UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – BLIGHT NOTICE – material date for consideration of appropriate authority's objection – whether appropriate authority's additional words by way of an "informative" to statutory ground of objection made his counter-notice invalid – whether intention not to acquire well-founded – blight notice declared valid – Town and Country Planning Act 1990 section 151(4)(b)

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

(1) ROBERT JACK CRADDOCK
(2) SOPHIE MARY CRADDOCK

Claimants

and

SECRETARY OF STATE FOR TRANSPORT **Appropriate Authority**

Re: Old Rectory,
Hall Lane,
Swynnerton,
Stone,
Staffordshire,
ST15 0RD

A J Trott FRICS

Determination on written representations

The following cases are referred to in this decision:

Charman v Dorset County Council (1986) 52 P & CR 88
Mancini v Coventry City Council (1985) 49 P & CR 127
Kayworth v Highways Agency (1996) 72 P & CR 433
Head v Eastbourne Borough Council [2009] UKUT 271 (LC)
Ayr Harbour Trustees v Oswald (1883) 8 App. Cas. 623, [1883] UKHL 873

Introduction

1. Mr Robert Craddock and Mrs Sophie Craddock ("the claimants") are the freehold owners of the Old Rectory, Hall Lane, Swynnerton, Stone, Staffordshire, ST15 0RD. The property comprises a dwelling house, an attached cottage (which is let on an assured shorthold tenancy), gardens and park land. The whole site extends to 16.8 acres.

2. On 17 July 2017 the Government introduced the High Speed Rail (West Midlands-Crewe) Bill ("the Bill") into Parliament which made provision for the construction and operation of Phase 2a of the High Speed 2 railway ("HS2") between a junction with Phase One of HS2, near Fradley Wood in Staffordshire and a junction with the West Coast Main Line near Crewe in Cheshire. In September 2017 safeguarding directions were issued in respect of the Phase 2a project.

3. There is no dispute that the Old Rectory is blighted land under section 149(1) of, and paragraph 6(b) of Schedule 13 to, the Town and Country Planning Act 1990 ("the 1990 Act") on the basis that three plots, Nos. 111, 143 and 321, are subject to the safeguarding direction for HS2 Phase 2a.

4. In January 2018 the Bill received its second reading in the House of Commons, triggering a petitioning period. The claimants petitioned against the Bill and were due to be heard before the House of Commons Select Committee in July 2018. Shortly before this date the claimants' petition was deferred pending the service by them of a blight notice. On 3 October 2018 the claimants served a blight notice and on 30 November 2018 the Secretary of State for Transport, as the appropriate authority (referred to hereafter as "the respondent"), served a counter-notice objecting to the blight notice under section 151(4)(c), (f) and (g) of the 1990 Act.

5. The claimants did not refer the objection to the Tribunal because they needed to resolve the evidential issues raised under grounds 151(4)(f) and (g). On 19 July 2019 the claimants served another blight notice. On 20 September 2019 the Secretary of State served a counter-notice objecting to the blight notice under section 151(4)(b) of the 1990 Act. The counter-notice said:

> "The ground on which this objection is made is:
>
> 1) Under section 151(4)(b) of the said Act, that the Secretary of State for Transport does not propose to acquire any part of the property*.
>
> * This is without prejudice to the nominated undertaker's ability to use powers of temporary possession over the property or part of the property."

6. The claimants referred the objection to the Tribunal under section 153(1) of the 1990 Act on 18 October 2019. The reference was allocated to the written representations procedure.

7. Ms Caroline Daly of counsel, instructed by BDP Pitmans LLP, made written submissions on behalf of the claimants and Mr Stephen Whale of counsel, instructed by the Government Legal Department, made written submissions in response for the respondent.

The relevant provisions of the Bill and their application to the Old Rectory

8. Clause 4 of the Bill deals with the power to acquire land compulsorily. Clause 4(1) provides that the Secretary of State may acquire compulsorily so much of the land within the Act limits as may be required for Phase 2a purposes. Clause 4(2) states that Schedule 6 contains provision about the particular purposes for which land within the limits of land to be acquired or used may be acquired under clause 4(1).

9. Clause 5 deals with the acquisition of rights and the imposition of restrictive covenants. Clause 5(2) states that in respect of land specified in the table in Schedule 8 the powers under clause 4(1) may only be exercised so as to acquire rights for purposes specified in relation to the land in column (3) of the table and/or so as to impose restrictive covenants for such specified purposes.

10. Clause 13 and Schedules 15 and 16 to the Bill are concerned with temporary possession and use of land. Paragraph 1 of Schedule 15 sets out the right of the nominated undertaker to enter on and take possession of the land specified in the table in Schedule 16 for the purpose specified in relation to the land in column (3) of that table in connection with the works specified in column (4) or for the purpose of constructing such works as are mentioned in column (5). Under paragraph 2(2) of Schedule 15 the power to acquire land compulsorily under clause 4(1) is not exercisable in relation to land specified in the table to Schedule 16.

11. Paragraph 1(2) of Schedule 15 says that the nominated undertaker may enter on and take possession of any other land within the Act limits for Phase 2a purposes, subject to the exceptions in paragraph 2. Paragraph 2(1)(a) says that paragraph 1(2) does not apply to land which is subject to a restricted power of compulsory acquisition. Under paragraph 2(4)(a) land is subject to a restricted power of compulsory acquisition if the power under clause 4(1) may be exercised in relation to the land only so as to acquire rights or impose restrictive covenants relating to the land (see clause 5(2)).

12. Paragraph 3 of Schedule 15 describes the powers which are exercisable on land of which temporary possession has been taken. Paragraphs 4 and 5 deal with procedure and compensation for taking temporary possession. Under paragraph 4(2) the nominated undertaker may not, without the land owner's agreement, remain in possession of land after one year beginning with the date of completion of the work for which temporary possession was taken, unless steps have been taken within that period to permanently acquire the land (paragraph 4(3)).

13. Paragraph 5 requires the nominated undertaker to put the land of which temporary possession was taken into such condition as a scheme agreed with the land owner and the relevant planning authority may provide. If no agreement is reached within six months of the date of completion of the work the appropriate Ministers shall determine the scheme

following specified consultation. Unless the land owner and nominated undertaker otherwise agree, such a scheme must provide for the land to be restored to its former condition, subject to the exceptions set out in paragraph 5(4).

14. The Bill contains three plots of land within the Act limits that are within the curtilage of the Old Rectory:

    (i) Plot 111 (agricultural land and woodland) is identified in Schedule 6 of the Bill as a plot that may be acquired under clause 4(1) (power to acquire land compulsorily) for the purpose of the provision of environmental mitigation.

    (ii) Plot 143 (hedgerow and land) may be acquired compulsorily under clause 4(1) for Phase 2a purposes, i.e. for the purposes of or in connection with the works authorised by the Bill. Plot 143 is not specified in Schedule 6 for acquisition for a particular purpose.

    (iii) Plot 321 (hedgerow and private access track) is identified in Schedule 8 to the Bill as land where powers of acquisition are limited to the acquisition of rights or the imposition of restrictive covenants. The purpose for which rights may be acquired or restrictive covenants imposed is specified as the "provision of access for construction and maintenance".

15. Under paragraph 1(2) of Schedule 15 to the Bill, HS2 may take temporary possession of plots 111 and 143 for Phase 2a purposes. This power does not apply in relation to land, such as plot 321, which is subject to a restricted power of compulsory acquisition, see paragraph 11 above.

The relevant provisions of the 1990 Act

16. A counter-notice served under section 151 of the 1990 Act must be served in the prescribed form (section 151(1)). The prescribed form of a counter-notice is contained in regulation 16 of, and Schedule 2 to, The Town and Country Planning General Regulations 1992 ("the Regulations"). Regulation 16 provides that the forms set out in Schedule 2 "or forms substantially to the like effect" are the prescribed forms for the purposes of blight notices and counter-notices.

17. Section 151(4)(b) of the 1990 Act states as a ground of objection:

    "that the appropriate authority (unless compelled to do so by virtue of this Chapter) do not propose to acquire *or to acquire any rights over* any part of the hereditament…, in the exercise of any relevant powers;"

    Under section 151(5) the words in italics are deemed to be inserted where, as here, the appropriate enactment confers power to acquire rights over land.

18. Section 151(8) defines the meaning of "relevant powers":

> "In this section 'relevant powers', in relation to blighted land falling within any paragraph of Schedule 13, means any powers under which the appropriate authority are or could be authorised –
>
> (a) to acquire that land or to acquire any rights over it compulsorily as being land falling within that paragraph; or
>
> (b) to acquire that land or any rights over it compulsorily for any of the relevant purposes;
>
> and 'the relevant purposes', in relation to any such land, means the purposes for which, in accordance with the circumstances by virtue of which that land falls within the paragraph in question, it is liable to be acquired or is indicated as being proposed to be acquired."

19. Section 153 provides for the referral of the objection under a counter-notice to the Tribunal. Section 153(4) states that an objection on the ground mentioned in section 151(4)(b) shall not be upheld by the Tribunal unless it is shown to the satisfaction of the Tribunal that the objection is well-founded. The effect of this provision in the present reference is that the respondent must satisfy the Tribunal that its objection under ground 151(4)(b) is well-founded in respect of all of Plots 111, 143 and 321.

20. If the objection is not upheld on a reference to the Tribunal, the Tribunal shall declare the blight notice to be valid (section 153(5)) and the appropriate authority shall be deemed to be authorised to compulsorily acquire the claimants' interest in the hereditament and to have served a notice to treat in respect of it, which in this case means the whole of the Old Rectory (section 154 (1) and (2)).

21. The parties agree that the material date for considering whether the objection made under section 151(4)(b) is well-founded is the date of the counter-notice, i.e. 20 September 2019.

The case for the claimants

22. The claimants relied upon three grounds to support their argument that the respondent's counter-notice was not well-founded.

(i) Invalidity of the counter-notice

23. The respondent's counter-notice contained a qualified reliance on ground 151(4)(b). The statutory language of sections 151(3) and (4) did not permit such qualification and nor did the prescribed form contained in the Regulations. The without prejudice qualification indicated the respondent's intention to exercise temporary possession powers and was therefore non-compliant with the statute and Regulations.

24. The respondent referred to his qualification of the ground of objection as a "rider" and an "asterisked informative" but neither the 1990 Act nor the Regulations made provision for the inclusion of such additional information. In any event the qualification was either

incorrect or incomplete since the powers of temporary possession under the Bill did not apply to Plot 321 which was subject to a restricted power of acquisition (see paragraphs 11 and 14(iii) above).

25. Ms Daly emphasised this was a substantive issue and not, as the respondent suggested, a matter of procedural form. The permissible grounds of objection for the service of a counter-notice under section 151 formed a closed list and it must be taken that Parliament intended that a counter-notice would rely solely on one or more of those grounds without qualification or caveat. This was a matter that went to the heart of the respondent's opposition to the blight notice and to the Tribunal's jurisdiction to consider the objection.

(ii) Temporary possession necessarily contemplates permanent acquisition

26. In the alternative to ground (i), and if the Tribunal finds the counter-notice to be valid, the claimants argued that the respondent's stated intention in his counter-notice to consider exercising temporary possession powers in relation to parts of the Old Rectory, namely Plots 111 and 143 (but not Plot 321 which is subject to a restricted power of compulsory acquisition), had the effect that the respondent must necessarily also be contemplating exercising permanent powers of acquisition. That being so the Tribunal could not be satisfied that the respondent did not propose to acquire the land or any rights over it and thus his ground of objection under section 151(4)(b) must fail.

27. Ms Daly explained that neither plots 111 or 143 had been listed in the table in Schedule 16 as being subject to temporary possession powers only. They therefore remained liable to permanent acquisition because the respondent had not removed them from the permanent powers of acquisition in the Bill.

28. Plot 111 was listed in Schedule 6 (acquisition of land for particular purposes) as land that may be required permanently for the purpose of providing environmental mitigation. It was also subject to temporary powers of possession under paragraph 1(2) of Schedule 15. So Plot 111 could be acquired permanently or possessed temporarily or possessed temporarily and then acquired permanently. The latter possibility would arise if, following its temporary possession by the respondent for the purposes of environmental mitigation, no agreement could be reached between the claimants and the respondent about the long-term maintenance of the works, i.e. following the expiry of one year from the completion of the works. There was nothing in Part 1 of Schedule 15 to the Bill (temporary possession for construction of works) that required the respondent to restore the land to its previous condition or which mandated the landowner to undertake long-term maintenance. Part 2 of Schedule 15 provided for powers relating to temporary possession for the maintenance of scheduled works only, i.e. those works shown in Schedule 1 to the Bill. Environmental mitigation works were not specified as scheduled works. So if longer term maintenance of such works was required, which Ms Daly said seemed inevitable given their nature, and in the absence of agreement between the parties, then compulsory purchase had to remain in prospect to ensure the integrity and longevity of the said works.

29. Ms Daly drew support for this conclusion from the Promoter's Response Document ("PRD") which was issued in June 2018 following the claimants' petition against the Bill.

In its response on the issue of powers of temporary possession, the PRD referred to a series of generic assurances the promoter had given to the National Farmers Union in May 2018 and which it said "are in part also applicable in relation to the Phase 2a scheme proposals affecting the [claimants'] property." One of the assurances concerned the situation where land is materially changed and there was a need for an obligation to maintain it. The assurance provided that, if the claimants entered into an agreement with the respondent and satisfied certain conditions concerning ongoing maintenance, the respondent would not exercise compulsory purchase powers but would instead exercise powers of temporary possession. In the event the claimants did not wish to, were unable to, or were not suitable persons to, enter into such an agreement with the respondent regarding the continuing maintenance of land materially altered in nature the PRD envisaged that the land would be permanently acquired.

30. The extent of the land required permanently by the respondent had not been established at the material date. The PRD referred at paragraph 8 to the land to be taken and cited HS2's Information Paper C3: Land Acquisition Policy which said that in any individual case, "the exercise of these powers will operate on the basis that the Secretary of State will acquire no greater amount of land than that which appears to him to be reasonably required following detailed design of the Proposed Scheme." That detailed design had not been undertaken at the material date.

31. Ms Daly also referred to HS2's Information Paper E20: Maintenance of Landscaped Areas which stated that where agreement could not be reached that would ensure the continued objectives of the landscaping were maintained into the future, "the land will be retained and maintained by the nominated undertaker until agreement is put in place with a suitable owner or party. This could mean that such land will remain within the land boundary of the Proposed Scheme."

32. According to the PRD Plot 143 was:

> "a strip of land along the northern boundary of the Petitioners' land, required during construction for works associated with the diversion of Tittensor Road, including changes to the vehicular access to the Old Rectory … A relatively small strip of this land is shown as required permanently for the diverted road." (Page 6, paragraph 3)

Ms Daly said plan CT-06-225 dated 15 January 2019, which was included in the Environmental Statement for Phase 2a, also showed part of Plot 143 as being in permanent use for engineering earthworks associated with the diversion of Tittensor Road.

33. Plot 143 was to be subject to permanent compulsory purchase powers under clause 4(1), although, in principle, it could also be possessed temporarily under the powers contained in paragraph 1(2) of Schedule 15.

34. Paragraph 3(1) of Schedule 15 states that where the nominated undertaker has taken possession of land under paragraph 1(2) it may, for the purposes of or in connection with the construction of the authorised works –

> "(a) remove any structure or vegetation from the land;

(b) construct such works as are mentioned in relation to the land in column (5) of the table in Schedule 16;

(c) construct temporary works (including the provision of means of access) and structures on the land;

(d) construct landscaping and other works on the land to mitigate any adverse effects of the construction, maintenance or operation of the works authorised by this Act."

Paragraph 3(2) states that the other works referred to in sub-paragraph (1)(d) include works involving the planting of trees and shrubs and the provision of replacement habitat for wild animals.

35. Ms Daly submitted the provisions of paragraph 3(1) formed a closed list and that if the works to construct permanent engineering earthworks in connection with the diversion of Tittensor Road are to be undertaken, the only way this can be done is by the permanent acquisition of the relevant part(s) of Plot 143.

36. Ms Daly concluded that under these circumstances the respondent could not rely on ground 151(4)(b) because he could not exclude the possibility that the exercise of temporary powers of possession would lead to the permanent acquisition of land. Therefore the respondent could not say categorically that he did not propose "to acquire" any part of the Old Rectory.

(iii) No evidence of intention not to acquire at the material date

37. Ms Daly submitted the respondent had failed to discharge the burden of proof in demonstrating that as at the material date, i.e. the date of the counter-notice on 20 September 2019, he had a bona fide intention not to acquire any of the three plots at the Old Rectory. The intention he had expressed in reliance on section 151(4)(b) was a mere assertion. That was insufficient to sustain this ground of objection as the Tribunal, J H Emlyn Jones FRICS, found in *Charman v Dorset County Council* (1986) 52 P & CR 88 at 97-98:

> "On one view of the matter the words in brackets [in section 151(4)(b)] do have some significance in that they indicate that a mere assertion by the local authority is not in itself sufficient to establish the validity of the counter-notice. Something more is required to indicate either that the authority has come to grips with the question (as suggested by this Tribunal (V.G. Wellings Esq., Q.C.) in *Louisville Investments Ltd v Basingstoke District Council*) or that the intention is bona fide or that, as in this case, it is an intention which they are capable of putting into effect…"

38. Ms Daly considered the history of the respondent's engagement with the claimants and said at no time before the service of the counter-notice had the respondent expressed any doubt about the need to acquire part of the Old Rectory. He had not done so in the 2018 PRD nor in the counter-notice dated 30 November 2018 to the first blight notice served by the claimants, the grounds of which included section 151(4)(c) which says in terms that the appropriate authority intends to acquire a part of the hereditament. In a letter to the

claimants dated 21 March 2019 HS2's Head of Acquisitions wrote to the claimants reiterating that the respondent's grounds of objection to the claimants' first blight notice included the fact that "we do propose to acquire or seek rights over the areas of land coloured hatched blue (shown on the attached plan)." The said plan showed Plots 111, 143 and 321 coloured and hatched blue. This correspondence indicated no change in the respondent's position that it wanted to acquire part of the Old Rectory and nothing further was said by the respondent to indicate a change of mind until the counter-notice to the second blight notice was received.

39. At the date of the counter-notice there was no evidence that the respondent had resolved the question of whether he would need to acquire some parts of the Old Rectory and had therefore formed an intention not to acquire any of Plots 111, 143 or 321. The respondent had indicated in the counter-notice that he might need to exercise powers of temporary possession but there was no evidence that he had considered whether those powers would be sufficient to undertake the works that required the inclusion of the three plots in the Bill. Had the respondent done so he was bound to conclude that temporary powers were not available in respect of Plot 321 as it is subject to a restricted power of acquisition. Only the proposed works at, and use of, Plot 111 could have been undertaken using temporary possession powers and they alone could not ensure the long-term efficacy of the ecological mitigation works for which those powers were sought.

40. In *Mancini v Coventry City Council* (1985) 49 P & CR 127, the Court of Appeal considered the material date in connection with an objection made under section 194(2)(b) of the Town and Country Planning Act 1971, the wording of which is identical to section 151(4)(b) of the 1990 Act. Purchas LJ, with whom the other Lord Justices agreed, said at 140:

> "I have come to the conclusion that the tentative view expressed by the Lands Tribunal was right, and that subject to one reservation mentioned subsequently, the date in relation to which the tribunal must consider whether the council have established an objection under section 194(2)(b) of the 1971 Act must be the date of the objection notice."

The reservation, which Ms Daly said was *obiter dicta* in the case, was set out at 141:

> "I would add one qualification: during argument mention was made of the provisions of the Landlord and Tenant Act 1954 with reference to the right of the landlord to serve a counter-notice in certain circumstances, in which case it is well established law that the material date is not the date of the counter-notice but the date of the hearing. This may well arise in a case in which the critical decision lies between the date of the objection to the blight notice and the date on which the tribunal determines the matter. This does not arise in this case nor has the matter been fully argued before us. It is sufficient for me to hold that the earliest material date for the purposes of this appeal is the date of the objection notice. Nothing in this judgment should be taken to exclude the possibility of contending, in an appropriate case, that the material date might even be postponed to the date of the hearing by the tribunal."

41. Ms Daly submitted that in the present reference the respondent had made no such critical decision since the date of the counter-notice and that the circumstances of this case did not fall within the scenario outlined in *Mancini*. Furthermore, she said that the obiter remarks made in *Mancini* had not been followed in subsequent cases. In *Kayworth v Highways Agency* (1996) 72 P & CR 433 the Tribunal, Mr T Hoyes FRICS, said at 438:

> "Accepting that a particular position is said to have been reached by mid April 1995 [the date of the counter-notice], namely that the reference hereditament was not required, on the evidence I have difficulty in treating it as either definitive or reliable because no attempt, other than by way of the counter notice, was made to communicate it to the claimants. As Mr Howlett said, the claimants have nothing in writing showing a *bona fide* intention to improve the road elsewhere."

42. Ms Daly submitted that the absence of correspondence from the respondent outside the statutory blight process explaining any change of his position meant the respondent's counter-notice could not be taken as a definitive or reliable indication of his intentions.

43. In *Head v Eastbourne Borough Council* [2009] UKUT 271 (LC) the Tribunal, Mr A J Trott FRICS, was asked to consider the situation where, as at the date of the counter-notice, the appropriate authority said it could not categorically confirm whether or not it proposed to acquire the relevant land but where it subsequently abandoned the redevelopment brief that had given rise to the blight. The Tribunal said at paragraph 58:

> "In this reference I have determined that the council failed to establish ground (b) at the date of the counter-notice since it had not shown a categorical intention not to acquire the claimant's property. But the subsequent abandonment of the Brief and the town centre regeneration proposals may appear to strengthen the council's case. I do not accept this for two reasons. Firstly, in my opinion the counter-notice must itself be 'good and honest' (per analogy with *Betty's Café*) before any subsequent events can be taken into account. I do not think that the council's counter-notice satisfies that test; at the time it was served it was wrong to object under ground (b) when it was clear, on the face of the Brief, that the council anticipated that some residential property might be acquired by them (even if funded by the private sector) and that such property might include the subject hereditament. The fact that subsequently, and, judging from the newsletters, unexpectedly, the town centre regeneration proposals were unable to progress "at the current time" should not be allowed to rescue what would otherwise be an unsuccessful objection."

44. The material date was also considered in *Charman* where the Tribunal said at page 97:

> "Purchas L.J. therefore leaves open the possibility that the relevant date might be the date of the hearing. These remarks are strictly *obiter* and for present purposes, I think it is sufficient that I should say that I take the relevant date to be at the earliest date of the lodging of the counter-notice. At the same time in judging the validity of the grounds expressed in the counter-notice and in particular the precise nature of the county council's declared intention, I cannot shut my eyes to subsequent events as an indication of the weight to be attached to that declared intention."

45. In summary, Ms Daly said that under ground 151(4)(b) it was necessary for the respondent to satisfy the Tribunal that the objection was well-founded. To do so it had to show that it had a bona fide or good and honest intention not to acquire any part of the Old Rectory as at the date of the counter-notice. Merely asserting such an intention was not sufficient; the respondent had to show that it had engaged with the issue. The intention had to be manifest at the date of the counter-notice but subsequent events could be taken into account to help judge the weight to be attached to the declared intention. But subsequent events or evidence could not make good what would otherwise be an unsuccessful objection.

46. The respondent produced a witness statement dated 30 April 2020 from Mr Connolly Meagher, a senior property acquisition manager for Phase 2a of HS2 and the case officer for the present blight notice. He explained that Plot 111 had been identified as a possible site for the provision of ecological ponds should another pond in Plot 144a ("the donor site") be lost. Mr Meagher explained that:

> "If the donor site can be retained through the detailed design stage or if there are no protected species at the donor site, then there will be no need to implement the receptor ecological ponds, grassland habitat creation and hedgerow at Plot 111."

Furthermore, even if the donor site was not sufficient in this respect the respondent did not need to acquire the Old Rectory because it had a similar size alternative site at nearby Glebe House, the curtilage of which included Plot 158 and which the respondent was in the process of acquiring. Mr Meagher said it would also be possible to provide woodland planting at Glebe House rather than at the Old Rectory.

47. Mr Meagher said the works proposed at Plot 143 did not require any permanent land acquisition and were likely to be of short duration. They would be undertaken using powers under the Bill to carry out highway works, which did not require compulsory acquisition, or under temporary licence.

48. Mr Meagher said Plot 321 had been included in the Bill to provide a temporary footpath diversion. In response to the claimants' petition against the Bill the respondent had reviewed whether pedestrian access could be maintained within the limits of deviation of Work No.75 (the diversion of Tittensor Road) and concluded it was feasible. Consequently, the respondent's technical team was confident that Plot 321 was not required and the respondent did not intend to acquire any rights over it. Mr Meagher explained that Plot 321 had not been removed from the Bill "on expediency grounds". Instead the respondent decided to deal with any further petitions on the point either by giving what he described as letters of assurance or addressing the issue before the Select Committee. Mr Meagher said such a letter of assurance had been offered to the claimants through their agent but this had been declined.

49. Ms Daly acknowledged that Mr Meagher's evidence could be considered as an indication of the weight to be attached to the respondent's declared intention in its counter-notice dated 20 September 2019 not to acquire any of the Old Rectory. But she did not think it added anything to the respondent's case because it said nothing about the respondent's intentions at the material date, only an assertion, unsupported by documents, about the position as at 30 April 2020. The respondent had fallen into error by relying on evidence

submitted many months after the material date. The Tribunal had stated in *Head* that unless a counter-notice was good and honest in itself it could not be rescued by subsequent events. Ms Daly submitted that the respondent's counter-notice failed that test.

50. Alternatively, she argued that even if the Tribunal was to consider the respondent's case at the date Mr Meagher prepared his witness statement it was neither definitive, "categorical" (*Head*) or reliable.

51. Mr Meagher had not ruled out the prospect that Plot 111 would be required for woodland planting and had not said whether such planting would be effected using temporary possession powers or compulsory acquisition. Even if temporary powers were used Ms Daly said the Tribunal could not rule out the possibility that permanent powers would be needed subsequently (see paragraph 28 above). Mr Meagher's comments about not needing Plot 111 for ecological ponds, grass habitat creation and hedgerow were conditional upon the donor site either being retained or no protected species being found there. There was no evidence to support this assertion which was contrary to the PRD where it was stated unequivocally that mitigation works would be required and which specifically identified Plot 111 as being suitable. Reference to the possible use of an alternative site at Glebe House was speculative since (i) the respondent, even at the end of April 2020, was only "in the process" of acquiring it and so there was plainly a risk that the acquisition would not be progressed; (ii) no evidence had been produced to establish the suitability of Glebe House to provide the ecological mitigation works that were required; and (iii) there was no consideration of the need to obtain planning permission given Glebe House did not appear to fall within the Bill limits.

52. The PRD said in terms that a small part of Plot 143 would be acquired permanently and this was supported by the counter-notice to the 2018 blight notice. Mr Meagher offered no explanation for saying in his witness statement that no permanent powers of acquisition would be required and he failed to explain what highway powers under the Bill or temporary licence regime could be relied upon to avoid acquiring part of Plot 143, which was not itself a highway within the definition in the Highways Act 1980.

53. The review into the respondent's requirement for Plot 321 was described by Mr Meagher as a "piece of work" undertaken in mid-2018 during the Select Committee hearings. This had not been mentioned previously and had not been disclosed to the claimants. Mr Meagher's reference to the plot being left in the Bill as an expediency was unexplained in the context of the respondent now saying there was no need to acquire the land but for which it continued to seek powers of compulsory purchase. The respondent had not produced any evidence about a letter of assurance and, in any event, Ms Daly submitted that such an assurance could not bind the respondent in the exercise of his statutory powers. She referred to *Ayr Harbour Trustees v Oswald* (1883) 8 App. Cas. 623 where Lord Blackburn said at 634:

> "I think that where the legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred

> on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void."

54. Ms Daly said that Mr Meagher's witness statement lacked detail or supporting documents to show how and when the respondent had changed his position about exercising powers over the three plots at the Old Rectory. As such the respondent had failed to discharge the burden of proof in demonstrating that he did not intend to acquire any part of the property as at the material date.

The case for the respondent

55. Mr Whale began the respondent's submissions in response by referring to the fact that the second and third grounds of the claimants' submissions were not relied upon in their statement of case and he objected to their introduction at this stage. He submitted that the Tribunal should only consider the claimants' first ground of argument, i.e. the invalidity of the counter-notice.

56. Mr Whale rejected the claimants' criticism of Mr Meagher's witness statement as lacking documentary evidence and pointed out that it was a formal statement supported by a statement of truth. Mr Meagher was not merely asserting the position as he considered it to be on the day he signed it, i.e. 30 April 2020.

57. The claimants' recital of the chronology of events was said by Mr Whale to be "so much water under the bridge" and did not impact on the fact that the respondent did not propose to acquire any of the claimants' land. It did not matter that the covering letter sent with the counter-notice did not elaborate on the basis for the respondent's reliance on ground (b) or gave any explanation regarding any changed intention. Nor was the lack of any correspondence outside of the blight notice process relevant; there was no obligation on the respondent to correspond about any changed position, or an absence of justification or evidential basis for such change, prior to the respondent's statement of case and Mr Meagher's witness statement.

58. As to the claimants' commentary on the Bill provisions, Mr Whale said they had not answered the point that clause 4(1) of the Bill did not impose a duty on the respondent to acquire any or all of the land within the Act limits and therefore he was under no duty to acquire any or all of the Old Rectory. And it was not to the point that the claimants inferred from the table in Schedule 16 that permanent acquisition of Plots 111, 143 and 321 may be contemplated; any such inference was contradicted by Mr Meagher's evidence that the respondent did not propose to acquire any of those plots. The claimants' analysis of the Bill provisions with respect to temporary possession powers was said to show that the acquisition of Plot 111 "must be a prospect" while permanent acquisition of Plot 143 was the "sole means" of constructing the engineering earthworks. But such arguments foundered in the light of Mr Meagher's evidence that the respondent did not intend to acquire any of the plots.

59. Mr Whale submitted that Mr Meagher's evidence explained why the respondent did not propose to acquire, or acquire rights over, any of the three plots. The claimants' reliance on *Ayr Harbour Trustees* was irrelevant since the respondent had issued no letter of assurance.

60. Turning to the claimants' three grounds of submission as to why ground (b) had not been established, Mr Whale said that to accede to the claimants' argument that the counter-notice was invalid would be an unwarranted triumph of form over substance. The respondent had served a counter-notice that specified the ground of objection upon which it relied and the Regulations allowed a counter-notice to be contained in a form "substantially to the like effect" as that prescribed in Schedule 2. The respondent's form of counter-notice satisfied the requirements of the 1990 Act and the Regulations. The inclusion of an "asterisked informative" did not render the counter-notice invalid such that the claimants' blight notice would automatically be deemed to be valid.

61. Mr Whale submitted, in the event the Tribunal were to consider the claimants' other two grounds of argument, that the ground suggesting temporary possession necessarily contemplated permanent acquisition, was a fallacy. He said this was demonstrated by the following propositions put forward by the claimants:

    (i) The words of the asterisked "qualification" in the counter-notice render it invalid;

    (ii) But if the Tribunal do not find it to be invalid, the words used in the qualification contemplate the exercise by the respondent of temporary powers; although

    (iii) Temporary possession powers cannot be exercised with respect to Plots 143 or 321; therefore

    (iv) The respondent must also contemplate exercising permanent powers of acquisition, specifically in respect of Plot 111.

    Mr Whale said that in any event the respondent's evidence was clear that he was not "contemplating" the exercise of permanent acquisition powers over any of the three plots.

62. Mr Whale denied that the history of the parties' engagement prior to the counter-notice was relevant or instructive save for the inclusion of ground (b) in the second counter-notice but not the first. Such pre-counter-notice considerations had also been rejected in *Mancini*. Mr Meagher's witness statement was more than just an indication of the weight to be attached to the respondent's declared intention in the counter-notice not to acquire any of the three plots; it substantiated ground (b). *Head v Eastbourne*, where the appropriate authority had abandoned a development brief after it had served a counter-notice under ground (b) and then sought to rely on that abandonment to support its ground of objection, was not analogous to the present case and had no relevance. Nor was this a case where the appropriate authority was simply asserting its intention not to acquire; Mr Meagher's witness statement plainly indicated that the respondent's intention regarding the three plots was one which he was "capable of putting into effect", the expression used in *Charman* but not referred to in the claimants' argument.

63. Mr Whale concluded that Mr Meagher's statement was definitive and categorical and clearly established that the respondent did not propose to acquire any of the three plots.

The claimants' response

64. Ms Daly submitted the claimants' three grounds were a response to the respondent's case as now articulated, including Mr Meagher's witness statement which had introduced new information and which had not been available at the time the claimants drafted their statement of case. Acting fairly and reasonably the respondent should have justified his reliance on ground (b) at the time he served the counter-notice, especially since the burden of proof was upon him and where the ground relied on represented a volte face from his previous position with respect to the first blight notice. The claimants' submissions were not novel and nor had the claimants abandoned the arguments in their statement of case. It would be unfair for the Tribunal to restrict the claimants' case to ground 1 only since to do so would be to deny the claimants the opportunity to address the issues raised in Mr Meagher's witness statement.

65. Ms Daly stressed the burden of proof was on the respondent and it was for him to satisfy the Tribunal that, at the date of the counter-notice and unless compelled to do so by a blight notice, he did not propose to acquire any of the claimants' land. The claimants' primary submission in this regard was that Mr Meagher's statement failed to address the respondent's intentions at the date of the counter-notice, or indeed at any point thereafter until he produced the statement on 30 April 2020. Mr Meagher's use of the statutory language of ground (b), i.e. "does not propose to acquire", seven months after the counter-notice told the Tribunal nothing about the respondent's intentions on the material date.

66. The claimants did not suggest the respondent was obliged to engage with them outside the blight notice process, but they did submit that the absence of any general supporting documentary evidence for the respondent's case, the absence of correspondence outside the blight notice process and the lack of evidential justification at the material date, all pointed to the conclusion that the respondent had not discharged his burden of proof. *Kayworth* showed that reliance on ground (b) would not be treated by the Tribunal as definitive or reliable in circumstances, such as those in this case, where no attempt had been made by the appropriate authority outside of the blight notice process to communicate a change of position to the claimants. The respondent had not addressed *Kayworth* or distinguished his position from it. Nor was it fair to imply that the claimants were trying to show the respondent intended to acquire part of the Old Rectory by relying on a material date earlier than the counter-notice (which was the case in *Mancini*). Ms Daly stressed the claimants accepted the material date was the date of the counter-notice and not before.

67. It was relevant to the consideration of the existence of the respondent's intentions at the material date that at no time before the service of the counter-notice had he expressed any doubt about the need or desire to acquire, or acquire rights over, the plots at the Old Rectory. It was a volte face on his part that was not justified by evidence or explanation and remained unsupported.

68. The claimants said they had not suggested the respondent was under a duty to acquire any of the plots if the Bill was enacted but submitted the respondent could have resolved the issue by removing the three plots from compulsory acquisition powers under the Bill or giving an assurance or undertaking that the plots would not be acquired. Ms Daly submitted it was not enough for the respondent to hope not to need to acquire the land. The approach taken in *Charman* was correct, namely that the appropriate authority had to be able to "justify a categorical assertion that they do not intend to acquire." The respondent had not met that requirement.

69. Ms Daly submitted that the continuing prospect that a plot would be compulsorily acquired, e.g. Plot 111, was relevant to the ground (b) test in that it showed the respondent could not justify a categorical assertion that he would not acquire the land. Mr Meagher's witness statement had made it clear that, at the very least, the respondent may provide woodland planting on Plot 111. But the respondent did not address how this planting would be maintained in the absence of agreement between the parties.

70. In relation to Plot 143 the respondent failed to distinguish between temporary possession to facilitate the construction of the road diversion to take place on Plot 143 and the alteration of the claimants' land through the construction of permanent engineering earthworks associated with that diversion, part of which encroached onto Plot 143. In either case Mr Meagher had not explained how the powers under the Bill would enable the respondent to rely upon either "highway works" or a temporary licence to undertake the permanent alteration of the claimants' land. Plot 143 was not a highway and therefore powers relating to highways would not apply to it. A temporary licence would require the claimants' agreement and that could not be relied upon by the respondent.

71. With regard to Plot 321, where no temporary possession rights were sought, the respondent had to show that it had no need for the plot at all in order to carry out the scheme at the material date. Mr Meagher had shed no light on when the respondent had formed a view that Plot 321 would not be needed and even when he wrote his witness statement in April 2020 the position was vague and unsubstantiated by extraneous evidence.

72. Ms Daly said the first ground of the claimants' case (that the counter-notice was invalid) was a substantive rather than a procedural matter. Parliament had set out a closed list of the grounds upon which an appropriate authority could object to a blight notice and these did not provide for any qualification, caveat or "informative". The respondent had sought to downplay the without prejudice qualification that it had made to its counter-notice, but by including it the respondent had taken its objection outside the ambit of the prescribed form set out in the Regulations.

73. The respondent had said the claimants' second ground was fallacious without explaining why and had not addressed the issue that had been raised, namely, given Mr Meagher's acceptance of the possibility that Plot 111 would be required for ecological mitigation works, how did the respondent propose to secure their long term maintenance? The respondent might hope not to have to acquire the plot compulsorily, but he was unable to justify a categorical assertion, whether now or at the material date, that he would not do so. Temporary possession necessarily encompassed the prospect of compulsory acquisition.

74. Mr Meagher's witness statement had not substantiated the respondent's case that he did not propose to acquire any of the Old Rectory at the material date. It just expressed Mr Meagher's view of the respondent's intention some seven months later. Mr Whale had not addressed the claimants' criticisms of Mr Meagher's statement on this point. Nor had the claimants suggested that the facts of *Head* were analogous to those in this case. They relied on the approach taken in *Head* when considering ground 151(4)(b), namely that the Tribunal should look first at whether the grounds expressed in the counter-notice were justified at that time before taking account of any subsequent events. Here there was nothing to establish the *fides* of the respondent's intention at the material date since Mr Meagher's statement only explained the position when he wrote it on 30 April 2020.

Discussion

75. I do not accept the respondent's argument that the claimants should only be allowed to pursue the first ground of their written submissions, i.e. that the counter-notice was invalid. It would not be fair or just to restrict the claimants' narrowly to the points raised in their statement of case given the subsequent introduction by the respondent of Mr Meagher's witness statement purporting to explain the respondent's intentions regarding the three plots of land at the Old Rectory. Reliance on pleading points by an authority vested with compulsory purchase powers is unattractive at the best of times, but this reference has been conducted on the basis of written representations so the respondent has had every opportunity to respond to the claimants' case, and has not been disadvantaged by any expansion of their case. In any event, as Ms Daly submits, the claimants' second and third grounds reflect the arguments contained in their statement of case, albeit not expressed in precisely the same terms. I therefore consider all three of the claimants' arguments.

Ground (i): Invalidity of the counter-notice

76. It is clear from the counter-notice that the respondent is relying upon section 151(4)(b) as his sole ground of objection. The respondent used the prescribed form contained in Schedule 2 to the Regulations but added what he describes as "an asterisked informative" but what the claimants say is a "qualification to the ground of objection relied upon". The form employed would remain substantially to the same effect as the prescribed form (and would therefore be valid) unless the addition was inconsistent with the statutory ground of objection. In my judgment the additional words used by the respondent do not seek to qualify the ground of objection upon which he relies, but are included to distinguish between acquisition and temporary possession, the ground of objection being based upon the expressed intention not to acquire rather than not to temporarily possess part or parts of the Old Rectory. Had those additional words been included in a covering letter they would not have rendered the counter-notice invalid. I do not think the inclusion of the additional words in the document itself invalidates the counter-notice either, since the respondent is unequivocally stating that it does not propose to *acquire* any land, but I think it is relevant in that it raises in terms the prospect that, at the material date, the respondent was considering possessing some of the Old Rectory temporarily. Were this not the case the additional words would have been otiose.

77. The inclusion of these additional words suggests that the respondent's intentions at the material date were not the same as they were when Mr Meagher made his witness statement. In that statement Mr Meagher does not refer in terms to the need for temporary

possession of Plot 111 or Plot 143. Instead he talks about the possible retention of the donor site or the use of Glebe House rather than the acquisition or use of Plot 111 and of using highway works powers or obtaining a temporary licence in respect of Plot 143.

Ground (ii): Temporary possession necessarily contemplates permanent acquisition

78. The respondent is dismissive of this ground of the claimants' submissions and simply says that looked at in the way Mr Whale sets out in his submissions (see paragraph 61 above) "one sees that Ground 2 is a fallacy." Mr Whale emphasises that the respondent is not "contemplating" the exercise of permanent acquisition powers in respect of any of the three plots at the Old Rectory.

79. The respondent does not explain the fallacy and nor does he engage with the detail of the argument put forward by the claimants, the essential theme of which is that the respondent could not, at the material date or otherwise, rely upon temporary possession powers to implement and/or maintain the works required at Plots 111 and 143. Mr Meagher's witness statement outlines the ways in which the respondent could, at 30 April 2020, avoid the need for compulsory acquisition or temporary possession of those plots. But his solutions are not unconditional; the proposed way of proceeding with Plot 111 depended upon either (a) the donor site being retained, or (b) an alternative property, Glebe House, being acquired by the respondent. The acquisition of Glebe House was said to be proceeding when Mr Meagher made his statement and was therefore not certain at that time. Mr Meagher did not say that its acquisition had been initiated at the material date.

80. The respondent does not consider the claimants' argument, assuming that temporary possession of Plot 111 will be required, that if agreement cannot be reached about the future maintenance of the ecological mitigation works the respondent's only option will be to acquire the plot permanently and implement a maintenance regime. Nor does the respondent address the claimants' argument that the works proposed at Plot 143 cannot be undertaken as one of the activities contained in the closed list defined in paragraph 3(1) of Schedule 15, or that it is not a highway and therefore highway powers are not available to the respondent in respect of it, or that the respondent cannot rely upon agreeing a temporary licence with the claimants to occupy it.

81. The respondent has not addressed the claimants' criticisms of the alternative solutions to temporary occupation put forward by Mr Meagher to avoid acquiring Plots 111 and 143. That being so, even if the intention of the respondent not to acquire any of the three plots was bona fide, I am not satisfied that is an intention, as the Tribunal noted in *Charman*, "which they are capable of putting into effect" as at the material date. Although the situation at Plot 321 is different given that no temporary powers are sought in respect of it, Mr Meagher's explanation that "a piece of work" was undertaken by the respondent after the claimants' petition against the Bill lacks any detail. If Mr Meagher is right in saying the respondent (or at least his "technical team") was confident that Plot 321 was not required and no rights over it needed to be acquired, it would seem more expedient to have removed it from the Bill rather than leave it in and address any further petitions by Parliamentary undertakings or assurances. It appears that no such undertaking or assurance was in fact given and there is no supporting evidence about the discussions on the point to which Mr Meagher refers. By leaving Plot 321 in the Bill the expediency referred to by Mr Meagher

would appear to be directed more towards retaining an option to acquire should the technical team's confidence be misplaced.

Ground (iii): No evidence of intention not to acquire at the material date

82. The relevant case law establishes the following principles:

(i) The material date for considering the intention of the respondent under section 151(4)(b) is the date of the counter-notice (*Mancini*);

(ii) If no effort is made by the respondent to communicate a position that has been reached as to intention other than by service of a counter-notice, the Tribunal may have difficulty in treating it as either definitive or reliable (*Kayworth*);

(iii) A mere assertion of intention is insufficient to establish ground (b). The respondent must show he has come to grips with the question, or that he is bona fide, or that it is an intention which he is capable of putting into effect (*Charman*);

(iv) The Tribunal, in judging the nature of the respondent's declared intention, can take account of events subsequent to the material date as an indication of the weight to be attached to that declared intention (*Charman*); and

(v) The counter-notice must itself be good and honest and subsequent events should not be allowed to rescue what would otherwise be an unsuccessful objection (*Head*).

83. Applying these principles to the present case I reach the following conclusions:

(i) In *Mancini* Purchas LJ expressed a reservation to the general principle that the date of the counter-notice is the material date for considering the respondent's intention under ground (b), namely that where "the critical decision" lies between the date of the counter-notice and the date of the Tribunal it may be possible to contend that it is the latter which is the material date. But the point was not fully argued before the court and did not form part of its core reasoning in that case. In this case there is no suggestion that any such critical decision was necessary or had been made and I take the material date to be the date of the counter-notice on 20 September 2019.

(ii) The respondent's position changed between the counter-notice to the first blight notice dated 30 November 2018, where he said he only proposed to acquire a part of the Old Rectory, and the counter-notice to the second blight notice dated 20 September 2019, where he said he did not propose to acquire any part of it. But there is no evidence, other than the counter-notice itself, of the respondent having communicated this change of intention, or the reasons for it, to the claimants. Nor is there evidence of when the change occurred, or of how firm the original or revised intention had been. Mr Whale is correct to say the respondent was not obliged to explain his change of tack when serving the counter-notice, but the respondent did not assist his case by remaining silent on the point.

(iii) The respondent asserted his intention not to acquire any part of the Old Rectory (apparently for the first time) at the material date, although the additional words to his counter-notice implied that temporary possession of part of the property was being actively considered. The respondent failed to address the claimants' arguments that

such temporary possession would not guarantee the long-term maintenance of Plot 111 and did not empower HS2 to undertake the proposed works on Plot 143. To dismiss these arguments as a fallacy without further reason was an inadequate response and I am not satisfied that the respondent is capable of putting his stated intention into effect.

(iv) Mr Meagher's witness statement was drafted in April 2020 and does not address in terms the position at the material date, the change of tack between the two counter-notices, or how firm the revised intention was when it was first expressed. His discussion about the respondent's intentions for each of the three plots reflects the position at the date of his statement and it is clear that the respondent's then intentions were only capable of being put into effect if certain conditions were satisfied, e.g. if the donor site could be retained, thereby releasing the need for Plot 111, or if the works on Plot 143 could be done under highways powers or under a temporary licence.

(v) In *Head* the Tribunal said the respondent's counter-notice must itself be "good and honest". Subsequent evidence, such as Mr Meagher's witness statement, can direct a light back to the material date and illuminate the respondent's intentions at that time. But, in my judgment, Mr Meagher's statement does not do that in this case. The light falls close to the time he wrote the statement and does not assist in establishing at the material date either the respondent's intention not to acquire any of the Old Rectory or that the respondent was capable of putting any such intention into effect.

Determination

84. For the reasons I have explained above, I am not satisfied that the respondent's counter-notice is well-founded under ground 151(4)(b) and I do not uphold the objection. I therefore declare the claimants' blight notice dated 19 July 2019 to be valid. Section 154 of the 1990 Act applies and the respondent shall be deemed to be authorised to compulsorily acquire the claimants' interest in the Old Rectory and to have served a notice to treat in respect of it. Section 153(7) provides that the Tribunal shall give directions specifying the date on which notice to treat is deemed to have been served and I direct that that date shall be the date of this decision, 1 April 2021. This will ensure that the parties will have the benefit of the full statutory period of three years from the date of (deemed) service of the notice to treat in which to seek to achieve agreement of compensation, see section 5(2A) of the Compulsory Purchase Act 1965.

85. The reference was determined under the Tribunal's written representations procedure and the Tribunal will not normally award costs in such a case, see direction 24.6 of the Tribunal's Practice Directions dated 19 October 2020. The respondent has asked for costs in his written submissions but has been unsuccessful in the reference. I do not consider that either party has acted unreasonably in this case and I do not consider there are any exceptional circumstances which would justify departing from the Tribunal's usual approach under the written representations procedure. Subject to the matters referred to in the following paragraph I therefore make no award as to costs.

86. In accordance with direction 10 of the Tribunal's order dated 19 March 2020, the claimants are awarded their costs of responding to the respondent's request for an

extension of time for service of his statement of case. The respondent shall also reimburse the claimants' reference fee.

Dated 1 April 2021

A J Trott FRICS