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The inside track on CPO practice

Paul Shadarevian QC and Harriet Townsend

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Objecting to a CPO: a promoter and objector's perspective

Paul Shadarevian QC

Preliminaries



- **PROMOTERS AND OBJECTORS SHOULD ALWAYS HAVE UTMOST REGARD TO**
- **Article 8 ECHM:** *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country....*
- **Article 1 P1 ECHM:** *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
- *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.....*

Preliminaries Cont.



- **Case law establishes that where a constitutional right is involved, it carries substantial force and only a public interest of still greater force is capable of overriding it (see e.g. Chesterfield Properties plc v SoS [1997] 7 WLUK 491, R (o.a. of Hall) v First Secretary of State [2007] EWCA 612.)**
- **Remember the Essential Principle that there must be a compelling case in the public interest to justify a CPO and its extent.**

Compelling Case



- What this amounts to in any given case will depend in large part on the statutory powers that underpin the CPO and the purpose of the CPO
- The compelling nature of the case for a CPO is not established merely by reference to the principal objective to be achieved, but also by reference to the way it is to be achieved so as to justify each acquisition. This is because:
 - There must be a clear public interest justification to deprive a person of their rights
in property: *R (Hall) v First Secretary of State [2007] EWCA Civ. 612*
 - Each case will depend on its facts but some central themes, including the issue of scheme alternatives, need to be addressed.

Promoters Be Alert



- **BEFORE MAKING A CPO THE PROMOTER SHOULD**
- Always anticipate that a CPO will be challenged on its merits and by reference to its justification
- That such objections may be at a high level i.e. attacking the need for compulsory acquisition having regard to the overall objective of the scheme underlying the acquisition at a more general or detailed level (the attacking the justification for the inclusion of the objector's land within the CPO having regard to the objectives of the scheme and how they might alternatively be achieved
- Consider the question of alternatives at the higher and detailed levels to be confident that compulsory acquisition is justified on both levels. Alternatives may include not pursuing the scheme at all, pursuing an alternative scheme or other options that might give rise to the realisation of similar objectives in the public interest without the need for compulsory acquisition or an alternative acquisition strategy
- Remember that it is open for the confirming authority (SoS) to modify a CPO by excluding an interest prior to confirmation
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Objectors Be Vigilant



- **OBJECTORS SHOULD TAKE THE ABOVE PRINCIPLES AS THEIR STARTING POINT IF THEY WISH TO OPPOSE A CPO.**
- In addition:
 - They will have regard to procedural requirements and the lawfulness of the draft order
 - They will scrutinise the conduct of the acquiring authority and the extent to which the authority has sought to consult with the affected owners and negotiate terms
 - Look to see if the CPO is a means of last resort or whether it could have been avoided, either generally or with respect to the objector's individual interest

Government Guidance



- **PROMOTERS AND OBJECTORS SHOULD FOLLOW GOVERNMENT GUIDANCE:**
- *Compulsory Purchase Process and The Criche Down Rules 2019*
- This provides essential guidance on most authorising statutory processes and provides an invaluable check list. It will be at the forefront of an Inspectors and the SoS's consideration of the evidence.

Compulsory Purchase Process and The Crichel Down Rules 2019



- TIER 1 GUIDANCE
- Every case will be considered on its individual merits, but the more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be.
- It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired, but a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time.
- Promoter should have a clear idea of how it intends to use the land which it is proposing to acquire; and show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale (this will include the funding of CPO compensation and the scheme underlying the acquisition). There needs to be evidence of the sources of funding and the timing of the availability of the necessary funding.

Compulsory Purchase Process and The Crichton Down Rules 2019



- TIER 2 GUIDANCE
- Gives specific advice in relation to the use of specific powers. Promoters and Objectors should pay more than lip service to its terms. Specifically it identifies the matters on which an Inspector or the SoS will wish to be satisfied about in reaching a conclusion in relation to the compelling public interest

Tier 2

TCPA 1990 s.226(1) facilitate the carrying out of development, re-development or improvement on or in relation to the land



- **What factors will the Secretary of State take into account in deciding whether to confirm an order under section 226(1)(a)?**

whether the purpose for which the land is being acquired fits in with the adopted Local Plan for the area or, where no such up to date Local Plan exists, with the draft Local Plan and the National Planning Policy Framework

- **In this regard objectors should be aware of TCPA 1990 245(1):**
- **this provides the Secretary of State with the right to disregard objections to orders made under section 226 which, in his opinion, amount to an objection to the provisions of the Local Plan.**
- **Objectors should consider how this may impact on criticisms of the scheme. Promoters should be alert to the scope of an objection in this regard.**

Tier 2: TCPA 226(1)



- the extent to which the proposed purpose will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area
- whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means
- the potential financial viability of the scheme for which the land is being acquired

Tier 2



- Common and additional themes appear in relation to the exercise of other CPO powers:
- *Housing and Regeneration Act 2008: Homes England*
- If Homes England has specific proposals for the land the Secretary of State will also consider:
 - any alternative proposals that may have been put forward by the owners of the land or by other persons for the use or reuse of the land and: or whether they are likely to be, or are capable of being, implemented (including consideration of the experience and capability of the landowner or developer and any previous track record of delivery).
 - what planning applications have been submitted and/or determined and the extent to which the proposals advocated by the other parties may conflict with Homes England's proposals (ie the timing and nature of any housing development and/or regeneration of the wider area concerned).

Homes England cont.



- whether the proposal is, on balance, more likely to be achieved if the land is acquired by Homes England, including the effect on the surrounding area that the purchase of the land by Homes England will have in terms of stimulating and/or maintaining the regeneration of the area
- if Homes England intends to carry out direct development, whether this would displace or disadvantage private sector development or investment without proper justification and that the objects of Homes England cannot be achieved by any other means

Homes England Cont.



- if Homes England does not have specific proposals for the land

If Homes England proposes to acquire the land for the purpose of stimulating private sector investment, that it will not always be possible or desirable to have specific proposals for the land concerned (beyond any broad indications in its Corporate Plan, or any justification given in Homes England's statement of reasons). However, the Secretary of State will still want to be reassured that:

- there is a realistic prospect of the land being brought into beneficial use within a reasonable timeframe; and
- Home England can show that the use of its compulsory purchase powers is clearly in the public interest.

Tier 2: UDCs



- Some matters upon which the SoS will want to be satisfied about:
- whether the urban development corporation has demonstrated that the land is in need of regeneration
- what alternative proposals (if any) have been put forward by the owners of the land or other persons for regeneration
- whether regeneration is on balance more likely to be achieved if the land is acquired by the urban development corporation
- whether the land is in an area for which the urban development corporation has a comprehensive regeneration scheme; and the quality and timescale of both the urban development corporation's regeneration proposals and any alternative proposals.

RELEVANT OBJECTORS AND OTHER OBJECTORS



- In accordance with statutory requirements for CPOs, objections can be made by owners, other qualifying persons and third parties, including members of the public. Only those who would have an interest acquired by the implementation of the CPO or be injuriously affected by it are “relevant objectors”.
- Under rule 14 of the Compulsory Purchase (Inquiries Procedure) Rules 2007, third parties (i.e. “other objectors”) have no right to be heard at an inquiry, although the inspector may permit them to appear at his discretion (although permission is not to be unreasonably withheld). This discretion is usually exercised benevolently where the non-statutory objection has a direct and serious bearing on the justification for the CPO.

Discussion Points



- **Very often the essence of an objector's case, if it is not based on legal compliance, fairness and the pre-CPO measures taken by the promoter to explain the purposes of the CPO and attempt to reach agreement on compensation before resorting to CPO procedures, is one of necessity.**
- **E.G:**
- **What is the specific need to acquire the objector's land?**
- **What other alternatives have been explored to obviate the need to use a CPO in respect of the objector's interest (and other person's interests)?**
- **Why can the objector not remain in ownership within the scheme via an alternative that requires the objector's willing participation or with collaborative or independent redevelopment or refurbishment?**

Discussion cont.



- Why is the issues of alternatives so important?
- The compelling case is founded upon the necessity of the acquisition.
- The SoS/Inspector is not bound only to consider the alternatives presented. Indeed, the Inspector/SoS may consider that there is a reasonable prospect of other reasonable alternatives that would not require the CPO and/or the acquisition of the objector's interest.
- In this regard, the promoter should be seen as having considered (and produced evidence to show that it has considered) all reasonable alternatives before resorting to the use of CPO powers and to be able to demonstrate against this that the CPO is the most appropriate and best means of securing the public interest.

Discussion Cont.



- Thus, once the issue of the public interest case has been established in relationship to the principle of the purpose of the scheme, the remaining question is whether there are reasonable alternatives to the scheme which can achieve similar outcomes? The SoS/Inspector is not bound to find that an inferior scheme should be preferred simply because it does not require expropriation (i.e. the presumption against interference with HR does not require such a conclusion).
- One of the principal advantages for a promoter and disadvantage for an objector is where the scheme is ensconced in up to date policy is TCPA 1990 s.245(1). This sets a high bar for objectors who wish to challenge the scheme on public interest grounds, particularly if the policy foundation is very detailed and been the subject of comprehensive public consultation.
- See also:
- *Grafton Group (UK) plc v SoST* [2016] EWCA Civ 561
- *Swish Estates Ltd v Secretary of State for Communities and Local Government* [2017] EWHC 3331

Discussion cont.



- In these circumstances an objector will need to consider whether the adopted scheme can be achieved without the CPO:
 - careful examination and evaluation of the policy scheme becomes essential
 - by the same token the promoter will need to consider the extent to which the scheme justifies the compulsory acquisition and to examine the scope and detailed requirements of the policy which forms part of the scheme i.e. what are the reasonable alternatives to the acquisition strategy?
 - are they viable and practicable? Would they result in delay and uncertainty?

Discussion cont.



- The more these issues are addressed in the statement of reasons the better both for the promoter and the affected land owners. Specificity and thorough groundwork by the promoter will allow the parties to focus on the essential areas of dispute, but this can also encumber the promoter and reveal weaknesses. If it does, the promoter has not done its job.

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Compulsory Purchase Orders

The Inside Track - Implementation

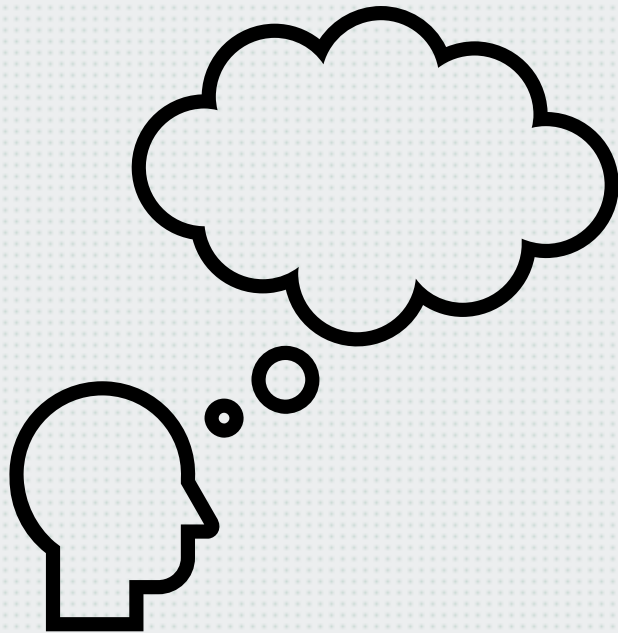
Mrs Harriet Townsend

Implementation



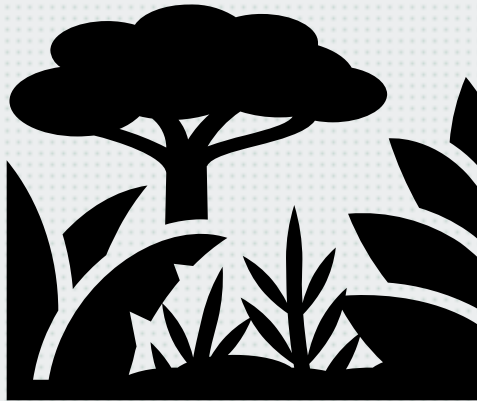
- We will cover
 1. Deciding whether/when/how to implement
 2. The General Vesting Declaration
 - The CP (GVD) Act 1981 (amended 2016)
 3. The Notice to Treat / Notice of Entry
 - The Compulsory Purchase Act 1965 (amended)
 4. What about ... ? Acquiring minor tenancies; easements; mortgages.
- We will not cover DCO rights of compulsory acquisition or compensation in any detail. Please bear in mind that, to achieve the aims of this webinar, a broad overview is given and statutory material is often simplified.

Whether to implement



- Unless or until it vests in the AA, the owner can deal with the land (e.g. sell it) and remains responsible for it.
- The CPO confers on the AA the right to acquire but there's no statutory requirement to implement. No need to acquire all interests if not needed to achieve objectives.
- Did the AA agree with owner not to implement on terms? If so, are there grounds to implement?
- Has the project changed? If so by how much? Implement only for the authorised purpose – within the scope of the power used to justify the CPO.

Gathering information



- Entering land for survey purposes
 - Any time after CPO takes effect.
 - Statutory purposes in s.11(3) CPA : surveying, valuing, and taking levels; probing or boring to ascertain the nature of the soil; setting out the line of the works.
 - The AA need only give between 3 and 14 days' notice to owners or occupiers of the land.
 - No compensation (that's NTT's role) save for damage caused.
- The authorising Act may also give special provision for entry onto land (s.584 Housing Act 1985).

When to implement



- Not before the CPO has “come into operation” [s.5(2) GVDA and ... CPA] –
 - should always serve notice of confirmation following confirmation of the CPO [s.15 Acquisition of Land Act 1981].
- CPO must be implemented within 3 years of the date it became operative [s.5A GVDA; s.4 CPA], unless a legal challenge is brought to the CPO in which case the period is extended by up to 1 year [s.5B GVDA; s.4A CPA].
- Once land vests in the authority, interest is applied to compensation.
- Levelling Up and Regeneration Bill cl.146: proposes the confirming authority may extend the implementation period to more than 3 years.

How to implement



- Three choices
 - Agreement
 - Notice to treat
 - General Vesting Declaration
- Agreement is relatively rare and must observe all the usual formalities of acquisition by consent (note s.3 CPA 1965).
- Which statutory procedure should be used? This depends on the particular circumstances of the individual CPO: the priorities of the AA, and the characteristics of the land/owners/rights acquired.



The General Vesting Declaration

The General Vesting Declaration Process



- Key statute :
 - The Compulsory Purchase (General Vesting Declarations) Act 1981, as amended by (in particular) the Housing and Planning Act 2016.
- Exclusive procedure (not if NTT has been served and not withdrawn)
- Steps
 1. Execute a “*a declaration in the prescribed form vesting the land in themselves from the end of such period as may be specified in the declaration (not being less than 3 months from the date on which the service of notices required by section 6 below is completed).*” [s.4(1)].
 2. Serve on (almost) every occupier – see slide 17 – and all those who have given information to the AA pursuant to invitation in the notice of confirmation served under s.15 AoL 1981 notice “*in the prescribed form*”. [s.6 GVDA and note s.329 TCPA 1990 applies re service].

The General Vesting Declaration Effect



- The vesting date is the day after the end of the period specified in the declaration [s.4(3)].
 - **S.8(1)** *Any land specified in the GVD, together with the right to enter upon and take possession of it, shall, subject to section 9 below, vest in the acquiring authority on the vesting date in relation to that land as if the relevant procedures in the CPA 1965 had been carried out.*
- On the vesting date (not before – s.8(3)) the AA acquires both right of entry and title to the land.
- On the vesting date the AA becomes liable to pay compensation for any interest in land entitled to compensation. It is the “valuation date” and interest on all heads of compensation run from this date [s.10].

The General Vesting Declaration



- *R (Dawes) v Birmingham City Council* [2021] EWHC 1676 (Admin) Holgate J
 - JR of the execution of a GVD succeeded – GVD quashed.
 - CPO made 2018 under s17 Housing Act 1985
 - Mutual undertakings after CPO made led to withdrawal of objection and confirmation of CPO in April 2019.
 - In August 2020 BCC executed the GVD.
 - BCC failed to make reasonable inquiries as to the condition of the property and whether it was being occupied.
 - Test: rationality seen from BCC's point of view. J held irrational of BCC not to undertake an internal inspection given the approach it had taken in period since confirmation of the CPO, the Claimant's circumstances, and what else BCC knew about the case.
 - A very high threshold for success (rationality) was reached on the specific facts of this case.



The Notice to Treat

Notice to Treat – commencing acquisition



- Key statute
 - Compulsory Purchase Act 1965 (consolidating legislation). Part 1 (for CPOs under Acquisition of Land Act 1981).
- Process
 1. Make “diligent inquiry” as to all those interested in, or with power to sell and convey or release the land [S.5(1)].
 2. Serve a notice to treat (NTT) on each of them [s.5(2)]
 1. State the particulars of the land (should attach a plan),
 2. Demand particulars of the recipient’s estate and interest in the land and of the claim for compensation made by them (a standard claim form is usually appended to the Notice), and
 3. State that the AA “are willing to treat for the purchase of the land and as to the compensation to be made”.
 3. Service: s.30(3) CPA and s.6 AoL 1981. Must be properly served.

Notice to Treat – commencing acquisition

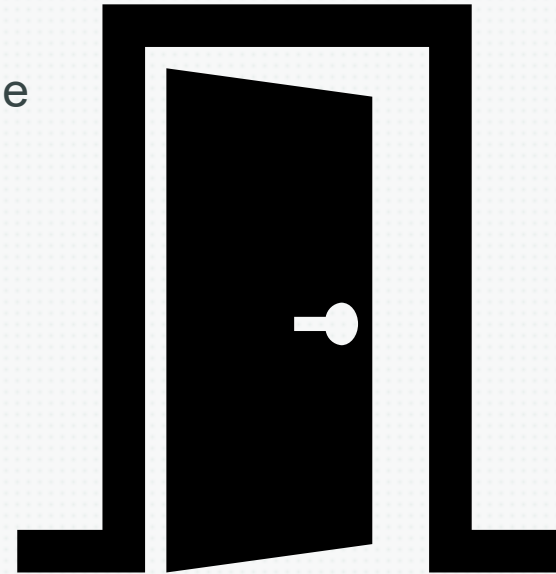


- Response to NTT and status quo post NTT
 - The owner remains owner – can deal with the land.
 - The owner may submit a claim for compensation.
 - If the land comprises a house, building or factory or a park or garden belonging to a house and only part is included in the NTT, the owner may require the owner to acquire the whole of the property.
 - NTT generally lasts 3 years (unless extension agreed) if no progress made [s.5(2A)].
- After receiving the claim for compensation and/or determination of compensation by Upper Tribunal, the AA has a limited opportunity (6 weeks) to withdraw the NTT.

Notice to Treat – Gaining Entry



- If an NTT has been served the AA may enter the land without the owner's consent provided it has given adequate "Notice of Entry" (NOE).
 - NOE can be served with the NTT
 - Service requirements are identical
 - Must give more than 3 months notice
 - Don't have to enter / take possession on the specific date in the NOE (can be later).



Notice to Treat – owner's rights



- If the statutory procedures were followed in service of NTT :
 - Right to have compensation assessed (valuation date moves with the date of assessment up to the point of entry and stops there);
 - Right to apply for an advance payment;
 - Right to serve a counter-notice requiring the AA to take possession by a given date (owner may have vacated and not wish to be responsible for managing the land).
- If the statutory procedures were not followed in service of NTT, damages and/or injunction for trespass.



Acquiring minor tenancies; easements; mortgages

Minor tenancies



- A minor tenancy = a tenancy for a year, or from year to year, or a lesser interest.
- If the minor tenancy expires or can be lawfully terminated ahead of the time the AA needs possession, there is no difficulty.
- GVDA: the GVD is not effective against a minor tenancy or against a long tenancy “which is about to expire”. In such a case a NTT must be served together with 3 months notice of entry on every occupier [s.9].
- CPA: tenant not entitled to NTT, but to compensation under s.20. the AA must simply request possession and tender compensation for the unexpired term [s.20(4)].

Easements



- Acquiring existing rights: in acquiring the dominant tenement, the AA acquires the rights it enjoys over other land.
- Acquiring the servient tenement:
 - unless the authorising Act says otherwise, the land is taken subject to the burden of rights over it, but
 - the AA and successors in title benefit from statutory powers to override those easements, paying the owner compensation (e.g. s.237 Town and Country Planning Act 1990, repealed and replaced by s203)
- For completeness: the creation/acquisition of new rights over land: only possible where the authorising statute says so explicitly. This is an area of law often considered ripe for reform.

Mortgages



- Generally, the mortgagee's interest causes no difficulty as their interest is merely financial and is dealt with when paying compensation.
- The position of the mortgagee is identical whether GVD or NTT is used, unless the mortgagee is in possession.
- GVD: good title and right of entry against the mortgagee vest in the AA on the vesting date. The mortgagor's interest is converted to a claim for compensation, dealt with in accordance with CPA ss.14 and 15.
- NTT: NTT and NOE must be served on a mortgagee in possession and unless an agreement over use of compensation to redeem the mortgage is possible, the statutory procedure under CPA ss.14 and 15 should be followed.

QUESTIONS





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Thank you for attending. Slides and presentation are provided for training purposes at the webinar held on 16 May 2022 and do not contain legal advice.

Mrs Harriet Townsend