CPA NATIONAL CONFERENCE 2019

CASE LAW UP-DATE

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Introduction

It might be that the law relating to compulsory purchase and compensation is so straightforward that there have been no landmark cases in the last 12 months relating to substantive CPO issues. Or it may be that such litigation is so demonstrably fraught with uncertainty that parties will do anything to avoid it.

Consequently I have taken the opportunity to look back at a general trend in CPO cases over the past three years in order for practitioners to take stock of the types of cases that habitually come before the courts.

As a starting point, it might be helpful to remind ourselves of the relatively narrow ambit of the courts in considering challenges to CPOs and analogous orders.

Basis of CPO challenges

Generally speaking claims to challenge CPOs will be made under the provisions of s.23 Acquisition of Land Act 1981. This is a statutory right of challenge by "a person aggrieved" who wishes to challenge the validity of a CPO, and must be made within

six weeks from the date upon which confirmation or making of the order is first published in accordance with the 1981 Act.

Claims are brought under conventional public law principles:

- Failure by the decision maker to take into account all material considerations;
- Taking into account legally immaterial considerations
- Failure to give proper, adequate and intelligible reasons on the principal controversial issues;
- Procedural irregularity (eg breach of natural justice, unfairness)
- The decision was otherwise irrational, eg based on no evidence
- The decision was otherwise outside the powers of the Act authorising acquisition.

The general principles were authoritatively summarised by Elias J in Margate Town Centre Regeneration Company ltd v SSCLG [2013] EWCA Civ 1178:

(a) A CPO should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a CPO sufficiently justify interfering with the human rights of those with an interest in the land affected: see now para 12 of Tier 1 of the Guidance on Compulsory purchase process and The Crichel Down Rules. To similar effect are certain observations of Lord Denning MR in *Prest v Secretary of State for Wales* (1982) 266 EG 527.

(b) A consequence of principle (a) is that "the draconian nature of the order will itself render it more vulnerable to successful challenge on Wednesbury/Ashbridge grounds unless sufficient reasons are added affirmatively to justify it on the merits": per Slade LJ in *De Rothschild v Secretary of State for Transport (1988) 57 P&CR 330*

(c) The grounds of challenge under section 23 do not entitle the court to revisit the merits of the decision, only to see whether there is any legal or procedural error

in the confirmation: see the observations of Sullivan J in *Powell v SSCLG [2007] EWHC 2051 para 3*

(d) When deciding whether or not to confirm an order, the S/S must have regard to all material considerations and must not take into account any immaterial considerations. But it is for the court to decide what are material considerations: see *Tesco Stores v Secretary of State for the Environment [1995] 1 WLR 759 at 764 per Lord Keith of Kinkel*

(e) The reasons for a decision must be intelligible and adequate. In determining whether those criteria are satisfied the decision letter must be read fairly as a whole, as if by a well-informed reader: *South Buckinghamshire District Council v Porter (No.2)* [2004] 1 WLR 1953 at 1964 per Lord Brown of Eaton-under-Heywood.

(f) The Court should interfere only if the decision leaves a "genuine as opposed to a forensic doubt" as to what has been decided and why: *Clarke Homes Limited v Secretary of State* (1993) 66 P. & C.R.263, 271 per Sir Thomas Bingham M.R.

(g) Where a decision maker has erred in law the decision should be quashed unless the court is satisfied that the decision maker would necessarily have made the same decision had the error not been made: see *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1988] 3 PLR 25 at 42 per Staughton LJ."

In cases involving disputed compensation, the issues encompass the matters set out above, but also include the proper application of the Compensation Code.

In practice many of the CPO claims (based on challenges under section 23 of the 1981 Act) use as their spring-board an alleged failure by the Acquiring Authority ("AA") to adhere to the guidance produced by the Ministry of Housing Communities and Local Government ("MHCLG") entitled "Guidance on Compulsory purchase process and The Crichel Down Rules". This is merely Guidance – it does not have the force of statute – but its importance is that it provides the policy framework for decision making and in particular the confirmation of CPOs by the Secretary of State.

In the selection of cases that I present today, we shall cover examples of typical challenges to the confirmation of CPO cases: This will include

-unfairness

-application of the Guidance

- procedural issues; and

- bias

Unfairness

Grafton Group v Secretary of State for Transport and Port of London Authority [2016] EWCA Civ 561

This case concerned the compulsory acquisition by the PLA of Orchard Wharf on the River Thames, owned by the Grafton Group. The PLA cited a need for the site for aggregate importation and concrete batching. There was a public inquiry at which the PLA sought (a) to appeal against the refusal of planning permission for the use of OW as a concrete batching plant; and (b) confirmation of the CPO. Grafton's case was that planning permission should be refused for the development and that even if it was granted there wasn't a compelling need (having regard to forecast aggregate demand) to justify confirmation of the CPO.

After a long (six week) inquiry, the Inspector recommended that planning permission for the concrete batching plant be refused, but that the CPO nevertheless be confirmed.

The S/S accepted the Inspector's recommendation. Grafton challenged the confirmation of the Order. The matter came before Ouseley J. who upheld the challenge and held that the consequences of the challenge succeeding was that the CPO was quashed, and that – contrary to the contentions of the S/S and the PLA – the promoters of the scheme would have to go back to square one and publish an entirely new CPO in the event that they wished to continue with the scheme.

The S/S and PLA appealed to the Court of Appeal. In terms of the correct relief – ie what happens when a CPO challenge is successful – it is rather telling that the issue had never before been directly addressed. That may be because it would have seemed too obvious that it was the entirety of the Order that is quashed, rather than the decision being remitted for redetermination and reconsideration (as the S/S and PLA argued).

The CA unanimously concluded that on a proper construction of section 24 of the 1981 Act, the term "quash the compulsory purchase order" meant the CPO as made, not the CPO as confirmed; and consequently the Order as a whole fell to be re-determined – effectively sending the process back to square one.

As to the basis of the quashing – the challenge focussed on the fact that the Inspector had recommended and the S/S had accepted that the CPO be confirmed even though planning permission was refused for the particular form of development which underpinned the need for the scheme. The Inspector had concluded that "the same throughput [of aggregates] might be achieved with no or but a slight change to the extent of the plant and storage, but better designed and laid out" and that "a better design would be likely to come forward". However, it was no part of the PLA's case at the inquiry that there existed an acceptable alternative design. The CA held that the CPO was confirmed by the S/S on a basis other than that put forward by the PLA and that as a distinct proposition – that there was a better design which could come forward – that was never put to the parties at the inquiry and that Grafton should have been given an opportunity to address it, unspecific as it was". Accordingly the Judge was right to conclude that Grafton had been unfairly treated and the appeal was dismissed.

This case is important for a number of reasons.

First, it demonstrates the vulnerability of a promoter of a CPO to a claim that the scheme underlying the CPO is not deliverable. Bear in mind the advice in the CPO Guidance at Tier 1, para 15 – "the AA will also need to show that the scheme is unlikely to be blocked by any physical or legal impediments. These include

- The programming of any infrastructure accommodation works or remedial work which may be required; and
- Any need for planning permission or other consent or licence".

Second, it demonstrates the importance of ensuring that objectors have a fair crack of the whip in considering any aspects to a CPO as it may change either in the run up to a public inquiry or even during it. It is unlikely the Grafton Group would have been successful if they had had the opportunity to address the notion that there was an alternative form of development – albeit unspecified or one which the promoter was itself not even promoting or suggesting was feasible or viable. What was extraordinary about this case was that the Inspector was faced with the AA telling him that the only form of concrete batching development which could viably be provided on the site was that which they were promoting.

Failure to apply Guidance correctly – whether the purpose can be achieved by any alternative proposals?

A recent example of an allegation of a failure to apply the Guidance correctly is to be found in Swish Estates Ltd v SSCLG and LB Enfield [2017] EWHC 3331 (Admin) – another challenge to the S/S's confirmation of a CPO, this time in Enfield. The CPO scheme was for a redevelopment for 167 residential units and associated commercial space. The CPO was promoted by the Council under its powers under s.226 TCPA 1990.

In that case the Claimant challenged the confirmation of the CPO on the basis that the S/S and Inspector failed to examine whether the purpose of redevelopment could be achieved by any alternative proposals.

In my experience, this is the aspect of a CPO which is most troublesome for promoters, and provides the most fertile ground for objectors. Such cases stem from the advice which is currently to be found in Tier 2, para 106 – "whether the purpose for the acquiring authority is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired".

This part of the Guidance presents something of an open goal for objectors to schemes take a shot at. It allows the following types of case to be advanced:

- That there is an alternative to acquiring the land which can achieve the same objective; often landowners come forward with their own schemes of redevelopment, and assert that their proposals don't require a CPO, and that they can redevelop the site themselves
- That there is an alternative location which better meets the need, or meets the need as well but with less adverse effects.
- That the promoters have failed to engage in negotiations with respect to identifying alternatives

The *Swish Estates* case was a classic challenge to a finding by the Inspector and S/S that the Order scheme would contribute to the achievement of the promotion or improvement of the economic, social or environmental well being of the area. The Court found that the decision was fully reasoned. It noted that the Claimant had not advanced any evidence of its track record in delivery. This isn't a particularly important case but merely serves as a reminder if you are a promoter or an objector of the kinds of issues to be beware of in preparation of the CPO.

Procedural Irregularities; and Bias

The case of Kuznetsov v SSCLG and LB Camden [2017] EWHC 2713 is an altogether more substantial case, not least for the plethora of points taken by the Claimant, who challenged confirmation of the CPO relating to the Bacton Low Rise Estate in Camden. This was classic spider's web litigation – which (to mix my metaphors) merely required the Claimant objector to get one ball in the back of the net to succeed. The case was made all the more harder because the objector was a litigant in person. The plethora of points raised in the litigation included:

- Procedural issues regarding service of notice and statements of case in respect of the CPO inquiry
- Refusal of adjournment (based on Claimant's request due to alleged invalid service)
- Bias of Inspector (manifested in an email produced through an FOIA request)
- Inappropriate approach to issue of viability

The judge held that despite a breach of the rules in relation to the time for serving statements of case by the AA, the Claimant had failed to show that his interests were substantially prejudiced by virtue of the failure. The Judge took account of the fact that the inquiry was held several months after the time for serving the Statement of Case; and that in any event the S/C was merely a restatement of the Statement of Reasons which had been served in time.

In terms of alleged failure to provide disclosure of documents, the Judge found that this was within the discretionary judgment of the Inspector. In terms of disclosure, the Judge found that the Claimant had not actually identified a document which existed and which was relevant for fair disposal of the case.

By contrast to the procedural irregularities which the Claimant said were perpetrated against him, he complained that documents he wished to produce were returned by PINS because they were submitted late. The Judge dismissed this point robustly, making a distinction between late submission of evidence and the provision of

documents which had been provided by the Council to the Inspector for the purposes of the CPO inquiry.

The Judge found that there was also a procedural breach in relation to the publication of notice of the inquiry. Again, the Judge dismissed this because there was no evidence that the Claimant had suffered substantial prejudice by the breach. Again note that the Court is assiduous to require evidence of actual prejudice to a Claimant. A breach of the Inquiry Procedure Rules will not automatically render the proceedings void.

As to the claim that the Claimant's evidence in chief and cross-examination should not have been curtailed, the Judge held that the Inspector has a broad discretion to determine the appropriate procedure. Dove J held:

"The purpose of cross-examination is to test the evidence in relation to the issues about which the decision maker has to form a view, and for the cross-examiner to adduce further evidence relevant to that party's case about the merits of whether or not the order should be confirmed. The effectiveness of a cross-examination is not measured by its length but by the quality of the questions which are asked."

As to the claim about bias – this was based on an email which the Inspector sent to the Planning Inspectorate after the end of the first day of the inquiry, which (it was claimed by the Claimant) showed a clear animus towards the Claimant. The email – which would make even the former British Ambassador to the United States blush, said:

"Subject: Bacton Low Rise
A very brief outline of the events of Friday:
Mr K turned up at 9.58 with his trolley of files. I had to ask him several times to wait with his application while I completed the formalities of opening. **He then made his application to adjourn and produced a photograph of his front door which was so obviously the front door shown in the Council's photographs that if it hadn't been so time-wasting it would have been laughable.** I refused his application after hearing his submissions and evidence from Ms Ellis who had made the stat dec and who I asked to confirm that in addition to posting through the door the notice had also been posted by special delivery (returned by the Royal Mail) and by first class post – not returned and the postman has access to the flat every day between 10.00 and 11.00.

I refused his application for further disclosure as the documents he wanted were not relevant to the matters I had to report on.
I tried to find out whether there were any other occupiers of the flat and he said he had tenants but did not name them, he confirmed they had tenancy agreements but when I asked to see them he said they were in a safe in Moscow.
Mr K then said he was at a disadvantage because he didn't have legal representation, to which I replied there was nothing I could do about that save to do my best to assist him as far as I could, and then he said he was also at a disadvantage because English was not his first language. I pointed out that he seemed to be managing all right so far but if he had any difficulty there was an interpreter present to assist him. He then said he did not need or want an interpreter so she left on the understanding that she could be contacted should anything arise.

The Council had no objection to me seeing the three bundles sent in and returned provided Mr K produced a note of which documents were relevant and why – he has until 5.00 on Monday to produce this to give the Council's barrister time to consider it given her commitments. As they are Mr K's documents it seems to me reasonable that he should know why he wants me to see them and the point they make.

When I asked the Council's barrister to open her case Mr K said he was withdrawing from the Inquiry. By then it was 11.30 so I said I would adjourn for 10 minutes for him to think about it. He did but decided to leave. We arranged a site visit at 5.00 that afternoon and he left. **Very unfortunately he came back 10 minutes later.**
His so called cross-examination was awful; it was more like submissions than questioning and he kept repeating things, especially irrelevant things, as I kept telling him, so in the end I had to time limit him. There is a fine line between him being allowed to have his say and the Council complaining that I gave him too much leeway and extended the time of the Inquiry unnecessarily. The Council eventually finished its case at 6.10 (all had agreed that they were happy to carry on save for a **very half-hearted attempt by Mr K at 5.15 to say he wasn't feeling well...**).

The site visit is going to take place at 5.30 on Wednesday and the Inquiry is resuming at 9.30 on Thursday. I plan to give Mr K until about 12.00 to give his evidence, then cross examination. I may, unusually, allow closing in writing – it depends on what Mr K and the Council say.
Then I go on holiday to return to write it up."

The Judge's conclusion in relation to this point was as follows:

> "Of all of the points raised by the first claimant in his s.23 challenge, this is the one which has given me the greatest pause for thought and the greatest cause for concern. I am wholly unsurprised that the first claimant would feel upset and aggrieved at the way in which the inspector expressed herself in this

email. The wisdom of writing such an email is, to put it as neutrally as I can, questionable on a variety of fronts. In truth, it was not a private conversation, as it was an email which could always be disclosed in precisely the manner which has occurred in this case. But whether or not the email should ever have been written is not, in truth, the issue; the question is whether it shows actual or apparent bias and whether a fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the inspector was biased.

In my view, the email must be read as a whole and the view taken in relation to it include the fact that it references the efforts which the inspector genuinely made to assist the first claimant in terms of interpretation facilities and giving him time to reflect upon whether he should withdraw from the inquiry. The comments made about the production of the photograph no doubt reflected the inspector's frustration at what she considered was the first claimant taking a very bad point. Equally, her observation that it was very unfortunate that the first claimant returned was undoubtedly borne out of her exasperation at what she considered to be the first claimant's subsequently demonstrated poor presentational skills and lack of focus on relevant issues at the inquiry. It is not uncommon, with the best will in the world, for a tribunal to become vexed by a participant if they are focusing on bad or irrelevant points, or if their presentation is repetitious or unhelpful. The expression of that feeling during the course of a hearing is sometimes necessary to bring home to a participant that an important feature of an effective hearing is using time efficiently, and focusing on the issues which will make a difference to the decision. The observations in this email would not, against this background, in my view lead the fair-minded and informed observer to the conclusion that there was a real possibility that the inspector was biased. She was venting her frustration and irritation with the first claimant's presentation of his case. That is a world away from concluding that there was a real possibility she was biased and not capable of independently and objectively evaluating the

first claimant's case from the documentation and the oral evidence with which she was presented. Her asides in the email would not give rise, in my view, to the conclusion that there was a real possibility that she would not stick to her important task of providing real and independent scrutiny to whether or not the CPO should be confirmed in the light of the first claimant's objections."

In the result the Claim was dismissed in its entirety. There were numerous other points taken – this was a scatter gun approach, and in the words of Lord Justice Sales, it is unnecessary to examine every pellet.

This is a case which demonstrates the plethora of points that can be taken in CPO cases, and which even if utterly misconceived, can serve to delay much needed development. Care must be taken by promoting authorities in observing timescales, in service of notices, and in ensuring that the cases they advance demonstrating a compelling need are supported by the requisite statutory authority. Those landowners who face the compulsory acquisition of their land may, in my experience, fight tooth and nail to the fullest extent possible to defeat such a proposal. In the whole range of property litigation, CPO land compensation litigation is often the fiercest, and so a slap-dash approach by an AA will often have very serious negative consequences, particularly through delay.

So far this paper has considered fairly run of the mill challenges to the confirmation of CPOs. There has been one case in the last two years which has considered a much more hard-edged legal issue – the assessment of compensation for compulsory acquisition. The case is the Supreme Court case of Homes and Communities Agency (Respondent) v J S Bloor (Appellant) [2017] UKSC 12.

The land in question was 27 acres in extent, part of a much larger area of some 420 acres acquired under the North West Development Agency Kingsway Business Park, Rochdale CPO. The original claim by Bloor was for £2.5m. The HCA offered £50,000

based on existing use value. The Upper Tribunal agreed that there was hope value and awarded £750,000. The matter went to the Court of Appeal which remitted the matter back to the UT to re-determine compensation on what it considered to be the correct basis. Bloor appealed.

The appeal raised questions concerning the *Pointe-Gourde* or *no –scheme rule:* that is that compensation for compulsory acquisition is to be assessed disregarding any increase or decrease in value solely attributable to the underlying scheme of the acquiring authority. This case concerned the relationship between the general provisions for the disregard of the scheme and the more specific provisions relating to planning assumptions.

However, the case fell to be determined by reference to the 1961 Act as it stood before the amendments made in the 2011 Localism Act, and to that extent has been overtaken by events.

The decision of the Upper Tribunal (Judge Mole QC and Paul Francis FRICS) was reversed by the Court of Appeal; and the UT decision was restored by the Supreme Court. I have to say that I don't think it will benefit anyone to examine the detail of the case like the entrails of a wasp – the dispute turned on the one hand to application of the Pointe Gourde rule to "the relevant land" ie the reference land itself; and on the other to land comprised in the compulsory purchase order as a whole; or more broadly still, to land comprised in the same scheme of development which may include, for example, land already in the ownership of the authority, or land acquired by agreement.

So there was this fundamental dichotomy – the rule relating to assumed permissions (sections 14-16 LCA 1961) was based on cancellation of the scheme solely in respect of the reference land whereas by contrast, section 6 LCA 1961 taken with the Pointe Gourde rule requires disregard of the scheme of acquisition in relation to the whole of the order land.

The UT's decision, which understood and applied this approach, was upheld by the Supreme Court, but it is to be hoped that this issue will be considerably simplified through the amendments to section 14 of the 1961 Act through the Localism Act 2011.

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