COMPULSORY PURCHASE: RECENT DECISIONS

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This paper sets out those recent cases which may be of general assistance to practitioners, covering the period June 2010 – June 2011. The paper seeks to gather together all of the relevant recent judicial pronouncements on matters relating to Compulsory Purchase, and to flag up the most relevant Upper Tribunal (UT) decisions on the subject. The paper does not cover decisions which appear to turn entirely upon their own facts.

CPOs

Recent cases have re-stated the well established principle that the right way to challenge the substantive reasons for making a CPO is not at judicial review, but at an earlier stage.

CHALLENGING CPOS

Boland v Welsh Ministers and Bridgend CC [2011] E.W.H.C. 629 (Admin)

Section 23 of the Acquisition of Land Act 1981 cannot be used to re-run arguments relating to the merits of making a CPO.

Facts

On 18 August 2010 the Welsh Ministers issued a notice confirming a full compulsory purchase order made by Bridgend CC to acquire land to build a school. There had been two CPOs, one relating to the school site, and the other relating to that site's drainage and traffic access needs. The drainage aspect of that second order needed to be amended when it came to be appreciated that the right to lay pipes did not carry with it the right to discharge water into a watercourse. A number of inquiries took place, at which the Claimants contended that the school should be built on an alternative site they claimed to be more suitable from a traffic point of view, and less likely to cause flooding from the point of view of drainage. The Claimant sought judicial review of the decision confirming the making of the order on grounds of irrationality, and also for various

technical grounds, such as that more than one order had been confirmed by the same decision, and various drafting infelicities.

Decision

Beatson J rejected the Claimant's decision. He reminded himself that the grounds of challenge for a decision by the Welsh Ministers were limited to (a) Wednesbury considerations, (b) failure to take into account relevant material/taking into account irrelevant material, (c) failure to comply with the requirements of natural justice, (d) failure to give reasons and (e) making a decision on a matter of fact differing from the decision of the Inspector, or making a decision on the basis of evidence not before the inspector, without permitting representations at a further inquiry.

Beatson J rejected the arguments based on unreasonableness or irrationality. The substantive issues had been amply considered by the Inspector, and it was not the function of the Court under section 23 to re-run those sorts of arguments. He also decided that the CPOs were not invalidated by reason of the technical issues advanced by the Claimants. There was no difficulty with confirming more than one CPO, and an order was not invalidated by drafting defects, even if they were unfortunate.

Greenwood v Secretary of State for Communities and Local Government and Bristol CC [2011] EWHC 263 (Admin)

The circumstances in which a CPO can be challenged under section 23 of the Acquisition of Land Act 1981 are limited.

Facts

G was a secure tenant of a prefabricated bungalow in Bristol, of which the landlord was Bristol CC by virtue of a CPO published in June 2010. The purpose of the CPO was to provide housing under Part II of the Housing Act 1985, including the erection of 300 dwellings and a car park. The land in respect of which the CPO was a residential part of Bristol which had been developed with prefabricated bungalows of the type G occupied. The bungalows appear to have been poor-quality accommodation and had deteriorated

considerably since their erection in the post-war period. G had objected to the CPO on various grounds by letter, though she did not attend the public inquiry, at which evidence relating to G's bungalow was specifically considered, and the conclusion was that the bungalow should not be retained, and that it fell below the Decent Homes Standard, so that the inspector recommended that the CPO be made. G challenged the validity of that CPO under section 23 of the Acquisition of Land Act 1961.

Decision

Frances Patterson QC, sitting as a Deputy High Court Judge, set out the observations of Sullivan J (as he then was) in Powell v Secretary of State for Communities and Local Government [2007] E.W.H.C. 2051, paragraph 3, where he stated that "this hearing is not an opportunity to rerun the merits of the Compulsory Purchase Order, it is simply an opportunity to see whether there is any procedural or legal error in the process of confirmation".

CHALLENGING GENERAL VESTING DECLARATIONS

R (Iceland Foods Ltd) v Newport City Council [2010] E.W.H.C. 2502

Facts

The Claimant sought judicial review of the Defendant's decision to execute and serve a general vesting declaration (GVD). The GVD followed the making of a CPO in 2006, which was made in relation to a pedestrian retail area. The Claimant retailer owned leases in that area, and objected to the CPO. In the statement of reasons, it was stated that the CPO was made to acquire land to allow for the development of a site suitable for a mix of residential, commercial and retail uses. The Defendant had already entered into an agreement with a developer by the time the order was made. The order was confirmed in 2007. Due to the then-prevailing economic climate, it became clear that by 2009 the developer would not be able to fulfil the terms of its development agreement. It was therefore proposed to re-market the site, but that in the meantime all outstanding acquisitions should be confirmed. The Claimant's challenge was, first, that the GVD was

made in circumstances in which the underlying purpose of the CPO had changed. Secondly, to proceed was a breach of A1P1 of the ECHR.

Decision

Wyn Williams J considered the first objection. He stated the principle in Simpsons Motor Sales (London) Ltd v Hendon Corporation [1964] QA.C. 1088, to the effect that a body which acquires land for a stated and limited purpose, cannot later decide to exercise its power for a different or collateral purpose. He rejected the suggestion that the purpose in this case was to carry out the relevant development with a pre-selected developer, and that to switch developers was impermissible. The overall objective, namely the redevelopment of a pedestrianised retail area to promote the economic wellbeing of the area, was the same. Although it was true that the scheme had been rendered unviable due to changes in the economic climate, what had in fact been rendered unviable was the scheme promoted by the pre-selected developer. For the same reason, an allegation that it was Wednesbury-unreasonable to implement a scheme which was "unviable" was rejected. While the financial mechanics of the precise scheme which had been laid out was unviable, that was not to say that another way of financing the scheme could not be found. He decided also that the execution of the GVD was susceptible to judicial review.

COMPENSATION

The UT has been busy with compensation decisions, many of which are highly fact-specific. However, there has been guidance as to how valuation evidence is to be presented to the UT, contained in the Streeter case, in which the President has cautioned against an automatic retreat into Pointe Gourde by acquiring authorities, and which has urged a more systematic approach to the statutory rules relating to compensation. There have been isolated points which have been picked up or reiterated: for example, it has been recently reaffirmed in the context of the Channel Tunnel litigation that tubes of sub-soil, for which there was no market, would attract the nominal compensation of £50 regardless of length, and that slivers of land would attract slightly more: O'Donoghue v Secretary of State for Transport [2011] U.K.U.T 203 (LC).

COMPENSATION

Potter v Hillingdon LBC [2010] U.K.U.T. 212 (LC)

Facts

The Claimants sought compensation for the compulsory purchase of land belonging to them, being a rough piece of grassed land on which they lived in a mobile home. Heathrow was immediately to the south, and the land seemed suitable for the third runway. The CPO was made in 2003, which was after BA had separately entered into an option to acquire the land in question. The acquiring authority valued the land at £1,000,000, whereas the Claimants contended for a value between £6,000,000 and 12,000,000. The Claimants claimed, essentially, that they would have been able to secure some ransom or hope value. The Defendant contended that the land should be valued on a "no scheme" basis, and put its case firmly on the Pointe Gourde footing.

Decision

This case gives rise to a practice and procedure point, but operates as a reminder that recourse should not be had directly to Pointe Gourde without first considering the effect of the statutory principles for considering the assessment of compensation. The President stated at paragraph [73] of his decision that

> The House of Lords decision in Spirerose is a reminder to practitioners and those deciding claims for compensation for the compulsory purchase of land that valuation for this purpose is to be made by applying the provisions that are contained in the Land Compensation Act 1961. The claimants' case referred simply to rules (1), (2) and (5) of section 5. Rule (5), dealing with equivalent reinstatement clearly has no application to a claim that is based in the on ransom value or alternatively hope value. The acquiring authority's approach was to take an initial leap into the no-scheme world and to proceed from there. The scheme, they said, was the scheme for which planning permission was granted in 1992, and, applying the Pointe Gourde rule, compensation was to be assessed at the value that the land would have had if the scheme had not existed. We think that in future valuers and their advisers will need to adopt a more methodical approach, considering the potentially relevant statutory assumptions and applying them to the facts of the case and only moving on to consider whether some additional assumption is required under Pointe Gourde when those earlier steps have been taken.

Applying that approach, the President decided that no Pointe Gourde issue arose on the facts.

Mockford v Durham CC [2010] U.K.U.T. 371 (LC)
Use of the BICS Index.

Facts

The Claimant was the owner of public amenity land which formerly formed part of the National Girls School. He wished to change the use of that land to private garden land, but this was refused by the local authority. The question before the UT was how to assess the value of the land as an educational site for acquisition by the acquiring authority.

Decision

Mr N J Rose FRICS decided that the appropriate basis for assessing compensation for the land was to have regard to the value of the land as existing amenity space, and for the purposes of construing a school. In assessing the latter, it was appropriate to have regard to the BICS index to provide an objective guide to contemporary building costs. Using the BICS index, the value of the land as an educational site was nil. The use as amenity land was £500.

Dunbar v Blackburn with Darwen Borough Council [2011] U.K.U.T. 169 (LC)
There was no entitlement to claim for a bridging loan to acquire an alternative investment property under rule (6)

Facts

This claim related to a sale by agreement of a house, 23 Alaska Street, Blackburn. The Claimant owned this as an investment property. On 15 September 2005 Alaska Street was declared a clearance area by the respondent council. The council first made an offer to purchase the house in November 2005, with agreement finally reached in February 2007, and completion the following April .The question of compensation for disturbance was

left outstanding. A substantial part of the disturbance costs sought were the costs of a bridging loan on a replacement property.

Decision

The President decided that the Claimant was not entitled to be compensated for the cost of the bridging loan under neither section 10A nor rule (6). To the section 10A claim, the President said as follows:

> "The property at 34 Lytham Road was acquired by the claimant in April 2006. The council took possession of 23 Alaska Street on 23 April 2007. The period within which the charges or expenses in acquiring an interest in other land must be incurred if they are to give rise to a claim under section 10A is the period of one year beginning with the date of entry. It is clear, therefore, that there would have been no entitlement to compensation under this provision."

Next, it was also not the case that the Claimant could claim for the bridging loan under rule (6), as he was not in occupation of the property.

ADDITIONAL COMPENSATION

Executors of the Estate of Mrs N Streeter v SoS for Transport [2011] U.K.U.T. 1 (LC)

Where a later development fell within the scope of the original purpose for which an acquiring authority acquired land, there was no right to additional compensation.

Facts

The Claimants owned an arable field which was compulsorily acquired for the purposes of constructing a motorway service area, including a 60 bed hotel, pursuant to a 1989 CPO. The compensation was agreed to be £960,000. In 2005, the planning authority authorised the construction of a further hotel. The Claimants claimed that this was an "additional development" within sections 23 and 29(1) of the Land Compensation Act 1961, and that they should be entitled to further compensation. The question arising was whether or not the further hotel was development for the purposes of the project in connection with which the interest was acquired. A preliminary issue was ordered to determine that question.

Decision

The Claimants argued that what the project for which the interest was acquired was, had to be determined by reference to the initial planning permission sought. As the new hotel was constructed under a separate and further planning permission, it fell outside the scope of that project. This was particularly so given that the hotel, the Claimants contended, was principally for the purposes of providing accommodation to users of Stansted Airport. The acquiring authority contended that the project as defined in the CPO was broad, and broad enough to embrace a new hotel, stating that the order was for the provision of a service station and other facilities or buildings to be used in conjunction with the M11.

The President decided that the mere fact that a hotel in this location might be used in connection with Stansted was not enough to take it out of the scope of the original development project. The location of the hotel strongly suggested that it would only be attractive to users of the motorway. Given that the additional hotel still fell within the scope of the original project, the claim for additional compensation was dismissed.

PRACTICE AND PROCEDURE

Perhaps the most momentous change has been the removal by the Supreme Court of immunity for experts giving evidence on behalf of their clients: see the Kaney case. This obviously extends beyond the sphere of CPOs, but is something which practitioners will need to be aware of and bare in mind. Furthermore, the Court of Appeal has recently given consideration to the application of the rule in Ladd v Marshall in the present context.

EXPERT IMMUNITY

Jones v Kaney [2011] 2 W.L.R. 823

There was no further justification for allowing expert witnesses to be immune from suit for breach of duty in relation to evidence given in Court or views expressed in anticipation of Court proceedings.

Facts

The facts are quite far from the subject matter of this conference. The Claimant suffered injuries after a road traffic accident, and he retained a psychiatric expert whose report, to be relied on in Court, stated that he suffered from post traumatic stress disorder. However, when she came to sign the joint statement with her counterpart, she stated he did not have any such disorder, and that the Claimant was deceitful. The trial judge refused the Claimant's request for a new expert, and the Claimant settled his claim. He claimed this was for less than he could have settled it for, and sued his expert, who defended on the basis that she was immune from suit. The facts were not, therefore, directly concerned with liability for statements made in Court by an expert, but the Supreme Court was very clear that it considered that the same considerations applied there too.

Decision

By a majority, the Supreme Court decided that experts' immunity from suit should be removed. Lord Philips considered the justifications for the rule that an expert witness was immune from suit. Traditionally, it had been considered that the immunity meant that experts could engage in full and frank discussion, and to give full evidence to the Court without fear of liability, that immunity guarded against defensive practices, and against vexatious claims by parties who lost. He considered that none of those justifications were of sufficient to justify immunity from suit for breach of duty of care; however he emphasised that there continued to be immunity from defamation (at paragraph [62]). Lord Brown considered that it was desirable to remove immunity in order to ensure that expert evidence was realistic and geared towards assisting the relevant tribunal (at [67]). Lord Collins, Lord Kerr and Lord Dyson also agreed with that approach. Lord Hope and Baroness Hale dissented. Lord Hope was concerned by the fact that there was a lack of a secure principled basis for removing immunity, and was also concerned that there was not a clear line drawn as to what was, and what was not, affected by the removal of the immunity, and a concern about the lack of evidence on the question of the practical implications of the removal of the immunity, led him to consider that legislation was the

more appropriate path. Baroness Hale's concern was that experts would be exposed to claims by disappointed litigants seeking to blame someone for their loss, and the removal by judicial decision of the immunity was "irresponsible" ([190]). She agreed with Lord Hope that this ought to be done by considered legislation.

APPLICATIONS TO ADMIT FRESH EVIDENCE

Ridgeland Properties Ltd v Bristol City Council [2011] E.W.C.A. Civ 649

The UT had been right to refuse to re-open proceedings to admit new evidence in relation to compensation

Facts

On 3 June 2009, the UT published a draft decision stating that the compensation payable for the compulsory acquisition of a property called Tollgate House was £4.5 million. That figure was reached by use of the residual valuation method as a last resort, there being no comparables. The landowner then produced letters from 2002 and 2003, in which period offers had been made to buy it for £15.3 million to £24 million, and asked the UT to re-open its decision so that those offers could be taken into account. It would appear that those offers were also known to the Respondent. The offer letters were consistent with the Appellant's valuation evidence.

Decision

Sullivan LJ, giving the judgment of the Court, sets out the relevant principles applicable to applications for fresh evidence. Those principles are set out in Charlesworth v Relay Roads Ltd [2000] 1 W.L.R. 230, at 238 (*per* Neuberger J (as he then was)), as follows:

> "In these circumstances, I conclude that the following principles apply where a party is seeking to call fresh evidence on a new point after judgment has been given but before the order has been drawn up: (1) the court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument; (2) the court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice; (3) the general rules relating to amendment apply so that: (a) while it is no doubt desirable in general that litigants should be permitted to take any

> reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) as with any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants; (4) quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in Ladd v Marshall; (5) almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it; (6) the court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare."

The Ladd v Marshall requirements are of course well-known, and are as follows:

> "First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

It was common ground that the UT had given consideration to those principles, and had exercised its discretion in disallowing the evidence. In those circumstances, the Appellant needed to show that the decision of the UT was either "wholly wrong", that is, outside the range of reasonable disagreement, or was reached on the basis of irrelevant considerations or without considering relevant ones. The Appellant contended that the UT was wholly wrong, on the basis that the offers were a potent indicator of value, that without that evidence, the principle of equivalence for the assessment of compensation would be breached, and because without these comparable offers, the UT could only value on the residual basis, which was an undesirable last resort. Alternatively, the UT (for substantially the same reasons, save that it was also added that the Respondent was

aware of the offers), failed to take into account relevant matters which were known to the Respondent.

Sullivan LJ considered why it was stated that the offers were of critical importance, and observed that their significance was not that they were a way for the UT to "cross-check" the residual valuation, for which purpose the offers were useless, but that it was plainly the purpose of admitting these offers that the valuation be re-done from the ground up by reference not to comparable transactions, but by reference to un-accepted offers. It was noted that this would be to advance a wholly new valuation case, and that such a fundamental change would require the most cogent justification. The Court of Appeal found that there was none. The failure to refer to the offer letters for a considerable period of time was inexplicable on the material before it. The Court of Appeal accepted that, while the fact of those offer letters were known to the Respondent, it was only with the benefit of hindsight that the Respondent appreciated that the offer letters might of assistance to the UT in reaching a conclusion on value. Once the full facts and circumstances underlying the offer letters was known, it could be appreciated that they could not simply be dismissed as uncompleted offers, but were of some evidential value. For those reasons, the Court of Appeal declined to interfere with the UT's exercise of its discretion not to re-open the proceedings.

SPECIAL REGIMES

PETROLEUM (PRODUCTION) ACT 1934

Bocardo SA v Star Energy UK Onshore Ltd [2010] 3 W.L.R. 654

Facts

By operation of the 1934 Act, property in petroleum vested in the Crown. Under section 2 of that Act, the Defendant, who was a licenced petroleum producer, was permitted to bore for oil. That right could be implemented either by the consent of a willing landowner, or by acquiring the right under the Mines and Minerals Act 1966, under which a compensation regime existed. There was a reservoir of oil, the apex of which was under the Claimant's land. Drilling into the apex is the sure way of extracting oil by the injection of water. Rather than apply for a licence, the Defendant drilled diagonally

under the Claimant's land, and extracted the oil. The Claimant claimed that this was a trespass, and that he was entitled to compensation, which should be calculated as a percentage of the value of the oil extracted. The Defendant stated that there was no trespass, but that at any rate compensation should be limited to a nominal amount to reflect the fact that there was a scheme in place. The case therefore turned on what the negotiating damages would have been against the backdrop of that statutory framework. The main issue on that point was whether or not the effect of the statutory scheme had had the effect of robbing the Claimant's land of all value attributable to the fact that the oil was located under it.

Decision

The Supreme Court rejected the Defendant's appeal that there was no actionable trespass in this case. It was found that in this case, the works were not so deep as to render the concept of substrata being owned by the surface owner absurd, and hence there was a trespass. The Supreme Court also held by a majority that the Court of Appeal had been right to reduce the substantial damages awarded by the first instance judge to a nominal amount. It was found that the effect of the 1934 and 1966 acts together was to create a compulsory purchase regime, under which value had to be assessed by reference to compulsory purchase principles. The effect of this was that the increase in value of the land by reason of the introduction of the statutory scheme relating to oil had to be disregarded. The majority (Lords Hope and Clarke dissenting) was to the effect that it cannot have been intended by Parliament, having implemented the scheme, that the landowner through whose land a pipe passes should be entitled to a share of profits. The minority decided that the statutory scheme had not removed from the Claimant's land all value, but that it retained "key" value which pre-dated the scheme in the statutes. Lord Hope explained at paragraph [42] that

> "Anyone who had obtained a licence to search, bore for and get the petroleum under Bocardo's land would have had precisely the same need to obtain a wayleave to obtain access to it if it was not to commit a trespass. So it was not Star's scheme that gave the relevant strata beneath Bocardo's land its peculiar and unusual value. It was the geographical position that its land occupies above the apex of the reservoir, coupled

> with the fact that it was only by drilling through Bocardo's land that any licence-holder could obtain access to that part of the reservoir that gives it its key value."

Although the damages that the dissentients would have awarded the Claimants would have been less than what was granted at first instance, nonetheless, the damages should have been assessed at a substantial, and not a nominal, amount.

ELECTRONIC COMMUNICATIONS CODE

Bridgewater Canal v GEO Networks Ltd [2010] E.W.C.A. Civ. 1348

Facts

The Claimant is the owner of the Bridgewater Canal, under which run a number of fibre-optic cables to provide broadband to Manchester. GEO is the provider of broadband networks, and had rights to place cables under the canal, which qualifies as a "linear obstacle" for the purposes of the Code, paragraphs 12 and 13). They wished to run further cables under it, and initiated an arbitration under the Code to determine the level of compensation and consideration payable under its provisions, specifically under paragraphs 13(2). The question was whether or not a payment had to be made to install and keep the cable under the canal, or whether payment simply had to be made for the works of installation. It had been determined by Lewison J, hearing the appear from the arbitrator, that the payment was not limited to actual installation of the works, but that the payment had to reflect also the price for keeping the cable on the land: see [2010] 1 WLR 2576.

Decision

The Court of Appeal reversed the decision of the Lewison J. The Court of Appeal considered the operation of the Code in relation to linear obstacles was to provide for a quick method of resolution of disputes which differed from the manner in which the Code regulated the general case of installation of a mast on the land belonging to the landowner. The compensation and consideration payable related to (i) the right to carry out those works and (ii) the loss sustained by reason of doing so in implementation of the

right to install and keep. There was no need to provide additionally that the cost of installation also extending to the cost of keeping the installation under the Code.