Neutral Citation Number: [2020] EWCA Civ 43

Case No: C3/2019/0261

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (Lands Chamber)
Martin Rodger QC (Deputy President)
[2018] UKUT 0405 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:30/01/2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MCCOMBE
and
LORD JUSTICE DINGEMANS

- -

Between :

ANIXTER LIMITED	**Appellant**
- and -	
THE SECRETARY OF STATE FOR TRANSPORT	**Respondent**

- -
- -

Timothy Morshead QC (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Appellant**
Richard Honey with Merrow Golden (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

Hearing dates : 16th January 2020

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Approved Judgment

Lord Justice Lewison:

Introduction

1. At the relevant time Anixter Ltd was the tenant of four units on the Saltley Business Park in Birmingham. One of the units was required for the construction of the HS2 railway. The issue on this appeal is whether Anixter served counter-notices in time under the relevant compulsory purchase legislation, such as to trigger its potential ability to require the acquisition of its interests in all four buildings. That, in turn, gives rise to two sub-issues:

    i) Was Anixter's tenancy of Unit R "a long tenancy which is about to expire" for the purposes of section 2 (2) of the Compulsory Purchase (General Vesting Declarations) Act 1981 ("the 1981 Act")?

    ii) If it was, does time for service of a counter-notice under Schedule 2A to the Compulsory Purchase Act 1965 ("the 1965 Act") start to run when a notice to treat is delivered to the address of the holder of the interest; or only when the holder of that interest has knowledge of it?

2. The Upper Tribunal (Martin Rodger QC, Deputy President) decided that Anixter's tenancy was a long tenancy which was about to expire; that time began to run when the notice to treat was delivered; and that the UT had no power to extend time. The decision of the UT is at [2018] UKUT 405 (LC), [2019] 1 P & CR 16.

3. I can take the facts from the UT's decision.

The facts

4. The Saltley Business Park at Washwood Heath in Birmingham lies directly in the path of the proposed route of the HS2 railway. Until 2018 Anixter 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.

5. The Secretary of State for Transport is the acquiring authority for the HS2 scheme. High Speed Two (HS2) Ltd ("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.

6. On 8 December 2017 notice to treat was served on Anixter by HS2 under s5 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 s.6 of the 1981 Act of the making of a general vesting declaration (a "GVD") including Unit R. The GVD stated that the land comprised within it would vest in the acquiring authority as from the end of the period of three months from the date of completion of service of notices after the making of the GVD. (In the event, that date turned out to be 13 March 2018). The notices were sent by both ordinary and recorded delivery post; and were delivered to and received at Anixter's registered office on 12 December 2017.

7. The notices sent by HS2 on 8 December 2017 were addressed to Anixter's "Company Secretary". But Anixter does not have (and is not required to have) a company secretary. In such a case the notices are treated as having been addressed to the company itself.

8. As HS2 was aware, the person who dealt with real estate matters on behalf of Anixter, including dealing with HS2, was Mr Brookes. The envelope containing notice of the GVD was delivered and signed for by a member of Anixter'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 Anixter's procedures would otherwise have required. Because Anixter does not have a company secretary the letter was not immediately delivered to any individual, nor was it given to Anixter'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 unopened 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.

9. 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. The UT found that that was the first time that anyone within Anixter's organisation was aware of the GVD. The UT made no separate finding about the notice to treat; but it is not suggested that anyone within Anixter's organisation knew about it any earlier.

10. 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.

11. Anixter'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 contractual period of a little over nine months still to run. That period was less than the specified period of one year and one day.

12. Anixter was in occupation of Unit R for the purposes of its business; and therefore, its tenancy was one to which Part II of the Landlord and Tenant Act 1954 applied.

The statutory framework

13. Ever since the early days of compulsory purchase Parliament has recognised that if an acquiring authority only requires part of a person's land holding, that may cause the landowner significant harm. Thus, beginning with section 92 of the Lands Clauses Consolidation Act 1845, the legislation has provided that in certain circumstances a person cannot be compelled to sell part of his land holding if he is willing to sell the whole. The landowner signified his willingness to sell the whole by counter-notice given to the acquiring authority. That rule was repeated in section 8 of the 1965 Act. Neither of those two Acts laid down any particular time limits for the exercise of the right to require a sale of the whole. If counter-notice is given the acquiring authority must decide whether to take the whole, or to abandon the acquisition. It is that right which Anixter wishes to exercise.

14. When this rule was incorporated into the 1981 Act Parliament, for the first time, introduced a time limit for the service of a counter-notice. That time limit was 28 days after service of notice under section 6 of the 1981 Act; but that time could be extended where it was proved either that the notice was never received; or that it was received less than 28 days before the date on which the period specified in the GVD expired: 1981 Act Sched 1 paras 2, 10 (both now repealed).

15. Subsequent amendments to the 1965 Act introduced a time limit; and subsequent amendments to the 1981 Act altered the time limit contained in that Act. But the time limits in the two Acts are expressed in different words.

16. The current time limit for the service of a counter-notice under the 1965 Act is 28 days "beginning with the day on which the notice to treat was served": 1965 Act Sched 2A para 5. The current time limit for service of counter-notice under the 1981 Act is 28 days "beginning with the day the owner first had knowledge of" the GVD: 1981 Act Sched A1 para 3. Both these amendments were made by the same Act: Housing and Planning Act 2016 section 199; and Schedules 17 (amendments to the 1965 Act) and 18 (amendments to the 1981 Act).

17. It is (now) common ground that *if* the 1981 Act applies to Anixter's interest then the counter-notices were in time. But *whether* the 1981 Act applies to Anixter's interest is the first main issue on this appeal. If it does not, the second issue is whether the counter-notices given under the 1965 Act were in time.

18. The GVD procedure was first introduced in the Land Commission Act 1967. Its purpose is to short-circuit the lengthier process of notice to treat followed by notice of entry. Execution of a GVD is (after preliminary notice) a single-step process which vests title to subject land automatically in the acquiring authority without need for formal conveyance or investigation of title. It is of particular value to an acquiring authority where many titles are to be acquired or where the investigation of title may be complex. It also simplifies the date for assessment of compensation, which will be measured as at the vesting date.

19. If an acquiring authority makes a GVD, it takes effect as a notice to treat served on every person on whom the authority could have served notice to treat; except a person entitled to a minor tenancy or a long tenancy which is about to expire: section 7 (1). Any land specified in the general vesting declaration, together with the right to enter upon and take possession of it vests in the acquiring authority on the vesting date: section 8. But there is an exception to this contained in section 9, which provides:

> "(1) This section applies where any land specified in a general vesting declaration is land in which there subsists a minor tenancy or a long tenancy which is about to expire.
>
> (2) The right of entry conferred by section 8(1) above shall not be exercisable in respect of that land unless, after serving a notice to treat in respect of that tenancy, the acquiring authority have served on every occupier of any of the land in which the tenancy subsists a notice stating that, at the end of such period as is specified in the notice (not being less than 3 months) from the date on which the notice is served, they intend to enter upon

> and take possession of such land as is specified in the notice, and that period has expired.
>
> (3) The vesting of the land in the acquiring authority shall be subject to the tenancy until the period specified in a notice under subsection (2) above expires, or the tenancy comes to an end, whichever first occurs."

20. The effect of this section is that neither a minor tenancy nor a long tenancy which is about to expire will vest in the acquiring authority on the vesting date. Instead, the acquiring authority may simply terminate the tenancy (or allow it to expire); or, alternatively, may serve notice to treat on the tenant. If an acquiring authority takes the first course, it will not have to pay compensation under the Land Compensation Act 1973. There is, therefore, a potential saving to the public purse. If Anixter's tenancy was a long tenancy about to expire, it will have been excluded from the GVD. Its right to serve counter-notice would not therefore arise under the 1981 Act. In those circumstances its right to serve counter-notice would only have been triggered by the service of notice to treat. That would be a counter-notice served under the 1965 Act.

21. The critical question, then, is whether Anixter's tenancy of Unit R was "a long tenancy which is about to expire". That phrase is defined by section 2 (2):

> "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."

22. A minor tenancy is a tenancy for a year or from year to year, or any lesser interest; and "tenancy" has the same meaning as in section 69 of the Landlord and Tenant Act 1954.

23. Part II of the Landlord and Tenant Act 1954 applies where the property comprised in the tenancy is or includes premises occupied by the tenant for the purposes of a business carried on by him: section 23 (1). Section 24 (1) of that Act provides that:

> "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act..."

24. There are statutory means of terminating the tenancy; and, in addition section 24 (2) allows for termination of a tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy.

25. One of the statutory means of termination is by notice given by the landlord under section 25. This is a notice in the prescribed form given not more than 12 months nor less than 6 months before the date of termination specified in the notice. The specified date may be the date on which the tenancy would contractually expire or a later date. The effect of the notice is to terminate the tenancy on the specified date; unless the tenant applies to the court for the grant of a new tenancy. In that event section 64 prolongs the tenancy until 3 months after the final disposal of the tenant's application.

26. On the other hand, a tenancy may include a contractual right for the landlord to terminate it by notice. If a notice is served on an occupying tenant in conformity with the lease, but not in conformity with the Act, its effect is to terminate the contract but not the tenancy: *Scholl MFG Co Ltd v Clifton (Slim-Line) Ltd* [1967] Ch. 41.

27. Because protection under Part II of the 1954 Act is dependent on occupation by the tenant for business purposes, a tenancy may go in and out of protection during its contractual term, depending on whether the tenant is or is not in occupation. The case-law takes a broad view of what amounts to occupation for this purpose. The essential question is whether the thread of business continuity has been broken. But once a tenant ceases to occupy the property for business purposes during the contractual term, the protection of Part II of the 1954 Act is lost and the tenancy will expire by effluxion of time on its contractual termination date: *Esselte AB v Pearl Assurance plc* [1997] 1 WLR 891.

28. Where the tenant is in occupation of the property for the purposes of its business on the contractual termination date, then the tenancy will continue under section 24 (1). Unlike such types of tenancy as assured tenancies and secure tenancies (and, possibly, certain fixed term farm business tenancies) where a statutory periodic tenancy arises on the expiry of a fixed term tenancy, a tenancy continuing under section 24 (1) is the same tenancy. As Denning LJ put it in *H L Bolton (Engineering) Co Ltd. v T J Graham & Sons Ltd* [1957] 1 QB 159: "the common law tenancy subsisted with a statutory variation as to the mode of determination." In the *Scholl* case Diplock LJ said:

> "There is but one tenancy of which the terms which would otherwise govern its coming to an end are modified by the Act. It is true that the tenancy may continue by virtue of the Act after the period at which, apart from Part II of the Act, it would have come to an end, but it is throughout one and the same tenancy."

29. But for the operation of section 24 a tenancy for an indefinite term would not be one that was recognised by the common law: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386.

Preliminary objection

30. Mr Honey raised a preliminary objection. He said that both the points were new points which had not been raised below; and that this court should not allow them to be taken on appeal.

31. So far as the first of the two points is concerned, I agree with Mr Morshead QC that it is not a new point at all. Whether Anixter's tenancy was a long tenancy about to expire was always the main issue before the UT. Anixter has consistently contended that it was not. It is true that Mr Morshead puts the argument in support of that contention in a very different way to the way in which it was put below. But that does not, in my judgment, make it a new point.

32. So far as the second point is concerned, Mr Morshead accepts that it is a new point. But he says that it is a pure point of law, and that he should be allowed to argue it. The principles were restated by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360:

> "[15] The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
>
> [16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> [17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
>
> [18] Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24, [2017] RTR 22 at [29])."

33. There is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken: *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 at [26].

34. In my judgment the second point is a "pure point of law"; there is no evidence that could bear on the point, and the Secretary of State has had ample time to consider it.

35. Accordingly, in my judgment we should permit Mr Morshead to argue both his points.

Was Anixter's tenancy a long tenancy about to expire?

36. I consider that the question whether a particular interest is a "long tenancy about to expire" is a question of hard-edged property law. It is a question which must be answered "yes" or "no". It cannot be answered "maybe".

37. There is no doubt that, in terms of contract, Anixter's tenancy was a long tenancy about to expire. The remaining contractual term was nine months; less than the specified period of a year and a day.

38. The argument for Anixter, in essence, is that the tenancy had the potential to continue beyond the contractual expiry date. Mr Morshead laid particular emphasis on the precise way that the definition is framed. The question posed by the definition is:

> "on the vesting date does the tenancy have a period still to run which is *not* more than the specified period?"

39. It is only if that question can be answered "yes" that the tenancy is a long tenancy which is about to expire. In the present case, because of the potential operation of section 24 of the Landlord and Tenant Act 1954, the question can only be answered "maybe". If, by contrast, the statutory question had been framed differently, the answer would be different. Suppose for instance that the question had been:

> "on the vesting date does the tenancy have a period still to run which *is* more than the specified period?"

40. That question could not be answered "yes" either; because Anixter might have gone out of occupation before the contractual term date. Again, the answer would be "maybe". In that event Anixter's tenancy would fall within the definition.

41. Because the question that the definition actually poses cannot be answered "yes", Anixter's tenancy was not a long tenancy about to expire (as defined). That tenancy was not, therefore, excluded from the GVD; with the consequence that Anixter was entitled to serve its counter-notice when it did.

42. The statutory provisions which require it to be assumed that the tenant has exercised any option to renew show that Parliament's intention was that such potential should be taken into account. As Mr Morshead put it in his skeleton argument: the policy is that the general vesting regime should cover any tenant whose existing tenancy is, or might bloom into, one of sufficient duration to last beyond the specified limit.

43. One immediate pointer against this argument is that section 2 (2) also requires the assumption that the landlord will exercise any power which he has to terminate the tenancy. It might equally be said, therefore, that section 2 (2) is intended to encompass any tenancy which is not, or might not become, one of sufficient duration to last beyond the specified limit.

44. This appears to have been the view taken by the Law Commission in its report: *Towards a Compulsory Purchase Code (2) Procedure* (Law Com No 291) para 8.47:

> "This latter class of tenancy is intended to catch tenancies (of whatever duration) which shall terminate, or which are terminable, within one year of the vesting date. In other words, they are functionally equivalent to tenancies with an interest no greater than that enjoyed by tenants from year to year."

45. Mr Morshead pointed out that the statutory ancestors of section 2 (2) had been contained in statutes which long pre-dated the Landlord and Tenant Act 1954. The specific phrase "a long tenancy about to expire" (with a definition in terms similar to that in section 2 (2) of the 1981 Act) made its first appearance in the Town and Country Planning Act 1944. Its use within the procedure for general vesting declarations can be traced to the Land Commission Act 1967. At any rate in 1944 (if not in 1967) the protection given to business tenancies was far more limited. In most cases it was restricted to the payment of compensation under the Landlord and Tenant Act 1927. Accordingly, when Parliament first adopted the definition of "a long tenancy about to expire" there was no question of any continuation of a tenancy consequent upon the tenant's continued occupation. Now that the mechanism for conferring security of tenure on business tenants has changed, the definition must be applied to the new legal landscape.

46. I am not persuaded that this point really advances the argument. If (as Mr Morshead accepts) when the definition was first adopted Parliament had its gaze fixed on the contractual term of the tenancy, why should the meaning of the same definition have changed subsequently? Even under Part II of the Landlord and Tenant Act 1954 there is a clear conceptual difference between the tenancy and the contract that created it. That is why (under the old law) an original tenant was not liable for rent falling due after the contractual term date: *City of London Corporation v Fell* [1994] 1 AC 458. It is also why service by the landlord of notice under a break clause terminates the contract, but not the tenancy.

47. Mr Honey placed some reliance on the decision of this court in *Newham LBC v Benjamin* [1968] 1 WLR 694. Mr Benjamin was the tenant of a shop in Upton Park which he occupied for the purposes of his business. His lease was limited to expire on 24 June 1966. West Ham BC served him with notice to treat on 30 July 1965. The general rule was that compensation was to be assessed at the date of the notice to treat. But if a tenancy created "no greater interest than a tenant from year to year" then, under section 121 of the Lands Clauses Consolidation Act 1845, compensation would not be assessed until the acquiring authority required possession. Dealing with Mr Benjamin's tenancy, Lord Denning MR said:

> "One thing is clear. On July 30, 1965, when the notice to treat was given, the claimant had a "short tenancy": for the simple reason that his lease at that date had less than one year to run. He had "no greater interest therein than as a tenant for a year or from year to year" within section 121 of the Lands Clauses Consolidation Act, 1845. His lease expired on June 24, 1966, and he held over under the Landlord and Tenant Act, 1954. His interest then too was a "short tenancy" for it was "no greater

> than a tenant from year to year." It was so held, quite rightly, by the Lands Tribunal in *Selborne (Gowns) Ltd v Ilford Borough Council*. It is true that apart from the compulsory acquisition, he would have been entitled to apply for a new tenancy. But Parliament has enacted that his compensation under section 121 is to be assessed without regard to his right to apply for a new tenancy, see section 39 (1) of the Act of 1954. It expressly says that he is to be no worse off than if his landlord intended to demolish the premises or wanted them for his own business, see section 39 (2), in which case he would have been compensated by being paid twice the rateable value, see section 37 (2) of the Landlord and Tenant Act, 1954 ."

48. Mr Honey argued, rightly, that Lord Denning concentrated on Mr Benjamin's remaining contractual term. He went on to argue that that was the state of the law when Parliament passed the 1981 Act. Under the so-called *Barras* principle (see *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402) when an Act uses a word or phrase that has been judicially interpreted in the same context, the court may infer that Parliament intended the phrase to be interpreted in the same way.

49. Although that case is mildly helpful to the Secretary of State, its utility is limited. In the first place, whether Mr Benjamin's tenancy was a short tenancy was not argued. It was expressly accepted by his counsel that it was: see [1968] 1 WLR at 699A, 699G. Second, as Lord Denning explained, there was an express statutory provision (now repealed) in section 39 (1) of the Landlord and Tenant Act 1954 which provided:

> "(1) The amount of any compensation payable under section one hundred and twenty-one of the Lands Clauses Consolidation Act, 1845 (which relates to the payment of compensation and the obtaining of possession by an acquiring authority in the case of tenancies from year to year or less interests) shall, in the case of a tenancy to which this Part of this Act applies, be assessed without regard to the right of tenants to apply under this Part of this Act for the grant of new tenancies.

50. Although that sub-section has now been repealed, section 39 (3) is still in force; and that provides:

> "(3) Nothing in section twenty-four of this Act shall affect the operation of the said section one hundred and twenty-one."

51. There were, therefore, two explicit instructions to ignore the prospect of a continuation of the contractual tenancy. Lord Denning's discussion must be understood against that statutory background. I do not consider that, in those circumstances, the *Barras* principle carries any real weight.

52. Nevertheless, I agree with Mr Honey that the ordinary and grammatical meaning of the words used in section 2(2) refers to how long the tenancy which was granted still has to run contractually. It is first instructive to consider the phrase which section 2 (2) sets out to define. It is "a long tenancy which is about to expire". It is well

established that the choice of the term to be defined is relevant in interpreting a definition: see, for example *MacDonald v Dextra Accessories Ltd* [2005] UKHL 47, [2005] 4 All ER 107; *Walker v Birmingham CC* [2007] UKHL 22, [2007] 2 AC 262. As Lord Hoffmann put it in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [17]:

> "The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such cases the language of the defined expression may help to elucidate ambiguities in the definition or other parts of the agreement."

53. Clearly, the definition contemplates a tenancy which will expire at some point. The date of expiry of a tenancy is its contractual term date. It goes too far to say that a tenancy protected by Part II of the Landlord and Tenant Act 1954 will not expire. It may well do, if the tenant is not in occupation on the contractual termination date. In many cases, no doubt, the acquiring authority will have taken possession on the vesting date so that the tenant will no longer be in occupation on that date; which is the date as at which the statutory question must be answered. So there is nothing in the term defined by section 2 (2) which would exclude a tenancy protected by Part II of the Landlord and Tenant Act 1954.

54. Second, what is to be defined is a species of tenancy. As noted, the common law does not recognise a tenancy granted for a term of uncertain duration. That, too, suggests that what the definition is directed towards is a fixed term created by contract.

55. Third, the focus is on what is granted. What is granted is what is contained in the lease or tenancy agreement; not what happens to it afterwards. Accordingly, I agree with the UT at [41] that 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."

56. Fourth, in my judgment, section 2 (2) is, at least in part, designed to eliminate uncertainties. That is why it requires the positive assumptions that any option to renew is exercised and that any right to terminate is also exercised. It is common ground that the "options" referred to in paragraphs (a) and (b) of section 2 (2) are contractual options only. In the case of a landlord's right to terminate, termination of the contractual tenancy does not necessarily determine the tenancy itself, if the tenant is in occupation. The utility of section 2 (2) (b) would be seriously diminished if the tenant's continuing right to remain in occupation were allowed to cut across the clear statutory assumption in that paragraph.

57. In addition, it was common ground that it would be undesirable for an acquiring authority to have to engage in crystal ball gazing. At the date of the GVD all that could be said with any certainty was that Anixter had a tenancy with nine months left to run. Whether it became entitled to a continuation tenancy would depend, among other things, on whether it continued in occupation until the contractual term date.

58. It would, in my judgment, impose an unacceptable burden on acquiring authorities were they compelled to undertake an evaluation of whether (and if so for how long) a tenant might expect to remain in occupation simply in order to decide whether a tenancy was "about to expire".

59. Lastly, if Mr Morshead's argument is right, it would also apply to minor tenancies as defined; because a periodic tenancy protected by Part II of the Landlord and Tenant Act 1954 may also continue indefinitely if terminated at common law, without also being terminated under section 25 of the Act. It seems improbable that such was the intention of Parliament.

60. As I have said, section 39 (1) of the Landlord and Tenant Act 1954 has been repealed. It was initially replaced by section 47 of the Land Compensation Act 1973; and section 47 has itself been amended by the Neighbourhood and Planning Act 2017. In its original form section 47 applied where an acquiring authority acquired the interest of either the landlord or the tenant in land subject to a tenancy to which Part II of the Landlord and Tenant Act 1954 applied. In such a case the right of the tenant to apply for a new tenancy was to be taken into account "in assessing the compensation payable" either to the landlord or to the tenant. In its current form, section 47 applies to all tenancies where before the acquisition the tenant was carrying on a trade or business on the land. In such a case, then in "assessing the compensation payable by the authority to the landlord or the tenant" under section 121 of the Lands Clauses Consolidation Act 1845 or section 20 of the Compulsory Purchase Act 1965:

> "(3) Regard must be had to—
>
> (a) the likelihood of the continuation or renewal of the tenancy,
>
> (b) in the case of a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (security of tenure for business tenants) applies, the right of the tenant to apply for the grant of a new tenancy,
>
> (c) the total period for which the tenancy may reasonably have been expected to continue, including after any renewal, and
>
> (d) the terms and conditions on which a tenancy may reasonably have been expected to be renewed or continued."

61. There are four points to be made about these provisions. First, they show that where Parliament intended the *prospect* of continuation or renewal to be taken into account, it said so expressly. Second, the assessment of compensation is a very different exercise to the determination whether a particular interest in land is or is not a long

tenancy about to expire. The assessment of compensation is a valuation exercise, in which the valuer can assess the present value of all potential advantages which the owner of the interest has by virtue of his ownership. In making that assessment the valuer may take into account future possibilities, such as "hope value" for future development, suitably discounted to reflect the element of uncertainty. How those possibilities are translated into hard cash is, in the end, a matter of expert opinion. Thus, in prescribing certain possibilities to be taken into account in assessing compensation, Parliament was not doing anything out of the ordinary in the context of valuation. Third, the *Pointe Gourde* principle (i.e. that compensation should not be diminished as a result of the scheme underlying the compulsory purchase) applies to the assessment of compensation: *Pointe Gourde Quarrying & Transport Co v Sub-Intendent of Crown Lands* [1947] AC 565. Section 47 reflects that principle. But the *Pointe Gourde* principle does not apply to the identification of the interest to be acquired: *Minister of Transport v Pettit* (1968) 20 P & CR 344; *Rugby Joint Water Board v Foottit* [1973] AC 202. In so far as Mr Morshead sought to rely on this principle to identify the interest to be acquired, I consider that such reliance was misplaced. Fourth, it is common ground that the value of Anixter's tenancy is to be assessed in accordance with section 47, with the consequence that the measure of compensation is unaffected by its inclusion in or exclusion from the definition of "long tenancy about to expire". In financial terms, therefore, it is no worse off.

62. I acknowledge the elegance and attraction of Mr Morshead's concentration on the precise formulation of the statutory question. But for the reasons I have given, I do not consider that it can prevail.

63. I would reject the first ground of appeal.

When did time begin to run under the 1965 Act?

64. Mr Morshead's argument under this head begins by reference to the statutory regime before amendments introduced by the Housing and Planning Act 2016. Before then, in contrast to the 1981 Act, there was no time limit in the 1965 Act applicable to the service of a notice requiring an acquiring authority to purchase the whole of an owner's interest. The Law Commission considered the differences between the two regimes and recommended that they should be governed by the same procedure.

65. The amendments to the 1965 Act were made by the Housing and Planning Act 2016 which inserted Schedule 2A to the 1965 Act. That schedule entitles an owner, in certain circumstances, to serve a counter-notice requiring the acquiring authority to acquire the whole of his land. The counter-notice must be "served" within "the period of 28 days beginning with the day on which the notice to treat was served": para 5.

66. Mr Morshead argues that where (as here) an acquiring authority *both* serves notice to treat *and* makes a GVD there is potential for confusion on the part of an owner if different time limits apply. The more generous time limit applicable to the GVD regime ought to apply to both. Mr Morshead relied on the explanatory notes to the Housing and Planning Act 2016. Having pointed out differences in procedure depending on whether the acquiring authority had used a notice to treat or a GVD, paragraph 551 of the notes stated:

> "The intention is to harmonise (as far as possible) the approach to the treatment of material detriment under the vesting declaration and notice to treat procedures and to allow the acquiring authority to enter and take possession of the land they are authorised to take, before any dispute has been determined by the Upper Tribunal."

67. In addition, the compulsory acquisition of land and the potential to serve a counter-notice engage article 1 of the First Protocol and article 6 of the European Convention on Human Rights and Fundamental Freedoms. It is now established that the court may "read down" apparently inflexible time limits where it is necessary to do so in order to comply with article 6 of the ECHR: *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 WLR 3156. The jurisdiction is not a general one. It applies only in exceptional circumstances and where the appellant has done all that it can to bring the appeal timeously. Examples given in that case were where a would-be appellant succumbs to a serious illness and remains in intensive care; or where notice has been sent by post and is therefore deemed to have been served, but never arrives. Anixter contends that the same approach should apply in this case.

68. It is not, as I understand it, contended that there is anything special about the facts of this case, other than the fact that the acquiring authority chose both to serve a notice to treat and to make a GVD. If, then the argument is right, it will apply to all such cases.

69. Section 30 of the 1965 Act provides that section 6 of the Acquisition of Land Act 1981 applies to the service of notices under the 1965 Act. Section 6 of that Act provides:

> "(1) Any notice or other document required or authorised to be served under this Act may be served on any person either by delivering it to him, or by leaving it at his proper address, or by post, so however that the document shall not be duly served by post unless it is sent by registered letter, or by the recorded delivery service.
>
> ...
>
> (3) For the purposes of this section and of section 7 of the Interpretation Act 1978 the proper address of any person upon whom any such document as aforesaid is to be served shall, in the case of the secretary or clerk of any incorporated company or body, be that of the registered or principal office of the company or body, and in any other case be the last known address of the person to be served..."

70. Section 7 of the Interpretation Act 1978 provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is

> deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

71. Section 7 thus provides for two things: (a) how service by post is effected and (b) when service takes place. As to the latter, service takes place when the letter is delivered; and there is a rebuttable presumption that delivery takes place in the ordinary course of post. Of course, where a letter is sent by the recorded delivery service, there will be a signed receipt (as there was in this case). In *Tadema Holdings Ltd v Ferguson* (1999) 32 HLR 866, 873 Peter Gibson LJ said (in a case relating to service of a notice under the Housing Act 1988):

> "'Serve' is an ordinary English word connoting the delivery of a document to a particular person."

72. The Supreme Court approved this observation in *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67, [2019] 1 WLR 104. In *Freetown Ltd v Assethold Ltd* [2012] EWCA Civ 1657, [2013] 1 WLR 701 this court considered section 7 in detail. The issue in the case was whether service was effected at the time of posting or at the time of receipt. The court held that service was effected at the time of receipt. There was no further requirement that the document served should come to the attention of the person who would deal with it. As Rix LJ put it at [40]:

> "... section 7 is there to make it completely plain that, whether the expression used is "serve", give", "send" or anything else, the concept of receipt remains the dominant concept, albeit there is a deemed receipt subject to proof otherwise."

73. He observed further at [45]:

> "As for registered post, the advantage of this method of post is that (i) the day of posting will be recorded, (ii) the fact (and date) of delivery will be recorded, and (iii) if the letter cannot be delivered, it will be returned and the sender will be informed. Thus, if the letter goes astray or the addressee cannot be found, the sender will know, and ought to know more or less promptly, that that is so.... The same will be true of recorded delivery."

74. In my judgment where Parliament chooses a word in a statute which has a clear and consistent meaning in law, it must be taken to have adopted that meaning. The point is all the stronger where the term is itself defined by statute.

75. I do not consider that the explanatory note carries the argument further. First, it said nothing about time limits. Second, it was principally concerned with the treatment of material detriment and the ability of an acquiring authority to take land, rather than the service of any counter-notices. Third, the intention was to harmonise the procedures "so far as possible". That does not compel the conclusion that they were to be identical. Fourth, Parliament had the precedent of the 1981 Act but did not amend the 1965 Act to conform with it. On the contrary the amendment to the 1965 Act

required any counter-notice to be "served" within "the period of 28 days beginning with the day on which the notice to treat was served." Since amendments to both the 1965 Act and the 1981 Act were made by the same amending Act, that is a powerful pointer to the difference in language having been deliberate. Fifth, the language of explanatory notes cannot override the words of the Act itself. Sixth, in so far as Mr Morshead relies on the Law Commission, it is to be noted that the Commission's actual proposal (Proposal 11 (3)) was that:

> "Except as provided by regulations under this section, a divided property notice shall be served within 28 days of the notice of acquisition."

76. There was no additional recommendation that time would not start to run until the notice came to the knowledge of the owner.

77. Nor do I consider that this is a case in which it is necessary to read down the time limit, in the absence of some special facts, such as those to which the court referred in *Adesina*. In the general run of cases in which both a notice to treat is served, and a GVD is made, a 28-day time limit for service of a counter-notice is not so short as to impair the right of access to a court.

78. I do not, therefore, consider that paragraph 5 can be read as requiring any element of knowledge on the part of a person (still less a corporate body) who or which has actually received a notice properly delivered to them.

79. I would reject this ground of appeal as well.

Result

80. I would dismiss the appeal.

Lord Justice McCombe:

81. I agree.

Lord Justice Dingemans:

82. I also agree.