Neutral Citation Number: [2012] EWCA Civ 1657

Case No: B2/2012/1386

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HONOURABLE MRS JUSTICE SLADE DBE
QB/2010/0010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2012

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE RIX
and
LORD JUSTICE PATTEN

- -

Between :

FREETOWN	**Appellant / Defendant**
- and -	
ASSETHOLD LTD	**Respondent / Claimant**

- -

(Transcript of the Handed Down Judgment of
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- -

Mr Tom Weekes (instructed by **The Chancery Partnership**) for the **Appellant / Defendant**
Mr David Nicholls (instructed by **Greenwood & Co**) for the **Respondent / Claimant**

Hearing dates : Thursday 15th November 2012

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Judgment
As Approved by the Court

Lord Justice Rix :

1. This appeal concerns the familiar question of whether a notice required under provisions of a statute concerned with real property becomes effective when posted or when received. It does so in the context of the Party Wall etc Act 1996 (the "Act") and in particular the sending out of a Party Wall award to the parties to a party wall dispute. Under section 10(17) of the Act, a party has 14 days from service of the award to appeal to the county court, and there is no discretion to extend time. On the facts, the issue is critical to whether an appeal is in time or not. The judges below, Mr Recorder Hochhauser QC in the county court and Mrs Justice Slade in the high court, each held that the service of the award was effective from the date of posting. In doing so, they applied the learning of *C A Webber (Transport) Ltd v. Railtrack plc* [2004] 1 WLR 320, a decision of this court on section 23(1) of the Landlord and Tenant Act 1927 ("LTA 1927"), where the question of service arose in the context of registered post. In sum, the essential question is whether or not section 7 of the Interpretation Act 1978 applies in order to clarify that the relevant time is that of receipt (or deemed receipt), not sending. In *Webber* it was held that section 7 was excluded from application by the contrary intention to be found in the provisions of the LTA 1927. Does that reasoning apply to the Act?

The facts

2. The appellant is Freetown Limited, the freeholder of property known as 12 Westport Street, London E1. The respondent is Assethold Limited, the long lessee of property known as 4 Westport Street, which is immediately adjacent to the south of Freetown's property. On 20 January 2011 Freetown served notices under the Act in relation to development work it intended to carry out on 12 Westport Street. That led to a party wall dispute between the neighbours. Each appointed a surveyor who selected a third surveyor pursuant to section 10(1) of the Act. The third surveyor made an award dated 22 July 2011.

3. The award was posted by the third surveyor on either Friday 22 July or Saturday 23 July 2011. It was received by Freetown on Monday 25 July 2011. Freetown's appeal was lodged on 8 August 2011. If the award was served within the meaning of the Act when it was posted, then the 14 days for appealing ran out on Thursday 4 or Friday 5 August 2011. If, however, time only began to run from the day the award was received by Freetown, then the 14 days ran out on only Sunday 7 August 2011, when the court office was closed. On that basis, time became extended to the next working day, viz 8 August 2011, under the rule in *Mucelli v. The Government of Albania* [2009] UKHL 2, [2009] 1 WLR 276. On that basis, Freetown would have been in time in its appeal lodged on that day. So far, these matters are common ground.

The Party Wall etc Act 1996

4. The Act provides by section 10 as follows:

> "(15) Where an award is made by the third surveyor –
>
> (a) he shall, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors; and
>
> (b) if it is served on their appointed surveyors, they shall serve it forthwith on the parties…
>
> (17) Either of the parties to the dispute may, within the period of fourteen days beginning with the day on which the award made under this section is served on him, appeal to the county court against the award…"

5. Section 15 of the Act makes provision for the service of notices or other documents required to be served, such as the award:

> "(1) A notice or other document required or authorised to be served under this Act may be served on a person –
>
> (a) by delivering it to him by person;
>
> (b) by sending it by post to him at his usual or last-known residence or place of business in the United Kingdom; or
>
> (c) in the case of a body corporate, by delivering it to the secretary or clerk of the body corporate at its registered or principal office or sending it by post to the secretary or clerk of that body corporate at that office.
>
> (2) In the case of a notice or other document required or authorised to be served under this Act on a person as owner of premises, it may alternatively be served by –
>
> (a) addressing it "the owner" of the premises (naming them), and
>
> (b) delivering it to a person on the premises or, if no person to whom it can be delivered is found there, fixing it to a conspicuous part of the premises."

Landlord and Tenant Act 1927

6. Section 23 of the LTA 1927 provides:

> "(1) Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there, or, in the case of a local or public authority or a public utility company, to the secretary or other proper officer at the principal office of such authority or company, and in the case of a notice to a landlord, the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf."

7. The Recorded Delivery Service Act 1962 extends any statutory provision such as section 23 dealing with registered post so as to encompass delivery by the process of recorded delivery. I will refer generally to registered post as a convenient short-hand and as including recorded delivery. In any event, on the facts of this case we are not concerned with such forms of post at all.

8. It may be observed that the question could arise as to whether section 23(1) sets out the exclusive alternative means of service for the purposes of the LTA 1927, or whether the methods specified are merely permissive (among others). That question arose in *Stylo Shoes Ltd v. Prices Tailors Ltd* [1960] Ch 396, where Wynn-Parry J decided the issue in favour of a permissive interpretation, at 405-406. That was confirmed, by this court, in *Galinski v. McHugh* [1988] 57 P&CR 359 at 365. It is for this reason that the section 23 methods of service have sometimes been spoken of as the "primary methods of service", as in the edition of *Woodfall, Landlord and Tenant* cited by Peter Gibson LJ in this court in *Webber v. Railtrack* at [26].

Interpretation Act 1927

9. Section 7 of the Interpretation Act 1927, headed "References to service by post", 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."

Webber v. Railtrack

10. This court's decision in 2003 in *Webber v. Railtrack* was, and remains, the latest in a line of jurisprudence on the meaning of "sending it through the post in a registered letter" in section 23(1) of the LTA 1927. Some but by no means all of that jurisprudence also considers the interrelationship of that provision with section 7 of the Interpretation Act 1927.

11. The issue in *Webber* arose in the following way. A landlord sent his tenant notices pursuant to section 25 of the Landlord and Tenant Act 1954 ("LTA 1954"), to inform him that he would oppose the grant of new tenancies. Such a notice had to be sent not less than six months before the specified date of termination, here 22 January 2002. The notices were posted by recorded delivery on 20 July 2001, received on 23 July, and responded to on 24 July to the effect that the tenant was unwilling to give up possession. Subsequently the tenant sought a declaration that the landlord's notices had been served out of time because received within the six month period. So the question whether service was effected by posting or by receipt was again critical. Section 66(4) of the LTA 1954 applied section 23 of the LTA 1927 to the question. This court held that section 7 of the Interpretation Act was excluded, that service was effected by posting by recorded delivery, and that such an interpretation was compatible with article 6 of the European Convention on Human Rights (ECHR), as well as to article 1 of its First Protocol.

12. The essence of the reasoning was that the matter had been decided by the weight of authority, and particularly by the decision in this court in *Galinski v. McHugh* (1988) 57 P&CR 359: section 23 afforded three primary, alternative, methods of service, each of which was equally effective when performed. It followed that posting by registered post was effective at the time the registered letter was put into the post, and that section 7 of the Interpretation Act was necessarily excluded.

13. In *Galinski*, Slade LJ, delivering the judgment of the court, had said (at 365):

> "In our judgment, the object of…[section 23(1)]…is not to protect the person upon whom the right to receive the notice is conferred by other statutory provisions. On the contrary, section 23(1) is intended to assist the person who is obliged to serve the notice, by offering him choices of mode of service which will be *deemed* to be valid service, *even if in the event the intended recipient does not in fact receive it.*"

In *Webber*, Peter Gibson LJ cited that passage and observed:

> "[22] The general proposition laid down by this court in that case was that the purpose of section 23 is not to protect the addressee of the notice, but to assist the server of the notice by offering him choices as to how to effect service in ways which will be deemed to be good service, even if the notice is never received by the intended recipient. That, as it appears to me, was a necessary part of the reasoning of the decision of this court. It is a part which was detached and abstracted from the specific peculiarities of the particular case which gave rise to the decision. Accordingly, in my judgment, that was ratio and binding on this court."

14. Peter Gibson LJ went on to hold that a decision of this court in *Lex Service plc v. Johns* [1990] 1 EGLR 92, which was subsequent to *Galinski*, had been decided *per incuriam* (at [26]). In *Lex Service* this court considered the relationship between section 23(1) of the LTA 1927 and section 7 of the Interpretation Act and held that non-receipt was not proved by its mere assertion. Therefore, for the purposes of section 23(1) and section 7, receipt was deemed to have been effected by reason of section 7. It was not a case where the issue, as in this case and as in *Galinski*, turned on whether time of service was on posting or on receipt. *Galinski* does not appear to have been cited, at any rate it is not mentioned in the judgments. In *Webber*, Peter Gibson LJ said of *Lex Service*:

> "[25] It is clear, therefore, that both members of this court proceeded on the basis that section 7 applied to section 23. However, neither considered whether section 23 disclosed a contrary intention. The report of the case does not reveal any argument that there was a contrary intention disclosed by section 23. The applicability of section 23 appears simply to have been assumed by this court…"

15. The oddity is that section 7 does not appear to have been considered in *Galinski*. It can equally be said, therefore, that *Galinski* did not consider the question of whether section 23 disclosed a contrary intention. Nevertheless, this court in *Webber* considered that the question of contrary intention had been decided, as it were *sub silentio*, by *Galinski*. Thus at [29] in *Webber* Peter Gibson LJ said:

> "For the reasons already given, it seems to me that the ratio of *Galinski's* case is inconsistent with that of the *Lex Service* case in so far as the *Lex Service* case decides that section 7 applies to section 23."

16. In coming to that conclusion it can be said that Peter Gibson LJ was also influenced by *Chiswell v. Griffon Land and Estates Ltd* [1975] 1 WLR 1181 (another, earlier, decision of this court), where section 7 had not been considered either, but Megaw LJ had observed (albeit obiter) that a notice sent by registered post, being one of the "primary methods laid down", was proof of sufficient

service even if it were to be clearly established that it had gone astray and was never received; and by *Beanby Estates Ltd v. Egg Stores (Stamford Hill) Ltd* [2003] 1 WLR 2064, where section 7 was considered and Neuberger J reasoned that the point about the timing of service by registered post was strictly open but was not persuaded that he should depart from a previous decision by Smedley J in *Commercial Union Life Assurance Co Ltd v. Moustafa* [1999] 2 EGLR 44, who had interpreted previous authority as pointing to the exclusion of section 7, and from the other indications in the jurisprudence. Peter Gibson LJ described Neuberger J's detailed judgment as helpful (at [32]).

17. Thus it was ultimately only in *Webber* that this court considered the relationship of section 23 of the 1927 Act and section 7 of the Interpretation Act, and held that the latter was excluded by the former, or at any rate that authority required such an answer. As to that, Peter Gibson LJ had begun his analysis with the comment that –

> "[15] In the absence of authority, Mr Tanney's simple submission that section 23 contains nothing to exclude the applicability of section 7 would be well arguable. However, in the light of the authorities, several of them in this court, it seems to me impossible that Mr Tanney's first submission should prevail."

18. That of course was all in the context of section 23(1) of the 1927 Act and its express reference to "by sending it through the post in a registered letter addressed to him there". In the present case, there is no reference to registered post; but the argument that "by sending it by post…" referred to in section 15(1) of the Act is again an alternative primary method of service is available and has been pressed on behalf of the respondent.

19. The question has been raised therefore whether this court is bound by either the decision or the reasoning in *Webber*, or whether section 15 of the Act is different in relevant respects from section 23(1) of the LTA 1927.

20. In that connection, none of the section 23 jurisprudence considers the position under section 15 of the Act (or other statutes). Section 15 was, however, considered in *Harpalani v. Gray's Road Investment Limited* (HHJ Knight QC, unreported, 25 January 2010). Judge Knight there held that *Webber* was to be distinguished in the case of section 15 of the Act. He said that he saw "no logic" in section 15(1) requiring that the act of posting equates with service. Whereas it was "understandable that service by registered letter transfers the risk of receipt to the recipient", there was no reference to registered post in section 15(1) (at para 23). *Harpalani* is the only prior case which has been discovered in which the

present issue under section 15(1) has had to be decided. It also concerned a third surveyor's award which was posted before, but was received after, 14 days prior to a party's appeal to the county court.

21. It should be observed that section 7 has also been considered in connection with other statutes concerned with the service of documents by post. Thus the Housing Act 1985 contains provisions about notices in its section 176: section 176(3) states that "A notice under this Part may be served by sending it by post". (Section 176(4) also provides that a housing association may be served by its tenant "by leaving it [the notice] at, or sending it to, the principal office of the association…": which can permit the argument that, in the case of a landlord who is a housing association, there are two primary forms of service.) In *Terry v. London Borough of Tower Hamlets* [2005] EWHC 2783 (QB) (Michael Supperstone QC, sitting as a deputy high court judge, unreported, 2 December 2005), the question was whether the claimant had proved serving a section 122 notice of his wish to exercise his right to buy prior to 26 March 2003, when the discount rules were changed. It appears to have been common ground that section 7 of the Interpretation Act applied. The claimant proved that his notice was posted by first class post on 6 March, and the defendant failed to prove non-receipt in the ordinary course of post (although it accepted having received it on 10 June 2003).

22. Section 99(1) of the Leasehold Reform, Housing and Urban Development Act 1993 provides that any notice required or authorised under the relevant part of that Act "may be sent by post". (There are again alternative provisions about methods for service in further sub-sections of section 99 in special cases.) In *Calladine-Smith v. Saveorder Ltd* [2011] EWHC 2501 (Ch), [2012] L&TR 3 the dispute was between a tenant who had served a notice seeking to exercise his right to acquire a new lease on payment of a premium, and a defendant landlord who alleged that it had served a counter-notice. Section 7 was applied. The trial judge in the county court found that the counter-notice had been posted but not received, but that the claimant had not also proved that the letter had not been correctly addressed. Therefore the trial judge held that the notice was effective. On appeal, the claimant succeeded in reversing the decision: it was for the sender of the notice to prove correct addressing of the notice for the purposes of section 7, but it was sufficient for the addressee to prove that he had not received it, and that the claimant had done. *Webber* and other cases on section 23 were before the court. Morgan J contrasted section 23 with the provision in section 99(1) and said that it was agreed that section 7 of the Interpretation Act applied to that case (at para [8]).

23. Section 79(1) of the Commonhold and Leasehold Reform Act 2002 provides that a notice, which under section 79(1) of that Act has to be "given" to the landlord by a certain date, "may be sent by post". In *Moskovitz v. 75 Worple Road RTM Company Ltd* [2010] UKUT 393 (LC), [2011] L&TR 4 George Bartlett QC, President, decided a disputed issue as to the application of section 7 to these

provisions. The question was whether the defendant management company was entitled to manage 27 flats in a property owned by the claimant. The landlord said that the notice served by the company was served out of time, and succeeded, because it was held that, applying section 7, notice was not served, or "given", until it was deemed to have been received, viz in the ordinary course of post, not on posting.

24. It cannot be said, however, that the application of section 7 in these three cases was in issue on the ground that a "contrary intention" had been shown.

25. In this context I should also refer to section 17 of the Law of Property (Miscellaneous Provisions) Act 1994, which provides:

> "(1) Service of a notice affecting land which would be effective but for the death of the intended recipient is effective despite his death if the person serving the notice has no reason to believe that he has died.
>
> (2) Where the person serving a notice affecting land has no reason to believe that the intended recipient has died, the proper address for the purposes of section 7 of the Interpretation Act 1978 (service of documents by post) shall be what would be the proper address apart from his death."

It is submitted on behalf of the appellant that these provisions suggest that section 7 will at least generally apply to statutory provisions authorising or requiring the service of notices affecting land. I would accept that section 7 provides a general statutory code regarding sendings by post and that the statutory presumption is that it will apply – unless a contrary intention appears.

The judgments below

26. Mr Recorder Hochhauser simply considered that "there is no reason to distinguish the Act from the Landlord and Tenant Act 1927" and that he was therefore bound by *Webber*. He added that in reaching that conclusion he had considered submissions as to the injustice of adopting such a course, but considered he had no room to manoeuvre, although he reached his decision "with some reluctance".

27. Mrs Justice Slade agreed. Having considered the jurisprudence on section 23, she said that section 15 "is not materially distinguishable", despite the absence of any reference to registered post. She reasoned:

> "[29] 'Sending by post', a primary method of service specified in Section 15, includes all postal communication: registered, recorded, tracked and ordinary delivery. The construction contended for by Mr Power would lead to a conclusion that an award sent by registered as well as ordinary post would be served when received. No difference to reflect any increased certainty of delivery by registered post would be recognised by such a construction. Further, such a construction would deprive Section 15(1)(b) and the latter part of 15(1)(c) of any purpose. The inclusion of service by post as a primary method of service would do no more than to repeat the common law position as explained by Wilson J in *Gojra*[1] referring to the comments of Megaw LJ in *Chiswell*:
>
> > "…notice sent by ordinary post instead of by a primary method, is served – and given – on such dates, if any, as it is received."

She added:

> "[31] A construction of Section 15(1) which treats service by post as effected when a document is consigned to the post provides greater certainty of proof of service than would one which depends upon evidence of receipt."

28. Slade J then went on to conclude as follows:

> "[35] In my judgment, a proper construction of section 15 that service by post is effected when a document is consigned to the post, evidences a 'contrary intention' to the deeming provision in Section 7 of the 1978 Act which is predicated on service being effected when a document is received. There is no basis on which to distinguish Section 15 in this regard from the conclusion reached on the non applicability of section 7 to Section 23 of the LTA reached by the Court of Appeal in *Webber*. I respectfully disagree with the conclusion reached by HH Judge Knight QC in *Satish Harpalani* as to the construction and application of section 15.
>
> [36] For the reasons given by *Webber* by Peter Gibson LJ at paragraphs 46, 50 and 53 and by Longmore LJ at paragraphs 57 to 62, Section 3 of the HRA does not require a construction of Section 15 to provide that service by post is effected when a document is received not when it is consigned to the post.
>
> [37] This Court is, as was the Recorder, bound by the judgment of the Court of Appeal to hold that the Award was served on Freetown on 22 or 23 July 2011."

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[1] *Railtrack plc v. Gojra* [1998] 1 EGLR 63 (CA), at 65

Submissions

29. On behalf of the appellant, Mr Tom Weekes submitted that the starting-point for analysis must be the language of section 15(1) of the Act. There was nothing in that language which disclosed an intention that the rules about service contained in section 7 of the Interpretation Act should not apply.

30. On the contrary, there was every reason for thinking that it could not have been the intention of Parliament in drafting section 15(1) that the short 14 day deadline for claiming an appeal against a party wall award should be capable of being cut down still further by delay during the post or eliminated entirely by non-receipt. Mr Weekes emphasised five such reasons. First, the right of appeal was an important right, since an award authorised and regulated building works which would otherwise amount to a trespass, and thus supplanted the common law. Secondly, if receipt did not matter once an award had been committed to the post, then a right of appeal could be lost without the existence of an award even being known. Thirdly, the time for appealing was short enough as it was. Fourthly, the date of posting would be known only to the surveyor who posted the award: neither party to the award would know the date on which time for an appeal ran out. Fifthly, it would be unsatisfactory for the existence of an appeal to depend on the evidence (as to posting) of the surveyor against whom a party wished to appeal.

31. Mr Weekes further submitted that the interpretation of section 15(1) for which, with the assistance of section 7 of the Interpretation Act, he contended was supported by the consideration that it would be an interference with a party's rights under article 6(1) of the ECHR to deprive that party, through lack of knowledge of an award, of an effective right of appeal against it. That was illustrated by such authorities as *Tolstoy Miloslavsky v. United Kingdom* (1995) 20 EHRR 442 and *Pomiechowski v. Poland* [2012] UKSC 20, [2012] 1 WLR 1604.

32. In connection with these submissions Mr Weekes referred us to *Regina v. Secretary of State for the Home Department, Ex parte Saleem* [2001] 1 WLR 443 (CA) where this court held that immigration rules that provided for a deemed receipt date of a notice of determination and a period of only five days for appealing thereafter were in combination ultra vires. The immigrant had moved her address and never received the relevant notice. She was thereby deprived of her right of appeal. The case was decided not long before the introduction of the operation of the Human Rights Act 1998. Mummery LJ said (at 453B/C) that rules which extinguish the right of appeal by deeming a notice to have been given regardless of when or whether it was received cannot fairly and reasonably be regarded as regulating the exercise of rights of appeal and were thus outwith the

rule-making power. Hale LJ said (at 458F/G) that there was an analogy with article 6 of the ECHR:

> "But if the state establishes such a right it must ensure that people within its jurisdiction enjoy the fundamental guarantees in article 6. It is for national authorities to regulate the procedures governing the exercise of such rights, but these requirements must not be such that "the very essence of the right is impaired"."

33. On behalf of the respondent, on the other hand, Mr David Nicholls submitted that Slade J had been right to say that there was no material distinction between section 15 of the Act and section 23 of the LTA 1927. In both cases the sections were (a) permissive, not compulsory; and thus (b) designed to assist the person serving the notice by the permitted method. In effect, if the permitted method is adopted, then the notice is deemed to have been served, and delay or even non-receipt is immaterial. It is different where a statute provides for sending by post as the *only* primary method of service (see the cases cited above where it has been held, although largely as a matter of assumption, that section 7 of the Interpretation Act applies). The only difference between section 15 and section 23 is that the latter refers to registered post as one of the primary methods, but that is no real difference. It is the alternatives for personal service which demonstrate that posting, like the alternatives, is intended to be the moment of service and thus equally demonstrate a contrary intention to section 7. The function and purpose of both section 15 and section 23 is thus fundamentally the same. The risk of non-receipt is placed on the addressee so as to provide certainty, consistency and simplicity. That certainty would be lost if it was open to the addressee to prove delayed receipt or non-receipt, as section 7 would permit to be done.

34. In this connection, Mr Nicholls points out that section 15 applies to all notices or documents that may be served under the Act, such as are provided for in sections 1, 5 and 6 as between the owners of adjoining properties, where counter-notices need to be provided within 14 days. If within that period of 14 days there is no service of a notice of consent, a dispute is deemed to have arisen, pursuant to section 10, requiring the appointment of a surveyor or surveyors to resolve the dispute. Uncertainty as to the time of receipt would lead to delay to the proposed building works.

35. Moreover, Mr Nicholls espouses the reasoning of Neuberger J in *Beanby Estates*, approved by this court in *Webber*, as to the logic of the section 23 solution, and submits that it applies to all cases of alternative primary methods. That reasoning is summarised by Peter Gibson LJ in *Webber* at paras [33]-[36]. The essence of it reflects the point that if the other primary methods achieve service, and if posting by recorded delivery effects service, then "Logic strongly suggests that…the

moment at which the notice is put in the post is the moment at which service was effective".

Discussion

36. In my judgment, the critical question for the interpretation of section 15(1) is, and must be, whether "the contrary intention appears" therein so as to exclude the otherwise statutory and thus mandatory application of section 7 of the Interpretation Act. No other question can have precedence in the working out of the issue as to the interrelationship of section 15(1) and section 7. For it is the intention of Parliament that, "unless the contrary intention appears", the concept of service by post is to be dealt with as provided for in section 7. It is as if section 7 (which goes back in its origins to very similar language in section 26 of the Interpretation Act 1889) provides the incorporated meaning of service by post in any statute which authorises or requires any document to be "served by post". Thus the critical question posed is to be resolved by imagining that section 7 is about to be written into the Act and then asking whether section 15 creates, either by its express language or by necessary implication, a situation where section 7 would be incompatible (contradictory or inconsistent).

37. It may be observed that section 7 is a complex alteration of the common law rule which requires receipt to effect service. Instead, section 7 deems service to be effected at the time the posted document would be received in the ordinary course of the post. That presumption remains rebuttable, but the burden of doing so lies on the addressee. Another condition of the statutory refinement, however, is that the presumption only operates if a letter containing the document to be served has been properly addressed, pre-paid and posted ("by properly addressing, pre-paying and posting a letter containing the document"). The burden of proving that condition lies on the sender. The section seeks to answer various problems that might arise out of the posting of a letter, and to balance the interests of both the server and addressee. The ultimate formula, however, is to maintain that part of the common law rule which requires receipt, but to deem receipt to take place when would the letter be delivered in the ordinary course of post, subject to the right in the addressee to prove otherwise.

38. So, is there anything about the language or effect of section 15 which would be incompatible with section 7, if the latter section is imagined as potentially incorporated in the Act? Plainly, there is nothing in the express language which is any way incompatible. On the contrary, everything about that language points in the direction of service taking effect on receipt. First, that is the common law rule against which any statutory language must be measured. Secondly, the section speaks of service, which prima facie as a matter of language points to receipt ("A notice…to be served…may be served…"). Thirdly, this requirement built into the

concept of service is further emphasised by speaking about service *on* a person ("may be served on a person"). One would not naturally speak of serving a document on another person by long distance. Fourthly, section 15(1)(a) plainly requires such service on a person, for it speaks of the method "by delivering it to him in person". I find it hard to conceive that such a method does not involve receipt by that person. Of course, such a person may decline receipt by casting it from him, but if a notice is delivered by person to another person, I do not see that it can be properly said that the person to whom the notice is delivered can say that he has not received it.

39. I pass over section 15(1)(b) for the moment, which is the subject matter of dispute, and go on to section 15(1)(c) which concerns service on a body corporate. Section 15(1)(c) speaks of both delivery and, alternatively, use of the post. As for delivery, that plainly again contemplates receipt, albeit it suffices if delivery is to, ie receipt is by, "the secretary or clerk of the body corporate at its registered office". That language is necessary because a body corporate has to be represented by someone human and so the statute makes plain to whom the delivery of the document to be served is to be made. In the alternative case of post, the letter is likewise to be addressed to the secretary or clerk at the body corporate's registered office.

40. As for section 15(1)(b) and the latter part of section 15(1)(c), dealing with sending by post, there is again nothing in the express language which is in any way incompatible with section 7. Of course, once post is in issue, a question may always arise, as it cannot do in the case of personal delivery, as to whether it is the sending or the receiving by post which counts as service. However, even if there could be any doubt on that score against the background of the nature of service in general, or in the context of the rest of section 15(1), section 7 is there to make it completely plain that, whether the expression used is "serve", give", "send" or any thing else, the concept of receipt remains the dominant concept, albeit there is a deemed receipt subject to proof otherwise. To my mind, there is nothing whatsoever in the express language of section 15 to suggest that section 7 is incompatible, so that "the contrary intention appears". I do not think that is disputed by Mr Nicholls.

41. So, the next question must be whether, in the absence of any express incompatible language, there is an implied exclusion of section 7. The respondent's submission, based on the section 23 jurisprudence, is that there is. The argument, as I understand it, is that because sending by post is one of the so-called primary methods of service, therefore it must be assumed that service is deemed to take place at the time of sending. I am unable to accept that argument as persuasive. Where the other primary methods contemplate service on the person to be served, I do not see why sending by post should be understood, either necessarily or even reasonably, to involve something short of that equivalent. I see that the issue may arise, but I do not see why section 7 does not answer it. It is there to answer it; and

it does so by its refined reformulation of the common law. In the case of section 15(1)(c) and a body corporate, the sub-section tells us how the letter is to be addressed in order to meet the section 7 condition of "properly addressing" the addressee.

42. It seems to me that any other solution would be unreasonable, and therefore a highly improbable interpretation of the section. It would be unreasonable because it would be in disconformity with the common law, with the rest of section 15(1), and with the obvious intent of section 7 to provide the dominant presumption "unless the contrary intention appears". It would also be unreasonable because (a) the helpful code of section 7 would be lost; (b) a notice could be deemed served although established not to have been received, or received in time, which is essentially unfair, something which needs no authority to establish, but is in any event referred to in cases such as *ex parte Saleem* (at 453B/C, 458F/G, see above) or *FP (Iran) v. Secretary of State for the Home Department* [2007] EWCA Civ 13, [2007] Imm AR 450 at paras [61] and [74]; (c) the short time limits of 14 days to be found in section 10(17) and elsewhere in the Act could be seriously eroded if time were to commence with the time of posting rather than the time of receipt (and there is nothing even to prevent a notice being consigned to the post with a second class stamp on it); and (d), in the case of a section 10(15) notice from a surveyor of his award, the document does not even come from a party. In saying this, I am conscious that the time limit for responding to notices by counter-notice extends to one month (see section 4(2)), and also that most of the notices for which the Act provides are notices between parties. However, there is nothing like the substantially longer notice periods for which the LTA 1954 speaks. I would also refer to the matters to which Mr Weekes has drawn attention (see at para [30] above) to the extent that they go beyond what is said here.

43. I would observe that section 15(2) fits into the same pattern, expressive of conformity with section 7. That deals with the special case of an addressee "as owner of premises". Such a person may "alternatively" be served by addressing the notice to such a person, describing that person as "owner" and also naming the premises, and delivering the notice "to a person on the premises". That also requires the receipt of the notice by a person at the premises concerned, although it may be not the person addressed as "owner" nor a person authorised to receive the notice on the owner's behalf. There is a further alternative built in, for, if no person "to whom it can be delivered is found there", the notice can be fixed "to a conspicuous part of the premises". In either case, the notice is delivered to a person at the premises or at least to the premises and affixed thereon. There is nothing here to suggest, by analogy, that, in the case of posting, mere posting without delivery to the addressed premises will suffice; nothing here which is incompatible with section 7. It is true that neither of these section 15(2) methods will necessarily involve the notice coming to the attention of the true owner of the premises, but nevertheless the statute is expressive of efforts to achieve service at the premises themselves of a notice addressed to their owner. Moreover, this alternative, which, unlike the section 15(1) alternatives, may not in fact result in

the receipt of the notice by the addressee, is to my mind significantly dealt with in a separate sub-section from section 15(1).

44. Nevertheless, Mr Nicholls submits that the section 23 jurisprudence, at any rate by analogy, necessitates an answer to the same effect, namely that section 7 must be regarded as excluded. Mr Nicholls does not submit that this court is bound by *Webber* to reach the same answer with respect to section 15 of the Act, and accordingly he seeks to dispute any suggestion that Slade J proceeded on the basis that she was bound by the section 23 jurisprudence. Rather he submits that the section 23 jurisprudence, and in particular *Webber*, leads logically to the same result. I disagree. Section 23 is written in different terms from section 15, is to be found in a different statute, and the reasoning of its jurisprudence has developed in large part without consideration of section 7, even if ultimately in *Webber* the inference was drawn that section 7 was excluded.

45. Thus section 23 concerns a particular form of sending by post, namely by registered post. Moreover, it comes immediately after another alternative which refers to "leaving it for him at his last known place of abode in England or Wales". That is a method which may well not succeed in bringing about receipt by the addressee concerned. 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 (see *Regina v. County of London Quarter Sessions, Ex parte Rossi* [1956] QB 682 at 691/2). The same will be true of recorded delivery. In the case of the important notices with which the LTA 1927 and LTA 1954 are concerned, it may well have been thought to be of particular importance that the validity of a timely service can be proved by the sender, in circumstances where, if there is no delivery, that will be soon established. In such a case, the sender of the notice can inform the addressee of his timeous posting and will also be in the position to prove his posting by the clear evidence available to him through the process of the registered post. Moreover, in the case of the LTA 1954, the addressee has two months in which to serve a counter-notice and four months to apply to the court for a new tenancy. In such circumstances, it can well be considered that a curtailment of that period for a few days, in the circumstances regulated by the process of registered post, is neither here nor there (see, albeit in the ECHR context, Neuberger J in *Beanby* at para [76]). The question of a sender of a section 23 notice who *knows*, through the post office, that his notice has not been received, but then does nothing to inform his addressee about the missing notice, seems to have been acknowledged by Neuberger J in *Beanby* (at paras [85]-[86]) as unattractive, but nevertheless as an example of "occasional harsh or unfair results" which may have to be tolerated in any system. For myself, I would hope that any server of a notice who knows that he has posted a valid notice and also knows that it has not been received and that the addressee therefore knows nothing about it and yet does nothing to inform addressee of the notice, would

find his path strewn with difficulties. However, it seems to me that none of these considerations apply to the Act with which this appeal is concerned.

46. I have also been struck at how the section 23 jurisprudence has not proceeded so much by reference to section 7 of the Interpretation Act and its exclusion, as by reference to the construction of section 23 on its own terms. Thus in *Webber* this court reasoned that it was bound by this court's decision in *Galinski*, but *Galinski* did not consider section 7. In such circumstances, I do not consider that it would be appropriate to extend the reasoning applicable to section 23 of the LTA 1927 into a different statute, with different wording, by reference to which it cannot be said that section 7 is excluded on the basis that "the contrary intention appears".

47. Moreover, the "primary method of service" form of reasoning cannot explain those statutes which provide for simpler examples of permissive service by post, where it has been assumed that section 7 of the Interpretation Act applies. Mr Nicholls accepts that the "primary method of service" argument does not run to such cases. Yet, if a permissive form of service, viz sending by post, is authorised simpliciter, as in some at least of the statutes cited above, but is assumed, as in *Galinski* and *Webber* albeit in relation to the more complex wording in section 23, to apply for the benefit of the sender alone, then one could in theory arrive at a situation where section 7 is excluded simply because the statute concerned is assumed to grant a permissive method of service which goes beyond the common law, for the benefit of the sender, not the addressee. However, on the whole the assumption outside section 23 has been the other way around.

48. Slade J appears to have been influenced by the thought that "sending by post" can include registered post and recorded delivery (see at para [27] above) and that section 7 would add nothing to such forms of post. In this respect, and also in saying that the application of section 7 would deprive section 15(1)(b) and the latter part of section 15(1)(c) of any content, the judge appears to have thought that section 7 merely restates the common law. That, however, is not correct, for section 7 provides a code which goes beyond the common law. Moreover, section 7 can work well with a sending by registered post or recorded delivery: although in such a case it may have less to contribute in practice than in the case of a sending by ordinary post, proof of delayed or non delivery should be all the easier.

49. In the circumstances, there is no need to go on to consider the appellant's alternative submission that section 3 of the Human Rights Act may require section 15 of the Act to be interpreted in such a way as not to have the potential effect of destroying an effective right of appeal. It is sufficient to point out that analogous arguments failed in *Beanby* and in *Webber*, although it must be recognised that those cases were not considering a right of appeal. Moreover, although, on the alternative construction which has not persuaded me, the appellant in this case

would have been just out of time, it could probably have managed to bring itself within the deadline, if its impact had been appreciated.

Conclusion

50. I would therefore allow this appeal. That is the decision which this court indicated at the time of the hearing. This judgment sets out the reasons for which I joined in that decision at that time.

Lord Justice Patten :

51. I agree.

The Chancellor of the High Court :

52. I also agree.