JOINT PLANNING LAW CONFERENCE

THE PLANNING BALANCE IN THE 1990'S

COMPENSATION AND VALUATION MATTERS -THE PRACTICE

by

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The Law Society
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1. INTRODUCTION

1.1 Mathew Horton has given you a review of some of the more important changes in the law made by the Planning & Compensation Act 1991 and "clarifications" provided by the Courts. My role is to bring the discussion down to earth and so examine whether the balances have been changed – or ought to be changed; that is the balance between:

a. ensuring compensation is at least adequate for all as against "overpaying" many;

b. the advantage of paying an incentive for compulsion so that necessary public schemes are not opposed simply because the occupiers who will be displaced and paying just what can be proved to be lost; and,

c. a simple system which is perceived to be quick and easy to understand and a complex one which attempts to meet every possible combination of circumstances.

1.2 For the purposes of this paper I am only talking about the actual compnesation paid and the "rules" for its assessment in respect of Compusory Purchase. I do not therefore make any reference to the assessment of compensation arising from planning decisions which do not involve the loss of possession. In fact, the basic rules and assumptions are to a large extent the same and therefore much does apply but there are important differences which may, in a particular case make a great deal of difference.

1.3 Before I go any further, I would like to give a piece to advice to those of you who are not specialists in compensation, do not be intimidated by the jargon used by the specialists. The basis and much of the detail is much more straightforward than you would suppose from the string of rules and case names which so often punctuate their conversations. The judges have put it so nicely I think – the compensation should be

such that – so far as money can – you are no worse off then you would have been if you had not been deprived of the property. Statute has of course complicated that simple approach and the latest changes do nothing to reduce these added complications. Indeed as is so often the case, closing loopholes, may well cause at least as much difficulty in other areas.

2. GENERAL APPROACH

2.1 To avoid any misunderstanding, I feel it would be helpful to set out what I believe to be the essential elements in the assessment of compensation for acquisition.

2.2 The Acts require compensation to be assessed under just two heads – land taken and injurious affection and severance.

2.3 Injurious affection and severance are the money needed to compensate for loss in value suffered by the claimant on land not being acquired either because it has been severed from the land being acquired or because it is depreciated by the Acquiring Authority's proposals e.g. noise from a motorway.

2.4 Compensation for land taken is usually considered under two subheads, the value of the land actually taken and payment for other costs arising from the acquisition such as fees and disturbance that is the costs of vacating the property being taken and relocating, or, in some cases instead, the total value of the business disturbed.

2.5 The date at which the assessment of loss is to be made used to be an issue until the matter was settled by the Courts (West Midlands Baptist (Trust) Association (Inc) v Birmingham Corporation 1970 AC 874) and for valuers at least it is now taken to be the earlier of the time of assessment or actual entry on the land to be taken. The date for determining the planning assumptions I deal with later.

2.6 The Acquisition of Land (Assessment of Compensation) Act 1919 introduced six Rules which lay down the basic rules for assessing compensation (now Section 5).

For the benefit of those of you like me who cannot remember what the rules actually are, I have reproduced them in the Appendix incorporating the amendment made by the Planning and Compensation Act 1991. I have added under each Rule comments arising from recent decisions and other amendments introduced by the new Act.

2.7 From this it will be seen that the value of any land – whether being taken or remaining with the claimant, is to be valued at its open market value. Obviously any land with development potential can only be valued if something is assumed about what planning permissions are likely to be obtained, hence the Acts contain provisions for four types of assumptions to be made:–

i. any permission actually extant and permission for the acquiring authority's proposals – if they do not actually have permission.

ii. permissions arising from the development plan

iii. any permission indicated in a Certificate under the provisions of Section 17 in the 1961 Act.

iv. anything else which it is reasonable to assume.

2.8 What assumptions can be made and how these relate to the assessment of value I return to later. Suffice to say at this stage that (iv) is the one which causes the most difficulty but as it is the real life situation and it is the one I find the most useful.

2.9 The Acts provide that in specified circumstances the effect on value of some specified matters must be ignored, e.g. for example, when acquiring for a New Town – the designation of that New Town. This is said to be the statutory expression of a more fundamental rule, namely that the compensation shall exclude any increase (or decrease) in value due to the Acquiring Authoritiy's Scheme. This is refered to as the Pointe Gourde principle.

2.10 In modern compensation discussions, this rule is probably the single most important area of the argument. This is because the upsurge in compensation cases being observed now (to the surprise of old timers like myself, who were brought up on a surfeit of slum clearance and CDA's) are coming from transportation projects – roads or railways which have the potential of having a large effect on the value of properties near interchanges or terminals. So the issue is likely to become even more important as the Jubilee Line, Crossrail, the Channel Rail Link, and the new road building programme all get underway.

3. THE EFFECT OF ADVISERS

3.1 Compensation as a field has one major similarity to planning – the law as it is enunciated by the Courts is not always the same as it is understood by practitioners. It is the latter's perception and understanding which in nine cases out of ten are those which matter and not the correct legal view you would get from Counsel or the Courts.

3.2 In practice, valuers for an acquiring authority can range between extremes from those who ensure the claimant gets all the compensation payable under the system and those who try to incur the minimum financial liability for the acquiring authority. There can also be a difference in the strictness with which a valuer will apply the rules as he perceives them. In my experience, the very strict approach or worse still "let's see for how little we can get it" very often leads to a resistance which costs the authority more than any possible saving.

3.3 There was, many years ago, a DV in a "New Town" who was exceptionally strict in his view – in fact he took every possible point – not in his case to help the authority but because he believed it was his duty. A client of mine was asked by the Town if he would sell 30 acres in advance of powers being taken. Because of our experience in the Town we agreed with the client to say yes, but only if they agreed to buy for £30,000 within 3 months (there was the threat of a Labour Government and some form of Development Tax). £1,000 per acre was at the time more than its

agricultural value but much less than its development value. The DV advised the price was "much too high". We opposed the Complusory Purchase Order which was reduced to 6 acreas and I agreed the resulting compnesation at £45,000 – admittedly with the DV's successor. Whilst that is perhaps an extreme example, there are others which can illustrate the same point in a less dramatic way. What these cases do is give the system a bad name, not only as being "unfair" but also excessively slow. It can take a very long time to persuade a purist that he is wrong and it is much too expensive to contemplate going to the Lands Tribunal unless there is a very significant amount of money at stake.

3.4 For the avoidance of doubt, the opposite is also true. I had three former clients on the edge of another New Town who had bitterly opposed its designation and when they came to me were determined to get full development value for their land even though they knew they were not entitled to it. In fact it was all settled in a week because the DV made an offer which was, even in my client's view, generous. I believed then and still do that the DV saved his New Town far more than the bit extra that it cost in actual compensation. I hope he has gone far in the Valuation Office.

3.5 Compensation cases fall into two broad categories, those where the value of the land taken is dependent on future development and those where the value of the land taken is for its current use and the occupier is paid "disturbance" – that is the cost of moving from the acquired premises to new ones including any loss of profits to the business. At the heart of this assessment of value in the first category are the planning assumptions which should be made.

4. PLANNING ASSUMPTIONS

Date of Consideration

4.1 Mathew Horton has raised the question as to the date at which the assessment of what planning permissions are to be assumed and argues for the date of Notice to Treat. In my view, in equity and logic, that has to be wrong – and if it were legally correct

then great unfairness could result. He argues as other laywers would understand that the "policies" against which the assessment is to be made should be taken at the date of Notice to Treat because that is when the interest to acquire is "fixed". However, the application of the "planning policies" to which he refers is usually much wider than the property to be acquired and in a broad sense, reflect and shape the climate of value upon which "the open market value" is to be based. If between the Notice to Treat and the actual Entry there is a substantial change in the economic climate which is reflected in planning policies, why should the policies be fixed at one date when value itself is taken at another later date? Furthermore, the owner will not be able to buy an equivalent piece of property if there is a difference. What an owner actually loses is in practice only fixed when its ownership and liability pass and that is why I believe – and have always used – date of Entry for the assessment.

Section 17 Certificates

4.2 Section 17 Certificates (which are meant to provide the Planning Authority's view of what planning permission would be forthcoming if the property were not being acquired) suffer from at least two significant defects which are not touched on by the amendments made by the new Act.

4.3 Anyone who is involved in the development process knows how long it can often take to persuade a planning authority to say yes to an ambitious – or sometimes not so ambitious – scheme. It takes a long time for the Officers to believe they understand all the implications and then agree that on balance the benefits of saying yes outweigh the losses from saying no. In my experience, it is simply not possible to reproduce that process with a Certificate. There is for the planning authoirty no benefit from saying yes because the idea proposed will in fact never be built. Only if the Planning Officer concerned is both interested enough and has the time to spare, can you get near to reality. So only in the simplest of cases do I contemplate it as a procedure to use which is perhaps why I am not always too popular with the President of the Lands Tribunal who has not been keen to deal with planning issues. I agree with Mathew Horton that it is an illogical view for the Tribunal to take.

4.3 I think there is a second reason for any argument on planning assumptions going to the Tribunal.

4.4 The Compensation Acts and the Pointe Gourde principle require the effect on value of various matters to be left out of account in assessing value. As the Jelson cases demonstrate, whatever date is taken for the planning assumptions, it is quite possible for those assumptions to be inconsistent with the requirement to disregard the matters to be left out of account because of Pointe Gourde or the Acts.

4.5 It is too early to tell what practical difference the change in importance of Development Plans brought about by the new Act will make to the assessment of planning assumptions. However, if the acquiring authorities' scheme is big enough and has been awhile in the coming, the Development Plan may – probably should – have been based on the scheme being carried out and therefore it will be necessary for the planning assumptions arising from such a Development plan to be disregarded.

4.6 I am sure that it is only by looking at the planning assumptions and values together that the real truth will come out. This is why I believe the Lands Tribunal will have no option but to consider the planning issues in some cases and it would be wrong for them to resist considering the planning part of any case.

Unlawful Development or Use

4.7 One of the areas where the rules of compensation can be very harsh is the area of unlawful planning uses. There are many – usually small time businesses – which are occupying premises without planning permission. Since 1919, any increase in value "which is contrary to law" has to be disregarded (Rule 4) and it has been argued that any use or development which required planning permission and does not have it is caught by this provision.

4.8 Development which requires planning permission and does not have it can be divided into three basic categories:–

i. the planning authority do not know about it but could take enforcement action if they did.

ii. the planning authority know of it and have decided not to take action.

iii. it is free from the risk of enforcement because of the passage of time.

4.9 I am glad to say that the Courts have now decided (Hughes and Hughes v Doncaster MBC 1991 EG 133) that Rule 4 does not apply to (iii) above. That however leaves (i) and (ii) still at risk. My experience is that in many cases, it is not as black as the Rule provides.

4.10 Frequently when the planning authority find out they require a planning application to be made and the matter is resolved by the imposition of adequate conditions (sometimes including a limit of time). In other cases, the Secretary of State rather than the Planning Authority would be likely to grant permission on appeal.

4.11 Then there are the cases where the planning authority and the occupier do not realise that planning permission is required. For example, who believed that to move a local authority's Council and Committee meetings out of one of its building into another required planning permission at both buildings for a change of use before the decision of the Secretary of State supported by the Courts on the existing use of County Hall in London. At least that is what I think the decision means. That may, you think, be a little unusual but some years ago I advised that a building in Mayfair did not have planning permission for a use inspite of the fact that my client had two letters from Westminster Planning Officer saying that in his view it did. Leading Counsel agreed with me as eventually did the giver of a warranty as to existing planning use.

4.12 This last case is a good example of how the real world works because in fact a "clean" planning permission was given for the necessary change of use and everyone was happy. If it had been a case of acquisition and this point had not arisen until after the premises had been entered, I do not believe the "added value" could have

been recovered.

4.13 There is a simple solution to this problem that is to apply the planning assumption rules and not Rule 4 and leave the answer to a market judgement – that is what someone would pay knowing all the facts. Rule 4 was clearly intended to strike against immoral or unhygenic premises (e.g. back to backs) not some complex land use transgression which is technical only. And what about the shifting secondhand car dealers and panel-beaters – the bane of many planning authorities' life. Market value still works because if it is known action will be taken to stop the use then market value will be very little above that of an acceptable alternative.

Equivalent Reinstatement

4.14 Rule 5 provides that for a very small number of cases, one is entitled – but only at the discretion of the Lands Tribunal – to be compensated on the basis of "the reasonable cost of equivalent reinstatement". The Courts have yet again emphasised how narrow is the range of cases which qualify even to be considered. There are however many more cases where this basis of compensation is the only one which will leave the person acquired no worse off.

4.15 Golf courses are particularly vulnerable to road schemes and certainly in my experience fall into this category. What happens is the road takes a few holes and the Club buys some other adjoining land and amends the course to exclude the road land. At this point there is no problem in agreeing that the basis of compensation should be all the costs of buying the extra land and changing the course. However any such agreement has to be subject to a proviso that the total of these costs does not exceed the value of the whole course. As the cost of making greens and tees and putting in landscaping is high, the effect of the proviso is significant. Whilst my last case of one such squeezed under the gate so to speak, one of my Partner's recent cases did not "by a long way". This type of situation is not, in my view, satisfactory or fair.

4.16 Another example where reinstatement would be much fairer is where no similar premises exist to move to. For example, take the case of the little terrace houses that stood in the centre of Basingstoke. They were all acquired to make way for the new Centre. For compensation, the "effect of the scheme" had to be ignored. The result was that these houses were valued at, let us say, £12,000. In fact there were no other houses as cheap as these either in Basingstoke or anywhere comparable – and so to buy any other house they needed, say £25,000. I have every reason to believe they were paid the "correct" compensation but in my terms they were certainly not adequately or fairly compensated.

Disturbance

4.17 The statutory basis for disturbance seems to a modern surveyor a little short in words. I understand it started life in the Lands Clauses (Consolidation) Act 1845 Section 63:

> "In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

And Rule 6 only preserves "other losses not related to the value of land". Not much there you might think to get your teeth into.

4.18 However, the result is that the Courts have been able to adapt their thinking to the great variety of facts and the changing climate of economics and opinion over the years in cases coming before them. This is probably why the basis now seems to work with reasonably certainty but allows of new ideas provided it can be shown that the claimant has actually suffered a loss and that loss flows directly from acquisition.

4.19 The problems which do arise on disturbance are caused by the need to "prove" the loss.

4.20 One significant feature of compulsory purchase is that timing for the "sale" is not chosen by the claimant and there are distinct limits as to how far a claimant can arrange the timing of any move to new premises. For a small business, it can be extremely difficulty for its manager(s) just to find the time to get alternative premises, make them suitable and then organise the move. It can often distract the running of the business itself. For such people to keep good records of what time they are spending and the extra cost is asking a lot and thus their adviser is left with inadequate information. In many cases, where the adviser is not in early enough, the need to prove matters means that many losses do not even get mentioned.

4.21 As the surveying profession now knows only too well, the price at which a business can be sold in the market can vary very dramatically depending on the desire of buyer or seller before the recession hit the profession in any serious sense. Many such businesses were sold to the public or bought by financial institutions for price earnings ratios in the order of 17–18 and into the 20's. You would be lucky now to find a buyer who will be prepared to pay more than 7–10. The Lands Tribunal in the few cases that have come before it dealing with total extinguishment of a business have used three or four years purchase (approximately the same as price earnings ratio). It is in practice exceptionally difficulty to find hard evidence in a form which can be put before the Lands Tribunal to support higher figures but if compensation is intended to compensate completely, the figures which are habitually bandied around seem to me, and indeed I believe to others, to be too low to make the small business proprietor who is involved "no worse off".

4.22 There is a further difficulty in that these small businesses tend to have a cash element to them which does not always get entirely correctly translated into its books. When they are sold, they are frequently sold between acquaintances and it is difficult to unscramble the transaction. For compensation purposes, only the accounts filed with the Inland Revenue for tax purposes can be used. You may think as a matter of public policy that rule has to be right. The consequence is however for the small business where the reality and books do not entirely match the proprietor is very substantially worse off than he should be.

5. ADDITION FOR COMPULSION

5.1 I believe that there are three arguments why there should be a significant addition to the compensation payable because the transaction is compulsory. The first is because in a number of cases, in practice the person dispossessed does not get fully and adequately compensated, i.e. they are not put as far as money can in no worse position than they were before the acquisition; e.g. due to timing being at the low point in the value cycle, secondly there are losses which are not intended to be compnesated under the present code; and, thirdly there is a public policy argument for suggesting that an inducement for the owners and occupiers of property affected by such projects to move in the interest of the project itself and is what happens with private development.

5.2 Before looking at the shortfalls in compensation, can I remind you about the clawback provisions. If the land retained by a claimant is increased in value by reason of the project underlying the acquisition then that increase in value on the retained land is set off against the compensation. Although these provisions are not perfect, in my experience they can be said to recover what should be recovered from a dispossessed owner. The fact that some claimants will be benefiting from the project by an increase in property values would not be a reason, in my judgement, for restricting compensation for loss.

5.3 Whilst I do not know a great deal of the French system of compensation, it is based around the concept of market value plus an uplift to cover disturbance and other costs. The amount of uplift varies with size but for an average owner is about 25% for bare land and 20% for buildings. This is a simpler system than the UK and may seem more generous to the average layman. I do not know sufficient detail of the French approach to judge whether it is in fact more generous than the English.

5.4 I have indicated above some of the areas where there are difficulties with compensation but it is worth pulling together the essential ingredients relating to a compulsory transaction.

a. Such a transaction requires an authority to have powers and powers take time to get. The Jubilee Line Underground Line extension has been at least two years so far and I do not expect the promoters to be in the position to start proceedings to purchase before at least February or March of next year and the powers themselves will last 5 years. Over much if not all this time there is little a property owner or occupier can do except sit and wait. It is difficult to sell and in many cases advance purchase is either not possible or is not appropriate and the Blight provision applying as they do only to premises with a Rateable Value of less than £18,000 are seldom event relevant.

b. To relocate an occupation or use it can often take a significant time to find suitable premises in a comparable position and at a price which the ongoing business can afford. For example, it is quite possible that a manufacturing business occupying a mid-eighties "shed" at an existing rent of say £5 per foot may not be able to afford to take new space at £10 per foot, therefore they have to find another mid-eighties building which is available, suitable in size and location for their actual business and which does not involve them losing too many of their existing staff. Relocation therefore can be a much more difficult and time-consuming process than might appear on the face of it.

c. There can often be a premium value to an actual occupier of a property for that property which is not reflected in market value. This can be caused by sentiment (it was Granny's house), subjective considerations (a lovely view) or practical ones (the shape or disposition of the premises happens to suit the desires of the occupier in the way that other premises will not).

d. Because timing is in the hands of the acquiring authority and not the vendor, the level of values at which the sale takes place is not the one chosen by the owner occupier and therefore its position on the pendulum of property inflation is not of the choosing of the vendor.

5.5 In my experience, a proportion of those affected by public schemes do not in fact get

fully compensated. The premium for compulsion prevalent before 1919 is reported as being "less than 20%". I believe that 15% would make a significant difference to public perception of statutory compensation and therefore the opposition to large schemes and would ensure that those who are at present under-compensated were not.

6. PRACTICAL CONSIDERATIONS

Facts

6.1 You may think that "the facts of a case" is a surprising topic to be addressed in a paper on compensation and would be more appropriate in a first year degree course lecture on law. You, of course, are all experienced in one form of litigation or another and do not have to be told the importance of setting out the facts clearly so that an adequate decision can be made on them. In the area of compnesation however they are particularly important and I am not sure taht every practitioner is as aware of this as he should be.

6.2 I start from the observation from reading numerous compensation decisions that the Courts lean over backwards to try and ensure that the law allows them to award what they regard as proper compensation. There is also no doubt that it is much easier to persuade a valuer acting for an acquiring authority to take a particular view on the law if he believes that taking that view compensates for a real loss and is not a device for paying too much. The facts therefore are important. But it is not just the facts but even more the way in which they are presented and perceived. "Half-full" is very different indeed to "half-empty".

6.3 It probably takes quite a considerable amount of intellectual effort to get to the bottom of what a particular client has lost because of an acquisition. If that effort is made at the beginning and is rigorous, there is a much greater opportunity for succeeding in getting an adequate sum in compensation than if the points are thought of as the case goes on. This means that in compensation more than probably in any other field with which valuers may be concerned, it is essential to have done adequate homework

before the case gets too far in discussion with anyone else.

6.4 I remember that when the M3 was extended past Winchester, it took a strip about 30 metres wide off the end of St Swithun's School's grounds, apart from cutting through their only grass tennis courts worthy of the name, it also took some land off what appeared on the face of it to be a scruffy bit of playing field, but otherwise was not going to affect the School except by way of noise. This scruffy piece of playing field turned out to be one of the areas where they had lacrosse pitches and the effect was to reduce the number of lacrosse pitches of the School from seven to four. The sort of loss which a valuer might not take too seriously and would value at so much per acre of playing field lost. Fortunately, before I had even thought about it, the Games Mistress explained that the loss was going to lead to a more serious effect. There was no land to replace the pitches and because the requirements of timetabling, they needed so many of the girls out playing games at any one time and the remaining pitches were not enough to take up that number. In the end, compensation was agreed for this loss of land on the basis of a contribution to an indoor sports hall which the School had planned as a long term project but which was brought forward in order to meet their difficulties. The facts in this case required a great deal of assembly and it took me months to persuade the District Valuer that the facts themselves were actually correct and very many more months after that to persuade him that the economic effect was that which I was claiming. If I had not been fortunate enough to have been given the right view by the Games Mistress, I could have not have put the facts in the right way and there is absolutely no question that the School would have been much worse off.

6.5 So beware of facts and if you are fortunate enough to have legal advisers involved, make sure you get them to read any drafts that you are thinking of agreeing with the other side while you still have a chance of changing the way in which they are put. This is even more important for those caught up in a compensation case who are not experienced compensation valuers. Planners in particular will be working in a potential minefield of dates at which to consider matters, schemes to be ignored and perhaps the creation of a whole new "no scheme world". This is not a field for the

feint-hearted or poorly advised expert.

Expertise

6.6 A valuer dealing with compensation for a business, either to be moved, partially disturbed or shut down has to be sure that he understands that business fully. Frequently that means understanding processes and judgments which the valuer has never come across before. For example, I have never had to get involved in timetabling for a major school, but some understanding was essential if I was to put St Swithun's case properly. Although some understanding is necessary, there is a danger that people like myself will become instant experts on a whole range of subjects which they have never actually practiced. This danger exists for all involved in the case but particularly when one is advising an acquiring authority; after all the valuer to the claimant can always talk to the claimant who does understand the business if not the process of acquisition. The District Valuer or any person instructed on behalf of an acquiring authority may not however have any personal direct knowledge of the operational business and there is a reluctance, I observe amongst such valuers to get adequate advice from those who do. You try and explain to a non-golfer exactly what is involved in laying out a golf course and making it work and you may understand what I am saying.

Mitigation

6.7 An area of great difficulty is how to mitigate the effects of blight, that is how to get a client through the long drawn out and often uncertain period before compulsory powers are actually put into operation. Sometimes there is nothing to be done at all but on many occasions action can be taken. I have in the past very occasionally been able to agree with an acquiring authority the basis of compensation well before they exercise their powers and indeed in the extreme case of the Doncaster Golf Course which was on the route of the M18 around Doncaster, I agreed the basis of compensation before the route had been approved by the Secretary of State.

6.8 I am glad to say that there has now been confirmation by the Courts that this type of action is not precluded from being claimed even though it pre-dates the Notice to Treat. Of course, there is the other side of the coin, a citizen is under a duty to mitigate his loss arising from compulsory purchase. I do not actually remember seeing a case where it was argued that mitigation that should have been taken which had not, but I have found that need to mitigate is a useful argument in practice to justify a particular course of action taken by a claimant. However, what it really emphasises more than anything else is the importance of a claimant having adequate advice early enough because he can then be advised what steps of mitigation are likely to be acceptable under the compensation code. He can also ensure that any steps that are taken can be recorded as being "in mitigation" and may be even contemporaneously agreed with the acquiring authority to the greater benefit of all.

7. CONCLUSIONS

7.1 Those of us who are old enough to have cut our teeth on the post war boom in compulsory purchase – slum clearance, comprehensive development areas and non conforming uses – believed, as that wave subsided, that the volume of business would not return. Well, it is not yet back to that level but there is certainly very much more about than there has been over the last ten years and its activity may rise further if we invest in better transportation.

7.2 As Matthew Horton has demonstrated, there have been cases on many areas relating to compensation, and the Planning and Compensation Act 1991 is now law. Important as both are in detail, none have led to any significant change to the underlying principles. In fact I would suggest that the cases support my thesis that the Courts do want to reach the "right" figure rather than necessarily the "right" law.

7.3 I have little doubt that none of the changes will remove the public perception that "most people" get inadquately compensated and too late at that. I personally find this frustrating because I know that the present system can and should get closer than it does to its own definition of adequate compensation.

7.4 Whether a more generous approach as has to be adopted by developers without compulsory powers, would reduce the opposition to public projects is more difficult to judge because they are often opposed by bands of fanatics. However, these fanatics certainly have willing troops as long as the public perception relating to compensation persists. The Government missed a marvellous opportunity in the new Act to do something which I believe would cost in additional compensation a fraction of the savings generated by less opposition. But why should we not pay more for these schemes anyway? I believe the debate will continue as to the equitable balance and be heightened as compulsory acquisition comes more commonplace.

THE RULES FOR COMPENSATION
Section 5 Land Compensation Act 1961

RULE 1

"No allowance should be made on account of the acquisition being compulsory"
There have been no cases relating to Rule 1. The new Act amends Section 29 of the Land and Compensation Act 1973, to make home loss payments available to anyone who has been in occupation of a dwelling for at least a year of up to 10% of the market value of the dwelling subject to an upper limit of £15,000.

RULE 2

"The value of land shall, subject to as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise."
There have been a number of important cases on details relating to what you may or may not take into account, but the position is still that you have to value the property warts and all. This principle becomes crystal clear in the Tribunal and Court of Appeal Decisions in relation to Hillman and the East Yorkshire Borough of Beverley Council (1989 TLR October 18, 1990 14EG137) where Mr Hillman had bought a property the subject of a Closing Order but at a time when the Council had done very little and nobody was sure whether they would or would not pursue a Compulsory Purchase Order. At the end of the day the Tribunal, having decided with the subsequent blessing of the Court of Appeal, that the Demolition Order had to be taken into account applied a market test, i.e. it is the effect on price which counts.

The provisions of Schedule 3 Town and Country Planning Act 1990 have been significantly reduced by the omissions of the old paragraphs 3–8 and 11–14. Effectively this removes the assumed planning permission to improve or enlarge an existing building subject to a limit of 10% and also removes the right to change the use of any building within the Town and Country Planning Use Classes (3rd Schedule purposes) Order 1948.

A further change has been made in relation to compulsory purchases for road purposes. Section 14 of the Land and Compensation Act 1961 is amended so that it is to be assumed that "no highway will be constructed on any other land unless it is land held by the Highway Authority or which a Highway Authority has been authorised to acquire".

RULE 3

"The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from [the special needs of a particular purchaser, or] **the requirements of any authority possessing compulsory purchase Powers".**

The new Act has made a significant amendment by omitting the words within the square brackets.

There have been more cases looking at what these words actually mean and I would summarise the result that the Courts are extremely reluctant to define these words other than in the most strict legalistic fashion.

RULE 4

"Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account."

One of the more important decisions that has been forthcoming recently has clarified the position of unlawful planning uses (Hughes and Hughes v Doncaster MBC (1991 EG133) which I have dealt with in my main text.

RULE 5

"Where the land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for the land for that purpose, the compensation may, if the Land Tribunals is satisfied, that reinstatement in some other places is bonifide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement."

The cases relating to the use of Rule 5 emphasise yet again that the words are narrow and will continue to be interpreted in a narrow fashion. Therefore reinstatement cases will relate only to the premises falling strictly within the definition.

RULE 6

"The provisions of rule 2 shall not effect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

Palatine Graphic Arts Company v Liverpool County Council (1986 1 EGLR 19) dealt with the question of whether a Regional Development Grant paid in respect of the move to new premises was to be taken into account in assessing the loss of the old ones. The Court of Appeal decided that the grant was paid for something "of a different nature" and therefore should be ignored. In my surveyor's view the same answer could have been obtained by a valuer's based approach i.e. the availability of the grant would have been reflected in the value of premises in that area. Therefore, the prospect of the grant would have been taken into account in the price which the claimants paid for the new premises (be it rent or capital value). Such an approach was not apparently argued in the case in the Court of Appeal and I can only assume that it was too simplistic for the Judges and Lawyers concerned.

This rule is unaffected by the new Act.

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