UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Procedure – substitution of Acquiring Authority as respondent to reference after expiry of limitation period – whether essential to validity of reference – jurisdiction to make order – applicable principles – ss.9 and 35, Limitation Act 1980 – s.25 Tribunal, Courts and Enforcement Act 2007 – rule 9(1), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 – CPR r. 19.5 – application allowed

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

WILLIAM HILL ORGANIZATION LIMITED

Claimant

and

CROSSRAIL LIMITED

Respondent

Re: Unit 4,
135-155 Charing Cross Road,
London WC2

Martin Rodger QC, Deputy President

Royal Courts of Justice
on
5 May 2016

Timothy Corner QC and *Andrew Tabachnik*, instructed by Gosschalks, Solicitors, on behalf of the claimant
Richard Glover QC and *Richard Honey*, instructed by Eversheds LLP, on behalf of Transport for London

The following cases are referred to in this decision:

Adelson v Associated Newspapers Ltd [2008] 1 WLR 585

BPP Holdings v Revenue and Customs Commissioners [2016] EWCA Civ 121

GSM Export UK Ltd v Revenue and Customs Commissioners [2014] UKUT 457 (TCC)

Hillingdon London Borough Council v ARC Limited [1999] Ch 139

Hillingdon London Borough Council v ARC Limited (No. 2) [2000] EWCA Civ 191

IB v Information Commissioner [2011] UKUT 370 (AAC)

Insight Group Ltd v Kingston Smith (a firm) [2012] EWHC 3644 (QB)

R (Cart) v Upper Tribunal [2010] EWCA Civ 859

R (Okundu) v Secretary of State for the Home Department [2014] UKUT 00377 (IAC)

Introduction

1. Does the Upper Tribunal have power to substitute a new party as the respondent to a reference for compensation for disturbance after the expiry of the relevant limitation period? If the Tribunal has such a power, how should it be exercised? In the absence of substitution is a claimant nevertheless entitled to pursue a reference to which no party which may ultimately be liable to pay compensation is a respondent?

2. Those issues (which are novel in this jurisdiction) arise in what would otherwise be a routine claim for compensation for disturbance arising out of the acquisition for the purpose of the Crossrail project of premises at 135-155 Charing Cross Road ("the Premises") formerly occupied by the claimant, William Hill Organization Ltd. By mistake the claimant referred its claim to the Tribunal by a notice of reference which identified Crossrail Ltd as the acquiring authority and intended respondent, whereas the proper respondent should have been Transport for London ("TfL"). It now applies, after the expiry of the limitation period, to substitute TfL in place of Crossrail Ltd as the respondent to its reference.

3. At the hearing of the application Timothy Corner QC and Andrew Tabachnik represented the claimant and Richard Glover QC and Richard Honey represented TfL; Crossrail Ltd was not represented and it was common ground that the claimant has no valid claim against it. I am grateful to counsel for their persuasive submissions. To understand those submissions it is first necessary to refer to the relevant statutory provisions and the Tribunal's procedural rules.

Relevant statutory provisions

4. Under section 37(1)(a), Land Compensation Act 1973, a person displaced from any land in consequence of the acquisition of that land by an authority possessing compulsory purchase powers is entitled, subject to the provisions of that section, to receive a disturbance payment from the acquiring authority. The "acquiring authority", in relation to an interest in land, is the person or body of persons by whom the interest is, or is proposed to be, acquired (section 39(1) Land Compensation Act 1961, incorporated by section 87(1) of the 1973 Act).

5. Section 38 of the 1973 Act makes provision for the amount of a disturbance payment; by section 38(4), any dispute as to the amount of such a payment is to be referred to and determined by the Upper Tribunal (where such disputes are assigned to the Lands Chamber).

6. By section 9(1), Limitation Act 1980, any "action to recover any sum recoverable by virtue of any enactment" must be brought within 6 years of the date on which "the cause of action accrued". An action includes "any proceedings in a court of law" (section 38(1), 1980 Act).

7. The Upper Tribunal was established by section 3(2), Tribunals, Courts and Enforcement Act 2007 and is a superior court of record (section 3(5)). It is common ground that the Upper Tribunal is a court of law and that a reference to the Tribunal is an action for the purpose of section 9 of the 1980 Act.

8. In *Hillingdon London Borough Council v ARC Limited* [1999] Ch 139 the Court of Appeal determined that for the purpose of section 9 of the 1980 Act a cause of action for compensation arises on the date of entry onto the land by the acquiring authority and expires 6 years later. Prior to that decision it was uncertain whether the Limitation Act applied at all to a reference to the Tribunal to determine compensation on compulsory acquisition.

9. Section 35, Limitation Act 1980 concerns the making of new claims in pending actions; there were no equivalent provisions in the Act's predecessor, the Limitation Act 1939. So far as is relevant to this application, section 35 provides as follows:

> "35 – **New claims in pending actions: rules of court**
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> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced –
>
> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
>
> (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either –
>
> (a) the addition or substitution of a new cause of action; or
>
> (b) the addition or substitution of a new party; …
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the County Court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would effect a new action to enforce that claim. …
>
> (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned but only if the condition specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following –
>
> (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
>
> (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.
>
> (6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either –

(a) the new party is substituted for a party whose name was given in any claim made in the original action in the stake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

(7) – (8) …."

10. Leaving aside third party proceedings and new causes of action, the relevant effect of section 35 may be described in four propositions.

11. First, where a new claim is made in the course of an action, it is deemed to have been commenced on the same date as the original action.

12. Secondly, no new claim may be made in the course of an action in the High Court or County Court by A against B after the expiry of a relevant limitation period, except as provided by rules of court.

13. Thirdly, rules of court may only allow a new claim to be brought after the expiry of the limitation period if the new claim involves the addition or substitution of a new party, C, and if that course is necessary for the determination of the original action.

14. Finally, the substitution of C will only be necessary for the determination of the original action if either of two conditions is satisfied, namely: that the name of either A or B was given in a claim made in the original action in mistake for C's name; or, a claim made by A or against B in the original action cannot be maintained by or against them unless C is joined or substituted as plaintiff or defendant in the action.

15. Section 35 of the 1980 Act makes no mention of tribunals, or of tribunal procedure rules.

The Tribunal's procedural rules

16. Procedure in the Upper Tribunal is regulated by tribunal procedure rules made by the Tribunal Procedure Committee under section 22 of the Tribunals, Courts and Enforcement Act 2007 (section 22(1)-(2)). The 2007 Act is explicit in laying down that power to make rules is to be exercised with a view to securing that justice is done and "that the rules are both simple and simply expressed" (section 22(4)).

17. The powers of the Upper Tribunal are supplemented by section 25 of the 2007 Act which, so far as relevant, says this:

"25 – **Supplementary powers of Upper Tribunal**

(1) In relation to the matters mentioned in subsection (2), the Upper Tribunal –

(a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and

(b) [Scotland].

(2) The matters are –

(a) the attendance and examination of witnesses,

(b) the production and inspection of documents, and

(c) all other matters incidental to the Upper Tribunal's functions.

(3) Subsection (1) shall not be taken –

(a) to limit any power to make Tribunal Procedure Rules;

(b) to be limited by anything in Tribunal Procedure Rules other than an express limitation."

18. Procedure in the Lands Chamber is regulated by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

19. By rule 2(1) the overriding objective of the rules is to enable the Tribunal to deal with cases fairly and justly. The Tribunal is required by rule 2(3)(b) to give effect to that objective when it interprets any rule or practice direction. Dealing with a case fairly and justly includes "avoiding unnecessary formality and seeking flexibility in the proceedings" (rule 2(2)(b)).

20. The 2010 Rules give the Tribunal wide case management powers, the most significant of which is the most general, namely rule 5(1) which provides that:

> "Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure."

21. By rule 9(1) the Tribunal is given specific powers in relation to the addition, substitution and removal of parties. These are expressed simply, as required by section 22(4) of the 2007 Act. As the power of substitution is critical to this application I set the rule out in full:

"9. **Addition, substitution and removal of parties**

(1) The Tribunal may give a direction adding, substituting or removing a party in any proceedings.

(2) If the Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.

(3) A person who is not a party may apply to the Tribunal to be added or substituted as a party.

(4) If a person who is entitled to be a party to proceedings by virtue of another enactment applies to be added as a party, and the conditions (if any) applicable to that entitlement had been satisfied, the Tribunal must give a direction adding that person as a party."

22. The expression "party" used in rule 9 and elsewhere in the 2010 Rules is defined in rule 1. In a reference made under Part 5 of the Rules a party includes a respondent authority, an acquiring authority or a compensating authority. Part 5 applies to any proceedings allocated to the Tribunal with certain specific exceptions such as appeals from other tribunals; it applies to references for compensation under the 1973 Act.

23. Rule 28, which is included in Part 5 of the 2010 Rules, provides for notices of reference. Paragraphs (1) and (2) of the rule are in these terms:

"28. **Notice of reference**

(1) Proceedings to which this Part applies must be started by way of reference made by sending or delivering to the Tribunal a notice of reference.

(2) The parties to the proceedings are the person making the reference and any person named as a party in the notice of reference."

24. Rule 28(3) lists the information which must be provided in a notice of reference. Curiously there is no express requirement for the notice to state the name and address of any other party to the reference. Nonetheless, it would be hard to complete a notice of reference in a manner consistent with rule 28(3) without identifying the intended respondent. Rule 28(3)(e) requires that the nature of the interest in the land of any person named in the notice be stated, and the matter on which the person making the reference seeks a determination must also be stated together with a summary of their reasons for doing so (rule 28(3)(h)). It is certainly contemplated that other persons will be named as parties to the proceedings because rule 28(5) requires the person making the reference to provide sufficient copies of the notice for every other such person and rule 28(8) requires the Tribunal to send those copies to the persons named in the notice.

Crossrail and TfL

25. Crossrail Ltd and TfL are distinct legal entities. Crossrail Ltd is wholly owned by TfL.

26. Crossrail Ltd is a project delivery company responsible for the design and construction of the Crossrail project. It was formed in 2001 (under the name Crossrail London Rail Links Ltd) as a 50/50 joint venture between SRA Investment Company Ltd and Transport Trading Ltd. SRA was

owned by the Secretary of State for Transport. Transport Trading Ltd was owned by TfL. In December 2008 the interest of SRA in Crossrail was transferred to Transport Trading Ltd.

27. Provision for the Crossrail project is made in the Crossrail Act 2008. By section 6(1) the Secretary of State was given power compulsorily to acquire land required in connection with the works authorised by the Act. Schedule 6 has the effect of applying the statutory compensation code to such acquisitions.

28. By section 1(1) of the 2008 Act, the "nominated undertaker" was given power to construct and maintain the underground railway and other works required for the Crossrail project. The nominated undertaker is a person specified in an order made by the Secretary of State under section 39. The Crossrail (Nomination) Order 2008, nominated Crossrail Ltd for the purpose of the works which made the acquisition of the claimant's Premises necessary.

29. On 21 April 2010 the Crossrail (Devolution of Functions) Order 2010 came into force. By article 3 of the Order all references to the Secretary of State in the 2008 Act have effect as references to TfL. It is common ground that, as a result of the 2010 Order, since April 2010 the authority responsible for meeting claims for compensation arising out of the acquisition of the claimant's Premises has been TfL.

The facts

30. On 22 June 2009 the Secretary of State gave notice to Laystall Limited (a company in the same group as the claimant which held a lease of the Premises) of his intention to acquire the Premises in connection with the Crossrail project and his willingness to treat with the company to acquire its interest. On the same day a notice of entry was also given by the Secretary of State informing Laystall Limited that possession of the Premises would be taken in 3 months.

31. Both the notice to treat and the notice of entry were signed by the company secretary of Crossrail Ltd as agent for and on behalf of the Secretary of State. The covering letter explained that the Secretary of State was authorised to acquire the land and described him as "the Acquiring Authority". The purpose of the notice of entry was explained to be "in order that the Acquiring Authority may take possession of the land". The letter also included a form of claim for compensation which the recipient was invited to complete and return to Crossrail Ltd. The claimant's representative returned the form duly completed on 20 July 2009.

32. On 28 September 2009 the Secretary of State entered and took possession of the Premises. Time then started to run for the commencement of any action to enforce the claimant's right to compensation for disturbance under section 37 of the 1973 Act.

33. A little over a week after the coming into force of the 2010 Order (see paragraph 29 above) the claimants' agents, Gerald Eve LLP, informed TfL that they had been instructed by the claimant in relation to compensation arising out of the acquisition of the Premises. Gerald Eve intimated a claim

for compensation for disturbance in excess of £185,000 and asked that an advance payment be made under section 52 of the 1973 Act. An advance payment was duly made in a sum of just under £160,000 and on 19 July 2011 the claimant gave a receipt for that sum. The receipt recited that the functions of the Secretary of State under the 2008 Act had been transferred to TfL and that the advanced payment was made by TfL. The payment was said to have been accepted without prejudice to further negotiations with TfL over the final amount of compensation.

34. Negotiations over the claimant's entitlement to compensation appear then to have gone into abeyance for a time, but on 3 April 2012 Gerald Eve wrote again to TfL requesting a further advance payment. Detailed negotiations followed at meetings in November 2014, and in June and September 2015, but no final agreement was reached.

35. On 23 September 2015 under cover of a letter headed "Urgent – limitation expires 28 September 2015" the claimant's solicitors delivered a notice of reference to the Tribunal together with the formal documents required by rule 28 of the 2010 Rules. The notice of reference named Crossrail Ltd as the "compensating/acquiring/respondent authority" and stipulated section 37 of the 1973 Act as the statutory provision under which compensation was claimed. In an accompanying case summary Crossrail Ltd was identified as the acquiring authority and was said to have exercised powers under the 2008 Act to enter and take possession of the Premises on 28 September 2009. The matter for determination by the Tribunal was said to be "the compensation payable by the Acquiring Authority to the Claimant in respect of" various identified heads of loss.

36. The claimant's solicitor explained in a witness statement in support of the application (which was not challenged by TfL) that he had prepared and circulated a draft of the notice of reference to the claimant and its professional team and that he had intended that the notice should assert a disturbance claim against the acquiring authority, which he now appreciated he had incorrectly named as Crossrail Ltd. The notice had been prepared in some haste at a time when the claimant's solicitor had been on jury service.

37. TfL had been aware of the claimant's intention to make a reference to the Tribunal but no notice of reference had been served on it by the expiry of the limitation period on 28 September 2015; it therefore instructed its solicitors to make enquiries of the Tribunal, which they did on 5 October. They were informed that a notice of reference had been received on 24 September and served by the Tribunal on 2 October.

38. The notice of reference arrived at the offices of Crossrail Ltd on 6 October. Two days later its in-house solicitor contacted TfL and subsequently forwarded the notice of reference to it. The papers served by the Tribunal on Crossrail Ltd were eventually received by TfL on 14 October 2015.

39. Having taken stock of the situation with its solicitors and counsel the claimant's error became apparent to TfL. The error was pointed out in letters to the claimant's solicitors and to the Tribunal on 3 November 2015 written by Eversheds on behalf of Crossrail Ltd and in a statement of its case in which it was asserted that the claim for compensation could not succeed against Crossrail Ltd and

that the limitation period for making a new reference against TfL had expired. The claimant was invited to confirm that the reference would be withdrawn.

40. On 19 November 2015 the claimant wrote to Eversheds in its capacity as solicitors for both Crossrail Ltd and TfL and invited its clients to consent to an application to substitute TfL as respondent to the notice of reference. On 23 November Eversheds refused consent. The application to substitute TfL was issued on 25 November 2015, almost two months after the expiry of the limitation period.

Issue 1: Was the reference valid as submitted on 23 September 2015?

41. On behalf of the claimant Mr Corner QC first submitted that the notice of reference submitted to the Tribunal on 23 September 2015 was valid and sufficient, without the need for any order substituting TfL as acquiring authority in place of Crossrail Ltd. The function of determining claims for compensation under section 37 of the 1973 Act was assigned to the Tribunal and by rule 28(1) of the 2010 Rules such proceedings were to be "starting by sending or delivering to the Tribunal a notice of reference." The 2010 Rules did not require that the name and address of the acquiring authority be included in the notice of reference. The notice of reference in this case satisfied the requirements of rule 28(3) and was therefore a valid notice of reference which had the effect of stopping the running of time against the claimant. In the language of section 9(1) of the Limitation Act 1980 "an action to recover" a "sum recoverable by virtue of any enactment" had been duly commenced within the available six year period.

42. Mr Corner readily acknowledged that, as a matter of convenience and practicality, the Tribunal would require that the acquiring authority be identified, and the Tribunal's standard form of notice did so require. But the form was not prescribed by statute or regulation, and neither the statute nor the rules made the naming of a respondent as acquiring authority a precondition of the validity of a notice of reference. He suggested that the amount of compensation payable by TfL to the claimant could validly be determined by the Tribunal notwithstanding that TfL was not a party to the reference. It would no doubt be extremely rare for a notice of reference to identify the wrong acquiring authority and for no steps then to be taken to cure that error, but if the Tribunal proceeded to make a determination it would be valid and enforceable against the person liable to pay compensation. There would of course be a strong case for the Tribunal to set aside such a determination and to allow the correct party to participate in the proceedings, but until that happened the determination of compensation would be binding on the acquiring authority.

43. I do not accept Mr Corner's submissions on this aspect of the application.

44. Section 38(4) of the 1973 Act, which is the source of the Tribunal's relevant jurisdiction, allows reference to the Tribunal of "any *dispute* as to the amount of a disturbance payment." For there to be a dispute there must be at least two parties who disagree. In a case such as this those parties are identified in section 37(1)(a) as being the person displaced from the land in consequence of its acquisition and the authority possessing compulsory purchase powers which was responsible for the acquisition. Only a dispute between those parties may be referred to the Tribunal and a notice

of reference which does not refer such a dispute is not, in my judgment, a valid notice for the purpose of stopping time running against the displaced person.

45. Secondly, the subject matter of the notice of reference in this case is a dispute over the entitlement of the claimant to obtain compensation for disturbance from Crossrail Ltd. But no such dispute existed and the claimant freely acknowledges it has no entitlement to compensation from that source. Without substitution of a relevant respondent it is only as a reference of that notional or non-existent dispute that the notice of reference could be considered to have any formal validity. TfL has no liability to pay compensation in connection with that dispute and a determination of a sum in compensation in this reference could neither create nor crystallize such a liability on the part of TfL.

46. In my judgment, therefore, it is essential to the continuation of this reference that TfL be substituted for Crossrail Ltd as the acquiring authority and respondent whose liability to compensate the claimant is in dispute.

Issue 2: Does the Tribunal have jurisdiction to allow substitution after the expiry of the limitation period?

47. A far trickier issue is whether the Tribunal has jurisdiction to make an order for the substitution of TfL after the expiry of the limitation period. Mr Corner QC submitted on behalf of the claimant that the Tribunal has jurisdiction under rule 9(1) of its 2010 Rules to substitute a party, and that the only restriction on the exercise of that jurisdiction is the overriding objective of dealing with cases fairly and justly. Alternatively, he submitted, the supplementary powers conferred by section 25 of the 2007 Act give the Tribunal the same powers, rights and authority to substitute parties after the expiry of a limitation period as is enjoyed by the High Court. On behalf of TfL Mr Glover QC submitted that the Tribunal has been given no power by statute or by the 2010 Rules to deprive TfL of the benefit of the limitation defence conferred by section 9 of the 1980 Act.

48. It was common ground that the Tribunal has no power to extend an applicable statutory limitation period, as it has recently confirmed in *Harringay Meat Traders Ltd v Greater London Authority* [2014] UKUT 0302 (LC). That is not to say that a claim may never be commenced after the expiry of a limitation period. Unless the statute which confers jurisdiction on the Tribunal to determine compensation provides otherwise, limitation periods are matters of procedure rather than substance and, in an appropriate case, can be waived or become the subject of an estoppel (*Hillingdon London Borough Council v ARC Limited (No. 2*) [2000] EWCA Civ 191).

49. The starting point of Mr Corner's argument was section 35(1) and (2) of the 1980 Act which he described as being "of universal application" i.e. as applicable to proceedings in both courts and tribunals. Their effect was that a new claim made in proceedings by the substitution of a new party is deemed to have been commenced on the date of the original claim; if permission was given to substitute TfL the new claim would not be subject to a limitation defence because it would be treated as having been begun on 23 September 2015.

50. Mr Corner's submissions on section 35(1)-(2) assumed the existence of a power to substitute a party after the expiry of a relevant limitation period. When I asked what the source of that power was Mr Corner located it in rule 9(1) itself. That rule was unrestricted by sections 35(3) to (6) of the 1980 Act, which placed limits on the power of the High Court and County Court to permit substitution outside a limitation period, but which were inapplicable to the Tribunal. The Tribunal therefore had an unfettered power to order substitution.

51. I do not find Mr Corner's primary submission easy to accept. The Tribunal exists "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act" (s.3(2), 2007 Act) and its jurisdiction is limited by statute. The Tribunal's general power to regulate its own procedure is expressly made "subject to the provisions of the 2007 Act *and any other enactment*" (rule 5(1), 2010 Rules). Amongst those provisions is section 9(1) of the 1980 Act, preventing a reference for compensation from being brought more than six years after the accrual of the cause of action. On the other hand the limitation periods prescribed by the 1980 Act are properly regarded as affording a procedural defence, rather than as affecting the jurisdiction of the tribunal, and so can be waived or become the subject of an estoppel but no question of waiver or estoppel arises in this case. The availability of a limitation defence can also be curtailed by statute, as has been done by section 35, but not, I have concluded, by a procedural rule which is itself expressly subject to the provisions of other enactments. I therefore agree with the submission of Mr Glover and find it impossible to accept that rule 9(1) confers jurisdiction to permit a new claim to be made after the expiry of a limitation period, since that would be expressly contrary to section 9(1) of the 1980 Act.

52. Nor do I accept that section 35(1) and (2) of the 1980 Act can be relied on to bolster rule 9(1). Section 35(1) modifies the effect of section 9(1), and other limitation periods, by deeming a new claim to have been made earlier than it was in fact made in certain circumstances; the sub-section does not itself confer a power to permit new claims of any sort. That power is assumed and is obviously available to the courts and tribunals under their procedural rules. But where the exercise of the power conferred by those rules is itself subject to any other enactment, as is the case in the Tribunal, the rules cannot be relied on, as Mr Glover put it, to subvert those enactments, and specifically the limitation defence conferred by section 9. The only power conferred by section 35 is found in section 35(4) which permits the making of rules of court allowing a new claim after the expiry of a time limit under the 1980 Act, but only if the conditions in section 35(5) are satisfied. As Mr Corner accepted (subject to any impact of section 25 of the 2007 Act) section 35(3) to (6) do not apply to proceedings in the Tribunal.

53. Mr Corner's alternative formulation depends on section 25 of the 2007 Act which vests the Upper Tribunal with the powers of the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents, and "all other matters incidental to the Upper Tribunal's functions". This, he submitted, means that the Upper Tribunal has the same powers as the High Court in relation to substitution after the expiry of a limitation period, so that section 35(3) to (6) of the 1980 Act (and the relevant rule of court made in reliance on it, CPR r.19.5(3)) must be taken to extend additionally to the Tribunal.

54. The scope and effect of section 25 of the 2007 Act and its older sibling, section 29(2) of the Employment Tribunals Act 1996, have received only limited judicial exegesis. In *R (Cart) v Upper*

Tribunal [2010] EWCA Civ 859, the Court of Appeal surveyed the new tribunal landscape and noted that section 25 gives the Upper Tribunal in the discharge of its adjudicative functions "the same powers, rights and privileges and authority as the High Court". Sedley LJ suggested, at [16], that section 25 was "explicable as a badge of status and as a recognition that, but for the express provision it makes, the UT would lack the inherent powers enjoyed by the High Court." The issue in that case was "whether, despite its status", the Upper Tribunal was subject to the jurisdiction of the High Court by way of judicial review. At [19]-[20] the question was answered in the affirmative. The supervisory jurisdiction of the High Court runs to statutory tribunals in their new incarnation because there is nothing in the 2007 Act specifically to exclude it. The Upper Tribunal "is not an avatar … [or] the *alter ego* of the High Court":

> "The statute invests with standing and powers akin to those of the High Court a body which would otherwise not possess them precisely because it and the High Court are not, and are not meant to be, courts of co-ordinate jurisdiction."

55. More recently, in *BPP Holdings v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121, the Court of Appeal has noted once again that section 25(1)(a) confers on the Upper Tribunal the same powers, rights privileges and authority as the High Court and that those powers are not to be taken to be limited by anything in the tribunal procedure rules other than an express limitation. With the exception of these general statements in *Cart* and *BPP,* I am not aware of any other consideration by the Court of Appeal of the scope of section 25.

56. The Upper Tribunal has itself been asked to consider the scope of section 25 of the 2007 Act on a number of occasions. In two cases it has taken what might at first appear to be a rather restrictive approach. In *IB v Information Commissioner* [2011] UKUT 370 (AAC) the Upper Tribunal (Administrative Appeals Chamber) (Judge Jacobs) considered whether, by the operation of section 25, it could exercise the power vested exclusively in the High Court by section 42 of the Senior Courts Act 1981, to permit a vexatious litigant to bring proceedings. The Tribunal held that it had no such power, and gave two reasons:

> "37. First, this provision [section 25] cannot override express statutory provisions that confer powers on the High Court. The Act made numerous amendments to other legislation and authorised the extensive amendments in the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (SI No 2683) and the Transfer of Tribunal Functions Order 2008 (SI No 2833). It is inconceivable that, in that context, this general provision could have the effect of overriding statutory provisions that are expressly limited to the High Court.
>
> 38. Second, the provision only applies to matters incidental to the Upper Tribunal's functions. I was not referred to any authorities on the meaning of 'incidental'. Ultimately words acquire their meaning from their context. The word is suggestive of something that is of subordinate or secondary importance. In section 25(2)(c), that indicates something that is subordinate or secondary to the functions of the Upper Tribunal. Adopting that approach, permission for a vexatious litigant is more than incidental. It is an essential prerequisite to the court or tribunal having jurisdiction in respect of that

person. So important a matter, especially one going to the tribunal's jurisdiction, is not appropriately described as incidental."

57. The Tribunal's reasons are persuasive but not binding and the context is important. A civil proceedings order made under section 42 of the Senior Courts Act is an order of the High Court that no civil proceedings may be instituted by the person named in the order without the express permission of the High Court. Such an order had been made against Mr B, who subsequently wished to appeal to the Upper Tribunal against a decision of the First-tier Tribunal striking out proceedings brought by Mr B against the Information Commissioner on the grounds that the permission of the High Court had not first been obtained. By making and upholding that decision, the tribunals were doing no more than giving effect to the High Court's order, and section 25 of the 2007 Act does not purport to confer any power on the Upper Tribunal to rewrite orders of the High Court. While I agree entirely with the result, I therefore find the first of the Tribunal's reasons puzzling. It was not the statutory provisions which Mr B sought to override, but the limitation in the High Court's order itself. The second reason is more accessible: the removal of a prohibition on the commencement of proceedings cannot be regarded as incidental to the Tribunal's functions, since until proceedings are commenced the Tribunal has no relevant function to perform at all.

58. In *Raftopoulou v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 630 (TCC) the Upper Tribunal (Tax and Chancery Chamber) (Judge Berner and Judge Raghavan) held that section 25 did not extend to the Tribunal the power to make *pro bono* costs orders which was conferred on a defined category of civil courts, including the High Court, by section 194 of the Legal Services Act 2007. It had been submitted that by enacting section 25 Parliament had avoided the need to legislate expressly to transfer each of the High Court's individual powers to the Upper Tribunal, but this submission was rejected by the Tribunal at [14]:

> "We have concluded that s 25 cannot have the effect which Mr Thomas submits it has. The power of the High Court to make an order for payment in respect of *pro bono* representation has its basis in statute, and is thus conditioned by statute. The power afforded to the High Court by s 194 LSA is therefore confined by the limitations inherent in s 194 itself, in particular the jurisdictional limitation which Parliament has seen fit to impose. Section 25 TCEA cannot be construed so as to permit an extension beyond those express jurisdictional boundaries."

59. Expressing itself to be in agreement with the approach taken by Judge Jacob in *IB* the Tribunal concluded at [16]:

> "In our judgment, the scope of the relevant power in this case is expressly delineated by s 194 LSA so as not to be capable of being exercised in any jurisdiction other than those within the meaning of "civil court" under s 194(10). As that expression is defined by reference to particular jurisdictions, and does not include the Upper Tribunal, that limits the exercise of any power under s 194. That jurisdictional limitation cannot be overridden by s 25."

Once again I find this reasoning puzzling. It suggests the existence of a principle that section 25 cannot be taken to confer on the Upper Tribunal any power which is conferred by express statutory

provision on the High Court, and by necessary implication withheld from all other courts and tribunals. Such a principle seems to me to be inconsistent with the language and purpose of section 25 itself which, in conferring on the Upper Tribunal "the same powers" as the High Court, introduces no such limitation. Parliament was obviously aware of the powers of the High Court, both those which are inherent, and those specifically conferred by statute. Section 25 therefore seems to me to be intended to be read literally and applied generally, and to invest the Upper Tribunal with the powers of the High Court in relation to all matters incidental to its functions; the critical limitation in section 25(2)(c) is supplied by the reference to the functions of the Tribunal, and does not depend on the source of the power or the terms in which it has been conferred on the High Court. Parliament could obviously make explicit an intention that the Upper Tribunal was not to possess a particular power, but where it has not done so, and where no express limitation has been imposed by tribunal procedure rules as contemplated by section 25(3)(b), the Upper Tribunal must be taken to have the same powers as the High Court in relation to all matters incidental to its functions.

60. In relation to other aspects of costs section 25 has been more freely applied. In *Blada Ltd (in liquidation) v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT B7 (TCC), section 25 of the 2007 Act was relied on by the Upper Tribunal (Tax and Chancery Chamber) (Judge Bishopp) as the basis for its decision that the Tribunal has jurisdiction to direct the provision of security for costs in an appeal relating to VAT (as the High Court had such a power), despite there being no express reference to security for costs in the Tribunal's procedure rules. Judge Bishopp's decision was followed in *GSM Export UK Ltd v Revenue and Customs Commissioners* [2014] UKUT 457 (TCC). In *R (Okundu) v Secretary of State for the Home Department* [2014] UKUT 00377 (IAC), Green J suggested that, in addition to the powers conferred by section 29 of the 2007 Act, the Upper Tribunal had a parallel power to make orders for wasted costs which derived from section 25 and placed it in the same position as the High Court.

61. I am aware of no decision of the Upper Tribunal dealing with the issue of substitution of a party after the expiry of a limitation period. Mr Glover relied on *Raftopoulou* in support of the submission that the scope of section 25 was limited and could not be taken to confer on the Upper Tribunal any power conferred by statute expressly on the High Court. I do not accept that submission for the reasons given in paragraph 59 above.

62. The functions of the Tribunal obviously include the resolution of disputed compensation. The management of references for the determination of such compensation, including the procedure for the joinder of the correct parties, seem to me to be matters incidental to that function, and Mr Glover did not submit the contrary.

63. I am therefore satisfied that amongst the "powers akin to those of the High Court" referred to by Sedley LJ in *Cart*, and which are vested in the Upper Tribunal by section 25, is the power conferred on the High Court by section 35(3)-(4) of the Limitation Act 1980 to allow, in accordance with the relevant rules of court, a new claim to be made by the substitution of a new party after the limitation period provided the conditions in section 35(5) are satisfied. I therefore determine the second issue in the claimant's favour.

Issue 3: Should permission to substitute TfL be granted in this case?

23. In the High Court an application to substitute a new party after the limitation period has expired is determined in accordance with CPR r.19.5, which gives effect to section 35(4) of the Limitation Act 1980. It provides:

> "(1) This rule applies to a change of parties after the end of a period of limitation under
>
> (a) the Limitation Act 1980;
>
> ...
>
> (2) The court may add or substitute a party only if—
>
> (a) the relevant limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that—
>
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party; [or]
>
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant;
>
> ..."

64. Both parties approached the application on the assumption that, if the Tribunal had power to order substitution after the expiry of the limitation period, it should adopt the same approach as CPR r.19.5 to the exercise of the power. That seems to me to be correct for three reasons: first, CPR r.19.5 effectively replicates the statutory limitations which, as a minimum, apply to the making of such orders; secondly, the source of the Tribunal's power is the High Court's power, imported by section 25 of the 2007 Act, hence it is appropriate to apply the same test; and finally, the Tribunal's own procedure rules contain no explicit power and therefore do not require a more restrictive approach to be taken.

65. Mr Corner submitted that substitution was "necessary" for two reasons: first, the mistake in naming Crossrail Ltd as respondent was a mistake as to the name of the appropriate party falling within CPR r. 19.5(3)(a); alternatively the claim could not properly be carried on unless TfL was substituted for Crossrail Ltd, so CPR r. 19.5(3)(b) could also be said to be satisfied. Mr Glover disputed that either limb of the test was applicable on the facts.

66. The case law on what type of mistake falls within CPR r.19.5(3)(a) was reviewed by the Court of Appeal in *Adelson v Associated Newspapers Ltd* [2008] 1 WLR 585 and more recently by Leggatt J in *Insight Group Ltd & Anor v Kingston Smith (a firm)* [2012] EWHC 3644 (QB). In

order to fall within CPR r.19.5(3)(a), the mistake must be as to the name of the party rather than as to the identity of the party. It no longer matters that the mistake may have been misleading or have been such as to cause reasonable doubt as to the identity of the person intended to be sued (as had formerly been the case under RSC Ord 20, r 5(3)). It must however be possible to identify the intended defendant by reference to a description material to the type of case and "more or less specific to the particular case". The description relevant in this reference is that of the authority which, in the exercise of statutory powers, acquired the claimant's interest in the Premises and took possession of them.

67. The subjective evidence of the claimant's solicitor, which was not challenged by TfL, was that he had intended on behalf of the claimant to assert an entitlement to compensation for disturbance against the acquiring authority, but had mistakenly named Crossrail Ltd. The statutory basis of the claim as a claim for disturbance compensation is apparent from the notice of reference itself. Objectively the nature of the mistake is clear from the case summary which accompanied it: Crossrail Ltd is named as Acquiring Authority in the title to the document and there are then attributed to the Acquiring Authority those steps in fact taken by TfL in exercising powers under the 2008 Act and entering the Premises; the losses then referred to are in the nature of disturbance and had previously been the subject of negotiation and advance payment by TfL.

68. It was accepted by Mr Glover that it would have been obvious to an informed recipient of the notice of reference that a mistake of some sort had been made, but he suggested that the true nature of that mistake was obscure, and that it may have been the intention of the claimant to assert a claim of some different nature against Crossrail Ltd. I am satisfied that any reasonable recipient of the notice of reference and the case summary with knowledge of the claims previously asserted by Gerald Eve LLP on behalf of the claimant, and of the advance payment already made, would have understood the nature of the mistake in this case.

69. I am satisfied that the mistake made by the claimant was as to the name of the acquiring authority and would fall within CPR r. 19.5(3)(a) if these proceedings had been commenced in the High Court.

70. In paragraph 96 of *Insight Group* Leggatt J explained that the effect of the authorities which he had reviewed was that the power to order substitution under section 35(6)(b) and CPR r.19.5(3)(b) could be exercised if: (1) a claim made in the original action is not sustainable by or against the existing party; and (2) it is the same claim which will be carried on by or against the new party. The claimant's claim for disturbance compensation has been brought against a party which is not liable to pay such compensation and the claim will inevitably fail; the same claim is proposed to be conducted against TfL, which has previously acknowledged its liability in principle by making an advance payment. I am therefore satisfied that this application would also fall within CPR r. 19.5(3)(b) if these proceedings had been commenced in the High Court.

71. The making of an order for substitution is discretionary. The only prejudice which will be suffered by TfL if substitution is ordered is the loss of the right to defeat the claim against it by relying on the defence of limitation. That is obviously a significant prejudice, but it is a type of

prejudice which will always arise when such an order is made and cannot, by itself, be a sufficient reason to refuse to make the order. The application was brought promptly and there is no suggestion that TfL will be any less able to contest the reference than it would have been if it had originally been named as the respondent. It is already well informed as to the nature of the claim and was sufficiently satisfied of the claimant's entitlement to enable it to make an advance payment in July 2011. I am therefore satisfied that, apart from the loss of the limitation defence, TfL will suffer no other prejudice if it is substituted.

72. Mr Glover submitted that overriding considerations of fairness and justice militate against the claimant's application. Apart from the loss of the limitation defence this submission was supported by observations on the enormity of the mistake made by the claimant's solicitors, the sources of knowledge available to the solicitors which ought to have enabled them to avoid the mistake, and the absence of any good reason why the mistake should be excused. Individually or collectively those factors do not seem to me to be sufficient to make it fair or just for TfL to benefit from a windfall and for the public purse to avoid compensating the claimant fully for such losses as it was required, for the public benefit, to sustain in order that the Crossrail project could proceed.

73. I therefore direct that TfL be substituted for Crossrail Ltd as respondent to this reference.

Martin Rodger QC
Deputy President
17 June 2016