would have been in (as nearly as maybe) if he had received what he ought to have received at the time when he ought to have received it. If he had received compensation in June 1989, he would have used it, in part, to discharge his existing business development loan. The interest which did accrue on that loan would not have accrued. But, equally, the money used to discharge that loan could not have been invested to produce a return. To include the interest which accrued on the business development loan in the amount of the compensation and then to allow interest on that amount would be to compensate Mr Aslam twice over for the same element of loss. So it must be a consequence of the decision to allow interest on the amount of compensation that that amount be reduced by £14,365.

68. The existence of a power in the Lands Tribunal Rules to award interest in respect of a period prior to the date of the award makes it unnecessary to consider whether section 3(1) of the Human Rights Act 1998 would, in any event, require and enable the Court to construe section 115(2) of the Town and Country Planning Act 1990 in such a way as to achieve the same result; on the grounds that no other result would be compatible with Mr Aslam's Convention rights under Article 1 of the First Protocol set out in Part II to schedule 1 of the 1998 Act. I do not overlook the point; but, in the circumstances that I am satisfied that effect can be given to Mr Aslam's Convention rights without recourse to section 3(1) of the 1998 Act, I prefer not to decide it on this appeal.

Conclusion

69. It follows that I would allow this appeal. I would direct that, in the computation of projected annual net profit, there be substituted in the estimate of average gross income per sheep (i) the figure of £5.00 per skin in place of the figure of £3.75 per skin adopted by the Member, and (ii) the figure of £1.50 for "other parts" in place of the figure of £1.00 adopted by the Member. I would direct, also, that simple interest be awarded, pursuant to section 19A of the Arbitration Act 1950, on the amount of the compensation payable from the effective date of the discontinuance order to the date of payment. But I would direct, also, that the item "accrued interest on the claimant's development loan - £14,365" be omitted in the computation of the compensation payable.

70. I would be minded to direct (subject to hearing the submissions of the parties on the point) that the rate at which simple interest should be awarded on the amount of the compensation payable, in this case, should be the Commercial Court rate. I anticipate that these proposed directions could be incorporated in revised figures for the amount of the compensation payable, and interest thereon, agreed between the parties without the need for any further consideration by the Lands Tribunal. But I would invite submissions on that matter also.

LADY JUSTICE HALE:

71. I agree that the appeal should be allowed at least to the extent indicated by Chadwick LJ. My only reservation relates to the effect of our decision to award simple interest on the loss of business profit element in the compensation awarded upon the element relating to the accrued interest on the business loan. The member awarded, as a separate head of loss, the interest paid or accrued on that loan since August 1989, on the basis that Mr Aslam would otherwise have paid it off within the three years contemplated.

72. It seems to me that there are two separate questions. First, what were Mr Aslam's losses flowing from the closure order? Second, should he have interest on all or any of the sums awarded in respectof those losses?

73. As to the first, Mr Aslam lost future business profits. These were calculated on the discounted cash flow basis which, in effect, assumes that he is receiving his compensation in June 1990. He also lost money as a result of the forced sale of his fixtures. And he lost the extra interest that he incurred on his business loan, which he would otherwise have been able to pay off within the three years contemplated. Each of those three heads of loss would be recognised in other areas of the law as proper and distinct heads of damage.

74. As to the second, it is now common ground that the Tribunal had power to award simple interest on some or all of the award. It is clear that if the Member had appreciated this, he would have done so. It is not clear whether he would have awarded interest on all three parts of the award, still less whether he would have regarded that as a substitute for the business loan interest which he did award. The argument that he would have regarded it as a substitute, as I understand it, is that the award of interest is to compensate him for having been kept out of his money. Had he not been kept out of his money, he would have paid off the loan. Therefore to award him both is to award him double compensation. I have two worries about this.

75. First, there is no necessary coincidence between the simple interest awarded (at some as yet unknown rate) on the loss of income and the interest on the business loan, which must have been at compound interest and not necessarily at the same rate. In this particular case, the loss of income was so great and thus the interest upon it will be so great that it will undoubtedly be more than the sum at issue here. But the principle would be no different whatever the relationship between the two, that is whether or not the interest on the lost income would come anywhere near the extra interest on the business loan.

76. Secondly, there is a distinction between being kept out of his money, in the sense that he was kept out of the income which he would have used to pay off the loan, and being kept out of his money, in the sense of being kept out of the compensation to which he became entitled when his business was closed down. The award of interest compensates for the latter. The main award compensates for the former, but it comes too late to avoid causing the extra damage reflected in the interest on the business loan. It seems to me, therefore, that the interest awarded on the loss of income is awarded because Mr Aslam would otherwise be under-compensated for that loss of income, it having been calculated on the assumption that he was receiving it in June 1990. The extra interest on the business loan is a quite separate matter, for which he is not otherwise compensated in any way. I would therefore have left untouched that element of the award relating to interest on the business loan, but only as regards the extra interest occasioned by the closure, that is the interest from the date when the loan would otherwise have been paid off.

LORD JUSTICE NOURSE:

77. I agree with the judgment of Lord Justice Chadwick.

Order: Appeal allowed with costs, to be the subject of a detailed assessment; order made in form proposed in para 69 of Chadwick LJ's judgment; written submissions regarding points under para 70 of judgment to be lodged by Respondent within 28 days, with reply by Appellant within 14 days thereafter, and those to be dealt with by Chadwick LJ and Lady Justice Hale; permission to appeal to the House of Lords refused. (This order does not form part of approved judgment)

MR M ASLAM (litigant in person)
MR A ANDERSON QC and MR M DRUCE (instructed by South Bedfordshire District Council) for the Respondent