Section 9 after Pattle

By Reuben Taylor

1. This paper examines the compensation code's approach to compensating a freehold owner for rental losses, with particular regard to section 9 and the decision in *Pattle*[1].

2. We are all aware of the objective of the compensation code; to compensate the party whose land has been acquired for the actual loss that he has suffered as a result of the compulsory acquisition.

3. There are of course a number of statutory provisions enacted to assist in achieving that objective. Section 9 of the Land Compensation Act 1961 (LCA 1961) is one such provision. It provides:

> *"No account should be taken of any depreciation of the value of the relevant interest which is attributable to the fact that (whether by way of allocation or other particulars contained in the current development plan, or by any other means) an indication has been given that the relevant land, is or is likely to be acquired by an authority possessing compulsory purchase powers."*

4. Section 9 can be seen as establishing part of the principle that any increase or reduction in the value of land to be acquired compulsorily which is solely attributable to the proposed acquisition is to be disregarded by the valuer.

5. The following points should be noted:

   a. First, the expression "relevant interest" refers to the interest in the land compulsorily acquired at the date of the notice to treat[2]. That is not affected by

[1] [2009] UKUT 141 (LT)

[2] See *Rugby Water Board v Foottit* [1973] 1 AC 202. This includes the effect on leasehold interests - *Re Morgan and LNWR* 1896 2 QB 469 and confirmed in *Spirerose* 2009 1 WLR 1797.

the disregard under section 9 which is only concerned with the depreciation of the value of the interest once it has been identified.

b. Second, section 9 only applies to disregard depreciation of that interest. Thus it does not apply to the assessment of the value of compensation payable in respect of injurious affection or severance in respect of retained land.[3]

c. Third, there must have been an "indication" for the purposes of the section. The "indication" may be conveyed by any means (formal - such as the development plan itself or informal means)[4]. What amounts to an indication is a matter of fact and degree in each case.[5]

6. The most well known example of the role of section 9 in practice can be found in *Jelson v Blaby*[6]. In that case land was allocated in the development plan for a relief road. As a result it was left undeveloped in 1958 when the rest of the adjoining land was developed for housing. In 1961 the road proposal was dropped. A later appeal against the refusal of planning permission for the development of the land was dismissed because of the adverse effect on the houses that had been developed on either side of the land. A purchase notice was then confirmed in respect of the land with effect from 28th September 1965.

7. The Tribunal had before it three agreed valuations[7]:

a. Valuation 1, was "on the assumption that any decrease in value due to the effect of the road scheme underlying the acquisition must be ignored and consequently that the reference land would have been developed as part of the

[3] See *English Property Corporation v Royal Borough of Kingston upon Thames* (1998) 77 P&CR 1.
4 In *English Property* 1997 RVR 99 statements made during meetings with officers, including a line marked on a plan to show the extent of the road improvements were sufficient to provide an indication. Refusal of permission on the grounds that the land might be required for the highway improvement was a sufficient indication – see Trocette 1974 28 PCR 408 per Megaw LJ at 417.

5 See Hackney LBC v MacFarlane (1970) 21 P & CR 342 at 345-6.
[6] [1977] 1 WLR 1020.
[7] (1974) 28 P&CR 450

neighbouring estate. Value of reference land if developed in conjunction with and at the same net density as the neighbouring estate";

b. Valuation 2, was "on the assumption that at the date of valuation planning permission could reasonably have been expected to be granted in respect of the reference land for residential development comprising 31 units"; and

c. Valuation 3 was on the basis that there was no prospect of planning permission but some hope value.

8. Valuation 1 sought to reflect section 9 of the 1961 Act. It effectively contends that but for the indication of the likely acquisition for the road, the land would have been developed for housing with the adjoining development land. It was not. Thus any depreciation in value as a result of the fact that it was not must not be taken into account.

9. The Tribunal accepted the claimants' contention in support of Valuation 1. There was an appeal to the Court of Appeal which upheld the Tribunal's decision. Lord Denning explained:

"*There is no doubt that that section applies here. An "indication" was given years ago that this strip of land was to be acquired by an authority possessing compulsory purchase powers. … was there any depreciation in value by reason of the indication? The history shows plainly that there was. I need not go through it. The existing houses were built facing the strip because of that indication. In 1963 the application for development was refused because of the local residents. They said that their houses were built with the advantage of facing on to the ring road and it should not be built upon. Their complaint was upheld by the Minister. That is why the land was depreciated. … I think that the Lands Tribunal were right…"*

10. *Jelson* is thus confirmation that section 9 applies to depreciation that occurrs through physical development of land or its absence which takes account of the scheme, and which in turn leads to depreciation in the value of the reference land at a later valuation date.

Loss of Rental Value

11. Section 9 has come to fore more recently in the context of the consideration of compensation for loss of rental income.

12. There are four scenarios to consider:

    a. Loss of rent that would otherwise accrue after the valuation date on land that has been acquired;
    b. Loss of rent that would otherwise have been paid prior to the valuation date on land that has been acquired; and
    c. Loss of rent that would otherwise have been paid prior to the valuation date on land that has not been acquired
    d. Loss of rent that would otherwise accrue after the valuation date on land that has not been acquired;

a) Loss of rent after valuation date on land acquired

13. Where the freehold of land subject to a leasehold interest at the valuation date is acquired, the freehold owner will of course be entitled to compensation on the basis of the value of his freehold interest at that date.

14. The compensation payable to him represents the total value of his interest at that date. It will necessarily reflect the value to him of the rent that he would otherwise have received under the terms of the lease after the valuation date but of which he will now be deprived because of the compulsory acquisition.

15. The valuation of the freehold interest is usually achieved by adopting the investment basis of valuation whereby the gross actual and estimated rental income receivable from a property is capitalised by reference to a number of year's purchase, resulting in a figure that represents the open market value.

16. Section 9 operates to ensure that the rental value that is used as the basis for the calculation is not a rental that is depreciated by the existence of the scheme; rather section 9 ensures that it is the rental value in the no scheme world that is used as the basis for the calculation.

17. Thus, the open market value of the land will reflect the capitalised value of the full rental value of the property i.e. it compensates for the income stream that would otherwise have been received as rent into the future beyond the valuation date.

18. On this basis, an investment owner whose business is letting out property is not entitled to claim loss of profit in disturbance by reference to the loss of future rents because the open market value he is paid includes compensation for the loss of rent: see Court of Appeal in ***Mallick v Liverpool City Council*** [1999] 2 EGLR 7.

b) and c) Loss of rent prior to Valuation Date on land acquired/not acquired

19. *Pattle v Secretary of State for Transport* [2009] UKUT 141 (LC) considered the principle of whether compensation could be claimed where there has been a loss of rental income prior to acquisition in the shadow of a scheme on land that was acquired and on land that was not acquired.

20. The decision resulted from a preliminary issue taken in proceedings before the Tribunal by the Acquiring Authority which sought to establish that no compensation could be recovered.

21. The Claimants owned 1.44 ha of land ("the Property"). A small part of that land of about 0.045 ha fell within the limits of deviation for construction works for the Channel Tunnel Rail Link (CTRL). Outline planning permission had been granted in 1995 for the development of the Property as a whole for B1 and B2 uses but it was made subject to a condition that precluded permanent building of the part of the property that fell within the limits of deviation.

22. The Claim included a claim for compensation pursuant to s5 rule 6. The Claimant contended that in the no scheme world they could and would have completed a redevelopment of the entire property as an industrial estate in 1996 but this did not take place because of uncertainty regarding the precise route of the CTRL scheme as set out in the CTRL Bill. As a result, between 1996 and the valuation date, the Claimants argued that they received substantially lower rents from re-letting the existing units than they would have recovered if they had redeveloped in 1996. They sought compensation in the form of the difference between the rent they would have received from a redeveloped site and the rent actually received.

23. The Acquiring Authority argued that:

a. Section 5 rule 6 enables compensation to be sought:

> "…for disturbance or any other matter not directly based upon the value of land."

b. A Claim pursuant to s5 rule 6 could not be made in respect of any loss "directly based on the value of land";

c. An annual rent is the consideration agreed between a landlord and a tenant for the right to occupy and use land. An annual rent is therefore the annual value of land. A claim for lost rent is therefore a claim directly based on the value of land and is excluded.

d. The solution for lost rents is provided by section 9. If at the valuation date a property was let and the rent passing was less than the rent that would have been passing in the no scheme world, section 9 operated to ensure that the starting point for valuation under rule 2 was the latter rental value.

e. Rents lost in respect of the period prior to the valuation date were not recoverable.

24. The Tribunal held that the claim for compensation for the loss of rent could proceed on the following basis:

a. It is open to the Claimant to prove that the lost rents constituted losses reasonably attributable to the acquisition or prospective acquisition of the relevant land;

b. A claim pursuant to section 5 rule 6 can include a claim for losses by someone who is not in occupation;

c. A claim pursuant to section 5 rule 6 can include losses arising in the shadow of a scheme provided that causation is established;

d. The expression the value of land in rule 6 needs to be construed in the light of the use of the phrase in rule 2. It is appropriate to interpret rule 6 as if it provided:

"the provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the amount which the land if sold in the open market by a willing seller might be expected to realise."

e. Generally speaking rents lost in the past are not relevant to the calculation of what a buyer would pay to a willing seller on the valuation date;

f. The purpose of the words in rule 6 "not directly based upon the value of land" is to avoid overlap with compensation payable pursuant to rule 2. There is no double compensation in respect of the loss here because the losses claimed are not relevant to the calculation of compensation pursuant to rule 2. The losses in rental would be a separate loss for which compensation is not received pursuant to rule 2.

g. Section 9 does not provide an exhaustive remedy in these circumstances as the Acquiring Authority contends. It relates to the valuation of the relevant interest on the valuation date. Section 9 is not relevant to the assessment of compensation for disturbance or any other matter arising under rule 6.

h. Accordingly, in principle the claim for loss of rents could be brought in respect of rent lost prior to the valuation date:

i. From land actually taken; and

ii. From land that was never at risk of being taken;

Provided that it can established on the evidence that each loss is reasonably attributable to the prospective acquisition of that part of the land which is subject to the compulsory purchase and which is ultimately taken

i. A Claimant may have difficulties in establishing the necessary causal link in respect of rent lost prior to valuation on land that was never at risk of being taken. In particular, a Claimant may have difficulty in resisting an argument that he could and should reasonably have carried out his proposed development (in an abridged form) on that part of the land which was not at risk of compulsory purchase.

25. Thus, it has now been established that it is theoretically possible to claim in respect of lost rental arising in the shadow of a scheme on land actually acquired and on land not actually acquired subject to issues of:

a. Causation, reasonableness and remoteness; and

b. The mitigation of losses.

26. Further, the decision is important in that it establishes that section 9 has no role to play in the consideration of such claims. It relates to claims pursuant to section 5 rule 2. It does not relate to claims pursuant to section 5 rule 6.

d) **Loss of rent after valuation date on land not acquired**

27. Although ***Pattle*** does not expressly address the position of post-valuation date rental losses on land not acquired, it seems to me that the reasoning adopted by the Tribunal can be applied to consider such a situation.

28. In this scenario, there could be no claim pursuant to section 5(2) as no land is acquired. Accordingly section 9 has no role to play.

29. It seems to me that if a claim pursuant to section 5 rule 6 could in principle be made in relation to losses incurred in the shadow of a scheme on land that is not the subject o compulsory acquisition, then as a matter of logic there is no reason why such a claim could not be made in respect of losses after the valuation date.

30. However, again a Claimant would have to establish on the evidence that each loss is reasonably attributable to the acquisition of that part of the land which was subject to the compulsory purchase and which is was taken. Importantly, as I explain below, the Tribunal in *Pattle* stated that such losses in respect of land that was never included in a CPO and in respect of which no land was taken would be irrecoverable because they could not be fairly attributed to the taking of the land[8].

Causation

31. Notwithstanding that in theory a claim may be possible for the loss of rent in the shadow of a scheme, the causational issues are likely to be very difficult to over come. The Tribunal in *Pattle* explained (paragraph 53):

> "in a case where the loss to the letting business is caused by the general blighting effect of the scheme and the consequent depression of rental levels, rather than by the prospective acquisition of the land…on which the letting business is conducted, then we consider that such losses cannot be recovered…such losses are fairly attributable to the general blighting effect of the scheme…Also such losses…would plainly be irrecoverable if none of the landowners land was ever within the CPO or if none of his land was ultimately taken…"

32. An indication of the difficulties presented by the need to establish that rental losses were caused by the prospect of acquisition can be found in *Welford v Transport for London* [2011] EWCA Civ 129 where rental losses were found to have been caused by the prospect of roadworks rather than by the prospect of the acquisition of the land.

[8] See paragraph 53

33. To my mind, the outcome of all this is that there is the potential for us all, as practitioners, to spend a lot of time assembling evidence in an attempt to show that rental losses incurred are attributable to the acquisition as opposed to the general blighting effect of schemes. However, my feeling is that it is likely to be only rare cases where causation can actually be established.

34. In advising our clients, we will all need to consider whether the resource expenditure necessary in order to obtain the evidence that would be required to establish causation is likely to be justified in this context.

Mitigation

35. A further important point arising out of *Pattle* is the question of mitigating the loss. It was of course established in *Shun Fung* that the principle of mitigating the loss applied to pre-valuation date losses.

36. In the present context, it will be essential for a letting business to take reasonable steps to mitigate their loss by doing that which is reasonable to obtain the best rental return they can. In *Pattle* for example, this would probably have extended to pursuing the redevelopment on the land to be retained and letting it out. We all need to be alive to the need to advise our clients in this regard.

Conclusion

37. *Pattle* provides clear guidance that section 9 is only relevant to claims pursuant to section 5 rule 2 and not to claims pursuant to section 5 rule 6. *Pattle* does conclude that there is in principle a claim for rental losses arising in the shadow of the scheme. However, the need to show that these losses are reasonably attributable to the prospective acquisition pursuant to the CPO and are not attributable to the general blighting effect of schemes makes the likelihood of a successful claim small in my view.

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