IMPLEMENTATION OF COMPULSORY PURCHASE ORDERS

Implementing CPOs in changing circumstances

1. There are three routes to acquiring title following the making and confirmation of a CPO:

   (a) By agreement: (s3 CPA 1965);
   (b) Under the CPA 1965 – Notice to Treat etc (s5 CPA 1965).
   (c) By General Vesting Declaration (Compulsory Purchase (Vesting Declarations) Act 1981).

2. The precise formalities associated with each route are manifold and easily ascertainable from practitioners' texts. I do not consider these in this paper. Obviously, it is critically important that the proper formalities are followed. The purpose of this paper is to consider the position where circumstances change between the CPO being made and being implemented.

Changed Circumstances since CPO made

3. Given the time frames involved in the promotion of a CPO, its confirmation, the land assembly process and the attempt to secure occupiers for any redevelopment proposal there is a strong chance that circumstances will change between the confirmation of the CPO and the decision to implement it.

4. Government advice in Circular 06/04 is that implementation should take place as expeditiously as possible, and that acquiring authorities should

minimise the time delay between the confirmation of the Order and taking possession[1], and that they should be open to acquiring particular interests by agreement where this is requested before the implementation of the CPO.

5. However, in practice there will be certain matters beyond the control of the acquiring authority which will inevitable impact on their ability to progress the implementation "expeditiously". An obvious example of this is the economic climate and the availability of finance, as demonstrated with the recent recession and difficulty of developers in obtaining credit on favourable terms. A further factor will be the difficulty in establishing the total liability to compensation to which the acquiring authority will be exposed if it proceeds with implementation. Whereas the acquiring authority through its advisers should be able to estimate the open market value of the land being taken, there are other mattes which it will struggle to predict accurately, for example any disturbance claim which may include an element of lost profits.

6. Some key principles determine whether the CPO obtained can be proceeded with:

    (a) powers of compulsory purchase can only be exercise for the purposes for which they were granted, and not for any different (collateral) purpose (**Grice v Dudley Corporation** [1958] Ch 329.

    (b) The proper purposes include those which can fairly and reasonably be considered incidental to, or consequential upon, the principal purpose for which the relevant power has been conferred (**Grice and Dudley Corporation; Merivale Builders Ltd v SSE** (1978) 36 P&CR 87);

[1] Circular 06/04 paragraphs 58-59

(c) The test that must be applied is whether the exercise of the power of compulsory acquisition is for the statutory purpose and whether what the acquiring authority proposes to do is "against good conscience" (**Simpsons Motor Sales v Hendon Corporation** [1964] AC 1088).

7. The purposes for which powers of compulsory purchase may be granted are very wide ranging. These will include Acts promoted to deliver a specific piece of infrastructure, e.g. Crossrail Act 2008, but also more general powers such as the acquisition of land to provide for housing (under the Housing Acts) or to facilitate the development, redevelopment, or improvement of land (under section 226 of the Town and Country Planning Act 1990).

8. In each case it is necessary to identify the particular purpose for which the land was acquired. In some cases this will be very straightforward, especially where the power was conferred to deliver a specific project.

9. In other cases, particularly the planning powers, the purpose will have to be construed from the documents: the CPO itself, the Statement of Reasons, the Inspector's Report into any objections etc.

10. Government advice is to use a more specific power when one is available, and only to use a general power where unavoidable[2], and indeed the Secretary of State may refuse to confirm an order if it seems to him that a general power is being used to frustrate the intention of Parliament[3].

11. So, what can lawfully change?

[2] ODPM Circular 06/04 paragraph 15.
[3] ODPM Circ 06/04 Annex A paragraph 2.

12. Good example of possible changes is in the recent case of **R (on the application of Iceland Foods) v Newport City Council** [2010] EWHC 2502 (admin).

The Facts

- Claimant applied to quash making of GVD for city centre retail led redevelopment scheme
- CPO made on 13th April 2006 "to allow the redevelopment of the existing built development on the Land to be Acquired [John Frost Square] to provide a mixed use development ..."
- Claimant objected to CPO
- Inspector recommended confirmation
- CPO confirmed on 4th April 2007 "for the purpose of securing the carrying out of a comprehensive scheme of development (including retail, leisure, residential and hotel uses together with car parking, highways alteration and public realm works)"
- On 16th June 2009 Council's Cabinet resolved to complete all outstanding acquisitions under the Order, not to extend the development agreement (due to expire on 31st July 2009), and to re-market the site
- By then much of scheme had been pre-let, hotel had been dropped, and a number of premises had been vacated; but viability of scheme was in doubt and developer was in financial difficulties

- GVD executed 27th November 2009, despite Claimant's assertion that this would be illegal
- Notice of making GVD served on 21st December 2009

Grounds of Claim

- Grounds of claim were that execution of GVD was unlawful because:
- (i) its purpose was different from that for which CPO was made and confirmed
- (ii) it was contrary to Claimant's human rights

Ground (i)

- Judge referred to *Simpsons Motor Sales v Hendon Corpn* [1964] AC 1088 – where CP power is authorised for a particular statutory purpose, it cannot be exercised for a different or collateral purpose
- Purposes here defined by TCPA s226(1)(a) and (1A), by the Order itself, and by the terms of the confirmation letter, i.e. to secure the carrying out of "a comprehensive scheme of development which included many and various different land uses" – but <u>not</u> by a particular developer or company
- Claimant argued that, since by June 2009 scheme was not viable and could not be funded, purpose of executing GVD was not to secure implementation of scheme underlying CPO but to accumulate a land bank to facilitate some unspecified development in the future
- Judge found that, read as a whole, the relevant reports were advising Cabinet "to take a course of action which

will best facilitate the carrying out of a redevelopment scheme at John Frost Square"

- It was significant to the judge's decision that the site was to be re-marketed on the basis of the existing planning permission and development brief, and that the permitted scheme could (in Cabinet's view) still viably be delivered by another developer
- Claimant also argued that it was irrational of the Council to implement the CPO in circumstances where they had found that the scheme was unviable
- But in fact, Council had only decided that implementation of the scheme could still take place subject to obtaining alternative funding; therefore not irrational.

Ground (ii)

- Inspector gave proper consideration to the interference with human rights (by use of the standard formula)
- Changes in circumstances in the meantime did not mean that implementation of CPO through execution of GVD constituted an unjustified infringement of human rights
- This ground failed for the same reasons as ground (i), i.e. that the GVD had not been executed for a different or collateral purpose

Procedure and Delay

- The Court found that it is the administrative act of executing a GVD that is challengeable by way of JR, rather than the decisions that precede this
- On that basis, the claim was probably not brought promptly; but, given his conclusions on the merits, it was unnecessary for the judge definitively to decide the point

Comments

- Viability problems are likely to be an issue with a number of CPOs for town and city centre redevelopment schemes that were promoted/confirmed before the recession
- To resolve these, changes to the permitted schemes (including e.g. different uses/mix of uses and reduced site area) and/or to the Council's chosen development partner may be needed
- The *Iceland* case turned on its own facts
- It was of particular significance that the Court found that the Council considered the scheme underlying the CPO still to be capable of implementation in the hands of another developer
- The dropping of the hotel from the scheme was not seen as a problem
- Even if more extensive changes were made, the question would still be whether the execution of the GVD was for purposes which were (a) within the scope of the powers in s226, and (b) in conformity with the reasons given for making and confirming the Order

- Judge did not say that wanting to use the CPO powers before they expired was in itself an unlawful consideration
- May well be particular difficulties in cases where purpose of CPO is expressed in terms of facilitating a specific scheme
- Therefore drafting of CPO itself and Statement of Reasons of key importance

13. Another example is found in **R v Carmarthen DC ex parte Blewin Trust** [1990] 1 EGLR 29. Very briefly, the Council made a CPO over land including the car park of a hotel. The hotel owners objected on the grounds that they needed the car parking spaces to support the hotel. The developer agreed to provide a number of spaces within the redevelopment scheme and the Inspector confirmed the CPO. The purpose of the CPO (stated within the CPO) was "the development, redevelopment and improvement for commercial purposes of the development of retail stores and ancillary car parks". The CPO was made on 23 May 1985 and was confirmed in April 1986. Outline planning permission for the scheme had been obtained in April 1984. In confirming the CPO the Inspector found that the redevelopment scheme would allow for sufficient parking on the site, and he referred to the agreement with the developer to provide a minimum of 50 spaces.

14. Over the next two years changes among the proposed occupiers and developers took place. The new developer proposed a much more extensive scheme. Within this scheme the developer proposed 6/7 spaces next to the hotel, and a further 13/14 100m away.) To enable the scheme to go ahead the Council published its intention to make a GVD on 19 May 1989. The hotel owners (Blewin) challenged this decision on the ground that the CPO had

been made and specifically confirmed in the face of objections based upon specific proposals, and a specific factual allowance for 50 car parking spaces next to the hotel. It was for this purpose that the power was vested. The Council, it was claimed, was now exercising that power for a different purpose, and Blewin was denied the right to object to that scheme and to the loss of its spaces. At the time of the claim the hotel has ceased trading.

15. The Court (Nolan J.) commented: "It does seem to me extraordinary that the inquiry into objections which the Secretary of State is bound to make should be regarded as conclusive without any statutory right to bring up matters which may substantially enhance the validity of the objections and which occur between the granting of the power to make a vesting declaration and the execution of that power. But that is the law."

16. Nolan J applied the principle from **Simpsons Motor Sales (London) Ltd**. He considered that the purpose for which the CPO was made was wide enough to comprehend the new development now proposed. Circumstances had changed: the developer had changed, the agreement to provide the spaces had not come to fruition, and the hotel had ceased trading. It was not the Court's role to ask whether the Inspector would have reached the same conclusion on the changed circumstances. The Council was not acting unconscionably, "and the interest of the claimant (which will be reflected in the compensation payable), should not be allowed to prevail over the interest of the others affected by the development so as to preserve for the applicants the desire which they undoubtedly have to get the hotel back into operation".

17. The facts of **Simpsons Motor Sales (London) Ltd** provide perhaps the widest change in circumstances, certainly the most dilly dallying by the Corporation.

On 25 March 1952 the Corporation made a CPO under section 74 of the Housing Act 1936 "for the purpose of providing housing accommodation under Part V" of the 1936 Act. This included land on which Simpson's traded motor cars. Notice to treat was served in October 1953, and notice of entry served in August 1954. At that time the Council intended to build 12 flats on the land. By 1959, no action had been taken, and in fact the project had disappeared. The Council considered that to develop the site on its own was not realistic, it would have to be developed as part of a larger redevelopment, but in the circumstances that would not take place in the foreseeable future. The Council resolved however to proceed with the compulsory acquisition. Simpsons claimed that it was not open to the Council to proceed with the implementation of the CPO which had been conferred for a specific purpose, and the Council now proposed to acquire the land as part of a general redevelopment, and a new CPO should be made.

18. The House of Lords (Lord Evershed) applied the collateral purpose test: "*where a body such as the corporation obtains a power of compulsory acquisition which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body concerned to seek to use such power for some different purpose or to use the language of Lord Cranworth LC in Galloway's case for a collateral purpose*".

19. There was a separate power available under the Housing Act for 'Clearance and Redevelopment'. Simpsons claimed that the Council was implementing the power for a purpose within that part of the Housing Act, or under the Town and County Planning power to acquire land for redevelopment (now s226). Lord Evershed (with whom the whole Court agreed) held that the CPO did not limit the land to the specific project in mind at the time it was made. The land was available for any purpose contemplated within that part of the

Housing Act. "Although from the beginning of 1956 onwards the actual use to which the North Road site would ultimately be put became vague, if not visionary, it cannot be said that in all that during that period occurred the corporation at any time determined upon a use of the site which would be outside the purposes of Part V of the Housing Act or upon a use of the site which would be outside the purposes of Part V of the Housing Act or upon a use of any of the suggested "redevelopment" area which would be inconsistent with the North Road site being utilise in fact by the corporation for any purpose other than the purpose of providing housing accommodation within the scope of Part C of the Housing Act".

20. Secondly, Lord Evershed considered whether in equity the Corporation should be prevented from proceeding with the compulsory acquisition,. He defined the test as follows:

> "*If such an equitable right is to be found then it must, as I conceive, be based upon the view that to permit the corporation to continue to enforce their rights under the original compulsory purchase order must in some real sense by against good conscience. In order to achieve such a result it seems to me that it would be necessary to show one or both of the following: that there has been on the part of the corporation something in the nature of bad faith, some misconduct, some abuse of their powers*".

21. Lord Evershed found no evidence of such bad faith.

22. Finally, in **Procter and Gamble Ltd v SSE** (1991) 63 P&CR 317, the Council made a CPO "for the purposes of securing the regeneration of part of the Tyne and Wear Development Area". Outline planning permission had been

granted for a large regeneration scheme, including East Quayside. Subsequent to the CPO being made the highways authority objected to the highways aspect of the proposal. The Council therefore agreed that part of the Order land should be dedicated for highways purpose to allow road widening. This had not formed any part of the stated purpose of the CPO previously, or of the Statement of Reasons. There was then the inquiry into objections to the CPO, which led to the CPO being confirmed, the Inspector concluding that the road improvements were reasonably necessary to deliver the regeneration of East Quayside. The Claimant challenged on the ground that the Order had been confirmed for a purpose different or additional to that for which it was made.

23. The Court of Appeal accepted that a CPO made for one purpose could not be confirmed for another purpose or an additional purpose. However, the actual purpose of the CPO was the regeneration of the East Quayside area, not the implementation of a particular scheme. The highway improvements were necessary to deliver that purpose. The confirmation of the CPO was therefore for the same purpose as that for which it was made.

Conclusion

24. Since **Simpsons** was decided there is now within the legislation a requirement to exercise the power of compulsory acquisition within 3 years of it being conferred (s4 CPA 1965). This would prevent such long stalemates as existed in that case.

25. However, where the AA choose to proceed via notice to treat and notice of entry there is the prospect of a period of up to six years between confirmation of the CPO power and the final date for their implementation (If

NTT is served within 3 years it remains valid for further 3 years[4]) – a prospect referred to in Circular o6/04 as "daunting"[5] for landowners.

26. It therefore remains eminently possible that circumstances will change between the CPO being made and being implemented. The above cases make clear that it is not appropriate for there to be a review at the time of implementation of whether the CPO would be confirmed again if reconsidered against those changed circumstances. As a result there is considerable scope for changes to take place, provided that the acquiring authority acts in good faith.

27. There is therefore a gulf between the policy as to implementing CPOs expeditiously, and effectively as soon as possible after they are confirmed, and the legal scope for implementing the CPO in changed circumstances.

28. In each case the scope for changes to take place will be determined by the precise terms of the CPO and the stated purpose for which it was made and confirmed. Those drafting CPOs and the Statement of Reasons should bear this in mind. If the CPO is not tied to an individual scheme, there is scope for changes to:

    a) **the developer**: at the time of the testing of the CPO it will be important to show that the resources are available to deliver the scheme. This will ordinarily involve some form of development agreement. Post-confirmation, however, there may well be changes to the terms of the agreement, the financing arrangements within it, and even to the chosen development partner;

[4] S5 CPA 1965
[5] Paragraph 59

b) **the intended occupiers**: it will often form part of the case for a CPO that a particular anchor will be provided. Subsequent to the CPO this may change, together with consequent changes to the scheme;

c) **the proposed development**, including the mix of uses and the inclusion of particular elements may change (e.g. hotel in **Iceland**), Again, ordinarily the power of compulsory acquisition will be confirmed against the background of specific proposals. Indeed it will ordinarily be necessary to show that there is no planning impediment to delivering the scheme[6].

d) the area **of land** to be developed;

e) the funding of the scheme, although if the authority is of the view that the scheme as a whole is unviable and will remain so for the foreseeable future, the implementation of the CPO may be Wednesbury unreasonable (**Iceland**).

Timing

29. This section of the paper touches briefly on some other elements of timing that will be relevant to the decision to implement the CPO.

30. Section 4 of the 1965 Act provides as follows:

> "*The powers of the acquiring authority for the compulsory purchase of the land shall not be exercised after the expiration of*

[6] Circular 06/04 paragraph 23.

three years from the date on which the compulsory purchase order becomes operative"

Notice to Treat

31. Where a compulsory purchase order is implemented by service of a notice to treat there is no ambiguity in the meaning of this section or its practical effect. The notice to treat must be served under section 5 of the 1965 Act within three years of the CPO becoming operative[7].

32. This then provides the longstop to make sure that the hard fought for CPO remains effective.

Effect of Notice to Treat

33. However, the service of a notice to treat in relation to a particular interest gives rise to a claim for compensation. The decision to serve notices to treat must therefore be taken carefully, after the financial consequences have been weighed.

34. It may also be sensible to stagger the service of notice to treat and subsequent entry to manage the financial implications.

Duration of Notice to Treat

35. A notice to treat shall cease to have effect three years after the date on which it is served (s5(2A) CPA 1965). This period is extendable, but only with the agreement of the person interested in the relevant land (s5(3A) CPA 1965).

[7] **Grice and Dudley Corp** [1958] Ch 329; **Marquis of Salisbury v Great Northern Railway Co** (1852) 17 QB 840

36. In the event that a notice to treat is allowed to lapse, the acquiring authority are liable for compensation for any loss or expense by the giving of the notice and its ceasing to have effect (s5(2C)).

37. A notice to Treat may be withdrawn, but only in certain circumstances:

    (a) By agreement;

    (b) Within 6 weeks of receipt of a notice of claim for compensation under s4 LCA 1961;

    (c) Where no claim has been submitted and the compensation has been determined by the Tribunal provided that possession has not been taken of the land (s31(2) LCA 1961)

    (d) Where a landowner serves a notice requiring acquisition of his whole interest which would require the acquiring authority to take more land than it requires for its purposes (s8 CPA 1965).

38. It is to be noted that the NTT cannot be withdrawn prior to the service of a claim under subsection 31(1) of the LCA 1961 (**Acton v Trustees of Birmingham SW Circuit Methodist Church Manses Trust** [2006] 30 EG 184).

39. George Bartlett QC identified the purpose of the power of withdrawal as follows, at p103:

    "*The purpose of the power to withdraw is clear. When the acquiring authority serves notice to treat, it is unlikely that it will be able to make a firm assessment of the compensation that it will have to pay in respect of its acquisition of the claimant's land. Although it ought to be able to assess the market value of the land (under 2(2) of section 5 of the 1961 Act), it is unlikely that it will have the knowledge needed to be able to assess additional elements of the compensation that are*

personal to the claimant – severance and injurious affection of its other land (under section 7 of the 1965 Act) or other consequential losses (under r(6)) – or to know whether the claim may be made on the basis of equivalent reinstatement (r(5)) or what the cost of this might be. The acquiring authority has to be able to withdraw the notice to treat when it knows what the limit of its liability is. Equally, however, the claimant needs to know where it stands, and the acquiring authority's power to withdraw is therefore limited in point of time. If it does not withdraw the notice to treat within six weeks of the notice of claim, or within six weeks of the tribunal's decision where no such notice has been served, it can be released from its liability to buy the land only if the claimant agrees or acquiesces."

General Vesting Declaration

40. It is a necessary pre-condition to the execution of a General Vesting Declaration that preliminary notice is given in a prescribed form (section 3 CP(VD)A 1981).

41. It should be noted that this notice may be given in the statutory notice of confirmation of the CPO (i.e. the notice of the confirmation of the Order that is required to be published or served by s15 ALA 1961).

42. The giving of this preliminary notice cannot, however, be relied upon as an exercise of the powers of compulsory purchase for the purposes of section 4 of the 1965 Act, and so will not keep the CPO alive. There is discordant judicial consideration of this issue: Compare **Westminster CC v Quereshi** (1990) 60 P & CR) and **Co-operative Insurance Society Ltd v Hastings**

Borough Council [1993] 2 EGLR. In my view, **Quereshi** is wrong and **Co-operative Insurance Society Ltd** is right. In the latter Vinelott J held as follows:

> *"A CPO becomes operative when published only in the sense that the powers conferred by it then become exercisable. The question in any given case is when those powers were exercised. It is, in my view, simply impossible to say that a section 3 notice is an exercise of those powers. The service of the section 3 notice committed the Council to nothing; it was still open to the council to exercise their power by the service of a notice to treat if they subsequently decided to take that course. The service of the section 3 notice equally conferred no rights on the society, A notice under section 3 is, in my judgment, no more than a warning by an acquiring authority that they may use the procedure of the 1981 Act and proceed, as it were, in a single leap to completion of a purchase without the intermediate stage of what has been described as a quasi-contract – the creation of a legal relationship under which the owner has the right to require the compensation to be agreed or ascertained by the Lands Tribunal (and subject to the acquiring authority's right under section 31 of the 1961 Act to resile from that transaction) to be paid the compensation once agreed or ascertained. The conclusion reached by Aldous J has very serious consequences which, in my judgment, could not have been intended by the legislature. They are well illustrated by the instant case.*
>
> *…*
>
> *Moreover, if Aldous J's decision were right, it would be open to an acquiring authority in any case to serve notice under section 3 as soon as a CPO had been confirmed and published in order to prevent the*

three year period in section 4 running against them. It would still be open to the acquiring authority to proceed by means of a notice to treat outside the three year period, it is preferred that course. The landowner would have no remedy, unless he could prove either that the section 3 notice was served in bad faith with the only or primary purpose of avoiding the time limit in section4, or that the acquiring authority's original; intention in obtaining the CPO has been abandoned."

43. The upshot is that if it is decided to implement the CPO via the GVD route then it is necessary to have given the preliminary notice required under section 3 and executed the GVD within three years of the CPO being confirmed[8]. The GVD must not be executed for at least two months beginning with the date of the first publication of the preliminary notice or such longer period as may be specified in the notice (s5(1) CP(VD)A).

44. There is a further complication in that the preliminary notice must be published and served prior to any notice to treat (s3(2) CP(VD)A 1981).

45. Two practical points:

    i. There is an obvious advantage in including the preliminary notice in the statutory notice of confirmation. In this way the requirement to give notice is met, and the acquiring authority keeps the option open to proceed via notice to treat and notice of entry, or via GVD.

    ii. The AA should consider carefully the mechanism it intends to use. There may well be an advantage in using the NTT

[8] See also Circular 06/04, paragraph 63.

procedure to have an idea of the extent of compensation claims, and subsequently using the GVD procedure to ensure all interests are acquired.

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25th March 2011.