

CPOs and Compensation: What's New?
Injurious affection

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S.10 CPA 1965



(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 Upper 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 Land Clause Consolidation Act 1845 has been construed as affording in cases where the amount claimed exceeds fifty pounds.

(3) Where this Part of this Act applies by virtue of Part IX of the Town and Country Planning Act 1990 reference in this section to the acquiring authority shall be construed in accordance with section 245(b) of that Act.

What's new?



254. However, the statutory provisions as to compensation for this type of loss are notoriously difficult and obscure. They persist in the use of the obscure expression “injurious affection,” which was a key concept in the Lands Clauses Consolidation Act 1845. Over forty years ago Lord Wilberforce said in *Argyle Motors (Birkenhead) Ltd v Birkenhead Corporation* [1975] AC 99, 128:

“The relevant section of the Act of 1845 (section 68) has, over a hundred years, received through a number of decisions, some in this House, and by no means easy to reconcile, an interpretation which fixes upon it a meaning having little perceptible relation to the words used. This represents a century of judicial effort to keep the primitive wording—which itself has an earlier history—in some sort of accord with the realities of the industrial age.”

Despite at least two opportunities for reform (Law Commission reports in 2003 and 2004, and the Localism Act 2011), section 10 of the Compulsory Purchase Act 1965 remains in force without significant amendment. The Neighbourhood Planning Bill, now before the House of Commons, may prove to be another lost opportunity.

House of Lords Select Committee on the High Speed Rail (London-West Midlands) Bill
Special Report of Session 2016-2017 (HL Paper 83)

Recent consideration



- *Elitestone Limited v National Grid Gas Plc* [2015] UKUT 0452 (LC)
- *Bourne Leisure (Hopton) Limited v Great Yarmouth Port Authority* [2016] UKUT 0044 (LC)
- Injurious affection where temporary possession of land?
 - HS2 Select Committee
 - *BPP (Farringdon Road) Limited v Crossrail Limited* [2015] UKUT 0356 (LC)

- Compulsory acquisition of rights to lay, use, maintain, repair and replace a high pressure gas pipeline.
- 4 issues – 2 relating to the claim for injurious affection
 - “Has the Claimant suffered any damage by way of injurious affection caused by the exercise of powers under the CPOs. If so, to what compensation (if any) is it entitled in respect of the alleged sterilisation of the land (i) having prevented the extraction of coal from the surface and by below ground deposits and (ii) having removed any long term residential development potential?”
- Concern primarily related to (1) potential future exercise of powers to maintain/replace the pipeline and (2) sterilisation of development potential due to presence of the high pressure gas pipeline

Elitestone Limited (2)



- NGG argued that the claim fell at the first hurdle, as the losses complained of had not been caused by “the exercise of the powers under the CPO” – no injury having been caused by the pipeline laid in exercise of the powers.
- NGG also contended that where at time of assessment of compensation powers had been exercised, assessment had to be based on the injury (if any) that had arisen from the actual exercise of those powers – ie judging injury based on what had in fact been done to date under CPO powers and what is likely to be done under CPO rights in the future

Elitestone Limited (3)

- LC found against C on the facts – no evidence produced “from the market to support [C’s] contention that the CPO and/or the exercise of rights under it has served to completely extinguish any potential development value, either for mining or residential development or both” (para 85)
- On NGG’s principal case, LC took the view, by reference to *Cowper Essex*, that if works have not yet been exercised, “*it is the extent of the injury that would be anticipated to be the consequences of the works that has to be considered*” (para 87)
- Necessary to assess injury having regard to the reality of the exercise of the powers under the CPO and how rights of entry for maintenance (etc) are likely to be exercised in practice, and not what might be ‘theoretically possible’ under CPO (para 82)

Bourne Leisure



- Claim under s.10 for losses caused by construction of the Great Yarmouth Outer Harbour, which “changed the tide-flow patterns in the vicinity, increasing erosion and [this] caused the failure of part of the sea defences adjacent to the reference land”.
- This led to loss of beach, loss of beach access and loss of cliff (including part of the reference land).
- Compensation claimed for carry out of works, maintenance and monitoring of works, operational losses and diminution in value of the reference land.

Bourne Leisure (2)



- 5 preliminary issues referred to LC, including:
 - Whether C entitled to bring a claim under s.10;
 - Whether types of costs and losses claimed by C are recoverable under s.10 or whether compensation can only be awarded under s.10 for diminution in value

Bourne Leisure (3)

- Was C entitled to claim under s.10?
 - Dependent on construction of s.4 Great Yarmouth Outer Harbour Act 1986;
 - C contended (inter alia)
 - S.4 applied Part 1 CPA 1965 “to the compulsory acquisition of land under this Act”: no c/a – land acquired by agreement
 - If inclusion of c/a powers enough to trigger s.10, power to c/a had to be available to promoter (even if not exercised) – here, powers of c/a had expired prior to construction of outer harbour
 - Must be a linkage between powers of c/p and s.10 claim – no powers existed at date outer harbour constructed
 - S.10 claim inconsistent with protective provisions / detailed mechanisms contained within the Act (*Marcic*)

Bourne Leisure (4)



- Was C entitled to claim under s.10?
 - LC: yes;
 - Application of s.10 does not depend upon any c/p powers having been exercised at all (para 40);
 - Not necessary for any c/p powers to be included in same enactment as powers to execute works, “*provided they both form part of the same package of enactments that comprise the special Act [Moto para 53]*” (para 40)
 - To exclude s.10 claim where works carried out on land acquired under a different Act would conflict with CA’s reasoning in *Moto* “*which focuses on the link between the power of [c/p] and the power to construct the works not when or pursuant to what power the land on which the works were constructed was acquired*” (para 41)

Bourne Leisure (5)



- Was C entitled to claim under s.10?
 - LC: yes;
 - The words “shall apply to the compulsory acquisition of land under this Act” in s.4 did not mean Part 1 CPA 1965 only applied where land actually compulsorily acquire – *Moto* made clear inclusion of such words did not have that effect (para 47);
 - Fact power of c/p had expired before land acquired and works constructed did not destroy the link between power of c/p and power to construct the works (para 51)
 - S.10 claim not inconsistent with statutory scheme of 1986 Act – this case clearly distinguishable from *Marcic* (paras 54-63)

Bourne Leisure (6)



- Were the types of costs and losses claimed recoverable under s.10?
 - Yes
 - No reason why, in an appropriate case, compensation payable should not include the cost of remedial work. *“The fact that there is no case in which this has been an issue is because it is so self evidently correct that [AAs] have never disputed it”* (para 97).
 - But: if the costs of remedial works exceed the diminution in value of the reference land, those works may be unreasonable or unreasonable to mitigate loss (para 105);
 - Ultimately, matter for evidence at trial whether all losses claimed were allowance or not (eg consequential business losses)

Temporary possession of land



- Claim for injurious affection available where temporary possession of land rather than c/p?
- High Speed Rail (London – West Midlands) Act 2017, Schedule 16, para 4(4):

“The nominated undertaker must pay compensation to the owners and occupiers of land of which possession is taken under paragraph 1(1) or (2) for any loss which they may suffer by reason of the exercise in relation to the land of the power or powers under that paragraph”
- Does this include a claim for injurious affection?

Temporary possession of land (2)



- Issue arose in petition of Euston Estates – who had 2 / 4 buildings (A & B) subject to c/p, and a third building (Building C) subject to temporary use.
- Promoter's position:

“...we made it clear that we accept that in their case, certainly, given the circumstances that you've identified, a claim for compensation following temporary occupation of Building C would include not only losses arising from the occupation of that building but any losses that arise as a result of temporary occupation of Building C in relation to the retained parts of the Estate. So, the spectre of a gap, of a mismatch, between the right to claim losses in relation to retained land that is being put, we've said that is that we accept that in the case of these petitioners at least that the way in which clause 4.4 should be read is as embracing both those losses, both the losses to the right of Building C itself and losses in relation to their retention of Building D.”

Temporary possession of land (3)



- Claim for compensation for temporary use / possession of land not in and of itself a claim for injurious affection – *BPP (Farringdon Road) Limited v Crossrail Limited* [2015] UKUT 0356 (LC):

“... we consider that injurious affection generally connotes damage to land which would have been wrongful but for the existence of statutory powers. Moreover, it generally connotes damage to land caused by activity conducted elsewhere. We do not consider it apt to describe activity which, but for statutory authority, would amount to trespass.” (para 53)
- Rule 10(6)(b) Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 does not therefore give jurisdiction to award costs in such proceedings