

**Welcome to Landmark Chambers’
‘Delivering Major Infrastructure: Part 5 – Land
compensation – assessing the claim’ webinar**

The recording may be accessed [here](#).

Your speakers today are...



Topics:
Accommodation works, disturbance costs and s.7 claims

Jacqueline Lean (Chair)



Topics:
Talk 1: Practical issues & Temporary possession

Talk 2: Part 1 claims

Simon Pickles



Topics:
Talk 1: The purpose of compensation, and fair value principles

Talk 2: Injurious affection and tenant compensation

Luke Wilcox

Colin Smith FRICS

Topics:
Accommodation works, disturbance costs and s.7 claims

The purpose of compensation, and fair value principles



Luke Wilcox

Topics to be covered

- Introduction to valuation and compensation – the principles
- Practical considerations – hints and tips
- Accommodation works, disturbance and s. 7 claims
- S. 10 claims and tenant compensation
- Part 1 claims
- Q&A

Preface: the nature of valuation

- Valuation involves elements of law, science/arithmetic, and a healthy dose of professional judgment – as much an art as a science!
- The role of law:
 - Sets the framework within which the valuation exercise is undertaken
 - Critical first step in any valuation is to identify the features and parameters of this framework
 - Cross-fertilisation from multiple areas of law: rating, rent review etc

- Once framework is established, the role of the law is largely over:

“Ascertainment of the rent at which premises might reasonably be expected to let on the statutory assumptions is a question of fact, not one of law. The selection of the most appropriate technique to be employed in answering that question is a matter of valuation judgment rather than legal precedent.”

Hughes (VO) v York Museums and Gallery Trust [2017] RA 302, para 112
(rating case)

Introduction to valuation for CPO compensation

- Governing framework: Land Compensation Act 1961, s. 5
- Seven rules:
 - No allowance for compulsory nature of acquisition
 - Open market value realised by willing seller
 - No-scheme world
 - No special suitability value for statutory power
 - No value from illegal/unlawful/detrimental uses
 - Reinstatement value
 - No impact on disturbance compensation

Valuation date

- Critical to any valuation – sets the circumstances of the hypothetical negotiations and transaction
- Factors arising after valuation date usually disregarded – unless they were reasonably foreseeable on the valuation date
- LCA 1961 s. 5A – specifies the valuation dates for various circumstances of acquisition

Principle of equivalence

- Overarching principle governing all CPO compensation

“The purpose of these provisions ... is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail.”

Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 1 AC 111 per Lord Nicholls

The open market and the hypothetical sale

- Open market value achieved by positing a hypothetical transaction between hypothetical parties
- Note – statute refers only to willing seller. Willing buyer, however, is necessarily implicit: risk of under-compensation otherwise
 - See e.g. *Dennis & Robinson Ltd v Kiossos Establishment* (1987) 54 P&CR 282 (rent review case)
- The “higgling of the market”
 - *Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee* [1937] KB 445

Value to the owner principle

- It's the value of the property to its owner that is sought to be identified, not the value of the property to the acquiring authority
- Underlies the “no scheme world” approach (aka the *Pointe Gourde* principle)
 - Implications for development value aspects of the compensation
- Also justification for disturbance payments

The principle of reality

- Aka valuation *rebus sic stantibus* (“as it stands”)
- Save where the statute requires otherwise, value by reference to the real world
- Physical condition of the land, patterns of ownership, use and occupation in the locality, state of the property market and wider economy etc are all as they were on the valuation date

How to value land for CPO compensation purposes

- A matter for valuers!
- Four main methods:
 - Comparables valuation
 - Residual valuation
 - Receipts and expenditure (“R&E”) valuation (aka the profits method)
 - Depreciated replacement cost valuation

Practical issues & Temporary possession



Simon Pickles

Practical issues (1/10)

- The importance (to both parties) of:
 - Claims that are both documented & explained from the outset
 - Understanding (if not acceptance) of the value for money principle
 - A clear strategy towards offers of settlement

Claims: documented & explained (2/10)

- Starting points:
 - MHCLG Guidance (2019) model claim
 - LC Practice Direction (2010)
- Claimant's interest:
 - A full Advance Payment
 - Costs of claim almost invariably recoverable
- AA's interest:
 - Efficient disposal of claims
 - Informed offers inc. sealed offers

Claims: documented & explained (3/10)

- Examples:
 - Relocation: Who undertook premises search & why, search parameters, factors informing premises selection
 - Management time: Personnel engaged, amount of time consumed, loss resulting from staff deployment
 - Mitigation: Explanation of key choices made

Value for money (4/10)

- Rebuttable presumption that expenditure on relocation premises secures value for money no always understood or accepted
 - » *Service Welding* (1979) 38 P&CR 352
 - » *Mohammed* [2016] UKUT 415
- Issues arise most typically in respect of new/replacement fittings & equipment
- But may also arise in respect of (part) rental (not a hard & fast distinction)

Value for money (5/10)

- Examples:
 - The builders' merchants
 - The dairy
 - Office or warehouse relocation

Temporary possession (6/10)

- Context
 - Previously permanent acquisition only subject to exceptions
 - Neighbourhood Planning Act 2017 (Part 2 Chapter 2)
 - S.18:
 - » All with power to CPO land empowered also to take temporary possession of it by agreement or compulsorily
 - » Only power to take temporary possession of land compulsorily (subject to express provision), therefore also applies to TWAOs and DCOs
 - A new frontier for objectors – not my plot, not permanently

Temporary possession (7/10)

- Procedure
 - s.19: May be authorised by CPO
CPO may authorise acquisitions that are perm & temp, temp only, or both perm & temp in respect of the same land acq
 - s.20: Within 3 years of CPO (5 in other cases)
>3 months notice of intended entry
 - S.21: Counter-notice (28 days): 12 (dwellings) or 6 months?
AA (28 Days) to accept, withdraw or CPO
Material detriment provisions apply

Temporary possession (8/10)

- Compensation (s.23)
 - ‘Claimant’ with an interest/right to occupy entitled to compensation for ‘*any loss or injury the claimant sustains*’ where an AA takes temporary possession
 - ‘Beneficial claimant’ (BC) is entitled to compensation ‘*any loss or injury*’ sustained by interference with a right or interest annexed to land belonging to BC, or breaching a restriction as to the user of land arising by contract to which BC is a party or the restriction benefits land belonging to BC

Temporary possession (9/10)

- Very broad scope:
 - No spatial limitation
 - No physical limitation
- Requirements to demonstrate:
 - Causation
 - Reasonableness/mitigation
- The role of the Scheme

Temporary possession (10/10)

- Business/trade disturbance
 - Compensation to include that for any loss sustained by reason of disturbance consequent upon having to quit the land for the period of the temporary possession.
 - Regard to be had, in estimating loss, to:
 - period for & terms on which the land may reasonably have been expected to be available for the purposes of the claimant's trade or business;
 - availability of other land suitable for those purposes during the period of temporary possession.

Accommodation works, disturbance costs and s.7 claims



Jacqueline Lean (Chair)

Colin Smith FRICS

Topics to be covered

- S.7 claims – severance and injurious affection
- Accommodation works – how do they factor into the claim?
- Disturbance costs

S.7 CPA 1965

“In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.”

Severance and injurious affection under s.7

- Can only be claimed by a person from whom an interest in land has been compulsorily acquired (cf s.10)
- Also applies where an acquiring authority is authorised to acquire rights over land (see, eg, ss13 & 14 Local Government (Miscellaneous Provisions) Act 1976)
- Applies where there has been depreciation in value of retained land – (note, if an increase in value – ‘betterment’ – this may need to be deducted from compensation for land acquired)

Severance and injurious affection under s.7

- A claim under s.7 does not arise in respect of all or any retained land – it must be “other land” “held therewith” the acquired land.
 - Common ownership not sufficient in and of itself
 - Neither necessary nor sufficient for land to be held under same title
 - *“The basis of the claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance”*

Holditch v Canadian Northern Ontario Rly [1916] 1 AC 536 per Lord Sumner

Severance and injurious affection under s.7

- “**Severance**” – can apply to horizontal strata as well as parcels of land (eg subsoil only acquired for a railway: City & South London Rly Co v United Parishes of St Mary, Woolnoth & St Mary, Woolchurch [1905] AC 1, HL)
- “**Injurious affection**” – depreciation in value of retained land as a result of works (etc) carried out under the order (or other enactment) which authorised compulsory acquisition of the land.
 - Does not require C to demonstrate that loss actionable at common law absent the statutory authority (cf s.10)
 - Is not limited to works (etc) carried out on the land actually acquired from C (s.44 LCA 1973).

Severance: S.8(2) CPA 1965

“(2) If any land which is not situated in a town or built upon is cut through and divided by the works so as to leave, either on both sides of the works, or on one side, a quantity of land which is less than half an acre, the owner of the land may require the acquiring authority to purchase the land along with the land subject to compulsory purchase:

Provided that this subsection shall not apply if the owner has other land adjoining the land so left into which it can be thrown so as to be conveniently occupied with it, and in that case the acquiring authority shall, if so required by the owner, at their own expense throw the piece of land so left into the adjoining land by removing the fences and levelling the sites thereof, and by soiling it in a satisfactory and workmanlike manner.”

S.7 – assessing the claim

- Amount by which the retained land is depreciated in value
 - (Value before vs value after)
- Statutory rules in s.5 LCA 1961 do not apply
- Can have regard to anticipated future use of the land acquired (eg in respect of exercise of rights in future by the acquiring authority) but must be considered by reference to “reality” and not just what is “theoretically” possible (*Elitestone Ltd v National Grid Gas plc* [2015] UKUT 452 (LC))
- Can include depreciation in / deferment of development value
- Is not to be assessed by reference to costs which C incurs to mitigate or deal with the effect of compulsory acquisition of part of its land (*Cooke v Secretary of State for the Environment* (1973) 27 P & CR 234).

Accommodation works



© Highways England
Green bridge over the A556

9 Accommodation works

- 9.1.1 Where land is to be acquired or temporarily occupied for the purposes of Phase One, it is likely that some form of accommodation works will be provided to allow the continuation of the activities adjacent to the railway. This may include the provision of new or altered accesses to or around the farm, fencing, the re-provision of built facilities, and the provision of services. Appropriate accommodation works will be discussed with farmers on a case-by-case basis and in a timely manner.
- 9.1.2 The provision of accommodation works will depend on the individual circumstances of the holding and will usually be developed as the detailed design of the Proposed Scheme is undertaken. Accommodation works are taken to include accommodation bridges and access arrangements and will have regard to the commercial justification by the landowner, such as the value, use and location of the lands concerned.
- 9.1.3 The structures of accommodation bridges, underpasses, culverts or sleeves over or under HS2 will be maintained by HS2 Ltd. The maintenance of access way surfaces or services within will need to be determined on a case-by-case basis. The farmer will normally be responsible for any surface over which he will have exclusive use.
- 9.1.4 The Nominated Undertaker will discuss with each landowner the provision and timing of accommodation works as part of the compensation package.

Accommodation works

- In broad terms, these are works which the acquiring authority may carry out in order to reduce the effect of severance and/or injurious affection on land (and, consequently, the compensation that would otherwise be payable)
- Landowner cannot be compelled to accept accommodation works on retained land– but is required to act reasonably in mitigating his loss

Note - s.8(3) CPA 1965

(3) If the owner of any land cut through and divided by the works requires the acquiring authority under the provisions of the special Act to make any bridge, culvert or other communication between the land so divided, and—

(a) the land is so cut through and divided as to leave, either on both sides or on one side, a quantity of land which is less than half an acre, or which is of less value than the expense of making the communication between the divided land, and

(b) the owner has no other land adjoining that piece of land,

the acquiring authority may require the owner to sell them the piece of land. Any dispute as to the value of the piece of land, or as to the expense of making a communication between the divided land shall be determined by the Upper Tribunal, and either party to proceedings for determining the compensation to be paid for the land acquired may require the Upper Tribunal to make its determination under this subsection in those proceedings.

Disturbance costs

- Costs or losses arising from compulsory acquisition and dispossession not directly based on the value of land (Rule 6, s.5 LCA 1961)
- C can claim for direct and reasonable consequence arising from compulsory acquisition
- Loss must not be too remote
- C must act in a reasonable manner and mitigate losses
- Can, in principle, include pre-acquisition losses – Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111 - subject to meeting 3 criteria above.

Disturbance costs

- In order to claim compensation for disturbance, C:
 - Must be the occupier of the land
 - Must have an estate or interest that has been compulsorily acquired
 - Caution! There can be difficulties where ownership of legal interest differs from ‘person’ in occupation.
 - Must have lost possession as a result of the compulsory acquisition of the land

- + claim must not be inconsistent with basis on which land acquired was valued –no double recovery!

Potential heads of claim

- Temporary and permanent loss of profits
- Loss of crops on agricultural land
- Cost of seeking suitable alternative premises
- Costs of fitting out alternative premises
- Stamp Duty on new premises
- Close down of business if relocation not possible
- (Reasonable) legal and surveying fees

- Does not include cost of alternative premises – it is assumed C has received value for money for the land acquired

Injurious affection and tenant compensation



Luke Wilcox

Injurious affection

- Compulsory Purchase Act 1965, s. 10:

“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”

Injurious affection

- Usually arises in one of two situations:
 - Where land (which has not been compulsorily acquired) is damaged by execution by public authority of works on some other land
 - Where proprietary but non-possessory rights (aka incorporeal hereditaments), e.g. a right of way, is extinguished by a compulsory acquisition

Wildtree – summary of s. 10

- *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1 per Lord Hoffmann identifies five key principles:
 - (1) No need for any of the claimant's land to have been taken
 - (2) S. 10 requires *injuria*, i.e. damage which would be unlawful (either public or private nuisance) but for the protection of the statute
 - (3) S. 10 only engaged where authority acts within/under its statutory powers
 - (4) Only creates entitlement to compensation for injury to land interests, i.e. purely personal losses outside scope
 - (5) Only available for injury caused by construction/execution of works, not for subsequent use/operation of the result of the works.

Tenant compensation

- Compulsory Purchase Act 1965, s. 20:

“(1) If any of the land subject to compulsory purchase is in the possession of a person having no greater interest in the land than as tenant for a year or from year to year, and if that person is required to give up possession of any land so occupied by him before the expiration of his term or interest in the land, he shall be entitled to compensation for the value of his unexpired term or interest in the land, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain.”

Tenancies covered

- Term certain of a year or less
- Term certain of any length with a year or less before determination
- Annual periodic tenancy
- Weekly or monthly periodic tenancies
- Tenancies at will

Compensation

- Compensation under s. 20 for:
 - Value of residue of term of the tenancy
 - Note – where periodic tenancy, assume determination at first opportunity under the lease
 - Disturbance payments

Part 1 claims



Simon Pickles

Part 1 claims (1/7)

Land Compensation Act 1973 Part 1

- Compensation where value of an interest in land depreciated by '*physical factors*' caused by the use of '*public works*' following their construction, their alteration or a change in their use
- Fills gaps:
 - » Where land not taken (CPA 1965 s.7)
 - » Where injurious affection not caused by execution of works (CPA 1965 s.10)
 - » Nuisance claim not maintainable (use authorised by statute)

Part 1 claims (2/7)

'Physical factors'

- Noise, vibration, smell, fumes, smoke and artificial lighting and discharge on to the land in respect of which the claim is made of any solid or liquid substance.
- Their source must be situated on or in the public works the use of which is alleged to be their cause except that physical factors caused by aircraft arriving at or departing from an aerodrome shall be treated as caused by its use (whether or not the aircraft is within its boundaries)
- Excluded: physical factors caused by accidents involving vehicles on a highway or accidents involving aircraft

Part 1 claims (3/7)

'Public works'

Any highway, aerodrome, and other works on land (not being a highway or aerodrome) provided or used in the exercise of statutory powers

Part 2 claims (4/7)

Potential claimants/qualifying interests

The interest must have been acquired before the public works are first used or, in the case of a highway, it is first open to traffic. NB *Fallows v. Gateshead MBC* (1993) 66 P&CR 460.

Dwellings – freehold or a tenancy with >3 years to run at date of claim

Other – “owner–occupier” where land is (or is part of) (i) a hereditament whose annual value is not in excess of a prescribed sum or (ii) an agricultural unit

Part 1 claims (5/7)

Claims

Generally not before expiry of 12 months following date highway open to public, or use of other works ('first claim day')

Reasonable valuation & legal expenses recoverable

Part 1 claims (Title 6/7)

Compensation

Payable in respect of depreciation in value of the claimant's interest in land

Tic public work's use existing on the 'first claim day', and intensification of use to be reasonably expected

LCA 1961 s.5 rules 2 (market value), 3 (special suitability or adaptability) & 4 (contrary to law) apply

Planning assumptions: Existing use & buildings except may tic (i) (in some instances) rebuilding, maintenance, alteration & improvement of buildings, & (ii) sub-division of a single dwelling house. Unimplemented permission to left out of account.

Part 1 claims (7/7)

- Set-off

- Increase in value

- of land to which claim relates
- of other contiguous or adjacent land to which entitled in same capacity
 - Contiguous – *touching*
 - Adjacent – *close to*

- Double-recovery provisions

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

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