

## CPA Law Reform Lecture 2014

### Compulsory Purchase Reform : Temporary Use of Land – Valuation and practical issues.

Paul Astbury MRICS, Head of Compulsory Purchase, GL Hearn.

The purpose of this paper is to raise issues for debate at and subsequent to the Compulsory Purchase Association (CPA) Law Reform Lecture on 12<sup>th</sup> May 2014. It does not purport to represent the views or recommendations of the CPA. In his paper, Barry Denyer-Green LLM PhD Hon RICS examines the legal rules relating to the taking of temporary possession of land.

#### The need for temporary possession

There is a bona fide need for the temporary use of land in the construction of public works.

Temporary powers protect the promoter of public works from unnecessary land purchases but in some cases it can be more economical to acquire the land permanently. The temporary occupation of land can add further uncertainty to the situation for the land owner. This can create a more onerous imposition on the interests of private individuals in the interests of the public good, but it is often the land owner that wants to see his land returned after the works rather than being acquired outright. It is therefore the case that the use of temporary powers can sometimes be for the benefit of the promoter and sometimes for the benefit of the land owner.

#### General form of temporary powers

Powers for the temporary use of land have not been developed in the same way as the powers for the acquisition of land and rights. Explicit powers for the temporary use of land are not available in Compulsory Purchase Orders or explicitly catered for in the Land Compensation Acts. Where temporary powers do exist they are in Special Acts or in Orders under the Transport and Work Act 1992 or the Planning Act 2008. The temporary powers used are not consistent in detail but do follow a general theme which is broadly captured in the Transport and Works Act model clauses (see Appendix 1) and can be summarised as follows:

##### Temporary use of land for construction, Model Clause 24

- Power to take possession of and use specified land for specified purpose in relation to specified works – set out in a schedule
- Entry on 14/28 days notice
- Occupy land for up to 12 months after works completed
- Remove buildings and vegetation
- Reinststate to an agreed spec. No obligation to replace buildings
- Pay compensation for “any loss”/ “any loss or damage” due to the exercise of the powers
- No obligation to purchase land occupied temporarily
- No power to compulsorily acquire land shown in temporary powers schedule

Temporary use of land for maintenance, Model Clause 25

- Any land within limits
- “Reasonably required” for maintenance
- Valid for 5 year period from opening of the works for use
- Occupy “as long as reasonably necessary”
- Excludes any house or garden or any occupied building
- No obligation to acquire

## Lack of uniformity

However, the model clauses in the 1992 and 2008 Acts are not binding, and promoters do alter them on a scheme by scheme basis. Similarly, although the clauses in Special Acts are generally based on preceding Acts promoters can and do vary the clauses on a scheme by scheme basis. One example is the HS2 Bill currently before Parliament. This broadly follows the principles in the 1992 Act model clause (albeit coincidentally) but goes further by permitting occupation for “other Phase One purposes” beyond those set out in the schedule and also allowing occupation of “any other land within the Act limits” in addition to the land identified in part 4 of Schedule 15 to the Act.

The effect of these changes is inevitably a widening of the power that can be used by the promoter, but more specifically it introduces the use of temporary powers over land that is also subject to the exercise of permanent acquisition powers. Such “doubling up” of powers is specifically prevented in model clause 24 and protected against indirectly in model clause 25 as the temporary powers for maintenance can only be used after the works are completed and opened for use.

A similar widening of powers has been adopted in the Nottingham Express Transit TWO of 2009 which allows for temporary use of “any of the land within the permanent limits” “in connection with the carrying out of the authorised works. The power to remain on the land has also been extended from 1 year after the completion of works to 2 years after completion.

## Compensation for temporary use of land

Whilst the scope of the powers sought varies from the model clauses the provision relating to compensation is remarkably consistent being on obligation to compensate the land owner or occupier for “any loss” or “any loss or damage” arising from the exercise of the temporary power in respect of their land.

Although the compensation provisions adopted are consistent, they are widely drawn and do not have the level of statutory or case law interpretation that exists for permanent acquisitions. It is arguable whether this makes the valuer’s job easier or more difficult but generally a pragmatic approach is arrived at by negotiation as a result of

- Widely drawn “any loss” compensation provision
- Claimant obligation to mitigate loss
- Promoter desire to mitigate compensation

- Landowner desire to retain the land (where applicable)

Due to the lack of statutory or judicial guidance problems can arise in some circumstances and the circumstances of temporary use can vary considerably in terms of the type of land taken, the use to which it was being (or would have been) put, the length of the temporary use, and of course whether the land is returned or subsequently acquired permanently.

Compensation for temporary use frequently includes disturbance type compensation relating to the direct costs incurred in removing from the land and implementing temporary working practices or replacement facilities, and business impacts arising from the dispossession and/or activities of the promoter on the taken land.

Where land would have been ready for redevelopment but for the temporary use by the promoter, the losses will generally reflect the opportunity cost of holding the land and any change in the value of the land for development due to the delay caused by the temporary use. This latter element may add to or offset compensation depending upon the direction in which the value has moved.

### **Problems with the use of temporary powers**

Two problems with the use of temporary powers I would like to highlight relate to extended periods of occupation and the use of both temporary and permanent powers consecutively on the same land.

The length of temporary occupation can vary from weeks or months to many years, particularly on large scale infrastructure projects. During the temporary possession period the owner or occupier cannot deal with their asset effectively and compensation can be considerably delayed due to no provisions for advance payments and the problems associated with assessing the loss whilst the possession is ongoing. Where the promoter is unclear about the length of the required occupation or the hand back date is postponed, it makes it especially difficult for the owner or occupier to plan for and deal with the disruption caused.

Under the current general form of powers, the owner or occupier cannot require a permanent acquisition by the promoter even if the temporary occupation period runs into years. Where temporary powers are used for periods in excess of six years it may be the case that the Limitation Act 1980 may operate to bar an action to recover compensation before the land is returned and the compensation can be fully assessed. In practice a six year occupation would be unusual but certainly not impossible.

The use of temporary occupation powers followed by permanent acquisition is not permitted under the model clauses issued for the 1992 Act or the 2008 Act but such a power has been introduced in some Acts and Orders, examples of which have been given above. The principal problem with the creation and use of this power is that it creates even more uncertainty for the owner or occupier. In addition to not knowing when they will receive their land back, they may not know with any certainty whether they will receive the land back in part, which part, or at all.

In terms of compensation complications may arise from the trend towards restricting the operation of the *Pointe Gourde* principle. In *Spirerose* and *GPE Hanover Square* the *Pointe Gourde* principle was restricted to the valuation of an interest in land as it exists at the valuation date and not making any adjustments to the facts regarding the condition of the premises, its occupation and the interests in it to disregard the effects of the “scheme”. If land is permanently acquired following (or in practice during) a period of temporary possession the condition of the land may be very much affected by the scheme. The widely defined scope of the compensation for temporary use being “any loss or damage” from the exercise of the temporary powers may admit a claim for any shortfall in the permanent compensation but the situation has yet to be tested.

The ability to take land temporarily and then only acquire the land required permanently at the end of the construction period (or the expiry of powers) would be convenient to promoters in terms of deferring compensation and retaining flexibility of design. However, this would be at an unacceptable cost to land owners and occupiers in terms of uncertainty and delayed payment. The power to acquire land temporarily or permanently is an onerous one and it should be incumbent on the promoter to determine the land required for the works before exercising powers. Where the promoter wishes to retain flexibility this should be with the agreement of the land owner and/or occupier.

## Procedural Issues

Some of the procedural problems relating to temporary powers are

- No “valuation date”
- No statutory interest
- No advance payment
- No Basic or Occupier’s Loss payment
- Limitation Act may operate on a claim before the land is returned and the loss can be quantified
- Dearth of case law or other guidance on compensation for temporary use of land

The lack of a valuation date may not in itself be a problem when assessing “any loss” compensation as the compensation is more akin to rule 6 than rule 2. A fixed valuation date may have a detrimental effect on the fair assessment of compensation, especially for longer occupation periods as the loss is ongoing rather than a fixed event as is the case in the permanent acquisition of land.

The lack of statutory interest is a particular concern as the compensation may not be paid for some time after a loss is incurred. If statutory interest were to be introduced, consideration would need to be given to the date(s) from which it should be paid. Payment of interest on all losses from the date of occupation would mean interest being paid on compensation before many of the losses are incurred. Payment from the date of loss would be fairer but is likely to be complex to calculate and there could be issues over when losses of certain types relating to lost business opportunities or development were or would have been incurred.

The lack of advance payment provisions has been criticised but there can be genuine issues relating to the assessment of compensation where land may appreciate in value over the course of the

occupation. It could be unfair to expect a promoter to pay an advance payment based on their expectation of the value of the land in several years' time. However, where losses are more tangible there would be a case for advance payment. This is an additional layer of complication to be added to an advance payment system that is already widely criticised and has been a perennial subject of reform considerations for the CPA.

The lack of Basic and Occupiers loss payments for temporary use of land has been raised as a concern. In principle the use of land temporarily can be just as disruptive as the permanent acquisition of land, if not more so. The purpose of the Loss payments was to enhance compensation and thereby reduce opposition to promoted Orders and resources required to agree compensation. It is arguable whether they have fulfilled that purpose and Loss Payments remain on the CPA agenda for reform in their own right. If loss payments were to be extended to land used temporarily it would be logical that the payment in some way reflected the length of occupation. This would risk turning the payment into a form of rent which may fail to reflect the impact on the affected individual. In the case of very long or short occupation periods the amount could become disproportionate.

## **Scope for reform**

The purpose of this paper is to raise issues for debate. The potential reforms outlined below are presented for that purpose and it is acknowledged that they need further debate and deliberation.

### **Temporary and permanent use to be mutually exclusive in respect of a piece of land / interest**

- Avoid "two stage" acquisitions
- Puts risk on land requirement on the promoter (where it belongs) and not on the claimant
- As existing model clauses – prohibit variations?

### **Exclusion of certain land types from temporary use**

- Already some exclusions in model clauses for maintenance
- Could be open to abuse by land owners / objectors
- Alternatively, limit temp powers to land in temp powers schedule so that owners can challenge at inquiry (i.e. prohibit "catch all" temp power clauses)

### **Ability for land owner to require purchase if occupation exceeds a certain period (12 months?)**

- Allows flexibility of temp use where parties agree without imposing onerous long occupations on unwilling owners or occupiers
- May need to allow promoter to compulsorily acquire superior interests?
- May lead to "two stage acquisition" in some cases but driven by owner

### **Standardisation of provisions in a Public Act**

- Temporary powers are currently created per project, albeit mostly follow the TWO and DCO model clauses

- Powers not consistent in scope. Incumbent upon individual objectors to challenge broadening of powers on some schemes. Expensive and risky. Inconsistent.
- Temptation for promoter to seek wider powers for convenience at expense of greater uncertainty for owners and occupiers

### **Compensation rules reform?**

- Broadly drafted compensation provision allows flexibility for wide variety in circumstances
- Virtually identical across schemes. Variation is in scope of powers
- Does general lack of case law reflect a system that works in practice?

## Appendix 1 Model Clauses Transport and Works Act 1992

See Transport and Works (Model Clauses for Railways and Tramways) Order 2006

Note that the corresponding model clauses (28 and 29) for the Planning Act 2008 are effectively the same (see Infrastructure Planning (Model Provisions) (England and Wales) Order 2009).

### Temporary use of land for construction of works

24. (1) The undertaker may, in connection with the carrying out of the authorised works—

(a) enter upon and take temporary possession of the land specified in columns (1) and (2) of Schedule 10 to this Order for the purpose specified in relation to that land in column (3) of that Schedule relating to the authorised works specified in column (4) of that Schedule;

(b) remove any buildings and vegetation from that land; and

(c) construct temporary works (including the provision of means of access) and buildings on that land.

(2) Not less than 14 days before entering upon and taking temporary possession of land under this article the undertaker shall serve notice of the intended entry on the owners and occupiers of the land.

(3) The undertaker may not, without the agreement of the owners of the land, remain in possession of any land under this article after the end of the period of one year beginning with the date of completion of the work specified in relation to that land in column (4) of Schedule 10 to this Order.

(4) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker shall remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land; but the undertaker shall not be required to replace a building removed under this article.

(5) The undertaker shall pay compensation to the owners and occupiers of land of which temporary possession is taken under this article for any loss or damage arising from the exercise in relation to the land of the powers conferred by this article.

(6) Any dispute as to a person's entitlement to compensation under paragraph (5), or as to the amount of the compensation, shall be determined under Part 1 of the 1961 Act.

(7) Without prejudice to article 44 (no double recovery), nothing in this article shall affect any liability to pay compensation under section 10(2) of the 1965 Act or under any other enactment in respect of loss or damage arising from the execution of any works, other than loss or damage for which compensation is payable under paragraph (5).

(8) The powers of compulsory acquisition of land conferred by this Order shall not apply in relation to the land referred to in paragraph (1) except that the undertaker shall not be precluded from—

(a) acquiring new rights over any part of that land under article 20 (power to acquire new rights); or

(b) acquiring any part of the subsoil (or rights in the subsoil) of that land under article 21 (power to acquire subsoil only) or in accordance with article 22 (power to acquire land limited to subsoil lying more than 9 metres beneath surface).

(9) Where the undertaker takes possession of land under this article, it shall not be required to acquire the land or any interest in it.

(10) Section 13 of the 1965 Act shall apply to the temporary use of land pursuant to this article to the same extent as it applies to the acquisition of land under this Order by virtue of article 18(1) (application of Part 1 of the Compulsory Purchase Act 1965).

### **Temporary use of land for maintenance of works**

25. (1) Subject to paragraph (2), at any time during the maintenance period relating to any of the scheduled works, the undertaker may—

(a) enter upon and take temporary possession of any land within the Order limits if such possession is reasonably required for the purpose of maintaining the work or any ancillary works connected with it; and

(b) construct such temporary works (including the provision of means of access) and buildings on the land as may be reasonably necessary for that purpose.

(2) Paragraph (1) shall not authorise the undertaker to take temporary possession of—

(a) any house or garden belonging to a house; or

(b) any building (other than a house) if it is for the time being occupied.

(3) Not less than 28 days before entering upon and taking temporary possession of land under this article the undertaker shall serve notice of the intended entry on the owners and occupiers of the land.

(4) The undertaker may only remain in possession of land under this article for so long as may be reasonably necessary to carry out the maintenance of works for which possession of the land was taken.



(5) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker shall remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land.

(6) The undertaker shall pay compensation to the owners and occupiers of land of which temporary possession is taken under this article for any loss or damage arising from the exercise in relation to the land of the powers conferred by this article.

(7) Any dispute as to a person's entitlement to compensation under paragraph (6), or as to the amount of the compensation, shall be determined under Part 1 of the 1961 Act.

(8) Without prejudice to article 44 (no double recovery), nothing in this article shall affect any liability to pay compensation under section 10(2) of the 1965 Act or under any other enactment in respect of loss or damage arising from the execution of any works, other than loss or damage for which compensation is payable under paragraph (6).

(9) Where the undertaker takes possession of land under this article, it shall not be required to acquire the land or any interest in it.

(10) Section 13 of the 1965 Act shall apply to the temporary use of land pursuant to this article to the same extent as it applies to the acquisition of land under this Order by virtue of article 18(1) (application of Part 1 of the Compulsory Purchase Act 1965).

(11) In this article "the maintenance period", in relation to a scheduled work, means the period of 5 years beginning with the date on which the work is opened for use.