ACQ/79/2005

LANDS TRIBUNAL ACT 1949

COMPENSATION – compulsory purchase – preliminary issue – notice to treat ceasing to have effect – reference to Tribunal by acquiring authority – whether Tribunal has jurisdiction – whether waiver or estoppel on part of claimant – held no waiver or estoppel – reference dismissed – Compulsory Purchase Act 1965 s 5(2A), (2B) and (2C)

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **OAKGLADE INVESTMENTS LTD** **Claimant**

and

GREATER MANCHESTER PASSENGER TRANSPORT EXECUTIVE **Respondent**

Re: Car Park and Land forming
2318 square metres or thereabouts
South Side of Elsinore Road
Old Trafford
Manchester

Before: The President

Sitting at the Employment Tribunal, 14-22 The Parsonage, Manchester, M3 2JA
on 2 September 2008

Mark Halliwell instructed by Shammah Nicholls of Manchester for the claimant
Ruth Stockley instructed by Tim Walmsley, Legal Officer, Greater Manchester Passenger Executive for the acquiring authority

The following cases are referred to in this decision:

Co-operative Wholesale Society Ltd v Chester-le-Street DC [1998] 3 EGLR 11
Hillingdon LBC v ARC Ltd (No 2) [2003] EGLR 97
Taylor Fashion Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133
Cardiff Corpn v Cook [1923] 2 Ch 115
Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850
Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55 (30 July 2008, unreported)

The following further cases were referred to in argument:

Stevens & Cutting Ltd v Anderson [1990] 1 EGLR 95
Llanelec Precision Engineering Ltd v Neath Port Talbot CBC [2001] RVR 36
Williams v Blaenau Gwent BC (No 2) [1999] EGLR 195
Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84
Mercer v Liverpool, St Helens and South Lancashire Rly Co [1904] AC 461
Lillis v North West Water [1999] RVR 12
HIH Casualty v Axa [2002] 2 AER (Comm) 1053
Rotherwick's Estate Executors v Oxfordshire CC [2000] RVR LT 225 (LCA/43/1999)
Bridgestart Properties Ltd v London Underground Ltd [2005] 1 P & CR 139

DECISION ON A PRELIMINARY ISSUE

1. The reference in this case was made by the acquiring authority, who were authorised by The Greater Manchester (Light Rapid Transit System) (Airport Extension) Order 1997 to acquire land now owned by the claimant. Notice to treat was served on 8 May 2002 on the claimant's predecessor in title, Alpetra Limited, in respect of land described as "Private car park and building on the south side of Elsinore Road, Old Trafford, Manchester M16". The land is a long narrow strip slightly over half an acre in area and currently used as part of a surface car park for adjoining industrial premises. It adjoins on its west side a disused railway line, along which the acquiring authority propose to construct an extension of their Metrolink tramway system.

2. Article 25(1) of the Order applies Part I of the Compulsory Purchase Act 1965 to the acquisition of land under the Order. Section 5(2A) of the Act provides:

> "A notice to treat shall cease to have effect at the end of the period of three years beginning with the date on which it is served unless –
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> (a) the compensation has been agreed or awarded or has been paid or paid into court,
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> (b) a general vesting declaration has been executed under section 4 of the Compulsory Purchase (Vesting Declaration) Act 1981,
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> (c) the acquiring authority have entered on and taken possession of the land specified in the notice, or
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> (d) the question of compensation has been referred to the Lands Tribunal."

3. It is agreed that none of these steps had been taken by 8 May 2005. In particular the notice of reference is dated 16 May 2005. The preliminary issue that is to be determined is whether the notice to treat has ceased to have effect so that the Tribunal has no jurisdiction to determine the claim for compensation. The contention on the part of the acquiring authority is that the time limit in section 5(2A) has been waived or alternatively that the claimant is estopped from relying on it.

4. There is an agreed statement of facts and witness statements by James Michael Ogborn MRICS of Lambert Smith Hampton for the acquiring authority and by Munir Ahmed of Partnership Property Consultants for the claimant were filed. Mr Ogborn has throughout had conduct of the negotiations on compensation with the claimant and its predecessor. Mr Ahmed has acted for the claimant in relation to the matter since 21 September 2006. Neither witness was called to give evidence as counsel agreed that there was not in the case of either statement any significant difference between the witnesses. On the basis of the agreed statement of facts and the witness statements, I find the following facts.

5. Although notice to treat was served on Alpetra Ltd on 8 May 2002 and Mr Ogborn was instructed to enter into negotiations with the claimant in relation to compensation, it was not

then clear what was the precise extent of the land that GMPTE required for the works since the contract for this phase of the Metrolink scheme had not at that stage been awarded. In September 2004 Mr Ogborn was able to tell Alpetra the extent of the land required, and on 18 October 2004 he was contacted by Donaldsons, professional property advisers, who said that they were instructed to act on behalf of Alpetra.

6. Notice of entry was served on Alpetra on 24 January 2005. There were then negotiations between the parties, and on 27 April 2005 the acquiring authority made a formal offer, which was expressed to be without prejudice and subject to contract. Negotiations continued without agreement being reached. On 16 May 2005 the acquiring authority gave notice of reference to the Tribunal.

7. Negotiations continued after the reference was made, and on 29 June 2005 Mr Graham Aitkenhead of Donaldsons wrote to the Tribunal to say that provisional agreement had been reached on the amount of compensation on a without prejudice and subject to contract basis and that solicitors had been instructed. He asked for the proceedings to be stayed to allow for the transfer to take place, and he said that the acquiring authority agreed to this request. GMPTE's legal officer sent a draft transfer to Alpetra's solicitors on 30 June 2005, but despite requests for a response on 27 September 2005 and 14 December 2005 no reply was received.

8. On 27 January 2006 the land was sold at auction to the present claimant, Oakglade Investments. The auction particulars included the following:

> "Note: We understand that this property is currently the subject of a Compulsory Purchase Order in connection with the proposed Metrolink extension. Buyers are advised to check the status of this with the Auctioneers before bidding."

GMPTE only became aware of the sale in March 2006 when Alpetra's solicitors told them about it, and on 20 March 2006 their legal services manager wrote to Oakglade Investments' solicitors expressing surprise and saying that he had written to the tribunal to advise it of the change of owner.

9. On 6 April 2006 the Tribunal wrote to the claimant's solicitors enclosing a copy of the notice of reference and supporting papers. It requested that a statement of case be sent to the Tribunal and served on the acquiring authority within 28 days. On 21 July 2006 a valuation document dated 16 June 2006 prepared by a Mr N Maxwell was filed and served, and on 21 August 2006 Mr Ogborn met Mr Maxwell to discuss this. The acquiring authority's reply was filed and served in August 2006.

10. On 21 September 2006 Partnership Property Consultants were instructed by the claimant to pursue the negotiations. On 28 September 2006 they wrote to Lambert Smith Hampton seeking agreement to "postpone the procedure" in the Lands Tribunal for 4 weeks and Lambert Smith Hampton replied the next day saying the GMPTE would not object to this. On 31 October 2006 PPC wrote to Mr Ogborn stating the sum they sought as the compensation.

Mr Ogborn refused a request for a further postponement, and on 8 December 2006 PPC filed an amended statement of case.

11. On or about 17 January 2007 PPC saw copies of the notice of reference, the notice to treat and notice of entry and it occurred to them that the notice to treat must have expired. They sought confirmation from the Tribunal that the date of the notice of reference was 16 May 2005, and the Tribunal confirmed this to them on 18 January 2007. On 30 January 2007 PPC wrote to GMPTE noting that notice to treat had been served on 8 May 2002 and that the reference to the Tribunal had been made on 16 May 2005, "which would appear to be outside the 3-year time limit". This was the first time that it had been suggested on behalf of either Alpetra or Oakglade that the reference had not been validly made. GMPTE did not disagree that notice of reference had been given outside the 3-year time limit. Further negotiations subsequently took place, but these were without prejudice to the claimant's assertion that the proceedings were invalid.

12. For the acquiring authority Ms Ruth Stockley, while accepting that none of the matters specified in section 5(2A) occurred within the 3-year period, submits that since the time limit is in essence a procedural requirement it is capable of being overridden by agreement or waiver or estoppel. She refers to *Co-operative Wholesale Society Ltd v Chester-le-Street DC* [1998] 3 EGLR 11 and says that waiver or estoppel will arise where the conduct of a party in relation to their negotiations and to the reference is such that it would be unconscionable for that party to rely on the failure to make the reference within the specified time period. In addition, where a compulsory acquisition is in process and the freehold owner of the subject land changes, the new freehold owner stands in the shoes of the previous owner as far as the compulsory acquisition is concerned and acquires his rights and liabilities in relation to it. If the freehold owner waives the invalidity of a notice to treat or is estopped by his conduct from challenging its validity, such acquiescence is thereafter effective against a successor in title. If that were not the case any waiver or estoppel could be defeated merely by transfer of the interest.

13. On the facts Ms Stockley submits that throughout the period to 30 January 2008 both Alpetra and Oakdale had conducted negotiations on the compensation and had acted in relation to the reference as though the notice to treat remained valid and the reference had been validly made. Each of the claimants had had available to it the date of the notice to treat and the date of the notice of reference and they had been advised by solicitors and surveyors. Each should have been fully aware of its right to raise the limitation issue. In the light of this it would be unconscionable for the claimant to be allowed to rely on the failure to make the reference within the 3-year period.

14. Ms Stockley submits that it is not necessary that a party must be aware of all the facts and the legal consequences of them in order for an estoppel to arise against him, and she refers to *Hillingdon LBC v ARC Ltd (No 2)* [2003] EGLR 97 in which at 102 Arden J referred to the judgment of Oliver J in *Taylor Fashion Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 rejecting the argument that a party had to be aware of what his strict rights were. Oliver J had said that the approach was a broad one of whether in the circumstances it would be

unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment.

15. If the conduct of Alpetra was such as to give rise to a waiver or estoppel, Ms Stockley says, Oakdale as purchaser of Alpetra's interest was bound by the waiver or estoppel, since, while a landowner is entitled to deal with his property after notice to treat, he cannot exercise this right so as to increase the obligations of the acquiring authority. She refers to *Cardiff Corpn v Cook* [1923] 2 Ch 115 per Romer J at 123. Oakdale, she says, effectively stands in the shoes of Alpetra for all purposes relating to the compulsory acquisition.

16. For the claimant Mr Mark Halliwell accepts that the limitation on the validity of a notice to treat is capable of being waived by the claimant or that the claimant may be estopped from relying on its invalidity, but, he says, on the facts no waiver or estoppel arises here. Neither the claimant's predecessor in title nor the claimant was aware that the acquiring authority was out of time until 18 January 2007, when the Tribunal confirmed to PCC that the notice of reference had not been given until 16 May 2005. Even if they had been aware of the dates of the notice to treat and the notice of reference they would not have had sufficient knowledge to give rise to a waiver or estoppel if they did not realise that under section 5(2A) the notice to treat had expired. When on 27 January 2006 the claimant purchased its interest in the land it did not have notice that the acquiring authority had any right or interest in the land that was referable to a waiver or estoppel, and no such right or interest was protected by registration under the Land Registration Act 2002. To the extent that the acquiring authority's reliance was on equitable rights, therefore, the claimant was a bona fide purchaser of a legal estate for value without notice of such putative rights.

17. To give rise to a waiver or estoppel, Mr Halliwell submits, not only must the party whose conduct is said to give rise to it be aware of his proprietary rights, but the other party must have suffered detriment that is specific and substantial in reliance on that conduct, and it must be unconscionable in all the circumstances for the first party to rely on his legal rights. There can be no question of unconscionability, Mr Halliwell says, if the first party is unaware of his rights. Mr Halliwell also draws attention to section 5(2C) of the Act, which requires the acquiring authority, where notice to treat ceases to have effect by virtue of subsection (2A), immediately to give notice of that fact to the person on whom notice to treat was served, and he says that the authority, having failed to do this, cannot be allowed to take advantage of its breach of statutory duty.

18. I have stated the facts in paragraphs 5 to 11 above. I need only to add this to what is said there. Firstly, since Alpetra was the recipient of the notice to treat and the notice of reference, it must have known the dates of each of these notices. There is however, no evidence that it was aware that the reference was, as a matter of law, out of time. Secondly, although it seems surprising that Oakglade, before making a speculative purchase of this strip of land that it knew was subject to compulsory powers of acquisition, did not investigate how things stood in relation to proceedings for compensation in the Lands Tribunal, there is no evidence that it knew that the reference was out of time until 18 January 2007. After that date it did nothing to suggest that it was treating the reference as validly made.

19. The case for the claimant is advanced on the basis of waiver or alternatively promissory or proprietary estoppel. In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, Lord Diplock at 882H-883C distinguished two forms of waiver:

> "'Waiver' is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. We are not concerned in the instant appeal with the first type of waiver. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have 'waived' the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is better categorised as 'election' rather than as 'waiver'. It was this type of 'waiver' that Parker J. was discussing in *Matthews v Smallwood* [1910] 1 Ch 777.
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> The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it. This is the type of waiver which constitutes the exception to a prohibition such as that imposed by section 29(3) of the Landlord and Tenant Act, 1954, and other statutes of limitation. The ordinary principles of estoppel apply to it."

20. It does not seem to me that the claimant or his predecessor can be said to have made an election so as to give rise to the first type of waiver. Whether to advance a particular defence in proceedings such as this does not involve an election of this sort. Any waiver would have to be of the kind that is of the nature of an estoppel. The 'ordinary principles' to which Lord Diplock referred are now set out in Megarry and Wade, The Law of Real Property, 7th Edn (2008) at paragraphs 16-007 to 16-018. Before considering the three elements on which a claimant relying on an estoppel must establish – encouragement or acquiescence, detrimental reliance and unconscionability – the learned editors note (paragraph 16-007, footnote 85):

> "... it is important to bear in mind that the fundamental principle is to prevent unconscionable conduct. While it is convenient to examine the prerequisites for a claim as if they were separate components, they do not in fact operate in isolation and must necessarily impact on each other. 'In the end the court must look at the matter in the round': *Gillett v Holt* [2001] Ch 210 at 215, per Robert Walker LJ."

21. The elements of estoppel have most recently been considered by the House of Lords, in relation to proprietary estoppel in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55 (30 July 2008, unreported). Each of the reasoned opinions (of Lord Scott of Foscote and Lord Walker of Gestingthorpe) recognised the requirement of unconscionability as an essential element in estoppel (whilst making clear that it is insufficient in itself: see Lord Scott at paragraph 16 and Lord Walker at paragraph 92). It is a requirement that the result should

"shock the conscience of the court", as Lord Walker put it. In the present case, in my judgment, there is an obvious absence of unconscionability, and, in view of this, it is unnecessary for me to consider whether the other elements of estoppel were present.

22. What seems to me of prime importance here is that the Act makes specific provision both for limiting and for extending the period of validity of the notice to treat and imposes particular requirements on the acquiring authority. The conduct of the parties and the question of unconscionability must necessarily be considered in this statutory context. In this important respect the considerations differ from those that arise when the Tribunal has to consider whether an acquiring authority is estopped from relying on section 9(1) of the Limitation Act 1980 where reference to the Tribunal has been made by a claimant more than 6 years after entry or vesting. I have set out subsection (2A) of section 5 above. Subsections (2B) and (2C) go on to provide:

> "(2B) If the person interested in the land, or having power to sell and convey or release it, and the acquiring authority agree to extend the period referred to in subsection (2A) of this section, the notice to treat shall cease to have effect at the end of the period as extended unless –
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> (a) any of the events referred to in that subsection have then taken place, or
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> (b) the parties have agreed to a further extension of the period (in which case this subsection shall apply again at the end of the period as further extended, and so on).
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> (2C) Where a notice to treat ceases to have effect by virtue of subsection (2A) or (2B) of this section, the acquiring authority –
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> (a) shall immediately give notice of that fact to the person on whom the notice was served and any other person who, since it was served, could have made an agreement under subsection (2B) of this section, and
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> (b) shall be liable to pay compensation to any person entitled to such a notice for any loss or expenses occasioned to him by the giving of the notice and its ceasing to have effect."

23. Thus it was the duty of the acquiring authority, once the 3-year period had elapsed on 8 May 2005, to give notice immediately to the owner of the land that the notice to treat had ceased to have effect. They did not give such notice then, and they have never done so. The purpose of the requirement in subsection (2C)(a), clearly, is to enable the owner of the land to know that the authority's right of compulsory acquisition has lapsed. For their part the acquiring authority are able, if they wish the notice to treat to remain in effect, to seek agreement on this with the owner of the land, although, if it is to be effective for the purposes of the Act, the agreement must be reached before the 3-year period has expired and must be for a finite period. This is the procedure for which the Act allows. GMPTE, however, did not seek the claimant's agreement to an extension of the period. All they did was to give notice of reference to the Tribunal, which was invalid when it was made since the 3-year period had elapsed, without notifying the owner of the land that the notice to treat had ceased to have effect. Moreover, since, as I have said, there is no evidence that either Alpetra or, up to 18

January 2006, Oakglade were aware that the notice to treat had lapsed, it is quite impossible to imply an extra-statutory agreement on the part of either of them to an extension of the period; and in any event subsection (2B)(b) contemplates that any agreed extension will be for a finite period.

24. In these circumstances it is, in my judgment, quite impossible to say that it would be unconscionable to allow the claimant to rely on the invalidity of the notice of reference. On the contrary: the fact is that the acquiring authority have failed to observe the requirements of the Act and have become the victims of their own failure.

25. The preliminary issue is therefore decided in the claimant's favour. The reference was invalidly made and must be dismissed. The parties are now invited to make submissions on costs, and a letter dealing with this accompanies this decision, which will become final when the question of costs has been determined.

Dated 16 September 2008

George Bartlett QC, President