HIGH COURT PLANNING CHALLENGES SEMINAR

FRUSTRATING REGENERATION SCHEMES – RECENT HIGH COURT CHALLENGES TO COMPULSORY PURCHASE ORDERS

BY

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1. INTRODUCTION

1.1 The importance of regeneration can be seen from the DCLG's "A Framework for Regeneration" (July 2008):

> *For our country to prosper in an increasingly competitive world, we cannot afford for any area to fall behind. We cannot allow communities to be left out of rising levels of prosperity and success. And we cannot let anyone have their talents wasted because of a lack of skills, information or access to work. This means that we must redouble our efforts to regenerate those parts of our country which are still tackling the challenges of deprivation and worklessness and improve the effectiveness of our support to local areas.*

1.2 At the heart of most regeneration schemes is found a CPO which delivers the necessary control over the constituent land.

1.3 Given the recognised importance of the role of regeneration in delivering sustainable communities, the substantive and procedural law relating to the process of compulsory

purchase has undergone amendment; in particular by way of the Planning and Compulsory Purchase Act 2004.

1.4 The aim has been to give added flexibility to the process and to broaden the powers; and to reduce the risk of defects in the process. As the Memorandum to Circular 06/2004 states (at paragraph 2):

Its aim is to help them [the acquiring authorities] *to use the their compulsory purchase powers to best effect and, by advising on the application of the correct procedures and statutory or administrative requirements, to ensure that orders progress quickly and are without defects.....*

1.5 As part of the amendments to CPO powers and procedures under the 2004 Act, the power to acquire land for development under section 226 of the Town and Country Planning Act 1990 was amended (this power was used in the *Walker* case dealing with a CPO for A City Academy in Darwen, Lancashire) . There are of course many other compulsory purchase powers available to be utilised as part of a regeneration scheme. For example the Leasehold Reform, Housing and Urban Development Act 1993 created the Urban Regeneration Agency with powers (under section 162 of that Act) of compulsory acquisition (see the *Pascoe* and *McCabe* cases below). [The URA merged with the Commission for New Towns in May 1999 and adopted the operating name "English Partnerships"]

1.6 There are themes that can be identified, however. It will be noted for example that 3 of the cases relate to the Olympic scheme (*Neptune Wharf, Smith* and *Sole*). It may come as no surprise that none of these challenges succeeded. Two of the cases relate to the extensive regeneration investment in Liverpool (*Pascoe* and *McCabe*).

1.7 This paper has categorised the cases by way of subject matter: obviously most cases involve more than one point of law. However, for ease of analysis the following loose headings are used:

- Procedural Defects
- Meeting the Statutory Tests
- Equality of Arms
- Other Human Rights Issues & "Foregone Conclusion"
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2. PROCEDURAL DEFECTS

Collis

2.1 *R. (on the application of Collis) v Secretary of State for Communities and Local Government* Queen's Bench Division (Administrative Court) 20 September 2007 [2007] EWHC 2625 (Admin); [2008] R.V.R. 120 (Underhill, J.) related to a CPO made pursuant to section 17 of the Housing Act 1985.

2.2 The applicant home owners (C) applied under the Acquisition of Land Act 1981 s.23(1) to quash a CPO made by the respondent local authority and confirmed by the Secretary of State. The order had been made in respect of a number of flats in Tower Hamlets for the purpose of regenerating the area. By resolution the local authority resolved that it was to *"initiate and appropriately manage [the] back up compulsory purchase order processes to assist the necessary re-purchase of leaseholds in [name of the blocks of flats]".*

2.3 A number of objections were received and a public inquiry was held. At the end of the public inquiry the Inspector recommended to the Secretary of State that the order be

confirmed. C submitted that the resolution was not a valid authority for the order because the words "initiate" and "manage" fell short of authorising the taking of a formal legal step. C argued that the resolution only authorised preparatory steps such as negotiating with the owners, confirming the identity of the owners, occupiers and mortgagees and surveying the properties to see if they were sub-standard or defective. The Secretary of State and local authority submitted that the language of the resolution was fully effective to authorise the order and that even if the order was invalid, the Secretary of State's confirmation could have validated it. The local authority and Secretary of State also submitted that if the order was invalid, the court should refuse to exercise its discretion to quash it, as all of the other owners and occupiers of the flats had agreed to vacate, and of the seven claimants, five had agreed to vacate and the remaining two were not occupiers.

2.4 The Application was refused:

(1) The resolution had to be construed as it stood. The drafting of the resolution constituted adequate authorisation for the order in fact made. The only sensible meaning that could be given to the term "initiates and ... manages... CPO processes" was as a reference to the making of a compulsory purchase order. The making of an order was in fact the first step in a process which included confirmation by the Secretary of State, the issue of a notice to treat and if necessary a notice of entry, followed by assessment of compensation. Those were the processes referred to in the resolution, not the preparatory steps referred to by C, since none of those steps, save for the need to survey the properties, required any formal authorisation. Whilst a survey of the properties might require formal power in order to gain access, that was of little significance in the instant case where the order was not based on the condition of the particular properties but on the block as a whole, as to which the local authority had been fully advised.

(2) Since the order had been validly made there was no need to consider the Secretary of State's fall-back submissions. However, had the court needed to do so, it would not have been persuaded by the argument that the Secretary of State could validly confirm an invalid order.

2.5 The Judge stated that the Secretary of State's submission regarding the exercise of discretion was an attractive one, but the court would have needed to hear much fuller argument about the possibility of prejudice to any of the Claimants before it would have been prepared to accede to it, Miller v Weymouth and Melcombe Regis Corp (1974) 27 P. & C.R. 468 QBD considered.

Neptune Wharf

2.6 ***R(on the application of Neptune Wharf Ltd) v Secretary of State for Trade and Industry*** [2007] 2 P&CR 20, concerned a claim for judicial review by the owners and lessees of land subject to a CPO to provide a relocation site for a bus depot for the 2012 Olympics. The Inspector had stated that the confirmation of the CPO depended on whether planning permission was obtained and that if the application had not been concluded, the SoS should make a direction pursuant to s.13C (Confirmation in Stages) of the Acquisition of Land Act 1981[1] to postpone his consideration of the order.

2.7 The planning application had not been determined and so the SoS accepted this recommendation and made the direction postponing consideration of the order in relation to the Claimants' land until he was notified of the outcome of the application or such earlier date as might be appropriate. The Claimants argued that s.13C(5)(a) (Confirmation in Stages) required the SoS to set a specific date and his failure to do so was unlawful:

[1] Inserted by section 100(6) of the Planning and Compulsory Purchase Act 2004.

If the confirming authority acts under subsection (1)-

(a) It must give a direction postponing consideration of the order, so far as it relates to the remaining part, until such time as may be specified by or under the direction;

2.8 The Claimants also argued that by making the direction without giving them a hearing, the SoS had breached the rules of natural justice.

2.9 Wyn Williams J rejected these complaints. He held that s.13C was concerned with situations where a decision maker faced uncertainty and therefore wished to defer his decision. To require a specific date would therefore be extremely difficult and Parliament could not have intended such a result. Furthermore, it was not unfair to issue the direction without hearing representations, especially since an opportunity had been afforded to make representations after service of the direction.

Smith

2.10 In ***Smith v Secretary of State for Trade and Industry*** [2007] EWHC 1013, the Claimants were gypsy and travellers who sought to quash a CPO of the caravan sites that they occupied. The CPOs were required as part of the site for the 2012 Olympics. The Inspector concluded that to prevent a breach of the Claimants' human rights, the order should not be confirmed until the SoS was satisfied that alternative traveller sites would be available. The SoS confirmed the orders without alternative sites being available because of the clear and overwhelming importance, timing and urgency of the order.

2.11 Wyn Williams J held that the SoS had not breached the Claimants' rights under Art.8 ECHR since the decision was a justified and proportionate measure given the overwhelming importance of acquiring the site. He also held that a decision to confirm a CPO might be proportionate even though it was not the least intrusive interference with a landowner's rights. In any event, on the facts, the CPO was the least intrusive

measure since realistically the only way of ensuring that a substantial proportion of the land for the 2012 Games was obtained by the necessary date was to make the order.

Sole

2.12 This was another challenge to a CPO made in relation to the Olympics. In ***Sole v Secretary of State for Trade and Industry*** [2007] EWHC 1527 (Admin), Prior to the announcement that London had been awarded the Games, in 2004 planning permission had been granted for the Olympic Village subject to a number of conditions, including a Grampian condition. That condition required that if the Olympic bid was successful, the development could not commence until a residential relocation strategy was submitted and approved by the LPA.

2.13 The London Development Agency subsequently made a CPO covering the Clays Lane housing estate where the Claimants lived. At inquiry it was made clear that the 2004 permission was not being relied upon. The Inspector therefore concluded that the CPO should be confirmed notwithstanding the absence of an approved relocation strategy because the Olympics required an extraordinary effort to implement large-scale development in a short period of time.

2.14 The Claimants argued that the Inspector had misdirected himself in relation to the Grampian condition, that the decision breached Art. 8 ECHR because there was not such an urgent need to justify a refusal to delay the order under s.13C.

2.15 Sir Michael Harrison held that the Inspector had referred to and understood the Grampian condition and that he was well aware that the absence of an approved relocation strategy concerned the residents. However, he was entitled to decide that there was no need to seek approval for a relocation strategy that was effectively already underway and it was very difficult for the Claimants to show that that process would not meet their needs.

2.16 He also held that there had been no breach of the Claimants Art.8 rights. The CPO was a proportionate interference, having regard to the fact that the Olympic Games were in the interests of the economic well-being of the country. It was not correct that there was no urgent need for the CPO; the construction was due to be carried out in early 2008 and the need was acute.

Belfields

2.17 In *Belfields Ltd v Secretary of State for Communities and Local Government* [2007] EWHC 3040 (Admin) (September 2007, Mr George Bartlett QC sitting as a Deputy High Court Judge) one of the grounds of challenge was that the order should have referred to the amendment to section 226(1) of the TCPA 1990 made by the Planning and Compulsory Purchase Act 2004. This was rejected by the Court on the basis that the amendment imposed a limitation on the exercise of the power (i.e. that the authority must not exercise the power unless it thinks that the development or improvement is likely to contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of their area) and does NOT contain the power under which the CPO was being made.

2.18 Another ground in this case was that the resolution to make the CPO was made by the Council's cabinet and not, as the Claimant argued that it should have been, by the Council. However, that argument was rejected since the power to make a CPO is not a function specified under the Local Authorities (Functions and Responsibilities)(England) Regulations 2000 as not being capable of being the responsibility of the authority's executive (see also *Powell and other v Secretary of State for Communities and Local Government and Sefton MBC* [2007] EWHC 2051 (Admin) where the same argument by Mr Powell was rejected).

3. MEETING THE STATUTORY TESTS

Town and Country Planning Act 1990, section 226

3.1 Section 226(1) of the Town and Country Planning Act 1990 (TCPA 1990) provides as follows:

"A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area.

(a) If the authority think that the acquisition will facilitate the carrying out of development/redevelopment or improvement or in relation to the land …

(1A) But a local authority must not exercise the power under paragraph (a) of sub-section (1) unless they think the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects:

(a) The promotion or improvement of the economic well being of their area;

(b) The promotion or improvement of the social well being of their area;

(c) The promotion or improvement of the environmental well being or their area …"

3.2 Section 6 of the Human Rights Act 1998 (HRA) makes it unlawful for a public authority to act in a way which is incompatible with a convention right. Of particular relevance in the context of these cases are Article 8 (Right to respect for private and family life) and Article 1 of the First Protocol to the Convention (Entitlement to peaceful enjoyment of possessions).

3.3 Rule 19 of the Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990 , requires the Secretary of State to give reasons for her decision to confirm a compulsory purchase order.

3.4 The Secretary of State has set out, most recently in ODPM Circular 06/2004 , her policy on how she will approach the confirmation of compulsory purchase orders.

That document comprises a memorandum and a number of appendices. In the memorandum there are various subject headings. Under the heading "Justification for making a compulsory purchase order" paragraph 17 provides as follows:

"A compulsory purchase order 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 compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in land affected. Regard should be had in particular to provisions of Article 1 of the first protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention.

The confirming minister has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those whose interest in land it is proposed to acquire compulsorily. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be. But each case has to be considered on its own merits …"

3.5 The memorandum also contains paragraphs concerning resource implications of the proposed scheme and whether there are any anticipated impediments to implementation (paragraphs 20–23).

3.6 Appendix A deals specifically with orders under section 226 of the TCPA Paragraph 2 states that the powers given by that section are:

"...intended to provide a positive tool to help acquiring authorities with planning powers to assemble land where this is necessary to implement the proposals in their community strategies and Local Development Documents. These powers are expressed in wide terms and can therefore be used by such authorities to assemble land for re-generation and other schemes where the range of activities or purposes proposed mean that no other single specific compulsory purchase power would be appropriate.... "

3.7 Paragraphs 6–11 deals with the "well being power". It includes, in paragraph 7, a reference to other statutory guidance issued by ODPM in 2001.

3.8 Paragraph 11 contains, amongst other things, the following:

"The re-creation of sustainable communities through better balanced housing markets is one regeneration objective for which the section 226(1)(a) power might be appropriate. For example it is likely to be more appropriate than a Housing Act power if the need to acquire and demolish dwellings were to arise as a result of an over supply of a particular house type and/or housing tenure in a particular locality … (it) may involve acquiring land to secure a change in land use, say, from residential to commercial/industrial or to ensure that new housing is located in a more suitable environment than that which it would replace. In urban areas experiencing market renewal problems, the outcome may be fewer homes in total."

Paragraph 12 advises:

"**Any program of Land Assembly needs to be set within a clear strategic framework, and this will be particularly important when demonstrating the justification for acquiring land compulsorily under section 226(1)(a) powers as a means of furthering the well-being of the wider area. Such a framework will need to be founded on an appropriate evidence base, and to have been subjected to consultation processes including with those whose property is directly affected..."**

Paragraph 15 advises:

"**It is also recognised that it may not always be feasible or sensible to wait until the full details of the scheme have been worked up, and planning permission obtained, before proceeding with the order...."**

Walker

3.9 In *Adrian Allen Walker, Thomas Kevin Brian v Secretary of State for Communities and Local Government, The Queen (OAO Walker) v Blackburn & Darwen BC* [2008] EWHC 62 (QB) (Wilkie, J.) the applicants (W) applied to quash a compulsory purchase order (CPO) and for judicial review of the decision to make that order. The

CPO had been made to enable the second respondent local authority to establish a city academy on a site adjacent to Darwen town centre. W were qualifying objectors to the making of that order, who favoured the academy being sited on the existing Moorlands High School site which was further from the town centre. The first respondent Secretary of State caused a local inquiry to be held. The Claimants complained about the lack of consultation on the CPO. By the time of the Inquiry planning permission and reserved matters approval had been granted for academy on the CPO site.

3.10 In her report, the Inspector set out all the objections and noted that whilst consultation on housing clearance proposals had been less than satisfactory, there was no specific requirement to consult on the CPO itself and any failure in respect of consultation was not fatal to its confirmation. The Inspector further considered the provisions of the European Convention on Human Rights 1950 Art.8 and Protocol 1 Art.1 but held that there was a compelling case in the public interest and that the CPO was a proportionate interference with the human rights of those with interests in the order lands. The Inspector recommended that the CPO be confirmed without modification.

3.11 The Secretary of State agreed with the Inspector that the CPO had been properly made and that consultation on it was not a specific requirement. She noted that there was evidence of negotiation, as most of the properties had been acquired by agreement, and that outline planning permission for the scheme had been granted after the proper statutory consultation had occurred. The SoS found, in agreement with the Inspector, that in relation to human rights, a fair balance had been struck between the use of compulsory purchase powers and W's identified rights.

3.12 The CPO was therefore confirmed. W made an application under the Acquisition of Land Act 1981 s.23 , and sought judicial review of the authority's decision to make the CPO. The local authority opposed those applications and sought an order lifting a stay

imposed by the court just after the making of the CPO. W contended, amongst other things, that the Secretary of State had failed:

(1) to apply her own policy by failing to have sufficient regard to the fact that there was insufficiency of consultation on the proposal underlying the CPO to locate the city academy on the site to which the CPO had applied;
(2) to identify sufficiently her reasoning for concluding that confirming the CPO would not constitute a breach of W's human rights.

3.13 The Application was refused:

(1) The question for the Secretary of State had been whether she was satisfied that there was a compelling case in the public interest for a CPO to be made. She had been bound to have regard to all relevant matters including the fact that outline planning permission had been obtained after a proper procedure and that all of W's arguments, and those of others who objected to the making of the CPO based on their objection to the underlying scheme, had been properly canvassed and considered at the inquiry. The Secretary of State had not, therefore, failed to have regard to her own policy.

(2) It was clear from the Inspector's report that she had been well aware of the nature and extent and seriousness of the potential interference with various human rights relied on by W. They had been accepted and not in any way undervalued. The Inspector had correctly identified the human rights involved and the proper approach to be taken in considering whether the making of a CPO would constitute a breach of them, and she had applied that approach. That approach had been mirrored by the Secretary of State, and the conclusion she came to was one that she was entitled to reach. The s.23 application would be dismissed, and the local authority would, accordingly, be granted the order

it sought lifting the stay. In those circumstances, the claim for judicial review would also be dismissed.

The Leasehold Reform, Housing and Urban Regeneration Act 1993 s.162(1)

3.14 Section 162 of the 1993 Act deals with the acquisition of land by the Agency in the following terms (*inter alia*):

(1) The Agency may, for the purpose of achieving its objects or for purposes incidental to that purpose, acquire land by agreement or, on being authorised to do so by the Secretary of State, compulsorily

3.15 Section 159 of the 1993 Act deals with the objects of the Agency in the following terms:

"Objects of Agency

(1) The main object of the Agency shall be to secure the regeneration of land in England —

(a) which is land of one or more of the descriptions mentioned in subsection (2); and

(b) which the Agency (having regard to guidance, and acting in accordance with directions, given by the Secretary of State under section 167) determines to be suitable for regeneration under this Part.

(2) The descriptions of land referred to in subsection (1)(a) are —

(a) land which is vacant or unused;

(b) land which is situated in an urban area and which is under-used or ineffectively used;

(c) land which is contaminated, derelict, neglected or unsightly; and

(d) land which is likely to become derelict, neglected or unsightly by reason of actual or apprehended collapse of the surface as the result of the carrying out of relevant operations which have ceased to be carried out;

and in this subsection "relevant operations" has the same meaning as in section 1 of the Derelict Land Act 1982 .

(3) The Agency shall also have the object of securing the development of land in England which the Agency —

(a) having regard to guidance given by the Secretary of State under section 167;

(b) acting in accordance with directions given by the Secretary of State under that section; and

(c) with the consent of the Secretary of State,

determines to be suitable for development under this Part.

(4) The objects of the Agency are to be achieved in particular by the following means (or by such of them as seem to the Agency to be appropriate in any particular case), namely —

(a) by securing that land and buildings are brought into effective use;

(b) by developing, or encouraging the development of, existing and new industry and commerce;

(c) by creating an attractive and safe environment;

(d) by facilitating the provision of housing and providing, or facilitating the provision of, social and recreational facilities."

Specific guidance on the use of the power of compulsory acquisition under the 1993 Act is found in Appendix C to ODPM Circular 06/2004.

Pascoe

3.16 The notable success in challenging regeneration schemes in recent years was ***Pascoe v First Secretary of State*** [2007] 1 WLR 885. In that case, the Claimant (P) applied for judicial review of the validity of a compulsory purchase order purportedly made by the first interested party (IP) pursuant to powers conferred by the Leasehold Reform, Housing and Urban Development Act 1993 s.162. The order was one in a series of compulsory purchase orders that IP planned to make in deprived inner city areas (under the Pathfinder areas scheme). Following a public inquiry, the Inspector,

appointed by the defendant Secretary of State, held that the order land was "predominantly" under-used or ineffectively used and so fulfilled the statutory requirements of s.159(2)(b) of the Act. The Inspector recommended that the order be confirmed without qualification, as he considered that a compelling case in the public interest had been demonstrated and that that justified the interference with the human rights of those with an interest in the affected land. The Secretary of State agreed with the Inspector's conclusions and confirmed the order.

3.17 P was the owner and occupier of a residential property named in the order. P contended that:

(1) the Secretary of State had misdirected himself in law by holding that the requirements in s.159(2)(b) were satisfied;
(2) the order had constituted an unjustified interference with her right to respect for private life and the right to peaceful enjoyment of her possessions under Art. 8 and Article 1 of Protocol No. 1; and
(3) she had been deprived of her right to a fair hearing under Art.6(1) because of the unavailability of public funding for legal representation. The essence of Ms Pascoe's last complaint was that the inquiry was so complex, lengthy and technical that she should have received funding for the legal representation and the services of professional witnesses, particularly in view of the fact that English Partnerships (the promoters) were represented by a large law firm (Eversheds), as well as leading and junior Counsel. She argued that the need for funding was heightened by the importance of what was at stake for her, namely her home.

3.18 Forbes J allowed P's claim, holding that (1) the purpose for which the statutory compulsory purchase power had been granted in the Act was to secure area-wide regeneration. The concept of land being "under-used" or "ineffectively used" in s.159(2)(b) expressly contemplated that some of the land to be acquired was being used, since otherwise it would be land that was unused under s.159(2)(a). In practical terms, the regeneration of a complete area would often require EP to take over the entire area in order to implement a coherent and effective plan of redevelopment for

regeneration. Parliament could not plausibly have intended to restrict EP's powers to a piecemeal or patchwork acquisition of individual plots of land in a regeneration area. In order to meet the requirements of s.159(2)(b), it was necessary to establish that the land, when considered as a whole, was under-used or ineffectively used. A finding that the land was predominantly under- or ineffectively used plainly involved the application of a less stringent standard than that required by s.159(2)(b).

3.19 In the instant case, both the Inspector and the Secretary of State had fallen into error by engaging in an impermissible dilution of the statutory requirement that had to be satisfied before IP was empowered to acquire the land in question compulsorily in order to secure its regeneration. The error made by the Secretary of State in confirming the order in respect of land that had been found to be predominantly under- or ineffectively used could not properly be remedied by recourse to s.160(4) of the 1993 Act. Accordingly, that ground of challenge succeeded:

> *"44. I am therefore satisfied that the Secretary of State also fell into error in concluding that the requirements of section 159(2)(b) had been met. In order to meet the requirements of section 159(2)(b) it was necessary to establish that the Order land, when considered as a whole, was "* under-used or ineffectively used*". In my view, for the Order land to be found to be "* predominantly *" under or ineffectively used plainly involves the application of a less stringent standard than that required by section 159(2)(b) : see the similar decision reached by Sullivan J in Meyrick Estate Management Ltd. ~v~ Secretary of State for Environment, food and Rural Affairs (2005) EWHC 2618 (Admin). I therefore accept Mr McCracken's submission that both the Inspector and the Secretary of State fell into error by engaging in an impermissible dilution of the statutory requirement that had to be satisfied before the Agency was empowered to acquire the land in question compulsorily in order to secure its regeneration."*

3.20 Forbes J also held that the order had constituted an interference with P's rights under Art. 8 and Article 1 of Protocol No. 1 since it deprived her of her home. However, the interference was not in accordance with the law, and was therefore not justified and constituted a breach of s.6 of the 1998 Act.

3.21 However, he rejected the complaint that, at the inquiry, there had been an "inequality of arms" contrary to Art.6 ECHR; P had been given a reasonable opportunity to present her case, which was the essence of the requirement of equality of arms. In the circumstances, there had been no violation of Art.6.

3.22 Following that decision, P sought permission to apply for judicial review in respect of the local authority's decision to demolish residential properties pending confirmation of a second CPO. The properties were owned by the authority and it possessed the necessary permission to demolish them. However, P argued that since the properties were required to be demolished in order to implement the comprehensive regeneration scheme which was to be delivered by the first CPO (i.e. that quashed by Forbes J), there was no good reason to proceed since it was not certain that that comprehensive scheme could be delivered pending the determination in relation to the second CPO.

3.23 Sullivan J granted permission and made an interim injunction to maintain the status quo until the substantive hearing which he ordered to be expedited. He held that there was no doubt that the demolition of the properties was never proposed as an end in itself, rather merely to facilitate the wider redevelopment. Since it was unclear what form the redevelopment would now take, it was arguable that it was unreasonable to proceed with the demolition pending the outcome of the second CPO. Importantly, no prejudice to the authority could be identified if the demolition were not able to proceed immediately. This summer a second Inquiry was held to consider the objections to the Order.

McCabe

3.24 In ***McCabe v SSCLG*** [2007] EWHC 959 (Admin), retail tenants challenged the validity of a CPO made by English Partnerships and confirmed by the SoS under the Leasehold Reform, Housing and Urban Regeneration Act 1993 s.162(1) which expropriated their leasehold interests in a leisure complex: the order concerned about 0.49ha of land and buildings, Concourse Tower, in the front of Lime Street Station in Liverpool The applicants relied on ***Pascoe*** and contended that land could not be taken if it only mostly or predominantly fell within one or more of the descriptions in s.159(2).

3.25 Goldring J rejected the complaint. The fundamental question before the Inspector had been whether the land considered as a whole was ineffective or under-used. Applying ***Pascoe*** he held that it would not be sufficient that the land was mostly or predominantly ineffective or under-used. However, the Inspector was not required to make a determination in respect of each parcel of land –the land had to be considered as a whole on the basis that the parcels could not be redeveloped separately. On the facts, the Inspector had been entitled to find that the land was more than mostly or predominantly ineffective or under-used.

3.26 Goldring J added that the fact land was vacant provided evidence that it was ineffective or under-used for the purposes of s.159(2)(b) and that an impression of neglect and unsightliness, whilst not sufficient on its own, was some evidence of ineffective or under-use.

> *"51 First, I agree with Mr Maurici that the fundamental issue before the Inspector was whether the order land, when considered as a whole, was under or ineffectively used. I respectfully agree with the reasoning of Forbes J in Pascoe. This is not a case in which the land could be described as vacant, given the presence of the occupied shops. However, vacancy of a part of the*

land may be evidence of ineffective or under-use. This is a section 159(2)(b) case or nothing, as Mr Maurici accepts.

52 Second, if all that could be said of the land as a whole was that it was predominantly or mainly under or ineffectively used, that would not be enough. That is not the test.

53 Third, it seems that EP accurately understood its powers. In paragraph 42 of the report the Inspector sets out (as I read it) EP's response to Mr Baig's objection:

"However this submission is based upon a partial reading and misconception of the statutory provisions. The Order Land should be considered as a whole. It is not tenable to argue that the Concourse Tower is anything other than vacant and under-used. While some of the shops are unoccupied, many are not. The whole impression is of an area which is neglected and unsightly. The statutory provisions of s159 of the 1993 are complied with."

54 Fourth, the inspector accepted that the retail units and the tower had to be considered as a whole: on the basis that this was a single building complex which could not be redeveloped in a divided way. The scheme had to be delivered as a single entity for budgetary reasons. Paragraphs 4, 5, 37 and 39 make that clear. The last three paragraphs were referred to in paragraph 82. It seems to me that on the evidence he heard the inspector was entitled to come to that conclusion. I agree with Mr Maurici in that regard.

55 Fifth, and it follows, when applying section 159(2)(b) the inspector had to consider whether this building complex was under or ineffectively used. In deciding that, he was obliged to have regard to those parts which were

occupied and that part which was not. The part which was not included the empty tower.

56 Sixth, if, having regard to the building complex as a whole, the inspector was entitled to conclude it was under or ineffectively used, and provided his reasons were adequately set out, his decision cannot not be impugned.

57 Seventh, the inspector's approach is set out in paragraph 82, where he states that a "clear case can be made from the inquiry evidence that the land and buildings within the Order site are vacant, underused or ineffectively used." Although the land being vacant is not part of the test in section 159(2)(b) (and may be a reference to section 159(2)(a)), that land is vacant is evidence of under or ineffective use, as I have already said. It seems to me the inspector was in the result approaching his task under section 159(2)(b) correctly.

58 Eighth, given that approach, was the inspector entitled to conclude, that the building complex was under or ineffectively used? Miss Olley submits he was not. Mr Maurici and Miss Patterson QC submit that he was. That too is my view.

59 By referring in paragraph 82 to other paragraphs it does seem to me, as

Mr Maurici submits, the inspector is setting out in shorthand what his findings were. In those references is clear evidence of under or ineffective use of this important site in the city centre. What the evidence found by the inspector comes to is this. The tower is vacant. The majority of the shops are empty. The area is in decline. It has been for some time. The building was poorly maintained before EP acquired the freehold. No enquiries have been made to

occupy further shops or the tower (other than temporarily). There has been a lengthy history of poor occupancy and a high turnover of tenants. The appearance is shabby. The quality of accommodation and services to be expected of modern commercial premises in such a key location are not offered by the tower. The environment created by the nature and appearance of the building complex is poor for Lime Street Station. While not sufficient on its own, an impression of neglect and unsightliness is, in my view, some evidence of under or ineffective use. EP's decision not to enter into any new lease agreements may have been a small contributory factor, as the inspector found.

60 I do not accept that the inspector was bound to conclude that the evidence amounted to no more than predominant or main under or ineffective use. It was a question of fact for him on the evidence he heard having regard to the land as a whole. Moreover, I am not sure it is helpful to subject the findings of the inspector in Pascoe to a close textual analysis; or to analyse his findings in detail and compare them with the present findings. Each case depends on its own facts. The inspector in Pascoe applied the wrong test. So did the Secretary of State. That was a sufficient basis for the judge to decide as he did."

4. **EQUALITY OF ARMS**

4.1 As seen above in *Pascoe* the Court accepted the Claimant's contention that the confirmation of the CPO was outside the terms of section 159(2) of the Leasehold Reform, Housing and Urban Regeneration Act 1993. However, the Judge rejected the complaint that, at the inquiry, there had been an "inequality of arms" contrary to Art.6 ECHR; P had been given a reasonable opportunity to present her case, which was the essence of the requirement of equality of arms. In the circumstances, there had been no violation of Art.6.

4.2 The ground of challenge was pleaded as:

"*The Claimant was deprived of her right to a fair hearing under Art. 6(1) ECHR because of the unavailability of public funding for legal representation.*"

4.3 Article 6(1) provides:

"*In determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*"

4.4 Article 6 is engaged since the compulsory purchase procedure is a determination of the Claimant's civil rights: see *R(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* (2003) A.C. 295, per Lord Slynn at paragraph 41.

4.5 The essence of the Claimant's case on this ground was that the compulsory purchase inquiry was so complex, lengthy and technical that she should have received funding for legal representation and the services of professional witnesses at the inquiry, particularly in view of the fact that the Agency was represented by experienced Leading and Junior Counsel and a large and well resourced firm of solicitors.

4.6 The Claimant contended that Article 6 guarantees a right of "effective" access to court and that therefore compliance with the Convention can require the provision of legal aid for an individual in an appropriate case. The Claimant relied upon Strassbourg case law, including the case of *Steel and Morris* which involved particularly heavy

and notorious libel proceedings brought by McDonlads against two litigants in person. In that case the ECHR held:

- It is central to the concept of a fair trial that a litigant is not denied the opportunity to present his or case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.
- The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia,* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.
- The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings.
- Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-a-vis the adversary.

4.7 However, in *Pascoe* the Court concluded that the Strassbourg case law relied upon by the Claimant did not cover the circumstances of the case for two reasons:

108 First , in my view the Strasbourg case law upon which the Claimant relies does not cover the circumstances of the present case for the following reasons.

- *(i) In both Airey and Steel and Morris , the applicants had exhausted all possible sources of funding. This was not the case here because neither the Claimant nor anyone on her behalf contacted the Secretary of State to apply for costs as suggested by the Inspector in his letter dated 27th July 2005. I accept the*

submission that the Claimant did not face a closed door: a further avenue was suggested through which she might have been able to secure funding, but she failed to take it. I do not accept that the Inspector was under any obligation or duty to forward the Claimant's application to the Secretary of State of his own motion. In those circumstances, as it seems to me, it cannot be said that the Claimant was "deprived" of the funding alleged to be necessary to ensure the right to a fair trial under Article 6(1) : see also Andronicou ~v~ Cyprus 25 EHHR 491 at page 556, paragraphs 198 to 201.

- *(ii) Neither Airey nor Steel and Morris is analogous to the present case for the reasons explained above. I accept that inquiry procedures are designed to be more user-friendly and less complex than those found in the courtroom. Individuals are enabled to present their own cases, and inspectors will normally adjust the inquiry timetable to facilitate matters for those seeking to put their case. This was done here, with the Inspector readily arranging the timetable around the availability of BEVEL's witnesses, even if this led to inconveniently long adjournments.*
- *(iii) In fact, the Claimant was much better placed than many litigants in person so far as concerns being able to present her case, because she benefited from a considerable amount of legal assistance and other support from witnesses and experts in an inquisitorial rather than an adversarial procedure: contrast the position of Mr McVicar in McVicar ~v~ UK (2002) 35 EHRR 22 .*

109 Second , looking at the " nature and facts " of the present case, I am satisfied that the Claimant was in fact given a " reasonable opportunity to present her case ", which is the essence of the requirement of "equality of arms": see Dombo Baheer BV ~v~ The Netherlands (1993) 18 EHHR 213 at paragraph 33. I reach that conclusion based on the following principal facts.

- *(i) The Claimant received the benefit of assistance from Counsel and a solicitor in the period before the inquiry. The Claimant's solicitor, a leading expert in compulsory purchase law, drafted a letter of objection in response to the Agency's Statement of Reasons. Counsel for the Claimant drafted for her the application for pre-emptive costs that was submitted at the pre-inquiry meeting on 22nd July 2005.*
- *(ii) During the inquiry itself, the Claimant had at various times the assistance of two barristers, acting pro bono, who attended the inquiry for three days, cross-examined some of the Agency's witnesses and submitted opening and closing submissions to the inquiry.*
- *(iii) The Claimant has a diploma in architecture and a degree in environmental science. She would therefore have had a much better grasp of the issues at the inquiry than would the ordinary lay objector.*
- *(iv) Another statutory objector, Mr Gwynne, who assisted the Claimant at the inquiry and cross-examined a number of the Agency's witnesses, holds professional qualifications in architecture. The Claimant clearly benefited from his expertise during the inquiry.*

- *(v) Despite her limited resources, the Claimant was able to obtain evidence and/or appearances from many witnesses, including several high-calibre public interest groups, academics and local politicians.*
- *(vi) Eversheds, the solicitors acting for the Agency, provided substantial administrative and technical support to the Claimant before, during and even after the inquiry. This was done free of charge. The details are set out in the witness statement of Ms Naylor at paragraphs 12.1 to 12.8. It is clear that the Claimant received very considerable assistance in this way (estimated at approximately 75 hours in all).*
- *(vii) Although additional evidence was served by the Agency on the penultimate day of the Inquiry, the Claimant did not seek an adjournment and, in the event, the Claimant's witnesses successfully responded to the evidence by email to Eversheds on the last day of the Inquiry (27th October 2005). Further, it is clear that Counsel for the Claimant had the benefit of seeing the evidence served by the Agency on 26th October 2005 before drafting the closing submissions on the Claimant's behalf.*
- *(ix) There is no substance in the other alleged disadvantages to which Mr McCracken made reference during his submissions for the reasons given in Mr Maurici's written note of his submissions at page 18, paragraphs 63.9 and 63.10, as follows:*

"63.9 ***the non-disclosure of the Kensington [Neighbourhood Renewal Assessment] NRA condition schedule*** *: again this is put forward as a particular circumstance where lack of sustained representation counted (or may have counted against) the Claimant BUT:*

- *a Non-disclosure of NRA condition schedule only discussed once at inquiry when [the Agency] gave explanation of City Council's position— and Mr Zwart [the Claimant's pro bono Counsel] present — so at key moment represented — could have pursued via s. 250 [of the Local Government Act 1972] if considered necessary, issues re non-disclosure of documentation considered in Mr Zwart's closing — so aware of position — made no application at any time;*
- *b Not alleged conclusions in [the Inspector's Report] could not be reached without this evidence — or unfair not provided;*
- *c Not even referred to in Grounds as pleaded (by Mr Zwart) as an example of inequality of arms.*

63.10 ***the failure to pursue the "housing market failure"/compensation/human rights point*** *: Claimant had objection drafted by Mr Brand CPO specialist, [an] editor of [the Compulsory Purchase Encyclopaedia] and assistance and closing submissions from 2 barristers specialising in field — not raise point for good reason (see above)."*

110 I therefore accept that the Inspector's own assessment of the "equality of arms" issue is both fair and accurate: see paragraph 494 of his report, which is in the following terms:

"In respect of the Inquiry itself, I am satisfied that its running allowed the Objectors fairly and reasonably to present their case with the resources available to them. These resources included advice from, and the attendance on two days of, Counsel, acting on a pro bono basis, who chose to cross-examine two of EP's witnesses. Closing submissions were also prepared on BEVEL's behalf by Counsel. The Inquiry programme was arranged to allow BEVEL witnesses to attend when convenient to them. Although fresh evidence was produced throughout the course of the Inquiry (on behalf of both EP and the Objectors) this was perhaps inevitable in the light of the nature of the case and examination and cross-examination of witnesses as the Inquiry progressed. There were no requests for any substantive adjournments to allow new material to be studied."

111 Accordingly, for those reasons, I am satisfied that the third ground of challenge fails.

5. OTHER HUMAN RIGHTS ISSUES & FOREGONE CONCLUSIONS

5.1 In short Human Rights arguments don't seem to have advanced directly objector's causes very much in the field of compulsory purchase. That is not withstanding the guidance in Circular 01/2004 noted above. In *Pascoe*, the only successful challenge under section 23 of the Acquisition of Land Act 1981 analysed in this paper, the finding by the High Court that there was a breach of section 6 of the HRA 1998 was solely on the limited basis that the interference with the Claimant's rights was not in accordance with law because of the error of approach to section 159(2) of the Leasehold Reform, Housing and Urban Development Act 1993.

5.2 In particular:

(1) The complaints that human rights **have not been adequately dealt** with by Inspector's and SoS have been rejected – *Pascoe* (paragraph 84) and *Smith,* at paragraphs 52 to 59 where the DL did not expressly refer to the article 8 point– despite claims of a lack of proper analysis of the interference with the complainant's human rights.

In *Smith* it was held that "*even if the Defendant failed to have regard to the respect which was afforded for the Claimants' traditional way of life, nonetheless, his decision to confirm the order was proportionate".*

See also the recent decision of Ouseley J (15 August 2008) in *Maley v Secretary of State for Communities and Local Government* – in relation to a Clearance Area CPO the suggestion that the SoS was duty bound to investigate the human rights implications was wrong – **there was no basis on which to assert that a general duty to investigate human rights implications was implied into the procedure**; that did not mean that such a duty could never exist in all circumstances – it was for the Claimant to establish the facts that showed that the degree of interference was not just. It was not right that the local authority had a duty to ask personal questions regarding the effect of the orders even if there had been a general duty to investigate human rights implications.

(2) The Courts have accepted that the policy requirement that a CPO will not be confirmed **unless there is a compelling case in the public interest** fairly reflects the necessary element of balance required in the application of article 8 and Article 1 of the First Protocol to the ECHR (*London Borough of Bexley and Sainsbury's v SoSE* [2001] EWHC Admin 323, paragraphs 33-48 and *Pascoe* [2006] EWHC paragraph 66).

(3) Accordingly there is **no requirement to set out in a formulaic way** the extent to which rights are interfered with. The Inspector's Report and the SoS's decision letter should be read as a whole to determine whether the necessary balancing exercise has been carried out.

(4) There is a **wide margin of appreciation** in relation to both Articles in terms of proportionality - *Pascoe* [2006] EWHC paragraph 67.

(5) A measure can be proportionate **even if not the least intrusive means possible**. That issue was dealt with fully in *Pascoe* (paragraphs 78-83 but now

seems settled in this context –see also *Belfields Ltd v Secretary of State for Communities and Local Government* [2007] EWHC 3040 (Admin).

FOREGONE CONCLUSION

Powell

5.3 In ***R(on the application of Powell) v SSCLG*** [2007] 2051 (Admin) the applicants sought to quash a CPO that had been made in respect of a number of homes for the purposes of regeneration. The applicants argued that the SoS had **failed to have regard to her own policies** in confirming the CPO since the decision ran counter to her policy on affordable housing and was therefore irrational. Secondly they contended that there had been a breach of Art.6 ECHR since the Inspector had failed to make findings of fact and instead had made conclusions and recommendations. Thirdly, they argued that the CPO infringed their Art.8 rights and finally they argued that the outcome of the inquiry had been a **foregone conclusion** in breach of Art.6 as there had **been prior approval** of the CPO under a funding agreement between the local authority and the SoS.

5.4 Sullivan J dismissed the application, holding that given the highly judgmental nature of housing, the SoS had not acted irrationally in the light of her housing policies:

> *"5. As set out in the grounds, ground 4 complained that the Secretary of State in confirming the order for the purposes of "the creation of a sustainable community through a better balanced housing market" failed to have regard to the requirements of her policy on housing and housing market failure and renewal. Various policy documents are referred to. It is not clear why some of them are said to be relevant to the present case since they deal with Compulsory Purchase Orders under the Housing Act but, in any event, the submission that the Secretary of State failed to have regard to her own*

policies is really a non-starter. There is no reason whatsoever to suppose, and the onus would lie on the claimants to establish, that the Secretary of State did fail to have regard to the relevant policies. Certainly there is nothing in the decision letter to suggest that there was any failure to have regard to them. In reality, as put by Ms Joyce, whom I permitted to speak on behalf of the claimants, the complaint under this ground appears to be rather more a challenge to the rationality of the Secretary of State's housing market renewal policy. The gist of the complaint, as it is now put, is that the policy effectively runs counter to other government's policies on affordable housing and therefore that the policy is irrational. I quite understand that the claimants may disagree with the Government's housing market renewal policy but it is really quite impossible to say that the policy itself is irrational, given the highly judgmental nature of housing policy generally. So it seems to me that ground 4, as now put, which is in essence a bald assertion that the housing renewal policy is irrational, is misconceived."

5.5 The Art.6 complaint was also misconceived; the inquiry system was fair and Inspectors do make findings of fact in reaching conclusions and making recommendations:

"8. The reasons, as I understand them, were principally these. First of all, it was contended that the Inspector should have been required to make findings of fact and it seemed to form a substantial part of the objectors' case that there had been a change in the relevant inquiries procedure rules from requiring the Inspector to make findings of fact and recommendations requiring him to make conclusions and recommendations. That criticism of the change in the rules is wholly misconceived. The change in the rules reflected the reality in planning and Compulsory Purchase Order inquiries and other inquiries of a similar kind. It is very difficult to disentangle straightforward findings of fact from matters of judgment or opinion and thus one very often sees findings of fact and conclusions and opinions mixed up. Thus, whether a site is a particular acreage or not is a question of fact; whether it is unduly prominent, whether it

is run down, why it is run down, those are matters of opinion, and judgment. Thus it is that conclusions are required from an Inspector and those conclusions will embrace both matters of fact and matters of opinion or judgment on which the Inspector will ultimately make his or her recommendation. If it can be demonstrated that in reaching his or her conclusions the Inspector has omitted to make an essential finding of fact , not a matter of disputed judgment, then that may form the basis of a legal challenge, because if the Inspector has not found an essential fact then neither the Inspector nor the Secretary of State would have been able to take it into account as a relevant consideration. So the rules first of all reflect the reality, that is to say the difficulty of distinguishing between fact and opinion in cases like this but, secondly, they do not preclude the possibility of a legal challenge upon the basis that it was necessary to find a particular fact and that fact was not found.

9. The question in this case, in any event, is academic because there is no proper evidential basis for the assertion that the Inspector failed to find particular facts. It is said that certain matters were or were not established during cross-examination. There is no proper evidence to that effect. It is well established that if a claimant in such a case wishes to challenge the accuracy of an Inspector's report, then the challenge must be set out in a witness statement so that the Inspector will have a proper opportunity to respond and the acquiring authority. That has not been done and I have to say that a number of the "facts" that it was said were established in evidence were rather more matters of judgment than fact."

5.6 The policy of encouraging regeneration of pathfinder areas and funding them would **not lead to pre-determination unless the SoS had forejudged the objections to the CPO**. On the facts she had plainly not done so and there was accordingly no pre-determination:

"13. That, I think, leaves one other matter which was raised. It was said that there was not a fair trial because effectively the outcome was a foregone conclusion because there was a "prior approval" of the Compulsory Purchase Order as a result of the various agreements that were entered into between the Secretary of State and the local authority and others prior to the Compulsory Purchase Order. In particular, there was a Marketing Restructuring (Implementation) Agreement dated 31st March 2004. Now, there is no doubt that under those agreements the Council was offered financial support under the regeneration of pathfinder areas programme and that certain targets were set for the acquisition of properties, the demolition of properties and so forth, and funding was provided upon the basis that those targets would be met. However, the answer to this point is to be found in both the skeleton argument of Mr Maurici and in the skeleton argument of Ms Patterson QC on behalf of the local authority. Clearly there cannot be any dispute that the Secretary of State does have a policy of encouraging the regeneration of pathfinder areas in the manner proposed by this council and, that because there is such a policy, funding is provided for its implementation. But that is a very long way from saying that the outcome of any particular compulsory purchase order or the fate of any particular property in a compulsory purchase order is effectively a foregone conclusion. As the Franklin case (Franklin v Minster of Town and Country Planning [1948] AC 87) demonstrates, while there may in principle be unlawful pre-determination, it exists only if the Secretary of State has forejudged any genuine consideration of objections to a Compulsory Purchase Order and simply does not genuinely consider the objections that have been made. One only has to read the Inspector's report for it to become perfectly obvious that the Inspector did very carefully consider all of the points made in respect of each individual objector, and reached conclusions in respect of them. I accept that the objectors do not agree with those conclusions, but the conclusions were open to the Inspector on the evidence. The Secretary of State has accepted those conclusions. Thus there is no evidential basis for the claim that there was in some way prior approval."

Belfields

5.7 In *Belfields Ltd v Secretary of State for Communities and Local Government* [2007] EWHC 3040 (Admin) (September 2007, Mr George Bartlett QC sitting as a Deputy High Court Judge) one of the grounds of challenge was that the market structuring implementation agreement entered into by the Council with the First Secretary of State amounted to prior approval of the CPO scheme.

5.8 The Court held:

> *59 The principal argument advanced by Ms Joyce on Mr Powell's behalf was that neither the Secretary of State as confirming authority nor the inspector in his duty to report the inquiry to the Secretary of State complied with the requirements of a fair hearing by an impartial tribunal. This failure to comply with Article 6 was said to have three elements. The first was that the Market Restructuring (Implementation) Agreement of 31 March 2004 effectively amounted to the prior approval of the CPO. The same contention on that and other agreements was advanced before Sullivan J in relation to the Queens Road and Bedford Road CPO , and he said this about it in paragraph 13 of his judgment:*
> *"Now, there is no doubt that under those agreements the Council was offered financial support under the regeneration of pathfinder areas programme and that certain targets were set for the acquisition of properties, the demolition of properties and so forth, and funding was provided upon the basis that those targets would be met. However, the answer to this point is to be found in both the skeleton argument of Mr Maurici and in the skeleton argument of Ms Patterson QC on behalf of the local authority. Clearly there cannot be any dispute that the Secretary of State does have a policy of encouraging the regeneration of pathfinder areas in the manner proposed by this council and, that because there is such a policy, funding is provided for its implementation. But that is a very long way from saying that the outcome of any particular compulsory purchase order or the fate of any particular property in a compulsory purchase order is effectively a foregone conclusion. As the Franklin case (Franklin v Minster of Town and Country Planning [1948] AC 87) demonstrates, while there may in principle be unlawful pre-determination, it exists only if the Secretary of State has forejudged any genuine consideration of objections to a Compulsory Purchase Order and simply does not genuinely consider the objections that have been made. One only has to read the Inspector's report for it to become perfectly obvious that the Inspector did very carefully consider all of the points made in respect of each individual objector, and reached conclusions in respect of them. I accept that the objectors do not agree with those conclusions, but the conclusions*

were open to the Inspector on the evidence. The Secretary of State has accepted those conclusions. Thus there is no evidential basis for the claim that there was in some way prior approval."

60 I respectfully adopt the judge's reasoning in that paragraph, and I reach the same conclusion on the report of the inspector in the present case and the decision that was made on the basis of it.

SUMMARY OF HUMAN RIGHTS POINTS ON PREVIOUS CASES

Smith

5.9 Wyn Williams J held that the SoS had not breached the claimants' rights under Art.8 ECHR since the decision was a justified and proportionate measure given the overwhelming importance of acquiring the site. He also held that a decision to confirm a CPO might be proportionate even though it was not the least intrusive interference with a landowner's rights. In any event, on the facts, the CPO was the least intrusive measure since realistically the only way of ensuring that a substantial proportion of the land for the 2012 Games was obtained by the necessary date was to make the order.

Sole

5.10 Sir Michael Harrison also held that there had been no breach of the Claimants Art.8 rights. The CPO was a proportionate interference, having regard to the fact that the Olympic Games were in the interests of the economic well-being of the country. It was not correct that there was no urgent need for the CPO; the construction was due to be carried out in early 2008 and the need was acute.

Walker

5.11 In her report, the Inspector set out all the objections and noted that whilst consultation on housing clearance proposals had been less than satisfactory, there was no specific requirement to consult on the CPO itself and any failure in respect of consultation was not fatal to its confirmation. The Inspector further considered the provisions of the European Convention on Human Rights 1950 Art.8 and Protocol 1 Art.1 but held that there was a compelling case in the public interest and that the CPO was a proportionate interference with the human rights of those with interests in the order lands. The Inspector recommended that the CPO be confirmed without modification.

5.12 The Secretary of State found, in agreement with the Inspector, that in relation to human rights, a fair balance had been struck between the use of compulsory purchase powers and W's identified rights.

5.13 It was clear from the Inspector's report that she had been well aware of the nature and extent and seriousness of the potential interference with various human rights relied on by W. They had been accepted and not in any way undervalued. The Inspector had correctly identified the human rights involved and the proper approach to be taken in considering whether the making of a CPO would constitute a breach of them, and she had applied that approach. That approach had been mirrored by the Secretary of State, and the conclusion she came to was one that she was entitled to reach. The s.23 application would be dismissed, and the local authority would, accordingly, be granted the order it sought lifting the stay. In those circumstances, the claim for judicial review would also be dismissed.

Stephen Morgan

October 2008