



How to Minimise Compensation?

Article by:

Stephen Lashmar, Director – Roger Hannah

Simon Cook, Managing Director – Roger Hannah

As we know compulsory purchase can be a draconian process which can create a hostile atmosphere between the Acquiring Authority and the Claimant. Often the cost of acquisition can be far more than what the Acquiring Authority anticipated. The process and the cost can leave the Acquiring Authority asking itself some difficult questions:

- Why is compulsory purchase so expensive?
- Why is the budget figure inaccurate?
- Why is the cost of compensating occupiers so difficult to estimate?
- Why does compensation appear to be loaded in favour of the claimant?
- How can we get claimants to make more reasonable claims?
- Why is the cost of professional fees so exorbitant?
- Why do claims take so many years to resolve?

Here we look at **8 top tips** which we believe are essential for an Acquiring Authority to follow in order to reduce its liability and exposure to compensation claims.

Tip No 1: Watch the Red Line

First of all the Acquiring Authority MUST understand the scheme and aspirations of the promoters (or Development Partner if working in partnership). It is necessary to understand technically what land is needed to make the scheme work. Challenge the Scheme promoters to ensure they understand the difference between “need and want”. It is all well and good having a significant Masterplan but ultimately if this leads to areas being acquired that are not necessary for the success of the scheme then this could result in the scheme costs exceeding expectations. In addition, acquiring land that is not required could undermine the comprehensive nature of a CPO, and result in the CPO itself being open to challenge at Inquiry.

Having established the aspirational Red Line, research the proposed Order Land. Look at the nature of the area and uses, *not everything is as it seems!* An example of this occurred when acting on the Mersey Gateway scheme in Runcorn. We acted when acting for a multi-national who occupied a typical 10,000 sqft industrial unit. Externally the premises looked a typical industrial unit, but inside there were production lines manufacturing pure silica which was sold on at significant profit! Accordingly negotiations with the Acquiring Authority were set around how the compensation could be minimised to avoid a loss of profit claim.

Research of the area will also reveal those properties where there is a potential for injurious affection or material detriment claims. Alternatively undertaking due diligence could identify

consecrated land and places of worship which have their own specific compensation regime under Rule 5 of Section 5 of the Land Compensation Act 1961. As a result would it be more beneficial to exclude such properties from the Red Line?

Case Study 1 – Bookmakers, North West

We were instructed to advise on a terraced retail unit occupied by a national bookmaker. The premises formed part of a comprehensive redevelopment scheme in an urban location, albeit on the periphery of the Scheme. The property was relevantly straightforward to value with the Council's surveyor valuing the property for £120,000. Not a problem at first glance!

However due to licensing and planning restrictions significantly reduced the catchment area for the business to circa 400m. As a result the claimant submitted an extinguishment claim for £1.8m, significantly above any budget set by the Council. The claim was settled at circa £800,000. The property was not integral to achieving the aims of the Scheme and ultimately the claim could have been avoided.

Tip No 2: Get the Budget Right

When assessing the land acquisition budget, be pragmatic and as identified in Tip No 1 undertake as much due diligence as possible. This will enable the Acquiring Authority to deal with challenges at an early stage. Review the budget on a regular basis so as to ensure appropriate planning can be undertaken to reduce the pressure on budget constraints.

Most importantly challenge your property team on the assumptions adopted in establishing the acquisition budget. Have they adopted the correct basis of valuation, reflected necessary planning policy etc?

Tip No 3: Engage with and Understand the Claimant

Engagement with the Claimant is essential, especially at an early stage. Engagement only appears once in the Guidance on Compulsory Purchase Process & the Crichel Down Rule (Feb 2018), stating *"in order to reach early settlements, public sector organisations should make reasonable initial offers, and be prepared to engage constructively with claimants about relocation issues and mitigation and accommodation works where relevant"*. This belies its importance.

Early communication is key, enabling the Acquiring Authority to understand the nature of the Claimant's business or interest, how it makes money, the personality as well as helping manage expectations not only of the Claimant but also their advisors! It also helps establish any legal or physical impediments to a CPO.

Initial meetings offer the chance to gather information at the formation stage of the CPO process which will feed into the requisition for information at the referencing stage.

Successful engagement is dependent on the Acquiring Authority appointing a suitable professional team and consultants who can communicate effectively. It is not just about project cost savings - the inability to communicate can delay the process and prove very costly for the Acquiring Authority. This would be a false economy in the long run. Ensure you are comfortable with your professional team and their ability to deliver results.

Engagement provides a framework to progress negotiations and sets the basis to create appropriate relocation and acquisition strategies which underpin a CPO. As a result acquisitions agreed in advance will ultimately reduce potential costs and save time which is critical to the successful and speedy delivery of a CPO.

Tip No 4: Making First Contact – the Critical Steps

As they say, first impressions count and usually there is no second chance of getting it right! Often the biggest frustration for a Claimant is not knowing what is happening, details of the scheme and most importantly the timescales involved. This creates uncertainty and mistrust in what is already an adversarial situation. Advice and information in terms of the Scheme must be clear and concise. The Acquiring Authority **MUST** be approachable and should not create “an us and them” situation. Listen to the Claimant and answer the questions honestly. This should improve the possibility of an early deal!

Tip No 5: Making Offers – Get it Right First Time

As we have seen, first impressions count, the same can be said in respect to negotiations. The Guidance on Compulsory Purchase Process & the Crichel Down Rule is informative when it comes to making offers, enabling an Acquiring Authority to consider the bigger picture, taking all costs into account. These costs are not direct costs in terms of compensation under the Code but indirect costs such as other legal fees (dealing with individual objectors at Inquiry or potentially at Upper Tribunal), wider scheme costs, overall cost of project delay, and other reasonable linked costs such as potential satellite litigation.

When undertaking negotiations, another key issue is flexibility and innovation. In addition to straightforward purchases, consider sale and leasebacks, deferred completions or options. Ultimately flexibility on deals will save time and mitigate exposure to compensation over the life of the CPO. This is an opportunity to demonstrate that CPO is the first rather than last resort!

Tip No 6: Mitigate for the Claimant

One of the age-old questions to consider is when is the legal duty mitigate on the part of the Claimant triggered? There are a number of cases on this point, in *Lindon Press vs West Midlands County Council (1987)* – the Claimant must take all reasonable steps to mitigate its loss and cannot recover any avoidable losses. In *Director of Buildings & Lands vs Shun Fung Ironworks (1995)* – it was held that a reasonable person in the position of the Claimant would have taken steps to eliminate or reduce the loss and if the Claimant failed to do so, then they cannot fairly expect to be compensated for the loss.

The legal duty to mitigate starts upon confirmation of the CPO. The Acquiring Authority however, must not sit back and expect the Claimant to do all the work! An Acquiring Authority must take a pro-active role and mitigate for the Claimant. The duty is on the Acquiring Authority to demonstrate that the Claimant has not mitigated its losses. As a consequence work with the Claimant, engage with their needs, undertake property searches for them. Provide options for the Claimant and by so doing it will assist the relocation process and reduce the risk of an extinguishment claim.

Tip No 7: Delay Vesting

The usual process for taking possession of land is normally scheme led and dependent upon the development timetable.

As discussed in Tip 6, the duty to mitigate on the part of the Claimant starts upon confirmation of the CPO. Under the provisions of the Housing & Planning Act 2016, the process of taking possession has been brought into line under a General Vesting Declaration (GVD) and the Notice to Treat / Notice of Entry (NTT/NTE) route, so that an Acquiring Authority must give a minimum of 3 months under either route. Although not a change to the GVD process historically under the NTT/NTE process an Acquiring Authority could take possession on 14 days' notice, so the ability of obtaining possession quickly has been lost.

It is therefore important to establish an appropriate timetable for possession. However 3 months' notice still places a significant amount of pressure on a business to relocate, and increasing the potential for a successful total extinguishment claim. Consequently in order to minimise the risk of such a claim, it is essential to give an occupier the maximum notice. Liaise with the scheme promotor or Development Partner and review the development timetable. Consider delaying vesting or extend the notice period under the NTT/NTE. By giving a minimum 6 months' notice this should increase protection and reduce the chances of an extinguishment claim succeeding.

Tip No 8: Watch the Costs – Do a Deal

The presumption is that Acquiring Authorities are liable for reasonable costs. As a consequence, and in accordance with the 2015 Guidance (as updated in 2018) it recommends the Acquiring Authority to look at the wider picture when negotiating with claimants. Typical Tribunal costs can be significant. Below is a crude guide to the potential level of professional fees:

- Legal Fees - £50,000 plus
- Surveyor Fees - £50,000 plus
- Forensic Accountants Fees - £100,000 plus
- Barrister's Costs - £100,000 plus

The actual fees will largely depend on the complexity of the case. The above though shows that fees can be significant.

Costs are important to consider as an Acquiring Authority could be liable for both their own as well as the Claimant's. However whilst there should be a general consensus to dealing a deal, be prepared to fight unreasonable compensation claims!

Case Study 2 – Former Petrol Filling Station & MOT Workshop

We were instructed to advise an Acquiring Authority in respect to a owner occupied former petrol filling station used as an MOT Station and vehicle repair shop. The claim progressed by the Claimant's agent was on the premise of an extinguishment of two businesses which the Claimant operated from the property. Despite attempts to negotiate a settlement, the case was referred to the Upper Tribunal with the Claimant seeking £1.45m whereas the claim being promoted by the Council was £300,000. Ultimately the Claimant would not compromise on their claim requirements until the day of the Tribunal. It is only at that point when the Claimant's barrister reviewed their case that they capitulated and accepted the Acquiring Authority's sealed offer.

Compulsory purchase is not designed to be easy, but the road can be made less hazardous, if these tips are followed. So to summarise:

- Early engagement with the Claimant
- Be fair with the money
- See the bigger picture
- Have the right team in place
- Assist with relocation
- Flexible timescales