



Learning from Wolves

The Judgment of the Supreme Court on the 12th May 2010 in the case of *R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20* provides an opportunity to review compulsory purchase process in respect of retail regeneration sites. Stan Edwards considers how this case is in many ways special to its facts and essentially does little more than remind authorities and promoters of the importance of respecting the legal structure and requirements.

Background

In 2002 Sainsbury's received approval to develop the site following a call-in and Inquiry, but in 2005 changed their mind, deciding to sell to Tesco. Tesco subsequently produced a scheme requiring the acquisition of additional land to accommodate a store 50% larger than the one with permission, in return for carrying out works to a Tesco controlled site with a number of listed buildings at the Royal Hospital (RH), 850m away. The RH site had been a financially unviable regeneration objective of the council for several years now, linked through cross-subsidy from the Raglan Street site. Following the exchange of an agreement with the council and the acquisition of third party rights Tesco sought an exchange with Sainsbury's. Sainsbury's decided instead to proceed with its development, and submit a fresh application of the Raglan Street site – after all it owned 86% of the enlarged site.

The council's dilemma

Both competing schemes were acceptable in planning terms, and discussions took place between the two store operators, but the differences were unresolved. The council resolved to promote a CPO which facilitated Tesco's proposals at Raglan Street, conditioned by the carrot of prior works at the RH site, and the stick that Tesco was unlikely to carry out the RH scheme unless it was selected to develop the Raglan Street site. It was reported to the council that the Tesco scheme would result in a significantly greater contribution to the economic, social and environmental (ESE) well-being of the council area.

The challenge

Sainsbury's challenge at the High Court, Court of Appeal and Supreme Court may be summarised in that case law on the legitimate scope of planning conditions¹ were relevant as were those on Section 70(2)² in respect of materiality³. It followed from these that the only off-site benefits which could be taken into account were those which fairly and reasonably related to the development. The benefits had to be material and relevant in relation to which the CPO power was being exercised, that is for the Raglan Street development, and that a potential cross-subsidy was relevant only where there was a composite development. In other words there must be a real connection between the benefit and the development. The position of the council and Tesco was that the Court of Appeal was right to say that there should not be a read-across from the planning

permission cases to CPO cases, but in any event the authorities showed that financial considerations, including off-site benefits through cross-subsidies, were relevant, and were essentially a matter for evaluation by the planning authority.

The Supreme Court decision was that the Sainsbury's appeal should stand.

Issues related to the challenge

Judgment Factors

Was Sainsbury's challenge legitimate? The majority (4:3) of their Lordships concluded that it was, and in the process rehearsed the following points:

- Connectivity and analogous planning case;
- The underlying principles of compulsory purchase;
- The application of CPO powers;
- Wolverhampton CC's selection process for a running partner.

Planning

Proper planning occurs in our system as a form of intervention to ensure proper governance in terms of services and the allocation of resources to local communities. The issues emanating from concerns of authorities result in policies, programmes and projects (PPP). Such elements may be stand alone or linked. All levels generate projects to be delivered for the public good involving sustainability, community engagement and compliance with national planning policy demonstrating an assessment and justification of public good. What should be done?

“ Many times in recent years, superstore led CPOs are seen to attempt to retro-fit CPOs to planning policy and background. ”

Derive the PURPOSE, then POWER (Waters Case/Circular 06/04)

PLANNING ELEMENT:

JUSTIFY in the PUBLIC INTEREST

- POLICIES in the
- PROGRAMMES
- PROJECTS A, B, C
- ORPHAN PROJECT – won after call-in/Inquiry

CPO ELEMENT:

JUSTIFY USE OF CPO – Public Good outweighs Private Interests
 Carry out an assessment Sustainable ESE Wellbeing > Potential claimants rights/ well-being
 Raglan Street – Evidence of planning and retail (economic) well-being, but no other evidence of assessment for CPO
 Evidence of community engagement in CPO?

DEMONSTRATE THE USE OF POWER
 Section 226(1)(a) ... authority think ... will facilitate ... development, re-development or improvement on or in relation to the LAND;
 No connectivity to other projects so the orphan LAND stands alone
POWER NOT SATISFIED in the Wolverhampton case
 Section 226 (1A) Condition satisfied in that it contributed to the economic (retail well-being) of the Raglan Street site but not ESE cross-subsidy for the Royal Hospital site.

CPOs require a more stringent form of assessment to justify expropriating

someone’s right or interest. Where a CPO was the product of a well documented planning audit trail for arguing the case for delivery of a scheme, it is easy to provide clearly defined linkages between composite projects because they were ‘material’, relevant and ‘reasonably related’ to one another.

In the Wolverhampton case this was not so. The Raglan Street development was a product of Sainsbury’s’ activities, call-in and Inquiry, therefore having shallow roots and no family in relation to other planning programmes and projects, but such is the case with many superstore led schemes. It is intriguing that the site was called-in to ensure that it was in the public interest and then, wonderfully, became so compelling in the public interest that an expanded site required a CPO to be delivered. It was restated in the judgment that in obtaining authorisation for promoting the CPO Wolverhampton CC could not report any connectivity between the schemes in planning terms.

The derivatives from the decisions in the planning context are:

1. That which is material (or relevant) consideration is a question of law, but the weight to be given to it is for the decision maker;
2. Financial viability may be material if it relates to the development, as it can be where it is part of a composite development on another part, as far that the proposed development will finance other relevant planning benefits may be material. Also, off-site benefits which are related to or are

connected with the development will be material.

Similar principles may be applied to compulsory acquisition for development purposes, provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of CPO principles is required. There must be a real, rather than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made.

However, many such projects that eventually require CPO assistance rarely assess the justification for a CPO beyond that required to justify the retail planning argument. The superficial arguments found in many CPO statements of reasons bear testimony of this.

Justifying the CPO

Justifying a CPO means an assessment of all the ESE sustainability/well-being/ community elements way before the choice of the power because, in deciding that there is a compelling case in the public interest and justifying the use of CPO powers, there has to be evidence provided that an assessment has been made which balances public good against private interests. Possibly, it was not in Sainsbury’s interest to challenge that this assessment does not appear to have taken place in this case. A retail assessment (economic well-being) related to the land was undertaken, plus a demonstration of a social and environment benefit in respect of the distant RH site. The redevelopment of the CPO site had been accepted in planning

Footnotes:

- 1 Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554. Newbury District Council v Secretary of State for the Environment [1981] AC 578, 599; Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 772.
- 2 Town & Country Planning Act 1990.
- 3 R v Westminster City Council, ex parte Monahan [1990] 1 QB 87 (CA); R v Plymouth City Council, ex parte Plymouth and South Devon Co-operative Society (1993) 67 P & CR 78 (CA); Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 (HL).
- 4 ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down* 14 & 15.
- 5 Waters v. Welsh Development Agency, [2004] 2 EGLR 103, Lord Nichols 63 (5).
- 6 Town & Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.
- 7 Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) [2006] UKHL 50, 2007 SC (HL) 33.

terms yet, as Lord Collins confirmed, there is no doubt that where a body has CPO powers, which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body to seek to use the power for a different or collateral purpose. The purpose for which an authority seeks to acquire land will determine the most specific power available for the purpose in mind⁴. But what defines purpose? Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority⁵. In the Wolverhampton case, the connectivity should have been seen from the policies, programmes and projects of the acquiring authority – it was not there.

Empowerment

Wolverhampton CC is the body empowered to promote the CPO under Section 226 (1)(a)⁶ “to acquire compulsorily any land in its area if it thinks that the acquisition will facilitate the carrying out of development or improvement on or in relation to the land”. But, the clause related the compulsory purchase power to the land affected by the CPO, not some unrelated off-site scheme. Many times in recent years, superstore led CPOs are seen to attempt to retro-fit CPOs to planning policy and background. Some get away with it, as in the Shirley Town Centre, Solihull CPO, and others, like this one, did not.

In providing a limitation to Section 226 (1)(a) of the Act, Section 226 (1A) states that a local authority must not exercise the power under Section 226 (1)(a) unless

they think that the development, re-development or improvement is likely to contribute to the achievement of *any one or more* of the promotion or improvement of the economic/ social/ environmental (ESE) wellbeing of their area.

The problem with many authorities exercising Section 226 (1)(a) power is that, in order to fulfil Section 226 (1A), they hunt for more than one ‘well-being’, even seeking benefits off-site, just to make sure. Wolverhampton CC / Tesco fitted the empowerment criteria in to promote the CPO, but in endeavouring to demonstrate social and economic well-being elements for Section 226 (1A), overplayed their hand by attributing to the CPO the well-being elements from another site (RHS) totally unconnected except for transactional arrangements to cross-subsidise. This is however an assessment in relation to the exercise of the power, not the assessment as to whether a CPO is justified.

Disposal

Section 233 of the T&CPA 1990 allowed Wolverhampton to choose a preferred developer providing its demonstration of estimate of ‘best terms’ (within its own standing orders and its procurement rules). The decision in the *Standard Commercial (Glasgow)* case⁷ reinforced this, and that related off-site benefits could be taken into account. In ‘private to private’, authorities have to be scrupulously careful that their actions are not seen as allowing a permission or power to be bought. In this case the only linkage between the two sites was a transactional one. Their Lordships gave no weight to the

percentage of ownership of the respective parties but it was probably high in the parties’ thoughts.

Lessons from Wolves

1. It is wrong for an acquiring authority (AA) to deprive an affected party of their property just because the AA will derive from that property benefits wholly unconnected with the acquisition of that property;
2. Materiality and reasonably related benefits are important considerations. This includes any connectivity, proximity, scale and direction of their flow in respect of CPOs;
3. Acquiring authorities have the right to choose their partners if it is line with the ‘best value’ and the provisions of Section 233 T&CPA 1990, but this alone is not a CPO criterion.

This case is specific to the facts, and essentially does little more than remind authorities, advisors and promoters of CPOs of the importance of respecting the legal structure and requirements, but even here it is an important, timely, shot across the bows. ■

Stan Edwards, a Chartered Surveyor, is a Director of Evocati Consultancy specialising in CPO process. He is also visiting lecturer in retail planning and development at Cardiff University and formerly Vice-Chairman of the Compulsory Purchase Association. Contact him on stan.edwards@evocati.co.uk.