IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 405 (LC)
Case No: ACQ/21/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PROCEDURE – whether knowledge of a general vesting declaration to be imputed to corporate recipient while notice remains unopened - whether regard to be had to prospect of statutory continuation under Landlord and Tenant Act 1954 in determining whether tenancy a "long tenancy which is about to expire" – whether late counter-notice effective – consequence of acquiring authority referring counter-notice to Tribunal – para.5, Sch.2A, Compulsory Purchase Act 1965 - para.3, Sch.A1, Compulsory Purchase (Vesting Declarations) Act 1981 - reference dismissed

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

ANIXTER LIMITED

Claimant

- and -

SECRETARY OF STATE FOR TRANSPORT **Respondent**

Re: Unit R and other premises at Saltley Business Park,
Washwood Heath,
Birmingham B8

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice
on
27-28 November 2018

Charles Banner, instructed by Bryan Cave Leighton Paisner, for the claimant
Richard Honey, instructed by Eversheds Sutherland, for the respondent

The following cases are referred to in this decision:

Adesina v Nursing and Midwifery Council [2013] 1 WLR 3156

Bolton Engineering Co. v T.J. Graham & Sons [1957] 1 QB 159

Charles v Judicial and Legal Services Commission [2002] UKPC 34

Gloucestershire CC v Keyway [2003] EWHC 3012 (Admin)

Harrison v GMC [2011] EWHC 1741 (Admin)

Mitchell v The Nursing and Midwifery Council [2009] EWHC 1045 (Admin)

Mucelli v Government of Albania [2009] UKHL 2

Natt v Osman [2015] 1 WLR 1536

Overseas Plastic v GLA [2016] UKUT 113 (LC)

Pomiechowski v District Court of Legnica, Poland [2012] 1 WLR 1604

R v. Secretary of State for the Home Department ex p. Jeyeanthan [2000] 1 WLR 354

Tadema Holdings Ltd v Ferguson (2000) 32 HLR 866

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Introduction

1. The Saltley Business Park at Washwood Heath in Birmingham lies directly in the path of the proposed route of the HS2 railway. Until earlier this year the claimant, Anixter Ltd, occupied four buildings on the Park in connection with its business as a distributor of communications and security products. The site of one of those buildings, Unit R, is required in connection with the new railway.

2. The Secretary of State for Transport is the acquiring authority for the HS2 scheme. The respondent, High Speed Two (HS2) Limited ("HS2"), is the nominated undertaker for the scheme and is authorised to serve statutory notices relating to the compulsory acquisition of land for the scheme on behalf of the Secretary of State.

3. On 8 December 2017 notice to treat was served on Anixter by HS2 under section 5 of the Compulsory Purchase Act 1965. The notice informed the company of HS2's intention to acquire Unit R, but not its other buildings at Saltley Park. At the same time, and as a precautionary measure, notice was also given under section 6 of the Compulsory Purchase (Vesting Declarations) Act 1981 of the making of a general vesting declaration (GVD) including Unit R.

4. The notices were received at the claimant's registered office on 12 December 2017.

5. On 10 January 2018 Anixter responded to the notices by serving counter-notices requiring the Secretary of State to acquire not only Unit R but its remaining premises as well. Anixter's counter-notices arrived the following day, which was three days later than the period of 28 days allowed by paragraph 5 of Schedule 2A to the 1965 Act for the giving of a counter-notice to the notice to treat. The counter-notice to the GVD also arrived on 11 January; whether it was applicable at all to Unit R, and if it was, whether it was served in time, are both in dispute.

6. Both counter-notices were referred to the Tribunal by HS2, expressly without prejudice to its contention that they were ineffective because they had been served too late.

7. The issue in the reference is whether Anixter is entitled to insist on the acquisition of its remaining premises at Saltley Park, but at this stage the Tribunal has been asked to determine as preliminary issues whether the failure to serve counter-notices by 9 January 2018 is fatal to that claim.

8. At the hearing of the preliminary issues both parties were represented by counsel, Anixter by Charles Banner and the Secretary of State by Richard Honey. I am grateful to them both for their assistance.

The statutory time limits

9. The applicable compulsory purchase power is contained in section 4(1) of the High Speed Rail (London – West Midlands) Act 2017. By section 4(3) of the Act, Part 1 of the Compulsory Purchase Act 1965 ("the 1965 Act"), as amended by the Housing and Planning Act 2016, applies to a compulsory purchase under section 4(1). By section 4(4), the Compulsory Purchase (Vesting Declarations) Act 1981 ("the 1981 Act") also applies, and provides an expedited and simplified procedure which may be adopted as an alternative to the procedures under the 1965 Act.

10. Where an acquiring authority seeks to acquire only part of a person's land, the land owner is entitled in certain circumstances to insist that the acquiring authority acquire the whole of the land and pay compensation on that basis. Where the exercise of the compulsory purchase power is pursuant to a notice to treat Schedule 2A of the 1965 Act applies. Where the authority proceeds by means of a general vesting declaration the relevant provisions are found in Schedule A1 of the 1981 Act.

11. I will come to some relevant details of the statutory scheme later, but in broad outline, an owner's right to require that all of its land be acquired is asserted by serving a counter-notice to the notice to treat or notice of general vesting declaration served by the authority. Where the former procedure has been adopted paragraphs 4 and 5 of Part 1 of Schedule 2A to the 1965 Act provide, so far as relevant:

> "4. A person who is able to sell the whole of the land ("the owner") may serve a counter-notice requiring the acquiring authority to purchase the owner's interest in the whole of the land.
>
> 5. A counter-notice under this Part must be served within —
>
> (a) the period of 28 days beginning with the day on which the notice to treat was served…"

12. An acquiring authority has a choice when it receives such a counternotice: it may withdraw its own notice and abandon the compulsory purchase; it may accept the counter-notice, thereby committing itself to purchasing the whole of the land; or it may refer the counter-notice to the Upper Tribunal to enable any dispute to be resolved (para.7, Pt.1, Sch.2A, 1965 Act). The authority must serve notice of its decision on the owner within the period of 3 months beginning with the day on which the counter-notice is served (a period referred to as "the decision period") (para.8). If the authority decides to refer the counter-notice to the Tribunal it must do so within the decision period (para.9).

13. Where the GVD procedure under the 1981 Act is used the relevant time limit is different. A counter-notice "must be served before the end of the period of 28 days beginning with the day the owner first had knowledge of the general vesting declaration" (para. 3, Pt 1, Sch.A1, 1981 Act). The consequence is the same in that the authority must make one of three

choices referred to above (para.6(1), Sch.A1, 1981 Act), but the authority may not decide to withdraw from the acquisition if the counter-notice was served on or after the original vesting date (para.6(2)).

Service of the counter-notices

14. The parties agreed a statement of agreed facts which confirms that the counter-notices were sent by HS2 on 8 December 2017 using both post and recorded delivery to the claimant's registered and head office, addressed to the secretary of the company, and were delivered to and received at that office on 12 December 2017.

15. Service was therefore effected on 12 December 2017 by actual delivery of the notices. It is not necessary to consider the date on which service would be deemed to have occurred by section 7, Interpretation Act 1978 (although that date is also likely to have been 12 December). The period of 28 days from the date of service accordingly expired on 9 January 2018. The counter-notice responding to the notice to treat was sent on 10 January 2018, and received on 11 January 2018. It was accordingly out of time.

16. Whether the counter-notice responding to the notice of the GVD was also out of time depends on when the claimant "first had knowledge of the general vesting declaration". It is not suggested that the claimant had notice of the making of the GVD by any means other than the notice given under section 6 of the 1981 Act.

17. The notices sent by HS2 on 8 December 2017 were addressed to the Claimant's "Company Secretary". The Claimant does not have a company secretary, and as a private company it is not required to have one (section 270(1), Companies Act 2006). In the case of a private company without a secretary, a communication addressed to the secretary is treated as addressed to the company (section 270(3), Companies Act 2006).

18. As HS2 was aware, the person who dealt with real estate matters on behalf of the claimant, including dealing with HS2, was Mr Brookes. HS2 was also aware that the claimant had instructed a professional team in connection with the anticipated compulsory acquisition (which had been in prospect since at least September 2017) comprising solicitors Berwin Leighton Paisner LLP, and Chartered Surveyors Jones Lang LaSalle. HS2 did not, however, send or copy the notice of making of the GVD to Mr Brookes, or either of the claimant's professional advisers, nor did it notify them that the documents had been addressed to the company secretary. It is not suggested that these omissions had any effect on the date of service of the notices.

19. The envelope containing notice of the GVD was delivered and signed for by a member of the claimant's post room staff. Mr Brookes was away on business at the time. The envelope stated on the outside that it was from HS2's Land & Property Team and warned that "this letter affects your property". Because the letter was not addressed to Mr Brookes by name it was not scanned and emailed to him by the post room staff, as the claimant's

procedures would otherwise have required. Because the claimant does not have a company secretary the letter was not immediately delivered to any individual, nor was it given to the claimant's facilities manager (as its procedures ordinarily required) because that post was temporarily vacant and being covered by Mr Brookes. Instead the envelope was left un-opened on Mr Brookes' desk to await his return, and although he telephoned his office daily during his absence he was not alerted to its arrival.

20. Mr Brookes did not open the envelope containing the notice of the making of the GVD until his return to the office on 20 December 2017. On the evidence that was the first time that anyone within the claimant's organisation was aware of the GVD.

When did the claimant first have knowledge of the making of the GVD?

21. Although he accepted that Mr Brookes had not opened the envelope until 20 December, Mr Honey invited me to find that the claimant nevertheless had constructive knowledge of the making of the GVD on 12 December when the notice was served on it. He suggested that it should not be open to a corporate recipient of a formal notice to deny knowledge of its contents on the basis that it had simply failed to open the envelope containing the communication.

22. There is nothing in the 1981 Act about deemed or constructive knowledge of the making of a general vesting declaration. In particular, paragraph 3 of Schedule A1 of the 1981 Act does not start time running when the owner "knew or ought to have known" of the declaration, but only when the owner "first had knowledge". Mr Honey therefore supported his argument by reliance on judicial statements made in different contexts.

23. He first referred to *Gloucestershire CC v Keyway* [2003] EWHC 3012 (Admin), a decision of Sullivan J concerning a prosecution for contravening a stop notice served under section 183 of the Town and Country Planning Act 1990. A copy of the stop notice had been left at the registered office of the company carrying on the prohibited activity, but it was suggested on behalf of the company that that was not enough to constitute "service". Because a breach of a stop notice is a criminal offence it was submitted that a corporate body should have its attention specifically drawn to the existence of the notice before it should be treated as having been served. That submission was rejected at paragraph 26, where it was said that there was no reason to adopt a "strained and unnatural interpretation" of the service provision (section 233). Since the legislation "enables documents to be served on corporate bodies by sending them through the post, it is to be expected that companies will make the necessary administrative arrangements to ensure that the right persons within the company hierarchy see important documents". Moreover, "any company worth its salt will make arrangements to ensure that documents left at its registered office will be dealt with administratively in such a way as to ensure that they reach the correct recipient within the company" (para 27).

24. *Keyway* was about the requirement of service of a document, rather than about knowledge of its contents, and for that reason it is not in point. It is not authority for the

proposition that, in the absence of appropriate statutory language, a company must be taken to have knowledge of any document which has been served on it.

25. Nor did I find a decision of this Tribunal on which Mr Honey relied of assistance. In *Overseas Plastic v GLA* [2016] UKUT 113 (LC) HHJ Behrens said, at paragraph 35, that "when a company receives a letter at its registered office it can reasonably be expected that it knows of the content of that letter". But the statutory provision in question (section 10(3) of the 1981 Act) specifically provides that the limitation period for making a reference to the Tribunal is to run from the date on which the person claiming compensation "first knew or could reasonably be expected to have known" of the vesting of the relevant interest. No such language is found in paragraph 3 of Schedule A1 of the 1981 Act, which is concerned only with the date on which the claimant "first had knowledge" of the GVD.

26. I do not accept Mr Honey's submission that a person cannot be served with a document, in fact and in law, and still not have knowledge of it. There is a clear distinction between knowledge and the concept of service. Knowledge is irrelevant to service, as Peter Gibson LJ explained in *Tadema Holdings Ltd v Ferguson* (2000) 32 HLR 866 at page 873:

> ""Serve" is an ordinary English word connoting the delivery of a document to a particular person. It does not seem to me to imply that the document has to be understood by the person to whom it is delivered. It does not have to be read by the person to whom it is delivered. Indeed, it may not even be known to have been delivered to that person if it is delivered to the proper address for service."

27. If Parliament had intended that a reasonable opportunity to acquire knowledge of the declaration should be sufficient to start time running for the service of a counter-notice it would have used language similar to that used in section 10(3), 1981 Act, which the Tribunal considered in *Overseas Plastic*. In the absence of any provision for deemed or constructive knowledge I am satisfied that paragraph 3 should be given its natural meaning, and that on the evidence in this case the claimant first had knowledge of the GVD on 20 December 2017.

Which procedure applies in this reference?

28. When it served the notice to treat HS2 explained that, on the basis of the facts known to it about the claimant's interest in Unit R, it considered the procedure under the 1965 Act was the correct means by which the right of compulsory purchase could be exercised; additionally, in case the claimant's interest had been incorrectly identified it gave notice of the making of the general vesting declaration under the 1981 Act. Two counter-notices were subsequently served in response and both have been referred to the Tribunal.

29. Since I have found that the counter-notice in response to the notice to treat under the 1965 Act was out of time, but that the counter-notice to the notice of making of the GVD was in time under the different provisions of the 1981 Act, it is necessary to determine which is the operative procedure.

30. The starting point is to consider whether the 1981 Act procedure can apply to the claimant's interest in Unit R. That procedure entails the authority giving notice under section 6 of the 1981 Act to every occupier of any land specified in the declaration "apart from land in which there subsists a minor tenancy or a long tenancy which is about to expire". Under section 7 of the 1981 Act a constructive notice to treat is deemed to have been served on every person on whom such a notice could in fact have been served, "other than any person entitled to a minor tenancy or a long tenancy which is about to expire". It follows that the 1981 Act procedure is inapplicable where the interest in question is a minor tenancy or a long tenancy which is about to expire. These are commonly known as "excluded" or "excepted" tenancies, as they are excluded and excepted from the GVD process, notwithstanding that the freehold land in which the tenancy subsists has been included in the GVD.

31. By section 2(1), 1981 Act, a "minor tenancy" is a tenancy for a year, or from year to year or any lesser interest; it is not suggested that the claimant's interest was a minor tenancy.

32. The meaning of "a long tenancy which is about to expire" is provided by section 2(2), as follows:

> "In this Act "long tenancy which is about to expire", in relation to a general vesting declaration, means a tenancy granted for an interest greater than a minor tenancy, but having on the vesting date a period still to run which is not more than the specified period (that is to say, such period, longer than one year, as may for the purposes of this definition be specified in the declaration in relation to the land in which the tenancy subsists).
>
> In determining for the purposes of this subsection what period a tenancy still has to run on the vesting date it shall be assumed—
>
> > (a) that the tenant will exercise any option to renew the tenancy, and will not exercise any option to terminate the tenancy, then or thereafter available to him,
> >
> > (b) that the landlord will exercise any option to terminate the tenancy then or thereafter available to him."

33. The period specified for the purpose of section 2(2) in the general vesting declaration made on 8 December 2017 was one year and one day. The vesting date was 13 March 2018.

34. The claimant's interest in Unit R was under a lease granted on 20 May 2013 for a term expiring on 24 December 2018 (referred to in the lease as the "Contractual Term"). At the vesting date provided for by the general vesting declaration the lease therefore had a period of a little over nine months still to run. That period was less than the specified period of one year and one day. Mr Banner nevertheless argued that the lease was not a long tenancy which was about to expire.

35. Mr Banner's submission was based on the fact that the lease created a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applied. As is well known, the 1954 Act confers statutory security of tenure on business tenants. Section 24 provides that a tenancy to which Part 2 applies shall not come to an end unless terminated in accordance with the provisions of the Act. The tenant under such a tenancy may apply to the court for the grant of a new tenancy, and pending the determination of that claim the tenancy is continued by the operation of section 64.

36. Mr Banner argued that it was necessary to assume, for the purpose of section 2(2) of the 1981 Act, that a tenancy to which the 1954 Act applied would be continued under the statutory procedures. That was said to be in accordance with the direction to assume, when ascertaining what period a tenancy still has to run on the vesting date, that "the tenant will exercise any option to renew the tenancy, and will not exercise any option to terminate the tenancy, then or thereafter available to him."

37. Mr Banner sought additional support for his submission in the definition of the word "Term" in clause 1.1 of the lease. This provided that:

> "Term" means, except in clause LR6, the Contractual Term together with the period of any holding over or any continuation of it whether by statute or common law."

This, Mr Banner suggested, meant that the remaining term of the lease should be aggregated with the period of any continuation when considering what period the tenancy still had to run.

38. I do not accept these submissions, for at least four reasons.

39. First, because Mr Banner's construction requires a period of statutory continuation under the 1954 Act to be treated as the exercise by the tenant of an "option" to renew the tenancy, as referred to in section 2(2) of the 1981 Act. Mr Banner suggested that an "option" simply meant a legal right, or the right to take a course of action. That is certainly a potential meaning of the word, which bears different meanings in different contexts. Where it is used in a statute concerned with the acquisition of land, and in a section dealing with the duration of tenancies, it seems to me more likely that it is intended to bear its more technical legal meaning. The authors of *Barnsley's Land Options* (5th ed.) (2009) provide a good working definition at paragraph 1-002 of their work: "Put simply, an option is a right to execute or relinquish a transaction on fixed terms within a prescribed period. It is usually acquired by contract." I do not consider that a statutory right of continuation or renewal falls naturally within the usual meaning of the word "option" in a property statute; in this context an option is a contractual right of renewal or termination.

40. Secondly, the option which must be taken to be exercised for the purpose of section 2(2) is an option "to renew" the tenancy. The exercise of a statutory right to remain in occupation while a tenancy is continued has nothing to do with the renewal of the tenancy. Under section 24 of the 1954 Act the existing tenancy is continued with a statutory variation

as to the mode of termination (*Bolton Engineering Co. v T.J. Graham & Sons* [1957] 1 QB 159, 168, *per* Denning LJ).

41. Thirdly, section 2(2) refers to a tenancy "granted" for an interest greater than a minor tenancy, but having on the vesting date a period still to run which is not more than the specified period. The focus of the language is on what was granted i.e. on the contractual term and, implicitly, on the period of that contractual term which is still to run. The definition would be impossible to apply if it was necessary to assume that the expiry of the contractual term would be followed by some indeterminate period of statutory continuation.

42. Fourthly, Mr Banner's construction would largely exclude the application of section 2(2) to tenancies of premises occupied for the purpose of a business. Any tenancy for a year, or from year to year or any lesser interest, which would otherwise be a minor tenancy, and any tenancy approaching its contractual term date, would fall to be treated as liable to be continued for some indefinite period by the 1954 Act. The sole exception would be a tenancy for a term of years certain which was subject to an agreement under section 38A excluding the provisions of Part 2 of the 1954 Act. The draftsman of the 1981 Act was certainly aware of the 1954 Act, having referred to it in section 2(1) which provides that "tenancy" has the same meaning as in the 1954 Act. That meaning is contained in section 69(1) and extends to any tenancy created either immediately or derivatively out of the freehold, by agreement "or in pursuance of any enactment (including this Act)". If it was intended that a potential period of statutory continuation under the 1954 Act ought to be assumed for the purpose of section 2(2) it is surprising that some express reference to the Act, or to continuation in pursuance of an enactment, was not made. The omission of such a reference clearly suggests that no such assumption was intended.

43. I do not consider that the extended definition of "Term" in clause 1.1 of the lease assists Mr Banner's argument. The reference cannot affect the meaning of the 1981 Act and does not in any event have the effect of lengthening the contractual term. Its purpose is to make clear that rights expressed to be enjoyed during the term and obligations to be performed at the end of the term (such as the covenant to yield up in repair "before the end of the Term" at clause 3.9) apply during and at the end of any period of statutory continuation.

44. I am therefore satisfied that the claimant's tenancy of Unit R was a long tenancy which was about to expire, and that the notice of making of the general vesting declaration under the 1981 Act had no application to it. The operative statutory regime is the 1965 Act, and the time limit for service of a counter-notice to HS2's notice to treat was the period of 28 days beginning with the day on which the notice to treat was served.

Does the 1965 Act allow the Tribunal to entertain a counter-notice served later than 28 days beginning with the day on which the notice to treat was served?

45. Mr Banner submitted that the answer to this question was yes. He made four preliminary submissions.

46. First, he noted that the legislative provisions say nothing about the consequences of failing to serve a counter-notice within the 28 day period. That is true both of Part 1 of Schedule 2A, which deals with the right to serve a counter-notice, and of Part 3, which makes specific provision for the Tribunal's role in relation to counter-notices.

47. Secondly, the absence of any statement of the consequence of not serving a counter-notice in time was to be contrasted with statutory time limits for challenges under the Planning Acts where the legislation expressly precludes a court from entertaining applications brought other than within the prescribed timescale. Mr Banner referred to section 118(1) of the Planning Act 2008 which provides that "A court may entertain proceedings for an order granting development consent only if … [the claim is brought within the prescribed time limit]"). There was no such jurisdictional language in Schedule 2A to the 1981 Act.

48. Thirdly, the use of mandatory language in paragraph 5 ("a counter-notice must be served within the period of 28 days") was not determinative. In *R v. Secretary of State for the Home Department ex p. Jeyeanthan* [2000] 1 WLR 354, the Court of Appeal held that to categorise statutory procedural requirements as either 'mandatory' (which must be complied with strictly) or 'directory' (which may safely be ignored) was of limited assistance. Instead the critical question was what the legislation provided as to the consequences of non-compliance with those requirements.

49. Fourthly, Mr Banner suggested that because the legislation was silent on the consequences of a counter-notice being served late, it was necessary for HS2 to persuade the Tribunal that it was implicit in the statutory scheme that the Tribunal has no jurisdiction to entertain a counter-notice served outside the 28 day period, no matter how compelling the extenuating circumstances. In the context of compulsory acquisition of land by the state, the Tribunal should be slow to imply such a "draconian sanction" for non-compliance. Had Parliament intended to exclude the Tribunal's jurisdiction altogether in relation to a counter-notice served after the end of the 28 day period, no matter how compelling the extenuating circumstances, it could and would have used the kind of jurisdictional language used in s.118(1) of the Planning Act 2008.

50. Building on these submissions Mr Banner suggested that there were at least two alternative approaches pursuant to which the statutory scheme could operate successfully without an implication to the effect that the Tribunal has no jurisdiction to entertain a counter-notice served outside the 28 day period.

51. Mr Banner's preferred approach was to treat the Tribunal's jurisdiction as being triggered irrevocably by the acquiring authority's reference to it of a counter-notice under

paragraph 9 of Schedule 2A of the 1965 Act, irrespective of any failure to give the counter-notice within the permitted 28 days. Such an interpretation would, he suggested, be faithful to Part 3 of Schedule 2A, which begins with the statement in paragraph 24 that "this Part applies where, in accordance with paragraph 9 or 21, the acquiring authority refer a counter-notice to the Upper Tribunal". It would also accord with paragraph 26(1) which provides that "the Upper Tribunal must determine whether" the severance of the land proposed to be acquired would cause material detriment. The Tribunal had no power to refuse to make such a determination when a counter-notice was referred to it.

52. Mr Banner argued that where an acquiring authority received a counter-notice out of time it could either refer the counter-notice to the Tribunal, thereby conferring jurisdiction on the Tribunal or it could refuse to do so on the basis that it was out of time. Since such a decision involved the exercise or non-exercise of a public function it would be amenable to judicial review on public law grounds. An authority could not reserve to itself the right to refer a counter-notice to the Tribunal and then dispute the validity of the counter-notice.

53. Mr Banner's alternative approach was to suggest that there should be implied into the statutory scheme a discretion on the part of the Tribunal to entertain a counter-notice served out of time if in all the circumstances it would be in the interests of justice to do so.

54. Once again I do not accept Mr Banner's submission.

55. At least since the decision of the Court of Appeal in *ex p. Jeyeanthan* the former approach of classifying statutory procedural requirements as either "mandatory" or "directory" has fallen out of favour. As Etherton C observed in *Natt v Osman* [2015] 1 WLR 1536 at [25]:

> "That approach is now regarded as unsatisfactory since the characterisation of the statutory provisions as either mandatory or directory really does no more than state a conclusion as to the consequence of non-compliance rather than assist in determining what consequence the legislature intended. The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole."

56. I agree with Mr Banner's submission that the use of imperative language in paragraph 5 ("must") is not determinative of the consequence Parliament intended if the time limit was not observed, but nor is it irrelevant. I do not accept that the absence of a clear stipulation in the 1981 Act that failure to comply with the 28 day time limit will deprive a counter-notice of all effect creates a presumption that Parliament had the contrary intention. The interpretation of the statute should be approached by considering the language used, the purpose of the time limit and the consequences for the operation of the statutory scheme of adopting a stricter or

more relaxed approach to compliance. The outcome does not depend on a presumption, any more than it depends on the particular circumstances of the actual parties to a particular reference.

57. If anything, in the face of a clear and unqualified statutory time limit, there would seem to be no basis upon which it could be extended. That was the starting point taken by Lord Neuberger in *Mucelli v Government of Albania* [2009] UKHL 2, at [74]-[75]. The relevant issue in *Mucelli* was whether a notice of appeal filed after the end of the period of 7 days permitted section 26(4) of the Extradition Act 2003 could be made valid by the court extending the time allowed for giving notice of appeal. The House of Lords held that in the absence of some statutory power it did not. The same approach has been followed in other contexts, for example, in *Mitchell v The Nursing and Midwifery Council* [2009] EWHC 1045 (Admin) and *Harrison v GMC* [2011] EWHC 1741 (Admin).

58. I asked Mr Banner if he could identify circumstances in which a more flexible or forgiving approach had been taken to a failure to comply with a procedural requirement involving a time limit. He referred me to a decision of the Privy Council, *Charles v Judicial and Legal Services Commission* [2002] UKPC 34 which concerned a failure by an investigating officer to observe a 21 day time limit for reporting information to a decision maker who would then decide whether to lay disciplinary charges under regulations dealing with discipline in the public service in Trinidad and Tobago. The Privy Council approached the question whether non-compliance with the time limit by two months should lead to a failure of the whole proceedings by seeking to considering the role of the regulation in the overall regulatory scheme, the purpose of the time provision, and forming a judgment whether the intention of the rules was that a breach of the time limit would deprive the decision maker of jurisdiction. In other words, *Charles* is an example of the "modern approach" described by Etherton C in *Natt v Osman.*

59. It is necessary to apply that approach to paragraph 5 of Schedule 2A to the 1965 Act. As aids to interpretation, the fact that the time limit is a relatively generous period of 28 days, and that the procedural step is a simple one (the counter-notice need do no more than require the authority to purchase the owner's interest in the whole of the land), as well as the absence of any power to dispense with the time limit, all seem to me to point clearly to an intention that the time limit be inflexible.

60. On receiving a counter-notice the authority is required by paragraph 7 of Schedule 2A to make one of the three choices referred to in paragraph 12 above, namely to abandon the compulsory purchase, to agree to acquire the whole of the land, or to refer the counter-notice to the Tribunal. They must serve notice of their decision within the three month decision period allowed by paragraph 8. If their decision is to refer the counter-notice to the Tribunal, they must make the reference within the same three months (para.9). The consequence of a failure to serve notice of its decision within the permitted time is spelled out by paragraph 10: the authority is treated as if they had served notice of a decision to withdraw the notice to treat.

61. It is notable that the consequence of a failure to give notice of the authority's decision is stipulated, but the consequence of a failure by the land owner to give a counter-notice is not. It might be suggested that the difference in treatment is significant and implies the possibility of a more flexible approach to the consequences of late service of a counter-notice. I bear that possibility in mind, but the contrast may equally be explained by the need for a default choice between the three options open to the authority with their different practical consequences. The recipient of the notice to treat has only one decision to make, whether or not to serve a counter-notice, and there will always be clarity about that decision when the permitted time for service expires.

62. The fact that the receipt of the counter-notice compels the acquiring authority to make a choice which it would not otherwise have to make, and to do so within a limited period of time, is to my mind a further factor suggesting that the time limit is intended to be inflexible. It is also significant, as Mr Honey submitted, that the giver of a counter-notice has no independent right to refer it to the Tribunal, but must wait for that course to be taken by the acquiring authority. If it had been intended that a late counter-notice could be referred to the Tribunal in order that it could consider granting relief against non-compliance with the time limit, it might have been expected that the power to make the reference would have been given to the land owner. Instead, Mr Banner submitted, the owner's only remedy would be to seek judicial review of a refusal on the part of the acquiring authority to accept the validity of the counter-notice notwithstanding its lateness. That would be a cumbersome and inconvenient procedure.

63. Looking more broadly at the purpose of the time limit points to the same conclusion. Time limits in statutory procedures make an important contribution to the achievement of certainty for all parties. In the context of the 1981 Act, if compliance with the time limit is regarded as essential, the acquiring authority will know by the end of the period of 28 days whether it may proceed with its acquisition of part only of the land of the recipient of the notice to treat, or whether it must within three months make one of the three choices open to it, namely to abandon the compulsory purchase, to agree to acquire the whole of the land, or to refer the counter-notice to the Tribunal. Those choices are significant, and may have very different practical and financial consequences, some of which were alluded to in the evidence filed by HS2.

64. On the same premise, if no counter-notice is served, the land owner will know with certainty whether it will be left with the remainder of its land after the date of entry. That may also have important practical consequences for the way in which a business owner organises its affairs.

65. These are important features of the scheme as a whole. The consequence of accepting Mr Banner's submissions would be that an authority could not plan its works, or make reliable estimates of its liability for compensation, at the end of the period of 28 days without the risk at some later time of being required to face the consequences of receiving a counter-notice. Mr Banner suggested that a substantial scheme of public works would face all sorts of risks and that an authority like HS2 is well able to plan for such contingencies, but that does not seem to me to diminish the importance of achieving certainty for both parties.

66. Mr Banner referred to the consequences of a failure to serve a counter-notice within the permitted time as "draconian", but it is important not to mistake what those consequences are. A land owner who fails to give a counter-notice foregoes the opportunity to insist that the authority acquires the whole of its land, provided the statutory conditions are met. Service of a counter-notice is not a qualifying requirement for a claim for compensation. Compensation remains available not only for the value of the land taken, under rule 2 in section 5, Land Compensation Act 1961, but also for disturbance under rule 6 and under section 7, 1965 Act. Under section 7 compensation is payable where land belonging to the claimant which has not been taken by the authority has nevertheless been depreciated in value by severance or injurious affection as a result of the compulsory acquisition of other land held with it. In an appropriate case if, as a result of the compulsory acquisition of part of its land, the claimant is unable reasonably to continue in business from the reduced site compensation will in principle be available for the total extinguishment of that business.

67. The consequences of a failure to give a counter-notice are therefore mitigated by the right to compensation. They are not sufficiently serious to require that paragraph 5 of Schedule 2A be treated as being subject to an implicit power on the part of the Tribunal to dispense with the time limit.

68. I do not agree with Mr Banner's submission that once a document purporting to be a counter-notice has been referred to the Tribunal by an acquiring authority neither the authority nor the Tribunal may then question the validity of the counter-notice. As a matter of interpretation, the references in Part 3 of Schedule 2A to "a counter-notice" mean a counter-notice served in accordance with the requirements of Parts 1 or 2. In other words, a valid or regular counter-notice, not one which has been served late. Any tribunal has the power to consider whether its jurisdiction is properly engaged, and in this case the counter-notice was referred expressly on the basis that it was invalid and that the Tribunal would be invited so to determine. I can see no reason why HS2 should not be entitled to make that case.

69. I would finally add that Mr Banner specifically disavowed any argument that this was a case in which section 3 of the Human Rights Act 1988 and Article 6.1 of the ECHR could assist the claimant. Article 6.1 provides that "In the determination of his civil rights and obligations …. everyone is entitled to a fair and public hearing, within a reasonable time by an independent and impartial tribunal established by law". The possible effect of Article 6.1 on a very short statutory time limit affecting personal liberty has been considered by the Supreme Court in *Pomiechowski v District Court of Legnica, Poland* [2012] 1 WLR 1604. In *Adesina v Nursing and Midwifery Council* [2013] 1 WLR 3156 it was held by the Court of Appeal to require that in the light of *Pomiechowski* the time limit which had been considered inflexible by the House of Lords in *Mucelli* should be treated as capable of being extended in exceptional circumstances. Mr Banner advanced no similar submissions and it is not necessary to consider in this reference whether, in sufficiently exceptional circumstances, the same approach might be required to be taken to a counter-notice given under paragraph 5 of Schedule 2A to the 1965 Act. It is clear, in any event, that the circumstances of this case would not qualify. The claimant had actual knowledge of the notice to treat for twenty days before the expiry of the time limit, albeit over the Christmas and New Year holiday period, and the failure to serve a counter-notice in time was due to a simple mis-communication between it and its professional advisers.

70. For these reasons the counter-notice was out of time, the Tribunal has no power to extend time, and the reference is dismissed.

Martin Rodger QC
Deputy Chamber President

3 December 2018