ACQ/212/2005
ACQ/29/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – compulsory purchase – preliminary issue – claimants claiming interest in land acquired but not served with notice to treat – whether Lands Tribunal has jurisdiction to determine claim – held notice to treat not pre-requisite of claim – held Lands Tribunal can determine issue of title – Lands Tribunal Act 1949 ss 1, 3, Land Compensation Act 1961 s 1, Compulsory Purchase Act 1965 ss 5, 6, 10, 22

IN THE MATTER OF TWO NOTICES OF REFERENCE

BETWEEN	**UNION RAILWAYS (NORTH) LIMITED**	**First Claimant**
	and	
	LONDON & CONTINENTAL RAILWAYS LIMITED	**Second Claimant**
	and	
	KENT COUNTY COUNCIL	**Acquiring Authority**

Re: Grassland, Scrub, Woodland, Reedbeds, part of the River Ebbsfleet, in the Ebbsfleet Valley, Kent

Before: The President and Mr A J Trott FRICS

Sitting at Procession House, 10 New Bridge Street, London EC4V 6JL on 19 and 20 December 2007

Guy Roots QC and *James Pereira* instructed by Cripps Harries Hall LLP of Tunbridge Wells for the claimants
Barry Denyer-Green and *Philip Sissons* instructed by Barlow Lyde & Gilbert for the acquiring authority

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The following cases are referred to in this decision:

R v Committee Men for South Holland Drainage (1838) 8 A & E 429
Stone v Commercial Rly Co (1839) 4 My & Cr 122
Tower v Eastern Counties Rly (1843) 3 Rail Cas 374
Adams v London and Blackwall Rly Co (1850) 2 Mac & G 118
R v London & North Western Rly Co (1854) 23 LJQB 185
Salisbury (Marquis of) v Great Northern Rly Co (1858) 28 LJCP 40
Stockton & Darlington Rly Co v Brown [1860] 9 HLC 246
Martin v London, Chatham & Dover Rly Co (1866) LR 1 Ch App 501
Abrahams v Mayor of London (1868) LR 6 Eq 625
Hammersmith Rly Co v Brand (1869) LR 4 HL 171
R v St Luke's, Chelsea (ex p Flight) (1871) LR 6 QB 572
R v Great Northern Rly Co (1876) 2 QBD 151
Ecclesiastical Commissioners v Commissioners for Sewers for City of London (1880) 14 Ch D 305
R v Edwards (1884) 13 QBD 586
Tiverton & North Devon Rly Co v Loosemore (1884) 9 App Cas 480
Davidson's Trustees v Caledonian Rly Co (1894) 21 R 1060
Caledonian Rly Co v Davidson [1903] AC 22
Frank Warr & Co Ltd v London County Council [1904] 1 KB 713
Goodwin Foster Brown Ltd v Derby Corpn [1934] 2 KB 23
Horn v Sunderland Corpn [1941] 2 KB 26
Oppenheimer v Minister of Transport [1942] 1 KB 242
Re Purkiss' Application [1962] 1 WLR 902
Mountgarret v Claro Water Board (1963) 15 P & CR 53
Argyle Motors (Birkenhead) Ltd v Birkenhead Corpn [1975] AC 99
Duttons Brewery Ltd v Leeds City Council (1980) 42 P & CR 152
R v Heron [1982] 1 All ER 993
Hillingdon LBC v ARC Ltd [1999] Ch 139
Clift v Welsh Office [1999] 1 WLR 796
Wildtree Hotels Ltd v Harrow LBC [2001] 2 AC 1
Westminster City Council v Ocean Leisure Ltd [2005] 1 P & CR 450
Moto Hospitality Ltd v Secretary of State for Transport [2007] EWCA Civ 764

The following further cases were referred to in argument:

Broadbent v The Imperial Gaslight Company (1857) 26 LJ Ch 227
King v Wycombe Rly (1860) 29 LJ Ch 462
Haynes v Haynes (1861) 1 Dr & Sm 426
Bird v Great Eastern Rly Co (1865) 34 LJCP 366
Ricket v Metropolitan Rly Co (1867) LR 2 HL 175
Harding v Metropolitan Rly Co (1870) LR 7 154
Metropolitan Board of Works v McCarthy (1874) LR 7 HL 243
Clark v School Board for London (1884) 27 ChD 639
Shepherd v Norwich Corpn (1885) 30 ChD 553
Mercer v Liverpool, St Helens and South Lancashire Rly Co [1904] AC 461
Re Richard v Great Western Rly Co [1905] 1 KB 68
Swallow and Pearson v Middlesex County Council [1953] 1 WLR 422

Grice v Dudley Corpn [1958] Ch 329
McNicol v Blackpool Corpn (1961) 12 P & CR 329
Essex County Council v Essex Incorporated Congregational Church Union [1963] 1 All ER 326
Whittaker v Leeds Corpn (1964) 15 P & CR 222
Rowe v Okehampton RDC (1964) 15 P & CR 319
Harrison v Croydon LBC [1968] 1 Ch 479
West Midlands Baptist Trust Assoc Inc v Birmingham Corpn [1970] AC 874
DHN Food Distributors v Tower Hamlets LBC (1975) 30 P & CR 251
Munton v Newham LBC [1976] 1 WLR 649
Cohen v Haringey LBC (1980) 42 P & CR 6
Advance Ground Rents Ltd v Leeds City Council (1986) 2 EGLR 220
Ashburn Anstalt vArnold [1989] Ch 1
Finsbury Business Centre Ltd v Mercury Communications [1994] RVR 108
Brown v Bridgenorth DC (ACQ/163/2002 unrep)
Mean Fiddler Holdings Ltd v Islington LBC (No 2) [2003] 3 EGLR 61
Secretary of State for Transport v Christos [2004] 1 P & CR 17
Malec v Westminster City Council [2005] RVR 384
Acton v Trustees of Birmingham South West Circuit Methodist Church Manses Trust [2006] 3 EGLR 101
R (Winchester College) v Hampshire County Council [2007] EWHC 2786 (Admin)

DECISION ON PRELIMINARY ISSUES

Introduction

1. The claimants in these references claim compensation for the compulsory purchase of land in the Ebbsfleet Valley in north Kent by the acquiring authority pursuant to the Kent County Council (South Thames-Side Development Route Stage 4) Compulsory Purchase Order 1996. The CPO was made under the Highways Act 1980 and was confirmed by the Secretary of State for Transport on 23 March 1998. Its purpose was to enable the acquiring authority to construct a new road, referred to as STDR 4.

2. At the time of the CPO the claimants were preparing to construct the new channel tunnel rail link to St Pancras, and STDR 4 was to be constructed adjacent to the proposed Ebbsfleet Station, which, 10 years on, is now open. The principal elements of the present claim fall under the heading of disturbance. In order to construct the CTRL here the claimants needed to divert certain underground electricity cables. They had planned to do so through land in which they claim to have had an interest and which was included within the CPO. The acquiring authority took possession of this land and, in consequence, the claimants say, they had to incur additional costs diverting the cables over a different route. The claim is particularised in the sum of £11,399,109.20.

3. The land in respect of which the claim is made comprises seven plots in the CPO. Notices to treat and notices of entry in respect of these plots were served on 23 March 1998 and the acquiring authority took possession on 13 March 2001. The notices were served on Blue Circle Industries Plc, which had been identified in the CPO as the reputed owners/lessees/occupiers, but no notice to treat or notice of entry was served on either of the claimants or on the Secretary of State for Transport, in whom powers to acquire land compulsorily were vested under the Channel Tunnel Rail Link Act 1996.

4. The claimants advance their claim in the alternative. It is, they say, either the first claimant, Union Railways (North) Ltd, or the second claimant, London and Continental Railways Ltd, that is entitled to the compensation claimed. They contend that they had interests in the land acquired, and are accordingly entitled to compensation. Those interests, they say, were derived from the Secretary of State for Transport through a number of agreements which put in place arrangements for the construction of the CTRL generally and in particular through the Ebbsfleet Valley and for the transfer of interests in the land on which the CTRL, together with its associated infrastructure, was built.

5. The interests that the claimants say that they had and which entitled them to compensation are said to have arisen by two inter-linked routes. Firstly, they say, by virtue of various agreements the Secretary of State had the right to acquire the freehold or leasehold interests in land in connection with the construction and operation of CTRL and that this land included the affected plots. The agreements were between the Secretary of State and Blue

Circle Industries as a major landowner in the Ebbsfleet Valley and obviated the need for the exercise of the Secretary of State's compulsory purchase powers. The claimants contend that, by virtue of various other agreements, they acquired from the Secretary of State the right to acquire such land and consequently have sufficient interest in the affected plots to be entitled to compensation.

6. Secondly the claimants contend that, through the operation of an agreement by which Blue Circle Industries granted to the Secretary of State the right to enter land for the purposes of constructing the CTRL, the Secretary of State had an irrevocable licence to enter land including the affected plots and that the claimants acquired the benefit of this licence, which amounted to a sufficient interest to entitle them to claim compensation. It is contended that the effect of the licence was to create a constructive trust for the benefit of the Secretary of State and, through the agreements by which the Secretary of State passed his rights to the claimants, for the benefit of the claimants.

7. The acquiring authority contend that neither claimant had any interest in the land that would entitle either of them to compensation under the compensation code. As pleaded, their case is that the agreements on which the claimants rely do not have the effects that the claimants assert. They also say that they were not obliged to serve notice to treat on the Secretary of State or the claimants in respect of the interests on which the claimants rely. In addition they also dispute the substance of the claim on the grounds of remoteness, causation and quantum.

8. It had been proposed that the issue of entitlement to compensation should be determined in a set of preliminary issues in advance of the subject-matter of the claim. Such issues, in view of the complex series of agreements on which the claimants rely, would require lengthy and complex argument. At a pre-trial review on 19 September 2007 it became clear that it is the acquiring authority's contention that in all circumstances notice to treat is a pre-requisite to entitlement to compensation for an interest in land that has been compulsorily acquired, and that, whatever the position of the claimants under the agreements, they were because of this excluded from any entitlement to compensation. If this contention is correct it would make it unnecessary for the Tribunal to hear and determine the complex issues arising under the agreements. It was therefore ordered that the question whether notice to treat is a pre-requisite of entitlement to compensation should be determined as a preliminary issue.

9. It later appeared to the claimants that this question was closely linked to a question that had not previously been raised by the acquiring authority: whether the Lands Tribunal has any power to determine the claimants' title and entitlement to compensation. The parties therefore agreed that the following two issues should be determined as preliminary issues:

> (a) Does the Lands Tribunal have jurisdiction to determine a claim for compensation where no notice to treat has been served in respect of the interest claimed by a claimant either because the acquiring authority have omitted to serve such a notice or because the acquiring authority contend that they did not need to acquire the interest that the claimant contends that he held?

(b) Does the Lands Tribunal have jurisdiction to determine a claim for compensation where no notice to treat is served on a claimant and where the acquiring authority dispute the claimant's interest or title and/or his entitlement to compensation?

The determination of these issues has required the consideration of a large number of authorities, to which reference was made at the hearing and skeleton arguments, and since the hearing we have invited and have received further written submissions, including submissions that we invited on the application of section 10 of the Compulsory Purchase Act 1965, a matter that had not been canvassed at the hearing.

The case for the claimants

10. For the claimants Mr Guy Roots QC contended that the issues were best approached by considering the evolution of the statutory provisions from the Lands Clauses Act 1845, through the Acquisition of Land (Authorisation Procedure) Act 1919 to the present regime, which is to be found in the Lands Tribunal Act 1949, the Land Compensation Act 1961 and the Compulsory Purchase Act 1965.

11. Under section 18 of the 1845 Act, when an acquiring authority wished to exercise its power to acquire land, it was required to serve notice to treat. Section 21 provided that, if, within 21 days after service of a notice to treat, a claimant had not served particulars of claim or if the acquiring authority had not reached agreement with the claimant, the amount of compensation was to be determined by one of the means provided in subsequent provisions of the Act. The 1845 Act contained no express provision stating the right to compensation but it provided the means of determining the amount of compensation. Where the compensation claimed did not exceed £50, the amount of compensation was to be determined by two justices (section 22) and ancillary provisions were in section 24. Where the compensation claimed exceeded £50, by virtue of section 23 the amount of compensation was to be referred, at the claimant's choice, to either arbitration (in which case the procedures were governed by sections 24-34) or a jury (in which case the procedures were governed by sections 38-57). Where the landowner was abroad or could not be found by diligent inquiry, compensation was to be assessed by a surveyor appointed by two justices: section 58. Section 63 provided for the measure of compensation where land had been taken from the claimant. Section 68 provided a right to compensation in certain circumstances where no land had been taken from the claimant. Section 124 provided for circumstances in which the acquiring authority had entered on land which they were authorised to purchase but without serving notice to treat. Section 125 contained supplementary provisions, and section 126 dealt with costs.

12. Mr Roots said that it became established through a number of cases that the role of the justices, the arbitrators or the jury, as the case might be, was to assess the amount of compensation and that they had no jurisdiction to determine the claimant's title to the land in question. Thus in *R v Edwards* (1884) 13 QBD 586 which concerned a claim for compensation under section 68, Sir Baliol Brett MR said (at p 591)

> "When such a claim is made, two questions it is obvious may arise, the first is as to the claimant's title. The second is, as to the amount of compensation to which he may be entitled. These are two different questions, and to my mind they are to be decided by different tribunals. It is obvious that there is no express authority given to magistrates to decide the question of title. Then are we to imply such authority? ... I consider no such implication ought to be made. Therefore it follows that one tribunal is to try title, if it is in dispute, and another is to settle the amount of compensation."

13. However, said Mr Roots, it should be noted that all the cases in which the question of jurisdiction had been considered arose out of claims for compensation under section 68. In a number of cases immediately following the enactment of the 1845 Act relating to claims under section 68, it was held that arbitrators and juries had jurisdiction to determine all questions relating to the settling of compensation including a claimant's entitlement. These cases were reviewed in *R v London and North Western Railway* (1854) 23 LJQB 185, in which it was held that arbitrators or juries did not have jurisdiction to determine questions relating to a person's entitlement to compensation. There were essentially two reasons for this decision: first, the interpretation of the words of section 68 and, second, the fact that matters decided by arbitrators and juries could not be the subject of an appeal.

14. The 1919 Act was enacted "to amend the law ...". Section 1 applied to compulsory acquisition by a Government department or local or public authority (and not therefore to all bodies authorised to acquire land compulsorily). Any question of disputed compensation was to be referred to and determined by one of a panel of official arbitrators selected in accordance with rules made under this Act. Section 6 provided that the decision of an official arbitrator was final and binding but the arbitrator could state a case for the opinion of the High Court on any question of law arising in the course of the proceedings.

15. The Lands Tribunal was created by the Lands Tribunal Act 1949. Section 1(3) set out the scope of the Tribunal's jurisdiction in these terms (so far as relevant for present purposes):

> "There shall be referred to and determined by the Lands Tribunal –
>
> (a) Any question which is by any Act (including a local or private Act) directed, in whatever terms, to be determined by a person or one or more persons selected from either of the following panels, that is to say, –
>
> (i) The panel of official arbitrators appointed under the Acquisition of Land Act; ....
>
> (b) Any other question of disputed compensation under the Lands Clauses Acts, where the claim is for the injurious affection of any land ...."

Thus, when the Lands Tribunal was created, its jurisdiction in relation to compensation matters was the same as the jurisdiction of the Official Arbitrators under the 1919 Act or the other procedures under the 1845 Act.

16. Section 3(4) of the 1949 Act, said Mr Roots, was expressed in terms similar to section 6 of the 1919 Act (which was repealed by the 1949 Act). It provides that a decision of the Lands Tribunal shall be final except that a person aggrieved by a decision on the ground that it is erroneous in point of law may require the Tribunal to state a case for the opinion of the High Court. Where the Lands Tribunal had made an award of compensation, the award was to be enforced under the Arbitration Act 1950. This has now been replaced by the Arbitration Act 1996, section 66 which is applied to the Tribunal by the Lands Tribunal Rules 1996, rule 32(d). The Lands Tribunal is a court of law: see *Hillingdon London Borough Council v ARC Ltd* [1999] Ch 139. Under the Civil Procedure (Modification of Enactments) Order 2000 the procedure under which the Lands Tribunal could state a case for the opinion of the High Court was amended, so that there is now simply a right of appeal, subject to permission being given by the Court of Appeal.

17. Section 1 of the 1961 Act provides:

> "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily, any question of disputed compensation ... shall be referred to the Lands Tribunal and shall be determined by the Tribunal in accordance with the following provisions of this Act".

The 1961 Act was a (largely) consolidating Act. Section 1 derives from the 1919 Act, section 1 which was in similar, though not identical, wording. While the 1919 Act applied only where the acquisition was by a Government department or a local or public authority, section 1 of the 1961 Act applies to all compulsory acquisitions. Section 6 of the 1919 Act was not re-enacted in the 1961 Act because it had been replaced by the LTA 1949, section 3(4).

18. Section 5 of the 1965 Act provides that notice to treat must be served on all persons interested in or having power to convey or release the land that the authority require to purchase. But, Mr Roots said it had been held that the requirement to serve a notice to treat may be waived by a claimant, and he referred to Cripps on Compensation 11th Edn para 2-009 and *R v The Committee Men for South Holland Drainage* (1838) 8 A&E 429 and *Tower v Eastern Counties Railway* (1843) 3 Rail Cas 374.

19. Section 6 of the 1965 Act, Mr Roots said, expressly provides for disputes as to compensation to be referred to the Lands Tribunal after 21 days following service of a notice to treat. Following the enactment of section 1 of the 1961 Act (which provides for questions of compensation to be referred to the Lands Tribunal) it was not clear, he said, exactly what function section 6 of the 1965 Act served. At first sight, the wording of section 6 implied that a reference to the Lands Tribunal could not be made until after service of a notice to treat, but that could not have been intended since section 1 of the 1961 Act (and its predecessor) did not make a reference to the Tribunal dependent upon service of a notice to treat. Section 6 might now have no greater significance than to require 21 days to pass after service of a notice to treat (where one has been served) before a reference might be made to the Lands Tribunal. The phrase "question of disputed compensation" was the same as in section 1 of the 1961 Act and must have the same meaning.

20. Section 22 of the 1965 Act provided for circumstances where land had been taken by an acquiring authority when it had failed to serve a notice to treat and notice of entry upon a person entitled to receive them. When the acquiring authority has received notice of a person's interest in respect of which it has not served notice to treat, if it accepts that the Claimant should have been served with a notice to treat, it is authorised to remain in occupation for six months while it purchases that interest by paying compensation. If it disputes the person's contention that he has a sufficient interest to be entitled to compensation, then it is authorised to remain in possession until the dispute has been "finally established by law" and compensation assessed.

21. Section 10 of the 1965 Act effectively re-enacted the LCCA 1845, section 68. There was, however, a change in the wording which had formed the basis of Coleridge J's analysis in *R v London and North Western Railway*. The words "If any person shall be entitled ..." have been replaced by "If any person claims compensation ..." In recent years, a number of claims under section 10 had been heard and determined by the Lands Tribunal leading to appeals to the higher courts. Examples were *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1, *Westminster City Council v Ocean Leisure Ltd* [2005] 1 P & CR 450, *Clift v Welsh Office* [1999] 1 WLR 796 and *Moto Hospitality Ltd v Secretary of State for Transport* [2007] EWCA Civ 764. In none of these cases, said Mr Roots, had any doubt been raised as to the jurisdiction of the Lands Tribunal to determine whether the claimant was entitled to compensation.

22. Mr Roots submitted that a claimant was able to make a reference to the Tribunal under section 1 of the 1961 Act notwithstanding that there was a dispute as to title. He relied on *Goodwin Foster Brown Ltd v Derby Corpn* [1934] 2 KB 23, in which it was held that an official arbitrator could state a case for the opinion of the High Court raising the question whether the claimant was entitled in law to compensation. Moreover, Mr Roots contended, a claimant could make a reference even though notice to treat had not been served in respect of his interest. This was so for three reasons. Firstly, section 1 of the 1961 Act made no express reference to service of notice to treat as a precondition of making a reference. It was sufficient that the land was "authorised to be acquired compulsorily", and that position was created by confirmation of a compulsory purchase order or (as here) by the enactment of the Act containing the necessary powers. Secondly, the requirement for notice to treat could be waived by a claimant. Thirdly, compensation could fall to be assessed under section 22 where the authority had failed to serve notice to treat.

The case for the acquiring authority

23. For the acquiring authority Mr Barry Denyer-Green submitted that by virtue of section 5 of the 1965 Act notice to treat was a pre-condition to the exercise of compulsory powers and that the effect of notice to treat was to create a relationship between the acquiring authority and the landowner that was analogous to that of purchaser and vendor, but with the price as yet unascertained and the landowner entitled to have the amount of compensation determined. It must follow from this, he said, that in the absence of notice to treat the relationship would not arise and the landowner could not have a claim for compensation determined. Under the

earlier legislation, Mr Denyer-Green said, a claim for compensation could not be advanced before the service of notice to treat, and he referred to *Stone v Commercial Railway Co* (1839) 4 My & Cr 122 and *Ecclesiastical Commissioners v Commissioners for Sewers for City of London* (1880) 14 Ch D 305; while *Martin v London, Chatham and Dover Rly Co* (1866) LR 1 Ch App 501 was authority that the owner of an equitable interest in respect of which notice to treat has not been served cannot appear in the compensation forum.

24. Mr Denyer-Green said that it was clear from section 1 of the 1961 Act and section 6 of the 1965 Act that the jurisdiction of the Lands Tribunal was limited to questions of disputed compensation. In the absence of notice to treat there was no dispute as to compensation. The Lands Tribunal, he said, had no jurisdiction to determine questions of title, and he referred as authorities for this *Duttons Brewery Ltd v Leeds City Council* (1980) 42 P & CR 152 in the Chancery Division, *Re Purkiss' Application* [1962] 1 WLR 902 in the Court of Appeal and *Mountgarret v Claro Water Board* (1963) 15 P & CR 53 in this Tribunal.

25. There would be a number of practical difficulties, Mr Denyer-Green said, which would arise if it were open to a party not served with notice to treat to seek the assessment of compensation. The scheme of the 1965 Act was to make provision for the service of a notice to treat to fix the land to be taken (section 5) and for the means by which compensation was to be assessed (section 6). If land was omitted, there were provisions to address that difficulty (section 22). If there was no notice to treat there would be difficulty in fixing the interest to be acquired; section 31, entitling the acquiring authority to withdraw notice to treat within six weeks of a claim, would be unavailable; the planning assumptions in sections 14 to 17 of the 1961 Act were related to the date of notice to treat; and a counter-notice under section 8 of the 1965 Act objecting to the acquisition of part only of a building was dependent on the prior service of notice to treat.

The questions in dispute

26. There are, it seems to us, three questions that, on the basis of the contentions of the parties, are in dispute:

(a) Whether an acquiring authority is entitled, if it chooses, not to serve notice to treat on the owner of an interest in land that it is taking under its compulsory powers.

(b) Whether a claimant can make a reference to the Lands Tribunal if notice to treat has not been served on him.

(c) Whether the Lands Tribunal has jurisdiction to determine the question of entitlement to compensation.

We will consider each of these questions in turn.

Discussion: (a) Whether acquiring authority entitled not to serve notice to treat on owner of interest in land acquired

27. Mr Denyer-Green's contention was that the acquiring authority are at liberty to select which interests in the land to be acquired they wish to purchase and need only serve notices to treat in respect of those interests. This contention is, in our judgment, incorrect. Section 5(1) of the 1965 Act (the modern version of section 18 of the 1845 Act) provides:

> "(1) When the acquiring authority require to purchase any of the land subject to compulsory purchase, they shall give notice (hereafter in this Act referred to as a 'notice to treat') to all the persons interested in, or having the power to sell and convey or release, the land, so far as known to the acquiring authority after making diligent inquiry."

28. Mr Denyer-Green's contention is thus contrary to the clear words of the section. It is moreover, in our view, unsupported by the authorities relied on by him and contrary to other authority. And, if correct, with the consequences that he says would follow, it would entitle the authority to cause loss to the owner of an interest in the land acquired without paying compensation.

29. *Stockton and Darlington Railway Co v Brown* [1860] 9 HLC 246, relied on by Mr Denyer-Green for this purpose, is authority only for the proposition that it is for the acquiring authority to determine which areas of land it wishes to purchase. It does not suggest that the authority, having determined what land it wishes to purchase, may decide to serve notice to treat in respect of some only of the interests in that land.

30. Mr Denyer-Green relied on *Stone v Commercial Railway Co* for the proposition that compensation can only be assessed in respect of this land identified by the notice to treat. In that case (as in *Ecclesiastical Commissioners v Commissioners for Sewers for City of London*, in which it was followed) the acquiring authority sought to have compensation assessed in respect of a smaller area of land than that in respect of which they had served notice to treat. It was held that they could not do so. Both these cases, however, concerned the physical extent of the land in respect of which notice to treat was served, and they have no bearing, in our judgment, on the question whether it is open to the acquiring authority, having served notice to treat in respect of a particular area of land on one person with an interest in it, not to serve notice to treat on all those with interests in the land.

31. Reliance was also placed by Mr Denyer-Green on *Abrahams v Mayor of London* (1868) LR 6 Eq 625. In that case claims in response to notice to treat had been made by the plaintiff, the sub-lessee of the premises in question, and by a number of his sub-tenants. On behalf of the acquiring authority, the City Corporation, the Lord Mayor issued a warrant to the sheriffs for the empanelling of a jury to determine all the claims. The plaintiff, who was concerned that some of the sub-tenants' claims were fraudulent and that his own claim might be adversely affected if the same jury dealt at the same time with all the claims for compensation, sought an injunction to prevent the claims from being heard together. Gifford V-C granted the

injunction, holding (at 634-5) that each claim was to be dealt with separately and that it was not open to the acquiring authority to tack other claimants on to any person who had properly made a claim. The plaintiff was entitled to a separate verdict on his claim. The case thus decided simply that each claim was to be dealt with separately, and it bears no suggestion that the acquiring authority is able to serve notice to treat in respect of some interests only in the land to be acquired.

32. A further authority relied on by Mr Denyer-Green was *Davidson's Trustees v Caledonian Railway Company* (1894) 21 R 1060, a case decided under section 117 of the Lands Clauses Consolidation (Scotland) Act 1845, the equivalent section in the Scottish legislation to section 124 of the 1845 Act. The promoters had served notice to treat on the owner of land across which they proposed to construct a railway in cutting. Unknown to them, the mineral rights were not vested in the owner, the proprietors of them being the pursuers in the case. The promoters took possession of the land and began to excavate the freestone before they became aware of this. The pursuers sought a declarator that they were entitled to the minerals and damages for the freestone removed. The promoters contended that, if the pursuers were indeed entitled to the minerals, they, the promoters, were able to serve notices under section 117 and pay compensation. At first instance this contention was accepted by the court. On appeal, a distinction was drawn between the minerals down to the authorised formation level of the line and the minerals below this level. In respect of the former the parties agreed that the claim fell to be determined under the Act. The issue, therefore, was confined to the minerals below the formation level, an amount, according to the promoters, that was very trifling, if indeed anything had been taken at all. The Court of Session held that in respect of any such amount there could be no case of inadvertence for the purposes of section 117 because the promoters had never intended to take it.

33. We do not see that this case provides any support at all for Mr Denyer-Green's contention that the acquiring authority are not obliged to serve notice to treat in respect of all interests in the land of which it was aware. The decision of the court was not that the promoters were entitled, if they chose, not to serve notice to treat in respect of the minerals below formation level, but that they could not take advantage of section 117 in respect of them (unlike the minerals above this level, in relation to which they had been inadvertent). It should be noted, for completeness, that the parties failed to reach agreement in respect of the minerals above formation level and further proceedings ended in the House of Lords in *Caledonian Railway Company v Davidson* [1903] AC 22, in which it was concluded that, for these the promoters could rely on section 117 notwithstanding the lapse of the time under the section, since until the proceedings had been determined there had been no determination of the owners' right. We refer to this case further below.

34. Finally among the authorities is *Martin v London, Chatham and Dover Rly Co*. There the plaintiff was a bank that had a mortgage interest in a leasehold interest in the land acquired. In a passage that we include more fully below, Lord Cranworth MR said ((1866) LR 1 Ch App 501at 505):

> "In my opinion it was clearly the duty of the company to have given notice under the 18th section, not only to *Sterne* and *Lane*, but also to the mortgagees, as parties

> interested, according to the language of that section, for it is perfectly clear that Messrs *Martin* had an interest in these lands, and it is also clear that this was known to the railway company, and indeed they said, we will take care of and protect your interest. That being so, it is clear they did not take the proper course."

35. Thus authority shows that section 5(1) means what it says. Where the acquiring authority require to purchase any of the land subject to compulsory purchase they must serve with notice to treat all of the persons interested in the land. They have no discretion to omit an interest for this purpose. It would indeed be unjust if they could omit such an interest. Take for example, the case of the owner of an option to acquire the land on the grant of planning permission for residential purposes, where, in the no-scheme world, such permission could be assumed, giving the option a substantial value. The scheme would render the option valueless. If it was open to the authority not to serve notice to treat on the owner of the option so that (on the basis of Mr Denyer-Green's contentions) he would receive no compensation, a manifest injustice would be worked. And it would be compounded by the fact that the compensation payable to the freehold owner of the land would fall to be reduced to reflect the fact that, in the no-scheme world, it was subject to the valuable option.

Discussion: (b) Whether claimant can make reference to Lands Tribunal if notice to treat not served on him

36. Mr Denyer-Green contended that the service of notice to treat was a pre-requisite of the right of the owner of an interest in the land acquired to refer a claim for compensation to the lands tribunal. Mr Roots did not accept that the provisions for the determination of compensation in sections 21 to 53 of the 1845 Act and under the modern legislation only apply where notice to treat has been served. As we have said, he put his contention on three bases. The first was that, although section 6 of the 1965 Act makes notice to treat a precondition of reference to the Tribunal, under section 1 of the 1961 Act a person can seek the assessment of compensation even though he has not received notice to treat. We cannot accept this. Section 1 of the 1961 Act is derived from section 1 of the 1919 Act, the purpose and effect of which was to transfer to the Official Arbitrators the task of assessing compensation. Its purpose was not, we think, to widen the range of circumstances in which a person could seek to have compensation assessed but simply to substitute the Official Arbitrators as the assessment tribunal. What was to be referred to them was "any question of disputed compensation" and this is what may be referred to the Lands Tribunal under section 1 of the 1961 Act.

37. We do not see how any dispute as to compensation can arise until the acquiring authority have served notice to treat in respect of the interest in question or have entered on the land. Until either of these points is reached the question of compensation does not arise. Although authorised to acquire land (for instance within the limits of deviation for the works authorised by the Act) the authority may well decide, having worked up the details of the works, that it does not require parts of the land. There would be no point in enabling the owner of any such part to make a reference in respect of compensation, and there could not in these circumstances be any dispute as to compensation. Such a dispute, in our view, can only arise once the authority has taken steps to exercise its compulsory powers. There is thus no difference in this

respect between section 1 of the 1961 Act and section 6 of the 1965 Act. The existence of these two sections, performing essentially the same function but in different terms, is at first sight surprising. The explanation for it lies in the genesis of the present legislation, and it is simply a feature of the current messy state of the statute law in the field of compensation.

38. Secondly, Mr Roots relied on *R v Committee Men for South Holland Drainage* and *Tower v Eastern Counties Rly* as showing that a claimant could waive the requirement that notice to treat should be served on him. Both these cases were instances of a claimant seeking to rely on the acquiring authority's failure to serve notice to treat, in the one case by seeking to prevent the reference of compensation to a jury and in the other to prevent entry on the land. In each case the claimant's action failed because he had entered into negotiations with the acquiring authority and was held on that account to have waived the requirement of notice to treat. The cases do not, in our view, constitute authority for the proposition that it is always open to a claimant who has not received notice to treat to have the question of compensation decided under the statutory procedures, and we can see no basis for saying that in the present circumstances the claimants are entitled to waive the requirement for notice to treat.

39. The third way advanced by Mr Roots for a claimant to have compensation determined without having received notice to treat was under section 22 of the 1965 Act, previously section 124 of the 1845 Act (section 117 in the Scottish legislation). Section 22(1) provides:

> "(1) If after the acquiring authority have entered on any of the land subject to compulsory purchase it appears that they have through mistake or inadvertence failed or omitted duly to purchase or pay compensation for any estate, right or interest in or charge affecting that land the acquiring authority shall remain in undisturbed possession of the land provide that within the time limited by this section –
>
> (a) they purchase or pay compensation for the estate, right or interest in or charge affecting the land, and
>
> (b) they also pay to any person who may establish a right to it full compensation for the mesne profits,
>
> and the compensation shall be agreed or awarded and paid (whether to the claimants or into court) in the manner in which, under this Act, it would have been agreed or awarded and paid if the acquiring authority had purchased the estate, right, interest or charge before entering on the land, or as near to that manner as circumstances admit."

40. Mr Roots relied on *Caledonian Railway v Davidson* in the House of Lords. There the promoters sought to rely on section 117 of the Scottish Act, as in the earlier proceedings they had said that they would do, with the question of compensation being referred to arbitration. The owners of the mineral rights said that it was too late for them to do so since the six month time limit in section 117 within which compensation had to be paid had elapsed. As we have said, the House of Lords held that the period had not elapsed since it ran from the date when the right of the claimant had been established, and it was only established by the decision then being given. In their speeches, the Earl of Halsbury LC (at 29) and Lord Ashbourne (at 32) expressed the view that, in order to call section 117 into effective operation, it was for the claimants to formulate their claim.

41. Section 22 is in our judgment plainly there for the protection of the acquiring authority. It is for them to take advantage of its provisions after they discover that through mistake or inadvertence they have failed to acquire the claimant's interest. If (as in the present case and in the case of the minerals below formation level in *Davidson's Trustees*) they do not make a mistake but simply do not intend to acquire the interest, the section has no application. It does not enable a claimant, whose interest has been omitted, to initiate a claim for compensation. In *Caledonian Railway* the promoters had throughout evinced an intention of relying on section 117, but, as the dicta in the House of Lords suggested, it was necessary for the claimants to make a claim in order to get compensation proceedings on foot. That was the context of what Lord Halsbury and Lord Ashbourn said, and their words do not carry the implication that a claimant could make a claim under section 117 where the acquiring authority were not relying on it.

42. We reject, therefore the three bases advanced by the claimants in support of their contention that a person who has not been served with notice to treat even though he has an interest in the land taken may nevertheless have compensation assessed. However, in our judgment, which we have formed after seeking and receiving further submissions from the parties, such a person has that entitlement under another statutory provision. That provision is section 10 of the 1965 Act, the modern version of section 68 of the 1845 Act.

43. Section 68 of the 1845 Act provided:

> "68. If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled by arbitration, or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for the purpose within twenty one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compenastion so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts."

44. Section 10, shorn of the parts of the section dealing with the assessment of compensation by justices, arbitration and a jury, and substituting the Lands Tribunal as the tribunal for this purpose, provides:

> "Further provision as to compensation for injurious affection
>
> 10(1) If any person claims compensation in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the Lands Tribunal.
>
> (2) This section shall be construed as affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Lands Clauses Consolidation Act 1845 has been construed as affording in cases where the amount claimed exceeds fifty pounds."

45. Section 68 is chiefly known as the provision under which the owner of land that has not been acquired but which has been injuriously affected by the execution of the works may claim compensation, and it has been criticised for its obscurity in performing this function. In *Argyle Motors (Birkenhead) Ltd v Birkenhead Corpn* [1975] AC 99, Lord Wilberforce said that it –

> "…has, over 100 years, received through a number of decisions, some in this House, and by no means easy to reconcile, an interpretation which fixes upon it a meaning having little perceptible relation to the words used. This represents a century of judicial effort to keep the primitive wording – which itself has an earlier history – in some sort of accord with the realities of the industrial age."

46. In *Horn v Sunderland Corpn* [1941] 2 KB 26, Scott LJ, who, as Sir Leslie Scott KC had been the author of the report on which the 1919 Act was founded, said at 42-3 that the compensation for injurious affection given by section 68 –

> "…has nothing to do with compulsory acquisition. It is a remedy for injuries caused by the works authorised by the Act to the lands of an owner who has had none of his land taken in that locality. The remedy is given because Parliament, by authorising the works, has prevented damage caused by them from being actionable, and the compensation is given as a substitute for damages at law... Whether the words "taken for or" in the second line of s 68 have any meaning or were a mere clerical error, it is unnecessary in the present case to speculate, for it is notorious that s 68 has always been construed as applying only to lands not held with lands taken."

47. Section 10 provides for the assessment of compensation –

> "…in respect of any land, or any interest in land, that shall have been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of the Act, or of the special Act"

Provision is thus expressed to be made for compensation in two situations – where land has been taken for the works and where land is injuriously affected by the works – and in each case the provision in terms applies where the acquiring authority have not paid compensation under the provisions of the Act or the special Act. Compensation in the first situation has been treated as payable, or potentially payable, in a number of cases that were cited to us in argument.

48. In *Adams v London and Blackwall Rly Co* (1850) 2 Mac & G 118, notice to treat had been served in respect of the claimants' land and had been followed by a claim for compensation and subsequent agreement between the parties. But the claim and the agreement were later abandoned and repudiated on both sides. The promoters then entered on the land in exercise of their powers under section 85, but they refused the claimants' request that they should summon a jury to assess compensation. The claimants sought specific performance of what they said constituted a contract with the promoters. Lord Cottenham LC allowed the promoters' appeal from the decision of Wigram V-C, who had granted the relief sought. He held that the claimants' remedy lay in section 68, under which they were entitled to have compensation determined by arbitration or by a jury.

49. In *Martin v London, Chatham and Dover Rly Co* the leaseholder mortgagor (Sterne) and his business partner (Lane) had been served with notice to treat, and, as the railway company required immediate possession and knew of the mortgage, they deposited money in the bank and gave bonds to the owners and to the bank under section 85 of the 1845 Act. There were then proceedings between the bank and the owners of the land, and these resulted in an arrangement that the company should be at liberty to proceed with the inquiry as to compensation with the deposit and an additional sum being paid into court. The amount of compensation assessed, in proceedings to which the bank was not a party, was substantially less than the amount owing under the mortgage. In proceedings in the Court of Chancery the bank sought various types of relief, including the application to their claim of a sufficient part of the sum in court. On appeal from the judge at first instance, Lord Cranworth LC held that the bank was not entitled to any part of that sum because it had been provided as security for the compensation due to the leaseholder and his partner. At 505-6 he said this:

> "It is however very difficult to come to a conclusion as to what ought to be the exact relief given in such a case as this. The first question is, what is the course which the company ought to have taken considering that this property of Messrs *Lane* and *Sterne*, which they were proposing to take, was, and was known by them to be, subject to an equitable lien. In my opinion it was clearly the duty of the company to have given notice under the 18th section, not only to *Sterne* and *Lane*, but also to the mortgagees, as parties interested, according to the language of that section, for it is perfectly clear that Messrs *Martin* had an interest in these lands, and it is also clear that this was known to the railway company, and indeed they said, we will take care of and protect your interest. That being so, it is clear they did not take the proper course.
>
> What then is the remedy which the bankers may have? I have looked at the statute, and I am not at all clear that such a case is provided for, but I do not think they are bound to recur to the 68th section if they do not think fit to do so, and there are great embarrassments, looking at the Act, in seeing how they are to get the jury. It may be

> that they have the means, but it is a complicated means. I think they stand in this position. They are equitable mortgagees. No proceedings have been duly taken by any person under the statute to deprive them of their rights as equitable mortgagees; and to those rights they are therefore entitled as if nothing had been done. That is the right which I think they retain. ...."

50. Mr Denyer-Green submitted that *Martin* was authority for the proposition that where notice to treat is required to be served but has not been served the compensation dispute tribunal has no jurisdiction. He relied on this later passage in the judgment of Lord Cranworth (at 507):

> "I ought to advert to one circumstance, which is this. It is said that, although the proceedings were against *Sterne* and *Lane* only, and not against the bankers, the depositees and equitable mortgagees, still they must be treated in this Court as having been parties, because they assented to it and were perfectly cognizant of what took place, and only interfered because they found that the sum awarded was not sufficient to pay them the amount of what was due. I agree entirely that they were aware of all that was proceeding, and I believe further that they did not care at all, they were content that it should go on only with *Sterne* and *Lane*, because they were satisfied that there would be money enough for all parties; and not only did they not interfere, but they could not interfere. If the company chose to deal with the owners of the equity of redemption, so to say, and not with the mortgagees, the mortgagees were helpless, and could do nothing. They were certainly well aware that the inquiry was going on, and of course knew that, not having been served, they could take no part in it. They did not and could not interfere, and it did not prejudice them whether there had been the proper sum found or not."

51. We think that it is a misreading of the case to suppose that it supports the proposition that Mr Denyer-Green advances. It would not have been open to the Court of Chancery to order the company to seek the summoning of a jury to determine compensation. That could only have been done by the Court of Queen's Bench through an order for mandamus. The earlier passage in Lord Cranworth's judgment to which we have referred in our view clearly implies that he thought that a claim could have been pursued under section 68 but that there were procedural difficulties, about which he did not elaborate, in the claimant's getting a jury summoned for this purpose. The passage on which Mr Denyer-Green relies is, we think, saying no more than that the bank could not have intervened in the inquiry relating to the claim for compensation by the leaseholder and his business partner since it was their claim that the jury had been summoned to determine, so that any claim that the bank might have was not limited by the award.

52. In *R v Great Northern Railway Company* (1876) 2 QBD 151 tenants of land of which the company had taken possession sought compensation under section 68. They were tenants under a lease for a term of two years, of which less than a year remained unexpired at the date of possession. They served notice on the company appointing an arbitrator, and, the arbitrators having failed to appoint an umpire, the Board of Trade did so. The reference was held before the umpire, at which the company appeared under protest. It refused to take up the umpire's

award, contending that section 121 of the Act applied since the lease had less than a year to run and that section 68 therefore did not apply. A Divisional Court, Mellor and Lush JJ, refused the relief sought, upholding the company's contention that section 121 applied.

53. In *Tiverton and North Devon Railway Company v Loosemore* (1884) 9 App Cas 480 the House of Lords held that the company had lawfully entered the plaintiff's land under section 85, notwithstanding that they had done so only 13 days before their statutory powers were due to expire. In the course of his speech Lord Blackburn said this (at 198):

> "It is true that s 68 gives the landowner, whose land is thus taken without paying the price, very stringent powers for forcing on the assessment of the price; and I suppose a willing seller would generally avail himself of those powers; I see nothing, however, in the Act to prevent his having recourse to the powers given by the earlier sections."

54. In *Frank Warr and Co Ltd v London County Council* [1904] 1 KB 713 the plaintiff had the exclusive right for a term of years to sell refreshments in the Globe Theatre in the Strand, which was compulsorily acquired by the council. It made a claim for compensation under section 68 in respect of its interest and on this claim an arbitrator awarded a sum as purchase-money and compensation. The claimant sued to recover the sum. The Court of Appeal, upholding the decision at first instance, held that the claimant did not have an interest in land that could found a claim for compensation under section 68 but only a licence.

55. In none of these five cases except *Adams* did the court determine that compensation could be claimed under section 68 in respect of an interest in land that had been taken for the works. But the claim in *Great Northern Rly* and *Frank Warr* was founded on section 68 on the basis that the interest which was claimed to give an entitlement to compensation was an interest in land that was taken for the works, and in each case the claim failed only because the interest was held to be insufficient (in one case a short lease, in the other a licence) and not because section 68 was thought to be otherwise inapplicable. In *Tiverton v Loosemore* there is the clear statement on the part of Lord Blackburn that section 68 applies so as to enable a claim to be made by the owner of an interest in land taken for the works. And in *Martin* Lord Cranworth clearly implied that a party with an interest who had not received notice to treat could have compensation assessed under section 68.

56. It appears to us in the light of these cases that Scott LJ's observation that "it is notorious that s 68 has always been construed as applying only to lands not held with lands taken" was not correct. Not only do the express words of section 68 refer to compensation for an interest in land taken for the works but they have been treated as applying in this way. In our judgment, therefore, section 10 of the 1965 Act applies also to interests in land taken.

57. Mr Denyer-Green said that the courts, in applying the 1845 Act, had drawn a distinction between provsions that conferred entitlement to compensation and those that were procedural. Thus in *Hammersmith Rly Co v Brand* (1869) LR 4 HL 171 the entitlement provisions were identified as sections 6 and 16 of the Railways Clauses Consolidation Act 1845 and section 68 was regarded as providing the procedure for resolving differences. However, "despite its

procedural appearance, the courts treated section 68 as creating a substantive right to compensation on principles which were worked out in a series of cases without reference to other enactments": (per Lord Hoffman in *Wildtree Hotels* [2001] AC 1 at 5H).

58. In fact none of the provisions of the 1845 Act expressly conferred the right to compensation; and this continued to be the case under the 1919 Act and it remains the position today under the 1961 and 1965 Acts. So it seems to us unsurprising that section 68 was treated as implying or assuming the right to compensation where loss had bee suffered through the taking of land and none of the other provisions of the Act provided for its recovery. As it was put in *R v St Luke's, Chelsea (ex p Flight)* (1871) LR 6 QB 572 (per Lush J delivering the judgment of the court at 576):

> "It is true that the Act does not say in terms, like the Railways Clauses Consolidation Act [1845], that the compensation shall be given for lands *injuriously affected*, but such intention is clearly implied. To hold otherwise would be to say that the Act gives a remedy without the right, and that the 22nd and 68th clauses are useless so far as they relate to land injuriously affected."

We can see no reason for distinguishing in the application of section 68 and section 10 between cases where none of the land in which the claimant has an interest has been taken and cases, as in the claim in the present case, where such land has been taken.

59. Nor is there any reason, in our judgment, for limiting the operation of section 10 in respect of interests in land taken to those interests in respect of which notice to treat has been served. There is nothing in the words used to suggest such a limitation. That the provision applies where "the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act" makes clear its function, which is to sweep up claims for compensation for which the other provisions have not provided and to enable a claimant to have them assessed. If an acquiring authority have failed to serve notice to treat on every interest as required by section 5 and have entered on the land, section 10 provides the owner of an interest who has not been served with notice to treat with the means of claiming compensation for the value of his interest and for consequential loss. No claim can be made under section 10, however, where the land has not been taken, so that the practical problems referred to by Mr Denyer-Green, which might arise if a person not served with notice to treat could seek compensation in advance of entry, would, at least for the most part, not arise.

60. For completeness we should deal with one further matter on the terms of the statutory provsions. This is subsection (2) of section 10, which we have set out above. This provision has to be construed in light of the fact that the 1965 Act was a consolidating Act. Its long title is: "An Act to consolidate the Lands Clauses Acts as applied by Part I of Schedule 2 to the Acquisition of Land (Authorisation Procedure) Act 1946, and by certain other enactments, and to repeal certain provisions in the Lands Clauses Acts and related enactments which have ceased to have any effect." Repeals are dealt with in Schedule 8 to the Act. They include the repeal in section 68 of the words "and if the compensation claimed in such case shall exceed the sum of fifty pounds" and the words from "either" to the end of the section. Thus section 68 stands shorn of the provisions relating to the assessment of compensation by justices,

arbitrators and juries. It is particularly to be noted, however, that the words "taken for or" were not repealed. They had not become redundant. Section 10, as a provision in a consolidating Act, must be taken to have incorporated the law as it stood (per Lord Scarman in *R v Heron* [1982] 1 All ER 993 at 999) and –

> "The earlier statute law, therefore, and judicial decisions as to its meaning and purpose are very relevant, if there be any difficulty or ambiguity." (ibid)

61. Thus section 10(1) is to be construed as having the same effect as section 68, and the purpose of subsection (2) is not to cut down the ambit of subsection (1) but to make clear that those earlier judicial decisions that "fixe[d] upon [section 68] a meaning having little perceptible relation to the words used" remain applicable. It is undoubtedly the case that the use that was made of section 68 had come to be as the foundation for claims for injurious affection. But, just as section 68 was not limited to such claims, so the provision in the consolidating Act, section 10, is not by the force of subsection (2) limited in its operation to such claims.

62. Finally on the question now being considered it is to be noted that the claimants' claim is based, in part, on the assertion that they or one or other of them owned an equitable interest in the land taken. The owner of an equitable interest in the land is entitled to receive notice to treat and to compensation: see *Oppenheimer v Minister of Transport* [1942] 1 KB 242, where an option to purchase was held by the High Court (Viscount Caldecote CJ, Humphreys and Asquith JJ) on a special case stated by an Official Arbitrator to entitle the claimant to compensation. The court moreover rejected the contention on the part of the Minister that the acquisition of the land had destroyed the option without taking the claimant's interest. In the present case, therefore, it would appear that if the claimants had an equitable interest in the land taken, they were entitled to notice to treat; and, not receiving such notice, they would, in our judgment, be entitled after the land had been taken to seek compensation under section 68.

Discussion: (c) Whether the Lands Tribunal has jurisdiction to determine the question of entitlement to compensation

63. Mr Denyer-Green contended that the Lands Tribunal has no jurisdiction to determine the question of the entitlement of the claimant to compensation. Under section 1 of the 1961 Act, he said, its jurisdiction was limited to determining "any question of disputed compensation". He referred to *Duttons Brewery Ltd v Leeds City Council* in the Chancery Division and *Re Purkiss' Application* in the Court of Appeal as authorities for the proposition that the Lands Tribunal has no jurisdiction to determine questions of title and to five Lands Tribunal decisions, which, he said, were to the same effect. All these decisions were, he said, consistent with the older authorities under the earlier legislation, and he referred in particular to *R v Edwards* and *R v London and North Western Rly Co*.

64. Mr Roots accepted that prior to the 1919 Act judicial decisions appeared to have established, in the context of section 68, that questions of title were for the courts and not for the justices, juries or arbitrators. In *R v London and North Western Rly Co* a Divisional Court

had determined that arbitration and juries did not have jurisdiction to determine questions of a claimant's entitlement to compensation. There were essentially two reasons for the decision: firstly, the interpretation of the words used in section 68 and, secondly, the fact that matters decided by arbitrators and juries could not be the subject of an appeal. Where a claim for compensation was made and the promoters disputed the claimant's entitlement to an interest in the land, the claimant's remedy, Mr Roots said, was to commence an action for the recovery of the land and, if successful, enforcement would then be stayed for six months to enable the promoters to take advantage of section 124 and have compensation assessed. He referred to *Salisbury v Great Northern Rly Co* (1858) 28 LJCP 40; and to *Caledonian Rly Co v Davidson*, in which the House of Lords had held that the six month period only began to run after the claimant's title had been established.

65. The 1919 Act, Mr Roots said, produced a significant change. Under section 1 questions of disputed compensation in the case of compulsory acquisition by a public authority were no longer to be determined by justices, juries or privately appointed arbitrators but by a body of surveyors called the Official Arbitrators holding office for this purpose. Section 6 provided that the decision of an Official Arbitrator was final, but the arbitrator could at any time state a case for the opinion of the High Court on any question of law arising in the course of the proceedings. Mr Roots referred to *Goodwin Foster Brown Ltd v Derby Corporation*.

66. In *Goodwin Foster Brown* it was held that an Official Arbitrator was entitled to state his award in the form of a special case for the opinion of the High Court raising the question whether the claimant was entitled in law to compensation. Derby Corporation had acquired the freehold of premises and also served notice to treat on the lessee but a question arose as to whether the lease had already terminated by virtue of a clause in the lease and consequently whether the lessee was entitled to compensation. The parties had agreed the amount of compensation in the event that it was determined that the claimant was entitled to it. For the claimants it was argued that, in the light of previous cases, an arbitrator could not deal with a question of title (see 27-28). For Derby Corporation it was argued that the position under the 1919 Act was different to that under the 1845 Act because of the arbitrator's power to state a case on a point of law to the High Court (see 29). The Court held that since the enactment of section 6 of the 1919 Act the arbitrator had power to state any question of law for the opinion of the High Court including a question of title. Lord Hewart CJ rejected the argument that the arbitrator could not deal with a question of title as follows ([1934] 2 KB 23 at 30-31):

> "There was a period during the hearing of the case when it was argued that an arbitrator could not deal with a question of title. Our attention was directed to various authorities upon that point, but none of them went to show that an arbitrator might not state a special case upon the question of title, and since s.6 of the Act of 1919 came into operation, following as it did similar provisions in earlier Acts, it seems to me to be quite clear that the arbitrator has power to state in the form of a special case for the opinion of the High Court any question of law arising in the course of the proceedings including a question of title, and also power to state his award as to the whole or part in the form of a special case for the opinion of this Court."

67. It is clear, therefore, that the question of title was an issue that arose for decision in the course of the proceedings before the Official Arbitrator and that a decision on that question fell to be made as part of those proceedings. *Oppenheimer v Minister of Transport*, to which we have referred above, is another instance of a Divisional Court determining on a case stated by an Official Arbitrator the question of entitlement to compensation.

68. In *Duttons Brewery*, on which Mr Denyer-Green relied, the plaintiff had been served with notice to treat in April 1967, and by April 1968 it had agreed compensation with the acquiring authority in the sum of £15,000. The authority did not enter on the property until June 1976, and the claimant sought to establish that it was entitled to compensation as at that date (when, it said, the property was worth £78,000) and that it was not bound to accept compensation limited to the £15,000 that had been agreed in 1968. Nourse J held that the agreement on the £15,000 was on the basis that entry would be made within a reasonable time, and that the reasonable time had expired in 1971 or shortly afterwards, so that the agreement as to price no longer stood and compensation was to be assessed as at the date of entry in June 1976. He rejected the authority's argument that, by reason of section 1 of the 1961 Act, the issue could only be determined by the Lands Tribunal as a "question of disputed compensation". In the course of his judgment the judge said ((1980) 42 P & CR152 at 156):

> "It is now established that the Lands Tribunal, like its predecessors, has no jurisdiction to decide questions of title. No doubt the reason for that was that questions of that sort were regarded as being matters which could only be determined by the court and not by persons who did not have a legal training: cf *Brandon v Brandon* (1864) 2 Drew & Sm 305, 310. But a question of title is, nevertheless, one whose resolution will often result in compensation being paid on one basis instead of another and a greater or a lesser amount being received by the claimant. In the broad sense to which I have referred it is, therefore, a question of disputed compensation, but it is one which the court is not only entitled but bound to decide itself.
>
> In my judgment, it is clear from this that the phrase "any question of disputed compensation" in section 1 of the 1961 Act cannot be used in the broad sense for which [counsel for the authority] contends. Similarly, in the present case the dispute between the parties is purely one of law and its resolution depends on a correct analysis of the contractual relationship between the parties. It is a question of disputed contractual rights...It may well be that the point could have been decided by the Lands Tribunal had the plaintiffs sought to take it there. A similar point was so decided and then went to the Court of Appeal in *Munton v Greater London Council* [1976] 1 WLR 649, which is a case to which I will have cause to return later. But that does not mean that the jurisdiction of the court is necessarily ousted. On general principles I would want to see a very much clearer provision than that contained in section 1 of the Land Compensation Act 1961 before I was prepared to hold that the jurisdiction of the court in deciding purely legal questions of a type which it considers every day of the week had been ousted."

69. What the judge determined, therefore, was not that the Lands Tribunal could not have decided the point as to contractual entitlement (indeed he said that it could well be that the point could have been decided by the Tribunal) but that the court's jurisdiction to decide the

point was not ousted by section 1 of the 1961 Act. His statement that it was well established that the Lands Tribunal has no jurisdiction to decide questions of title was thus obiter. The only authority that he referred to in this context was the 1864 case of *Brandon v Brandon*, and there is nothing to suggest that he had been referred to *Goodwin Foster Brown.*

70. *In re Purkiss' Application*, also relied on by Mr Denyer-Green, was an appeal against a decision of the Lands Tribunal on an application under section 84 of the Law of Property Act 1925 to discharge or modify a restrictive covenant. The Member (John Watson FRICS) had concluded that there was no scheme of development and that as a consequence none of the objectors had the benefit of the restrictions, but he dismissed the application on the basis that, if he was wrong in his conclusion on the right of the objectors to enforce the covenant, he refused to modify the restrictions. The Court of Appeal held that the decision did not conclude the question whether the objectors had the benefit of the covenant and consequently there was no question of law for it to decide. Under section 84(2) the court has power to declare whether a restriction is enforceable and, if so, by whom. Lord Evershed MR said ([1962] 1 WLR 902 at 908):

> "I should not for myself wish on this occasion to say finally that the tribunal under subsection (1) has no jurisdiction to decide questions of law – particularly of the kind enshrined in subsection (2). But I do think (and I say this out of no disrespect to the Lands Tribunal) that it should be extremely cautious in embarking upon problems of law of this kind which are obviously suitable for decision under subsection (2) or other appropriate legal procedure."

71. At 911 Upjohn J said that the Tribunal had no power to decide any matters falling properly within the ambit of subsection (2). At 914 Diplock LJ said this:

> "The tribunal, before embarking on any reference, must of necessity decide for itself whether the conditions necessary to found its jurisdiction are fulfilled, but since it is a court of limited jurisdiction it cannot by its own finding on this matter extend the jurisdiction which the statute has conferred upon it. Its decision, either that it had jurisdiction or that it had not jurisdiction, is not conclusive. It can be questioned either on appeal where the statute provides for appeal or by certiorari. In the absence of appeal or certiorari, it can be questioned in any subsequent legal proceedings in which the order made by the court of limited jurisdiction is in question."

72. To the extent that what was said in *In re Purkiss' Application* was based on the particular provisions of subsections (1) and (2) of section 84 it is of no assistance in the present context. Diplock LJ's observations, however, show that, in a case like the present, where the acquiring authority contend that the Tribunal has no jurisdiction because the claimants have no compensatable interest, the Tribunal has power to determine that issue.

73. Of the Lands Tribunal decisions, Mr Denyer-Green relied particularly on that of *Mountgarret v Claro Water Board*. The claimant claimed compensation under an order made under the Water Acts 1945 and 1948 in respect of the compulsory purchase of land and of water or rights to water. The authority denied that he had a separate compensatable interest in

respect of the water or water rights. The Tribunal (Sir William FitzGerald QC and Erskine Simes QC) said ((1963) 15 P & CR 53 at 57):

> "The first question to be decided on this hearing is whether upon a claim for compensation the Tribunal has jurisdiction to determine any dispute as to title which may affect the right of the claimant to, or the amount of, compensation.
>
> In the present case the question clearly arises in relation to the title of the claimant to the rights in the water flowing in and issuing from the Eagle Level, and this, we think, applies equally whether if, as the claimant contends, there is a separate claim for the acquisition of water, or water rights, under article 3 of the 1958 Order and the Schedule thereto which applies section 92 of the Third Schedule to the Water Act, 1945, or if, as the Board contend, the compensation for the land compulsorily acquired includes the value of any interest of the claimant in the water issuing therefrom."

74. The Tribunal then recorded the arguments of counsel, Sir Derek Walker-Smith QC for the claimant and Mr Desmond Ackner QC for the acquiring authority, and, having (at 59) set out section 1(3)(a)(i) of the Lands Tribunal Act 1949, which provides for the reference and determination by the Tribunal of any question directed to be determined by the panel of Official Arbitrators, it went on:

> "This, we are satisfied, gives to the tribunal the jurisdiction which was exercisable by the Official Arbitrator, and no more since it is only questions to be determined by him which are referred to, and to be determined by, the Tribunal.
>
> It seems to us impossible to infer from the provisions of section 3(4) or, indeed, any of the provisions of the Act of 1949, any extension of the jurisdiction conferred by section 1(3). Any such extension can only be conferred by express statutory provision, which does not exist.
>
> We are, therefore, satisfied that the Tribunal has no jurisdiction to decide title on the reference of any question which is by any Act to be determined by an Official Arbitrator, since it is agreed that the Official Arbitrator had no such jurisdiction...
>
> Since a bona fide dispute exists as to the title of the claimant to the water emerging from the Eagle Level and we have no jurisdiction to decide title, it follows that, until the question of title has been determined by the appropriate court, this claim cannot be entertained by the Tribunal."

75. While the Tribunal ought in general to follow its previous decisions, it is not bound by them and ought not to follow a decision that it is satisfied is wrong. The basis of the decision in *Mountgarret* was the agreement that the Official Arbitrators had no jurisdiction to decide questions of title arising on a reference. But *Goodwin Foster Brown* was evidently not referred to, nor, it must be assumed, was Diplock LJ's clear statement of principle in *Purkiss*.

76. The Lands Tribunal was created to accede to the jurisdiction of the Official Arbitrators and its fundamental purpose was to combine the expertise of surveyors and lawyers. The

deficiency of the Official Arbitrators was their lack of legal expertise, and the power to state a case for the opinion of the High Court was a cumbersome way of dealing with this deficiency, particularly in the field of compulsory purchase compensation, which has always bristled with difficult problems of law. So the Lands Tribunal was created with a lawyer President and both lawyer and surveyor Members, and section 3(4) of the Act gave a right of appeal against its decisions to the Court of Appeal on a point of law. It would be an oddly perverse result if the Lands Tribunal is to be treated in the field of compensation for compulsory purchase as no more capable of dealing with issues of law than the juries that had determined disputes about compensation in the nineteenth century.

77. In our judgment the Tribunal has jurisdiction to determine any question of law that arises on any reference, application or appeal. If the question goes to the quantification of compensation (for example, the circumstances in which the freeholder would have been entitled to terminate a leasehold interest in the land), it must decide it. If the question is whether on the facts there is entitlement to compensation for injurious affection under section 10, it must decide that question. If, as here, the question is whether the claimant is entitled to claim compensation and whether, therefore, the Tribunal has jurisdiction to determine the reference, the Tribunal must determine that question. If the Tribunal errs in deciding such a question, the aggrieved party may appeal and the error can be corrected by the Court of Appeal. A decision on a question of title will, however, only have effect for the purposes of the decision and the legal consequences that flow from the decision. And, if a reference has proceeded on the assumption that the claimant has title to the land, the acquiring authority will be able to resist the payment of compensation determined by the Tribunal if the claimant is unable to make out title.

Conclusions

78. On the three questions of general application that arise, we determine as follows:

(a) The acquiring authority must give notice to treat to every person with an interest in the land that they take. They have no power to avoid paying compensation to a person with such an interest by not giving him notice to treat.

(b) If the acquiring authority have failed to serve notice to treat on a person with an interest in the land that has been taken, he can claim compensation under section 10 of the 1965 Act and make reference to the Tribunal accordingly.

(c) The Tribunal has jurisdiction to determine any question of law that arises on a reference made to it on a claim for compensation. Such a question may be one of title. Its determination of the question of law will, however, only have effect for the purposes of the decision and the legal consequences that flow from the decision.

The preliminary issues

79. We determine the preliminary issues in the claimants' favour. They are not disabled from claiming compensation by reason of the fact that no notice to treat was served on them;

and the Tribunal has jurisdiction to determine whether they had such interest in the land acquired as to entitle them to compensation.

80. The parties are now invited to make submissions on costs, and a letter dealing with this accompanies this decision, which will become final when the question of costs has been determined. Directions for the further conduct of the reference will then be given.

3 June 2008

George Bartlett QC, President

A J Trott FRICS