

CPO: compelling case, human rights and alternatives



David Elvin QC

Compelling case: significance of CPO

- Laws J. in ***Chesterfield Properties Plc v Sec of State*** (1998) 76 P&CR 117
 - “To some ears it may sound a little eccentric to describe, for example, Kwik Save's ownership of their shop in Stockton as a human right; but it is enough that ownership of land is recognised as a constitutional right, as Lord Denning said it was. The identification of any right as ‘constitutional’, however, means nothing in the absence of a written constitution unless it is defined by reference to some particular protection which the law affords it. The common law affords such protection by adopting, within *Wednesbury*, a variable standard of review. There is no question of the court exceeding the principle of reasonableness. **It means only that reasonableness itself requires in such cases that in ordering the priorities which will drive his decision, the decision-maker must give a high place to the right in question. He cannot treat it merely as something to be taken into account, akin to any other relevant consideration; he must recognise it as a value to be kept, unless in his judgment there is a greater value that justifies its loss.** In many arenas of public discretion, the force to be given to all and any factors which the decision-maker must confront is neutral in the eye of the law; he may make of each what he will, and the law will not interfere because the weight he attributes to any of them is for him and not the court. **But where a constitutional right is involved, the law presumes it to carry substantial force. Only another interest, a public interest, of greater force may override it. The decision-maker is, of course, the first judge of the question whether in the particular case there exists such an interest which should prevail.**”

Compelling case

- Key requirement of national policy, long established, currently found in MHLCG online **Guidance on Compulsory purchase process and The Crichton Down Rules** (July 2019), e.g. **para. 12** (see also **para. 2**) sets a high hurdle -
 - “There are certain fundamental principles that a confirming minister should consider when deciding whether or not to confirm a compulsory purchase order (see How will the Confirming minister consider the acquiring authority’s justification for a compulsory purchase order?). Acquiring authorities may find it useful to take account of these in preparing their justification. **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 the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected.** Particular consideration should be given to the 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.”

Compelling case: cont.

- Proving the compelling case requires a significant degree of justification which inevitably turns on the facts of each case:
 - **“13.How will the confirming minister consider the acquiring authority’s justification for a compulsory purchase order?”**
 - The minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be.
 - However, the confirming minister will consider each case on its own merits and this guidance is not intended to imply that the confirming minister will require any particular degree of justification for any specific order. It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired, but a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time.”

Compelling case: cont.

- **Para 13** warns:
 - “If an acquiring authority does not:
 - have a clear idea of how it intends to use the land which it is proposing to acquire; ^[L]and ^[SEP]
 - cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale
 - it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making.”
- There are also requirements associated with the strength of the case (**paras. 14 and 15**) e.g. sources and availability of funding, other impediments to the scheme going ahead:
 - “the programming of any infrastructure accommodation works or remedial work which may be required; and
 - any need for planning permission or other consent or licence”
- Permission is not required but must show “no obvious reasons” for withholding it

Compelling case: categories of case

- **The CPO Guidance sets out guidance in Tier 2 for what must be shown in specific categories of case:**
 - Section 1: advice on section 226 of the Town and Country Planning Act 1990
 - Section 2: advice on section 121 of the Local Government Act 1972
 - Section 3: Homes England
 - Section 4: urban development corporations
 - Section 5: New Town Development Corporations
 - Section 6: local housing authorities for housing purposes and listed buildings in slum clearance
 - Section 7: to improve the appearance or condition of land
 - Section 8: for educational purposes
 - Section 9: for public libraries and museums
 - Section 10: for airport Public Safety Zones
 - Section 11: for listed buildings in need of repair

Compelling case: s. 226 CPOs

- **Additional requirements in s. 226 TCPA cases (Tier 2, Section 1, §106)**
- the purpose for which the land is being acquired fits in with the adopted Local Plan or, where no up to date Local Plan exists, with the draft Local Plan and NPPF
- the extent to which the proposed purpose will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area
- whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired
- the potential financial viability of the scheme for which the land is being acquired. A general indication of funding intentions, and of any commitment from third parties, will usually suffice to reassure the Secretary of State that there is a reasonable prospect that the scheme will proceed. The greater the uncertainty about the financial viability of the scheme, however, the more compelling the other grounds for undertaking the compulsory purchase will need to be. The timing of any available funding may also be important.

Compelling case: CPOs by UDCs

- **Additional requirements in UDC cases (Tier 2, Section 4, §132)**
 - i. whether the urban development corporation has demonstrated that the land is in need of regeneration
 - ii. what alternative proposals (if any) have been put forward by the owners of the land or other persons for regeneration
 - iii. whether regeneration is on balance more likely to be achieved if the land is acquired by the urban development corporation
 - iv. the recent history and state of the land
 - v. whether the land is in an area for which the urban development corporation has a comprehensive regeneration scheme; and the quality and timescale of both the urban development corporation's regeneration proposals and any alternative proposals

Compelling case: authorities

- ***Prest v Secretary of State for Wales*** (1983) 81 L.G.R. 193
- ***R. v Secretary of State for Transport Ex p. De Rothschild*** (1989) 57 P&CR 330
- ***Chesterfield Properties Plc v Secretary of State*** (1998) 76 P&CR 117
- ***Tesco Stores Ltd v. Secretary of State & Wycombe DC*** (2000) P&CR 427
- ***Bexley LBC v Secretary of State*** [2001] EWHC 323 Admin
- ***R. (Hall) v. First Secretary of State*** [2008] JPL 63
- ***R. (Clays Lane Housing Cooperative Ltd) v. Housing Corp*** [2005] 1 WLR 2229
- ***Horada v Secretary of State*** [2016] PTSR 1271 (SoS reasons for disagreeing with the Inspector on guarantees and safeguards inadequate)
- ***Grafton Group (UK) Plc v Secretary of State for Transport*** [2017] 1 WLR 373 (planning permission refused but CPO confirmed)

Compelling case: authorities

- **Prest** applied an approach which stricter than **Wednesbury** - which was confirmed as the correct approach in **De Rothschild** and given context by Laws J. in **Chesterfield Properties**
- In **Tesco Stores** and **Bexley** both Sullivan J and Harrison J. held the application of the ECHR added nothing of substance to the compelling case test. This was approved by the CA in both **Hall** and **Clays Lane Housing**.
- **Grafton Group** CPO confirmed despite the refusal of permission for the scheme, since there was sufficient prospect of a better scheme although though no detailed evidence presented. Laws LJ at [36]:
 - “Given his comprehensive appreciation of the details of the scheme on offer, his criticisms of its scale and design, his legitimate emphasis on the benefits of the wharf’s reactivation, taken with his view (para 12.61) that *on balance*, the proposals would be contrary to the development plan and the appeal should fail (emphasis added), the inspector was in my view wholly entitled to decide that there was a sufficient probability of an alternative, adjusted scheme coming forward and that in those circumstances the CPO should be confirmed.”.

Compelling case: examples

- **Liverpool City Council (Paradise Street Development Area, Liverpool) CPO 2003** (and related St Anne's Street CPO to relocate the fire station) -
 - Major comprehensive, privately-led scheme for regeneration of 18.5ha of Liverpool city centre involving restructuring of city centre around Paradise Street – now Liverpool One;
 - Supported by recent plan policy and major alternative contender for the whole scheme refused prior to CPO on appeal. The Scheme (which had involved a competition) had taken 5 years to reach the point of inquiry in 2003 and considerable investment including property acquisition. Planning permission had been granted at the time the Council made the CPO;
 - Complex development agreement with Grosvenor which included stopping up public highways rights on some streets and works to restore the Grade 1 Bluecoat centre;
 - Pressure to deliver by 2008 when L was European Capital of Culture

Compelling case: Liverpool One cont.

- No alternatives to whole scheme advanced, only to individual elements by individual landowners. The Inspector concluded (and SoS accepted) –
 - “473. A number of objectors advanced alternative proposals for their sites, which they were prepared to implement . The merits of any individual proposal are considered below in relation to each such objection. However, I am aware from the Council’s extensive submissions that case law shows that the use of compulsory purchase powers can be justified in order to achieve a better scheme of development in the public interest than an alternative scheme put forward by an objector which does not require compulsory acquisition. Further case law shows that the creation of delay and uncertainty in considering alternative proposals put forward in support of CPO objections is itself a material consideration in considering objections to a CPO, and I have also had regard to that. In this connection I accept that it is important to meet the aspirations of Government and the Council for the Capital of Culture in 2008, and the construction programme envisages that, provided a start on construction is made in mid-2004 completion in 2008 is attainable.”

Landmark Chambers



PSDA Masterplan

Landmark Chambers



Compelling case: examples

- **Crossrail Act 2008**

- Hybrid bill process ran from Feb 2005 to Royal assent in July 2008 with Select Committee hearings in HoC and HoL (similar process followed in the first HS2 Act). Prior public consultations ran for a number of years.
- Not have to prove compelling case to SC since hybrid bill, principle fixed at Second Reading – however, justification provided for the bill -
 - Need for strong cross London public transport links, unsuccessful attempts previously (including a failed private bill)
 - Support economic growth and the City
 - Overcrowding and lack of tube capacity
 - Need to provide faster connections across London and from City of London & Docklands to Heathrow
 - Integrated with LUT tube station works e.g. at Tottenham Court Rd



House of Commons

Select Committee on the Crossrail Bill

Crossrail Bill

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Promoter's Opening Address

from 10am until 12pm and from 2.30pm until 4.30pm; and on Thursdays from 10am until 1pm and from 2.30pm until 4.30pm.

9. The Committee has so far agreed a preliminary future programme; copies are available in the room from Winckworth Sherwood, the Government's Agents for the Bill, and on the parliamentary web page under the Committee's pages at www.parliament.uk.

10. The Committee has also agreed that petitioners are not required to enter appearances on the first day on which the Committee meets nor to enter an appearance in advance of being represented by themselves, their counsel or agents.

11. The Committee has also agreed, and I assume the legal profession agree, that counsel should appear in wigs and gowns.

12. The Committee would be grateful when anyone rises to speak if they could be loud, clear and give their name at the beginning of their remarks. Will those speaking to this Committee also please deposit 16 copies of any documents they are using in the room with the Committee Assistant at the beginning of the meeting. Copies must also be provided to the shorthand writer and to the display screen operator.

13. I ask all Members of the Committee, petitioners, agents and counsel and all members of the general public during the course of the Committee to ensure that mobile phones are switched off.

14. Finally, can I advise all present that the Government has not challenged the *locus standi*; that is the right to appear, of any petitioners, so in line with normal practice on a Hybrid Bill we will begin the proceedings with a factual statement from counsel to the Government about the proposals contained within the Bill. I should stress it is not in order at this stage to interrupt counsel in the course of his statement. Petitioners will get the chance to make their own views known in due course.

15. I now ask counsel for the Promoters to introduce his team and begin. I call Mr David Elvin to start this procedure.

16. **Mr Elvin:** Chairman, thank you very much. Chairman, Members of the Committee, can I begin by introducing the team promoting the Bill. I am appearing with my learned friends Ms Nathalie Lieven, Mr Tim Mould, Mr Reuben Taylor and Ms Rachel Bateson, all of whom are instructed on behalf of the promoting department.

17. As you will be aware, the Bill is promoted by the Government through the Secretary of State for Transport. It is co-sponsored by Transport for London and Crossrail London Links Limited, which is jointly owned by the Secretary of State, and Transport for London is the project developer.

18. There is available to the Committee, and I do not know whether they have been distributed already, three documents, one rather longer than the others. Can I just introduce those. Firstly, perhaps most usefully, there is the Crossrail Quick Guide, which was produced last year by CLRL, Crossrail London Links. This simply provides you with a useful overview map of the route, is handy to carry around and can be referred to and gives you some indications of the general locations of the stations and what is proposed. We also thought it would be useful for the Committee to have at this stage a copy of the main Environmental Statement Non-technical summary which has got some of the more detailed maps which I might refer the Committee to during the course of my opening submission in due course. The third document, which is the bulky one, is the information papers which have been prepared and published and are currently available on the Crossrail Bill document website which contains effectively a series of generic policy documents which explain a number of important matters which will affect many, if not most, petitioners relating to matters such as how the scheme was developed, a summary of the powers of the Bill, how environmental controls are proposed to be approached, property and compensation issues, and some particular papers with regard to the specific parts of the scheme. Those documents will be referred to in our response to most of the petitioners as we proceed.

19. **Chairman:** Mr Elvin, can I just ask one question. In relation to the two first documents, which were the Quick Guide and the Environmental Statement, are these available for petitioners?

20. **Mr Elvin:** Yes. They are available both in paper form and electronic form on Crossrail's website which I will come to in a moment. The Non-technical summary was part of the main Environmental Statement which was published at the time of Bill deposit last February.

21. As the Committee will know, this is the first hybrid Bill in a decade, the Channel Tunnel Rail Link having received Royal Assent 10 years ago in 1996. As the Committee will be aware, a hybrid Bill is an unusual composite of features of public and private Bills, and I do not think I need to say much more about it given that you summarised its principal characteristic in your opening address, namely the principle of the Bill in a hybrid Bill is fixed by the House on Second Reading. I do not, I anticipate, need to touch on the instructions at this stage but if any issue arises in due course then obviously I will address the Committee.

22. There are some short procedural matters that it would be useful to address at the end of the Committee hearing today or first thing in the morning if that is convenient.

Promoter's Opening Address

23. Also, I ought to say that although we are not operating under the full IT system which the Committee had demonstrated to it last Thursday in Committee Room 5, we do have two screens available upon which a number of images are proposed to be projected during the course of these submissions just to illustrate some of the points. In respect of detailed plans and the like, can I apologise that it is much more difficult to see the maps on these screens than it will be on the screens which you were shown last week in Committee Room 5 where you will each have an individual screen and the screen for the public will be that much easier to see. Where necessary, I will refer to plans in the Environmental Statement Non-technical summary as it saves eyestrain, because I for one certainly cannot make out all the detail from this distance and I think you are further away from the screen at the back, sir, than I am from the one at the front.

24. Crossrail is a major new cross-London rail link. It is a project which serves not only London but the South East of England and, in many respects, the nation as a whole. It will support and maintain the status of London as a World City by providing a much needed world class transport system. You have there, and it is in the Quick Guide and the Non-technical summary right at the front, the main route of that, which I imagine you will be at least passingly familiar with already at this stage. It is page two of the Non-technical summary.¹

25. The introduction of lines for heavy rail running from one suburb to another by a tunnel under the city centre with underground stations would be new to London but it is not to other cities. The RER system in Paris is perhaps the best known of this type of system. That system now has five lines.

26. The Crossrail project, therefore, represents a fundamental change to the past development of rail services which has resulted today in a cordon of termini of mainline rail stations that force the large proportion of people today who want to get from the rail termini to the centre of the city to transfer to underground or buses in order to get to their destination. Crossrail will enable those people to get much more directly to their final destination. It will increase the passenger capacity available for such journeys and will relieve the congestion at the termini and on London Underground, which of course has wider benefits, about which I shall say more in a moment.

27. The project includes the construction of a twin-bore tunnel on a west-east alignment under central London beginning at Royal Oak just west of Paddington and the upgrading of existing National Rail lines to the east and west of central London. Crossrail includes the construction of seven central area stations providing interchanges with London Underground, the National Rail system and bus services, and the upgrading or renewal of existing

stations outside central London. It will also allow an integrated upgrading together with Transport for London of Tottenham Court Road tube station to provide a joint interchange.

28. Crossrail will provide fast, efficient and convenient rail access to the West End and the City by linking existing routes from Shenfield in the east and Abbey Wood in the south-east with Maidenhead and Heathrow in the west.

29. Crossrail will be a significant and essential addition to London's transport infrastructure and the South East. It will deliver improved services for rail users through the relief of overcrowding, faster journeys and a range of new journey opportunities, which both the line and the interchanges will provide. It will have wider social and economic benefits, not only for London but, as I have already mentioned, for the South East as a whole, and in particular for the regeneration of areas such as Docklands and Thames Gateway and, as such, will also have national benefits.

30. The three key objectives of Crossrail are: firstly, to support the development of London as a World City and its role as the financial centre of Europe and the United Kingdom; secondly, to support the economic growth of London and its regeneration areas by tackling congestion and the lack of capacity on the existing rail network; and, thirdly, to improve rail access into and within London.

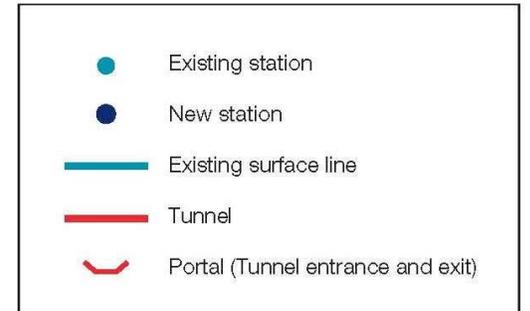
31. It will achieve these objectives by addressing problems of inadequate capacity on the National Rail and Tube networks by improving accessibility to regeneration areas, and by providing transport capacity for the growth expected for London. This is not at the expense of regional services, such as to the South West and to Wales. Crossrail services will use only the slow lines during normal operation, not the fast lines into Paddington and Liverpool Street that the regional services use. The scheme has been in the planning for many years, the need is a longstanding one and therefore has been subject to extensive consideration. Cross London Rail Links Limited, CLRL, was set up in 2001 to undertake the necessary feasibility, design and assessment work to support an eventual application for powers to authorise the project. CLRL was established as a joint venture company initially owned by TfL and the former Strategic Rail Authority. Following the Rail Review, the role previously taken by the SRA was assumed by the Secretary of State for Transport who, together with TfL, is the joint shareholder of CLRL. The Bill proposes that the Government shall nominate one or more organisations, known in the Bill as the nominated undertaker, to take the project forward once Royal Assent has been given, but until any such nomination is made the Secretary of State will himself have the powers of the nominated undertaker under the Bill. The Bill will, however, allow the devolution of the project, if that is thought appropriate, to either the Greater London

¹ Crossrail Non-Technical Summary, Route Map, [billdocuments.crossrail.co.uk \(LINEWD-EXH02-001\)](http://billdocuments.crossrail.co.uk/LINEWD-EXH02-001).



Crossrail line 1

Preferred Route map



Elizabeth line



Compelling case: examples

- **South Tees Development Corporation (Land at the former Redcar Steel Works, Redcar)**
Compulsory Purchase Order 2019, c 1752 acres, confirmed by Inspector 29.4.20. Underpinned by
 - Lord Heseltine “Tees Valley Opportunity Unlimited” (2016) following the closure of the main steel-making facilities at Redcar recommending setting up of DC
 - Setting up of South Tees Development Corporation to “take strategic leadership of the site to coordinate and drive regeneration in the area”
 - STDC to secure the regeneration of the STDC Area, focusing on the promotion of the long term sustainable economic prosperity & commercial development of Tees Valley
 - STDC SPD & Master Plan produced for regeneration and redevelopment of the area
 - Local plan policies supported, STDC aligned with TV Combined Authority and Mayor
 - Long term plan for regenerations – 20 + years anticipated
 - Government funding for keep safe & remediation and regeneration works and funding model provided for future development
 - Steps to acquire land and undertake preliminary works



MIDDLESBROUGH

SEAL SANDS

STDC AREA

SOUTH BANK

DORMANSTOWN

BERWICK HILLS

REDCAR

TEESVILLE

GRANGETOWN

WILTON INTERNATIONAL

ESTON



Potential Development Illustrative Plan



Compelling case: examples (cont.)

- **“Conclusion**
- 120. The scheme underpinning the CPO is wholly in accordance with the Local Plan, which is the key part of the statutory development plan, and the SPD. Both these documents, and the Master Plan, seek decontamination and regeneration of the wider area including the Order Lands with a focus on advanced manufacturing and technology and port related activities. It is also worth noting that the SPD specifically resists piecemeal development and recognises the role of compulsory acquisition.
- 121. The regeneration of the Order Lands will contribute to sustainable development and accord with the national objective of building a strong, responsive and competitive economy. It would also create an environment which has the potential to support the wellbeing of the community. The decontamination and reuse of the land would contribute to the protection and enhancement of the natural and built environment. The scheme which underpins the CPO is in line with national planning policy.
- 122. For the reasons set out above, especially related to the condition of the area and its recent history, there needs to be a properly phased programme of demolition, preparation and infrastructure provision across the Order Lands. This has to reflect the future needs of investors and end users.”

Compelling case: examples of failure to establish

- **Horada** (Shepherds Bush Market CPO 2013) (where the Inspector had been concerned that sufficient safeguards had not been provided to the Shepherds Bush market traders and the CA (disagreeing with Dove J) considered that the SoS failed to give sufficient reasons for disagreeing with the Inspector.
- **Welsh Streets, Liverpool** (CPO 2013) the SoS disagreed with the Inspector's recommendation of confirmation of the scheme which proposed to complete an earlier housing regeneration scheme with the partial demolition of some and conversion of others in a series of basic, and poorly maintained terraced houses on the basis that a viable alternative of restoration and reuse existed –"refurbishment and upgrading of existing homes should be the first and preferred option and that demolition of existing homes should be the last option after all forms of market testing and options for refurbishment are exhausted." Despite there being a detailed assessment SoS was "not persuaded that the scale of demolition proposed in this case - has been demonstrated to be necessary and that sufficient forms of market testing and options involving more refurbishment have been exhausted."

Compelling case: examples of failure to establish

- **Ayelsbury Estate**, Southwark - SoS surprisingly refused to confirm the latest phase of housing estate regeneration (despite earlier confirmations) in September 2016 and despite its compliance with the DP, viability and lack of alternatives since -
 - the scheme would have considerable economic, social and environmental disbenefits in terms of consequences for homeowners;
 - as a result of the number of dwellings that would fail to meet Southwark's adopted policies for sunlight and daylight, and the extent of overshadowing of the proposed amenity areas, the scheme would fail to achieve the environmental wellbeing sought;
 - Southwark had not taken reasonable steps to negotiate with the homeowners to acquire their interests by agreement;
 - the purposes for which the CPO was made would not justify interfering with the human rights of those with an interest in the land affected; and
 - in applying the Public Sector Equality Duty he was concerned that there would be significant negative impacts on protected groups if the CPO were confirmed.
- Decision quashed by consent (reasons) and in November 2018 the CPO was confirmed

Alternatives: policy

- No general guidance on alternatives in Tier 1 of the Guidance, but it is specifically set out as a consideration for confirmation in Tier 2
 - Section 1 §106 (s. 226)
 - Section 3 §124 (Homes England)
 - Section 4 §132, 135 (UDCs)
 - Section 5 §§143, 144 (new towns)
 - Section 6 §147 (local housing authorities)

Alternatives

- This in substance is an aspect of the compelling case, which is that the availability of an alternative may go to undermine the justification for expropriation.
- That will depend on a variety of factors e.g. the nature of the alternative, how it well meets the objectives of the CPO without expropriation or the same degree of expropriation, how it integrates with the CPO (if only a partial alternative), effects on funding and delay on the CPO scheme as a whole
- ECHR approach similar (see later)

Alternatives: cont.

- Often contended by objectors to major CPOs that they could deliver part of the scheme, or that part could be delivered, without the need for acquisition. Many such objections to the Liverpool Paradise St CPO (now the Liverpool One development) in 2003 but rejected because of their uncertainty in delivery, or lack of satisfactory ability to deliver or integrate with the CPO scheme or to be likely to create delay.
- On the other hand, during the bill proceedings for what became the Crossrail Act 2009, the Select Committee in several cases were willing to recommend alternatives or additions which were considered to better serve the public/private interest balance e.g. delivering a better solution to Liverpool Street Station and lesser interventions elsewhere e.g. in the Smithfield and Spitalfields areas, as well as requiring a station and Woolwich. The SC had the advantage of being able to give its views as it proceeded and for bill amendments to be published as the process progressed.

Alternatives: cont.

- Detailed alternative proposals may be presented but unless they are clear cut and would clearly be able to deliver aspects of the CPO scheme they are unlikely to be attractive to an Inspector/Secretary of State if the general case for regeneration has been made out.
- See the decision to confirm **Liverpool PSDA CPO** in 2003/4 despite attempts to argue individual alternatives could be delivered by the landowners – uncertainty and delay
- The **Bexley** case is a useful example where whilst the SoS granted planning permission on a call-in for a Sainsbury supermarket he rejected it as an alternative to the CPO scheme on the basis it would create uncertainty and delay delivery of regeneration.
- The rejection of the **Welsh Streets CPO** may be an example of a SoS looking to find the possibility of alternatives since the Inspector had found them unviable. Political dimensions?

CPO: issues under the ECHR

Human rights

- Main ECHR provisions engaged: arts. 6, 8 and Article 1 of the First Protocol
- Art. 8 requires any interference is proportionate (necessary in a democratic society) and in the public interest
- A1P1 requires that interference with private property rights must be justified in the public interest i.e. a “fair balance” must be struck between the public reason for acquisition and private property rights, a form of proportionality requiring that the decision to expropriate must be justified on the facts of the case.
- ***James v. UK*** (1986) 8 EHRR 123 at para. 50:
 - “there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised ... This latter requirement was expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the “fair balance” that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ”

Human rights: *James v UK* cont.

- Wide margin of appreciation [46] -
 - “... the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The court, finding it natural that the **margin of appreciation available to the legislature in implementing social and economic policies should be a wide one**, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation.”
- No requirement to demonstrate no available alternatives [51] -
 - “The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; **it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance"**. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way ...”

Human rights: *James v UK* cont.

- Availability of compensation relevant though not absolutely essential ([54])
 - “... the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants ...
 - ... the **taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1**. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this...”

Human rights: cont.

- Generally compensation required - *Holy Monasteries v. Greece* (1995) 20 EHRR 1. German unification provided a very rare example of where no compensation was justifiable but there was compliance with A1P1 – *Jahn v Germany* (2006) 42 E.H.R.R. 49
- Strasbourg rarely concerned with the basis of calculation of compensation it has found an interference contrary to A1P1 where there is an extreme disparity between the value of the asset expropriated and the compensation payable.
- *Vistins v. Latvia* (2014) 58 EHRR 4:
 - “110. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. The Court has already held that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference. In many cases of lawful expropriation, such as a distinct taking of land for road construction or other “public interest” purposes, only full compensation may be regarded as reasonably related to the value of the property. On this point, the Court cannot equate a lawful expropriation, complying with domestic law requirements, with a constructive expropriation that seeks to confirm a factual situation arising from unlawful acts committed by the authorities.”

Human rights: cont.

- In *Vistins*, the Court reaffirmed the view that circumstances may justify the payment of less than full compensation but found the limitations on the compensation payable so great as to be equivalent to the payment of no compensation -
 - “119 Nevertheless, the Court observes an extreme disproportion between the official cadastral value of the land and the compensation received by the applicants: that received by the first applicant constituted less than one thousandth of the cadastral value of his land, and the compensation awarded to the second applicant was some 350 times lower than the total cadastral value of all his properties. In the Court’s view, such disproportionate awards are almost tantamount to a complete lack of compensation. As the Court has already indicated above, only very exceptional circumstances may justify such a situation.”
- See also *Kozacioglu v Turkey* (2011) 53 E.H.R.R. 34 at [65]-[73] where the compensation payable for expropriation of a property considered a cultural asset failed to take into consideration the rarity or architectural and historical features of the applicant’s building and so failed to assess fair compensation because it did not take into account to a reasonable degree the property’s specific features in determining the level of compensation.

Human rights: cont.

- In both **Tesco Stores** (Sullivan J. pre-HRA) and **Bexley LBC** (Harrison J., post HRA) considered that the application of the ECHR made no substantive difference to the application of CPO. **Bexley** at [46]:
 - “The right of an individual to peaceful enjoyment of his possessions under that Article is a qualified, rather than an absolute, right and it involves a balancing exercise between the public interest and the individual's right whereby any interference with the individual's right must be necessary and proportionate. Like Sullivan J in the *Tesco Stores* case, I am not persuaded that there is anything materially different between those principles and the principles applied by the Secretary of State under Circular 14/94 whereby a compulsory purchase order is not to be made unless there is “a compelling case in the public interest”. Such an approach necessarily involves weighing the individual's rights against the public interest.”
- This approach was supported by the CA in **Hall** and **Clays Lane** where the CA also rejected the view that CPO required the “least intrusive option” and that planning/CPO already incorporated a proportionality balance between public and private rights.

- Maurice Kay LJ held:
- “25 ... the decision was then one between two preferred alternatives. Although not in every respect the same as a planning decision, it approximated to what Keene LJ was describing in *Lough v First Secretary of State* [2004] 1 WLR 2557, para 55, namely "a situation where the essential conflict is between two or more groups of private interests". I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If "strict necessity" were to compel the "least intrusive" alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as *Lough v First Secretary of State* and the present case.”

Thank you for listening

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