

Challenges beyond the Upper Tribunal

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Topics to be covered



- The role and jurisdiction of the Court of Appeal
- Some practical points on appellate procedure
- Review of (relatively) recent appellate decisions on CPO compensation

The role of the Court of Appeal

- Challenges from the UT(LC) to the Court of Appeal lie only on errors of law only
- No basis for challenging findings of fact or valuation judgment, unless perverse
- Appeals from the UT require permission (from either the UT or the CoA)
- The test:
 - “real prospect of success”; or
 - “some other compelling reason” to hear the case
 - E.g. where need to clarify the law, even if against the appellant (e.g. the Secretary of State...)

The role of the Court of Appeal

- Can challenge interim decisions without waiting for final determination: ***Persimmon Homes (Midlands) Ltd v SST*** [2010] RVR 122
- But can't appeal UT review/set aside decisions (TCEA 2007 s. 13(8))

The role of the Court of Appeal



- Practical tip:
 - The “Appeals from the Upper Tribunal to the Court of Appeal Order 2008”, despite its name and its terms, probably does not apply to CPO compensation appeals
 - ***PR (Sri Lanka) c SSHD*** [2012] 1 WLR 73 at para 14
 - White Book suggests otherwise, but may be wrong ...
- In any event, helpful to explain not just why there’s a real prospect of success, but why the appeal is important in practical/procedural terms – CA generally deferential to UT’s expertise

Court of Appeal practical considerations

- Court of Appeal can give permission only if the UT has refused it (TCEA 2007, s. 13(5))
- Time frame fairly tight:
 - Must apply to the UT in writing within one month
 - If refused, have 28 days to apply to the CoA
- If successful on appeal, Court of Appeal expressly empowered to re-make the relevant decision (TCEA, s. 14(2)(b)(ii))

Appellate decisions on compensation

J S Bloor (Wilmslow) Ltd v HCA [2015] RVR 292



- HCA compulsorily acquired two sites purchased by Bloor for residential development as part of the Kingsway Business Park
- Bloor sought a CAAD under s. 17 of the 1961 Act to the effect that planning permission would have been granted for dwellings on the sites.
- LPA refused to grant CAAD in those terms.
- UT(LC) found a 50% chance of planning permission for residential development being secured, and attached hope value accordingly
- Assessment of planning prospects was based on assumption that the KBP scheme was cancelled in its entirety, so that the DP requirement for comprehensive development at the appeal sites was more likely to be relaxed in favour of Bloor's proposed scheme

J S Bloor (Wilmslow) Ltd v HCA [2015] RVR 292



- HCA appealed: contention was that s. 6 of and Schedule 1 to the 1961 Act did not require the entire CPO scheme to be assumed to have been cancelled
- Only need to disregard the existence of the scheme for the purposes of identifying the planning status of the reference land; no need to disregard the scheme again for s. 6 valuation purposes.

J S Bloor (Wilmslow) Ltd v HCA [2015] RVR 292



- Held:
 - S. 6 designed to neutralise the impact of the CPO scheme (positive or negative) on the calculation of the reference land's intrinsic development value.
 - Can involve modifying the planning status of the reference land, if that is the only way to strip out the CPO scheme impact on the reference land value (e.g. where development dependent for access on a road to be built pursuant to the CPO scheme)
 - Requires UT to strike a balance between the “no scheme” world and the planning actualité (para 37)

J S Bloor (Wilmslow) Ltd v HCA [2015] RVR 292



“in my view, the reference in s. 6(1) to the prospect of the development of (in this case) the KBP land has to be construed as referring to more than simply the physical development of that land. It must denote the scheme of development itself with the development plan strategy and policies it contains and the implementation of those policies in the form of the grant of planning permission and the making of the CPO . This reading of s. 6(1) is consistent with the Pointe Gourde principle of construction which is designed to ensure that the legislation operates in conformity with that principle as explained in Waters v Welsh Development Agency . Although as the House of Lords made clear in that case, the application of the Pointe Gourde principle to supplement the 1961 Act should not be pressed too far, it would, in my view, be completely unrealistic to regard the scheme as not including the planning policies and objections which underpin it and dictate its form and scope.”
(para 38, per Patten LJ)

J S Bloor (Wilmslow) Ltd v HCA [2015] RVR 292



- Followed that UT was wrong to take account of the DP land allocation for the reference site, which was referable to the KBP scheme.
- That error gave rise to an overvaluation of the reference site: the land was not hindered by the KBP protective policies, but benefitted from the KBP-facilitating residential development allocation (Sales LJ at para 52)
- Implications remain to be explored. For example:
 - what would the local plan have done with the site but for the CPO scheme...?
 - what if the CPO scheme site allocation is the reason the LPA has 5 year housing land supply...?

Moto Hospitality Ltd v Transport Secretary

[2008] 1 WLR 2822



- Interesting and important case on identifying extent of schemes for calculating compensation for injurious affection
- Concerned the Cherwell Valley motorway service station, on the M40
- SoS conducted a scheme of works (facilitated by CPO) to the motorway junction which the appeal site served
- Scheme included the stopping-up of slip roads whilst the works were being undertaken
- Overall result of the scheme was that access to the service station from the motorway was more circuitous, and thus less attractive to passing motorists

Moto Hospitality Ltd v Transport Secretary [2008] 1 WLR 2822



- Two broad issues for the Court of Appeal:
 - Is injurious affection arising from stopping-up works (i.e. under the Highways Act 1980) capable of grounding a CPO compensation claim?
 - If so, had the claimant suffered special damage as a result of the scheme such as to justify an award on **McCarthy** principles?

Moto Hospitality Ltd v Transport Secretary [2008] 1 WLR 2822



- First issue concerned the scope of s. 10 of the 1965 Act:

(1) If any person claims compensation in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the Lands Tribunal.

(2) This section shall be construed as affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Lands Clauses Consolidation Act 1845 has been construed as affording in cases where the amount claimed exceeds 50 pounds.

Moto Hospitality Ltd v Transport Secretary

[2008] 1 WLR 2822



- Court held that s. 10 wide enough to encompass the stopping-up works:
 - S. 68 of the 1845 Act was not dependent on the inclusion of CPO powers in the authorising Act itself; rather s. 68 was engaged whenever it was incorporated by another provision and works were conducted under the authority of that provision (para 40)
 - S. 10 clear that it applies to all cases where s. 68 would have applied (para 51)

Moto Hospitality Ltd v Transport Secretary [2008] 1 WLR 2822



- **Joliffe** [1967] 1 WLR 993 distinguished (para 49):

“the Jolliffe case must be taken as authority for the proposition that, where the execution of the works is facilitated by a stopping up order made by a different compensating authority, under a different statutory scheme not incorporating the 1965 Act, the stopping up does not give rise to a claim under section 10. In this case, by contrast, the stopping up order was made under the same Act by the same authority, and as part of a composite package of measures, all of which were required for the execution of the works. We see no reason, based on the 19th century cases or otherwise, to extend the Jolliffe principle to a case like this”

Moto Hospitality Ltd v Transport Secretary
[2008] 1 WLR 2822



- First ground of appeal thus dismissed.
- But...

Moto Hospitality Ltd v Transport Secretary [2008] 1 WLR 2822



- Public nuisance ground allowed:
 - The UT was correct to find a special relationship between the parties, but that was not enough in and of itself.
 - Losses arising from injurious affection are compensatable only if they are “*particular, direct and substantial*” (para 72)
 - Here, the impact of the scheme on the service station arose from the rearrangement of the junction as a whole. Such losses are too remote to ground an injurious affection claim.
 - Insofar as the loss was referable to individual components of the scheme, it was unrealistic to examine them: they were incidental parts of the wider scheme (para 79)

Moto Hospitality Ltd v Transport Secretary [2008] 1 WLR 2822



“In this context, to justify a claim under section 10, it might be said, there would need to be at the least a direct interference with the access to an individual site which goes beyond what is ordinarily incidental to the traffic objectives of the scheme as a whole. Owners are protected by the obligation to provide “reasonably convenient” alternatives, and their right to object if the orders do not meet that requirement. It would seem difficult to envisage circumstances in practice where, that requirement having been satisfied, the damage could be said to be sufficiently “particular, direct and substantial” to found a claim for compensation.” (para 81, per Carnwath LJ)

Lancaster CC v Thomas Newall Ltd

[2013] JPL 1531



- Concerned a former mill site with a mix of uses
- On CPO, claimant claimed disturbance elements including:
 - Management time
 - Loss of rent
- Court of Appeal gave guidance on the approach to both elements

Lancaster CC v Thomas Newall Ltd

[2013] JPL 1531



- As to management time:
 - Claimant had put in detailed evidence of extensive time spent by its five directors working on the CPO
 - But ... evidence did not address financial relationships between the directors and the claimant (how they were paid, nature of their contracts etc), nor the directors' normal duties to the company
 - Additionally, the claimant company's sole real activity was managing lettings of units; if loss of management time affected business, would have affected it by reducing rental income (which was a separate head of claim)

Lancaster CC v Thomas Newall Ltd

[2013] JPL 1531



- Proper approach to management time disturbance claims:
 - Governed by usual principles of recovery as per ***Shun Fung***
 - Where claimant is a sole trader, evidence showing time spent above and beyond that ordinarily needed to maintain profitability will be sufficient
 - Conversely, where claimant is a company, additional evidence required to show impact of directors' time on the operation/profitability of the company itself (para 19)
 - Can treat cost to company of employing staff to deal with CPO as a proxy for loss to the company. But doesn't necessarily work for directors: can't assume nexus between directors' time and company's profit

Lancaster CC v Thomas Newall Ltd

[2013] JPL 1531



- Loss of rent claim:
 - Tribunal found, as a fact, that the vacancy rate for units was ordinarily 15%
 - Question for Court of Appeal was whether a 15% allowance should have been made to reflect the “usual” void period, against those units found to have been vacant as a consequence of the CPO. AA argued that it should be so included
 - CoA disagreed:

Lancaster CC v Thomas Newall Ltd

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“I cannot see how an automatic inclusion of a 15 per cent deduction for voids when calculating the rent lost in respect of any particular unit can be justified. The relevant period is from February 16, 2004, when the Council gave notice of its intention to acquire St George’s Works, to August 1, 2006, the valuation date. A tenant who, say, vacates on June 1, 2006 because of the compulsory purchase will, on the face of it, cause TNL to lose two months’ rent that, on the probabilities, it would otherwise have received. I find it difficult to see why, in principle, TNL’s recovery for such loss should automatically be reduced by a factor of 15 per cent. It can of course be said that the purpose of the claimed compensation is to put TNL into the position it would have been had there been no compulsory purchase, and it may be that the computation of compensation for lost rent ought therefore to take into account the possibility that the tenant vacating on June 1, 2006 might, in a “no compulsory purchase world”, anyway have vacated on, say, July 1, 2006. The existence of that possibility might justify the tribunal in applying some discount to the rent claimed to be lost, and therefore in the compensation claimed, although in my example it would seem unlikely that any discount would be justified. In the case of a tenant who, by reason of the compulsory purchase, vacates rather earlier, there might be more justification for the application of some such discount. But in any case, the application of any such discount would be a fact specific exercise. There could be no justification for an automatic application of the same 15 per cent deduction that was applied when valuing the freehold.” (para 66, per Rimer LJ)



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