Compulsory Purchase: Unlocking the Potential

By Guy Roots Q.C.

Introduction

For two hundred years, compulsory purchase of land has been critical to economic and social development. In the next century, it may well prove, in addition, to be critical to achieving sustainable development. The title of this paper is of course a reference to the potential of our urban areas to provide for a significant proportion of our future development needs so as to minimise the use of green field sites, and to the need for an effective compulsory purchase system to unlock that potential. However, some say that our present system is not up to this task. For example, the Environment, Transport and Regional Affairs Parliamentary Committee said[1] that it is:

> "very concerned about problems of land assembly and the failure to bring brownfield land into use for housing. The traditional way of dealing with these problems is the compulsory purchase order which has been little used in recent years. It is slow. A streamlined compulsory purchase order would be very helpful and is urgently required . . ."

Recognising the importance of compulsory purchase to urban regeneration,[2] the Government has embarked on a fundamental review of our existing system with the ambition of finding ways to make it more efficient, effective and fairer to all parties. This review, which is being undertaken by DETR with the assistance of a team of outside advisers,[3] has drawn together a wide range of opinions as to the shortcomings and qualities of our existing system and the question now being addressed is what changes are required in order to meet the Government's ambitions.[4] As a separate exercise, the Government has been giving consideration to the related problem of blight.[5]

This paper considers whether changing the system is critical to unlocking the potential of our urban areas.

Outline of the Existing System

Background

Our rule of law has, since Magna Carta, protected the ownership of land. Expropriation has only been possible when authorised by an Act of Parliament. Thus early infrastructure schemes such as canals, railways and harbours were constructed under the authority of Acts of Parliament which included specific provisions giving power to acquire the land required for the project, the procedure for doing so and the compensation to be paid. Parliamentary bills followed a procedure which enabled objectors to be heard. By the middle of the nineteenth century, such Acts had become so frequent that it was decided to standardise compulsory purchase procedure and compensation, which was achieved by the Lands Clauses Consolidation Act 1845. From the passing of that Act, any Act which authorised the compulsory purchase of land incorporated, but without repeating, provisions of the Lands Clauses Consolidation Act 1845. While the provisions of the 1845 Act were generally not new, the process of standardising them and drawing them together represents the birth of our present system.

[1] Report of Session 1997–8, Housing, October 1998, Cm 4080.
[2] Speech at National Symposium entitled "Compulsory Purchase: An Appropriate Power for the 21st Century?" February 22 1999, published by DETR August 1999.
[3] The Compulsory Purchase Policy Review Advisory Group ("CPPRAG").
[4] Fundamental review of the laws and procedures relating to compulsory purchase and compensation: Interim Report. DETR January 1999.
[5] Interdepartmental Working Group on Blight: Final report. DETR 1997.

In the late nineteenth and early twentieth centuries, when the functions of local authorities were greatly extended into fields such as housing, highways, public health, water supply and sewage disposal, it was recognised that compulsory acquisition would be needed frequently, and it would have been cumbersome for each authority to promote an Act of Parliament every time it wanted to build some houses, or a road or a sewage works. Such bodies were, therefore, given general powers to make compulsory purchase orders for purposes ancillary to their primary functions, although the mere existence of such powers did not authorise the purchase of a specific parcel of land. To acquire a particular parcel of land, it was necessary for a body to make a compulsory purchase order and secure the Minister's confirmation. Since the Minister was answerable to Parliament, a degree of Parliamentary control was retained over the expropriation of private property. That remains today as the system which applies to most bodies having compulsory purchase powers.

Where a promoter does not possess a general power to make a compulsory purchase order, it continues to be necessary for him to obtain an Act of Parliament to be authorised to acquire land compulsorily, unless his scheme is of a type to which the Transport and Works Act 1992 applies. This Act introduced a new procedure for authorising railway and other transport proposals enabling the Secretary of State to make an Order having a similar effect to a private Act. Instead of objections being heard by Parliamentary Committee, they are heard at a public inquiry. Such an order can grant compulsory purchase powers as an ancillary to authorising the promoter's scheme.

The Lands Clauses Consolidation Act 1845 also contained provisions relating to compensation. Under that Act,[6] two kinds of compensation were available to an owner whose land was acquired: the value of his land taken and the loss of value caused to his other land by reason of it being severed or otherwise injuriously affected. The 1845 Act did not prescribe the basis for assessing these, and principles developed through judicial decisions which provide the foundation of the present code. The value of the land came to be interpreted as the value to the owner taking account of the fact that the purchase was compulsory. Over time, it became the practice to reflect the compulsory nature of the acquisition by adding 10 per cent to the market value of the property acquired. The value to the owner also included all other losses caused to the claimant personally by reason of being dispossessed; this developed into a distinct element of compensation, now called disturbance, but to this day resting on judicial decision rather than express statutory right.

Those principles were modified by statute in 1919[7] primarily to eliminate the 10 per cent addition. The rationale for this was explained by Lord Justice Scott in these terms: "*The main object of the Act of 1919 was undoubtedly to mitigate the evil of excessive compensation which had grown up out of the theory, evolved by the Courts, that because the sale was compulsory the seller must be treated sympathetically as an unwilling seller selling to a willing buyer*".[8] The Act of 1919 introduced the rules now to be found in the Land Compensation Act 1961, section 5 which govern the valuation of the land taken. The element of the compensation which reflects value of the land taken is now to be assessed as open market value and no account is to be taken of the fact that the purchase is compulsory. The other two elements of compensation, severance and injurious affection and disturbance remain.

The Lands Tribunal was created in 1950[9] as a specialist forum to deal with compensation and other land and valuation related issues.

[6] Section 63.
[7] *Acquisition of Land (Assessment of Compensation) Act* 1919.
[8] *Horn v Sunderland Corporation* [1941] 2 K.B. 26, at p 40.
[9] Lands Tribunal Act 1949.

The "System" now

The "system" of compulsory purchase really comprises three distinct elements: *powers*, *procedures* and *compensation*. While these are obviously linked, it is convenient to consider them separately.

The *power* to acquire land compulsorily has to be provided by statute and is always ancillary to the primary functions of the body in question. When a body resolves to exercise such a power, it must then follow the *procedures* of the system.

The *procedures* of compulsory purchase can be conveniently subdivided between those which govern the process of authorising the compulsory purchase, and those which govern the implementation of the purchase after it has been authorised. The authorisation procedures, although originating in the nineteenth century, have been the subject of consolidating legislation enacted relatively recently in 1981 which applies to the majority of acquisitions,[10] although, for a minority of compulsory purchase orders, the 1845 Act still applies. In short, the body must resolve to make a CPO, it must advertise it and serve copies on those interested who have a right of objection. If there are objections which are not withdrawn, a public inquiry is held to hear them, and the Inspector reports to the Secretary of State who must decide whether or not to confirm the order with or without modifications.

Once a CPO has been confirmed, the promoter has a choice of routes for implementation. He may serve a notice to treat, and, after service of a notice of entry, may take possession of the land, but he will not formally complete the purchase until the compensation has been assessed. Alternatively, he may make a general vesting declaration which immediately vests the ownership in the acquiring authority leaving issues of compensation to take their course.

A right to *compensation* flows from the exercise of the power.

Compulsory purchase in other countries

One sometimes hears it said that other countries have better systems of compulsory purchase, and that some offer more generous compensation to encourage landowners to cooperate. I do not hold myself out as having any expertise in the jurisdictions or practices of any other countries, but I have sought to ascertain whether there is any prima facie basis for these contentions. One can gain some appreciation of the systems adopted by a wide range of other countries from a comparative study undertaken at a conference in Oxford in 1990; the papers delivered by lawyers from countries in the United Kingdom, Europe, north America, Africa and Asia have subsequently been published.[11] Of course, all the systems described differ in detail, and also differ in the theories of jurisprudence which underlie the ability to expropriate land. However, there are also many similarities. I venture to make a few broad generalisations based solely upon my reading of those papers.

First, all start from the basis that private property cannot be taken without statutory authority, and that any acquisition must be within the terms of that authority, in accordance with its procedures and subject to the payment of compensation. Second, broadly similar principles to our own appear to underlie the assessment of compensation. In the main, the aim generally is to pay the dispossessed land owner for what he has lost without reflecting what the expropriator has gained. The property actually taken is compensated in most systems at market value with compensation also being available for such losses as severance and disturbance. I have found in the papers I have studied no indication that any pay more than market value. However, in France, compensation for disturbance will include all the expenses

[10] Acquisition of Land Act 1981.

[11] "*Compensation for Expropriation: A Comparative Study*": Proceedings of the 1990 Conference of the United Kingdom National Committee of Comparative Law, published in two volumes by Jason Reese in association with The United Kingdom National Committee of Comparative Law.

involved in acquiring and moving to an equivalent site, whether or not the move is actually made, and in practice this is, I understand, often assessed as a percentage addition to the primary compensation for the land taken. This could be the source of the legend that the French are more generous with the result that their projects meet less opposition. I have gained the impression that the French are more generous about their compensation for disturbance, but the difference in attitudes towards compulsory purchase may instead or in addition reflect a difference of attitude towards projects which are seen to be in the public interest.

There are certainly differences in the procedures for achieving the expropriation. In France and West Germany there is an opportunity for views to be heard at a public inquiry prior to the decision to expropriate, as well as opportunities to challenge the lawfulness of the expropriation in the courts. In the United States, the position is complicated by the distinction between federal jurisdiction and the individual states whose systems differ to some degree. Some states, such as California, have a form of hearing prior to authorisation. In other states, such as Florida, there is an optional "quick-take" procedure, under which the condemnation, as they call it, can be achieved quite swiftly. In Australia, there appears to be no public inquiry stage but the fairness of a decision to authorise a compulsory acquisition can be reviewed in an administrative court, although this does not extend to reviewing the merits. In Canada, there is a right to object, but the holding of a public inquiry is a matter for the Minister's discretion. I have not found evidence, with the possible exception of the quick-take procedure in certain US States, that any of these systems are notably less cumbersome or bureaucratic than our own; they are just different.

The Human Rights dimension

The European Convention on Human Rights and the Human Rights Act 1998 are relevant to compulsory purchase in a number of respects. Article 8 lays down the fundamental principle that everyone has a right to respect for his private and family life, his home and his correspondence without interference by public authorities except as is according to law and is necessary in a democratic society. This is complemented by provision for the protection of property in Article 1 of the First Protocol that every natural and legal person has a right to the peaceful enjoyment of his possessions. However, Article 1 of the First Protocol also recognises that the expropriation of property may be permissible, but subject to two conditions: it is must be in the public interest and it must be subject to the conditions provided for by law. Article 6 requires that in the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.

Our current compulsory purchase system appears to me to provide the framework within which these principles can be achieved in individual cases. That is not to say that in particular cases the process will not be operated in a way which enables individuals to challenge the compulsory acquisition of their property on human rights grounds, but inevitably this paper is concerned with generalities. For present purposes, it is sufficient to note that radical change of the compulsory purchase system does not appear to be required to ensure compliance with the Convention, but, if changes to the system are contemplated in order to expedite the process, care will have to be taken not to create circumstances in which individual cases may result in successful challenges to compulsory acquisitions.

Facilitating Urban Regeneration

Concern has been expressed as to the adequacy of our compulsory purchase system for the purposes of facilitating and achieving urban regeneration. For example, The Urban Task Force Report says,

> "... there is a wide spread reluctance among many other local authorities to exercise their powers of compulsory purchase. Other than the problem of lack of resources, the four main reasons for this reluctance are the inherent bureaucracy of the process, uncertainty over powers, a loss of skills and the inadequacy of the compensation provisions".[12]

These four reasons can conveniently be commented upon under the headings of powers, procedures and compensation which I have already identified.

Powers

"Urban regeneration" is a loose and imprecisely defined concept, and before it can established whether existing powers are inadequate, it will be necessary to identify what it is that needs to be done and who is expected to do it. That is outside the scope of this paper.

Local authorities and other bodies have powers to acquire land both by agreement and compulsorily ancillary to the functions which Parliament has required them to fulfill. For example, a local authority fulfilling its functions in relation to housing or highways has the power to purchase land compulsorily to provide houses or highways. Such powers may well be relevant to achieving change which could be termed urban regeneration. All local planning authorities have powers under the Town and Country Planning Act 1990, section 226 to acquire compulsorily land which:

> "(a) is suitable for and required in order to secure the carrying out of development, redevelopment or improvement; or
> (b) is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated."

Thus, in so far as a particular proposal for "regeneration" falls within any of those words, the local planning authority will in principle have adequate powers to assemble the land required. However, some anticipate that regeneration may require intervention by a local authority or other body in circumstances which do not fall clearly within section 226.

T.C.P.A. 1990, section 226 is at present the only local authority power which enables local planning authorities to act as facilitators of development to be carried out by others. The scope of T.C.P.A. 1990, section 226, though wide, obviously has its limits. The words now to be found in that section derive from an amendment to the T.C.P.A. 1971 made by the Local Government, Planning and Land Act 1980, the same Act which introduced "urban development areas" and "urban development corporations". An urban development area had to be designated by the Secretary of State by statutory instrument.[13] The object of an urban development corporation was "to secure the regeneration of its area".[14] This was to be achieved "by bringing land and buildings into effective use, encouraging the development of existing and new industry and commerce, creating an attractive environment and ensuring that housing and social facilities are available to encourage people to live and work in the area."[15] An urban development corporation had power to acquire land compulsorily for these purposes.[16] Local authorities did not, and do not, have such wide ranging functions, and consequently do not have powers of compulsory purchase for such wide ranging purposes.

It is also contended by some that the test applied by D.E.T.R. as to whether compulsory acquisition under T.C.P.A. section 226 is "required" is too demanding. The Secretary of State has given guidance

[12] Towards an Urban Renaissance: Urban Task Force Report, page 228.
[13] L.G.P.L.A. 1980, section 137.
[14] L.G.P.L.A. 1980, section 136(1).
[15] L.G.P.L.A. 1980, section 136(2).
[16] L.G.P.L.A. 1980, section 142.

in Circular 14/94 as to the approach to section 226 which will be taken when a compulsory purchase order is sent for confirmation. The authority

> "*will be expected to demonstrate that the land is genuinely 'required' in order to secure the carrying out of the proposed development, etc.; or to achieve the stated purpose or purposes which it is necessary to achieve in the interests of the proper planning of the area. In this context, the Courts have held that 'required' must mean more than 'desirable' but that the acquiring authority should not be required to demonstrate that they had used all other available powers before resorting to compulsory purchase, provided that there was evidence from which it would be reasonable to conclude that, without the use of the compulsory power, the proposed development, etc., would be unlikely to be carried out or the purpose would be unlikely to be achieved. In general, there must be a compelling case in the public interest.*"[17]

The guidance also advises,

> "*Before making an order, the authority should be satisfied, so far as possible, that the proposed scheme would not be blocked by planning problems, eg the need for planning permission. The Secretary of State will expect the authority to assure him that, if the order is confirmed, the proposed scheme will be able to proceed without such planning difficulties.*"[18]

In addition, the guidance reminds authorities that

> "*they should, where practicable, seek to acquire land by negotiation before embarking on compulsory purchase*"[19]

although it is recognised that for some

> "*large urban sites it may be appropriate to seek compulsory powers at the same time as attempting to purchase by agreement . . .*"[20]

and it is also stated that the Secretary of State

> "*would normally consider it inappropriate to authorise the use of compulsory powers in the face of evidence that owners of the relevant interests were genuinely willing to sell by agreement at market value in accordance with the compensation code.*"[21]

The differences between compulsory purchase by urban development corporations and by local planning authorities were explained in Circular 23/88 as follows:

> "UDCs compulsory purchase powers are expressed in wide and general terms, reflecting both the national importance of the task of urban regeneration and the practical problems of ensuring that wide areas of severe urban dereliction can be speedily returned to beneficial use. Accordingly the Government's policies towards compulsory purchase orders submitted for confirmation will differ from those indicated in"

what is now Circular 14/94.[22] It was made clear that CPOs might be confirmed even though detailed land use planning and other factors had not been resolved, and even where the UDC had no specific, detailed development proposals.[23]

The question which the Government will have to consider in response to the Urban Task Force

[17] Circular 14/94 Appendix K, paragraph 4.
[18] Circular 14/94, paragraph 8.
[19] Circular 14/94, paragraph 11.
[20] Circular 14/94, paragraph 12.
[21] Circular 14/94, paragraph 12.
[22] Circular 23/88, paragraph 5.
[23] Circular 23/88, paragraphs 7–10.

Report is whether, in the interests of securing progress with regeneration, powers similar to those given to UDCs should be handed to local authorities or to other entities either in general or in relation to identified areas. The Urban Task Force Report makes recommendations which have some similarities with the scheme for urban development areas set up by the 1980 Act. The Report recommends identification of "Urban Priority Areas" for which an "Urban Regeneration Company" would be formed as a body "capable of acting swiftly, as a single purpose delivery body to lead and co-ordinate the regeneration of neighbourhoods in accordance with the objectives of a wider local strategy which has been developed by the local authority and its partners".[24] However, the Urban Task Force appears to assume that local authorities would perform the function of land assembly for urban regeneration. The Report says that

> "urban development corporations were given a clear right to acquire land compulsorily without the need to provide an economically viable scheme. There is a case for extending this freedom to local authorities in respect of urban priority areas where they can demonstrate that this additional flexibility is required to make headway in regenerating sites. Local authorities should not be free to buy up land with little or no potential for early development, or worse still, start competing with private developers. The area designation process should therefore test whether there is the prospect of long term value creation through an enhanced acquisition power".[25]

Procedures: Speed and Efficiency

The Urban Task Force is not the first to criticise the compulsory purchase system for operating slowly and inefficiently. Research by the City University obtained information about the course of CPOs in the years 1992-1995. I have endeavoured to obtain similar information for more recent years, but statistics comparable to those set out in the City University's report are not readily available. The City University found that the time between the acquiring authority's resolution to use CPO powers and the confirmation of a CPO was on average about 15 weeks where no inquiry was required and about 27 weeks where an inquiry was held.[26] Of course, this may have been preceded by a long period of gestation and may be followed by further delays before possession is taken.

One of the Urban Task Force's recommendations is that an expedited process of compulsory purchase be introduced. If speed is the over-riding criterion, time could of course be saved by eliminating the rights of landowners to object and to be heard at an inquiry, but it seems doubtful that the removal of the safeguards which afford some protection for landowners would be regarded as acceptable and might well infringe the Human Rights legislation. It must be remembered that not all candidate sites for regeneration are vacant and unused; sometimes regeneration is proposed for sites which have existing homes, businesses, shops and so on where proposals for redevelopment may be controversial both in principle and in detail. On this subject, Nick Raynsford has said this,[27]

> "But a word of caution: to deprive someone of their land against their wishes is a grave measure. It is a vital role of the confirming authority (the Secretary of State) to ensure that overriding public interest has been proven. So a landowner whose property may be acquired compulsorily must have the opportunity to be heard, or to appear and be represented, at an inquiry . . . We

[24] Towards and Urban Renaissance: Urban Task Force Report, page 147.
[25] Towards and Urban Renaissance: Urban Task Force Report, page 230.
[26] The operation of Compulsory Purchase Orders: A report by the City University Business School: D.E.T.R. May 1997.
[27] Speech at National Symposium entitled "Compulsory Purchase: An Appropriate Power for the 21st Century?" February 22 1999, published by D.E.T.R. August 1999.

> must never let our enthusiasm for regeneration blind us to the basic human right of those whose land is proposed to be taken, nor should we allow our natural enthusiasm to get things done quickly to erode any of these vital safeguards."

The alternative to removing or reducing the safeguards is to ensure that the system with the safeguards in place is operated in the most efficient and expeditious manner. There is no doubt that lack of expertise and experience in preparing and promoting CPOs is acting both as a deterrent to local authorities embarking on the process at all, and as a force which prolongs the process where a CPO is made. This is hardly surprising; CPOs are not promoted in very large numbers. The total number of CPOs confirmed for housing, planning, roads and public utilities was 306 in 1993, 231 in 1994 and 185 in 1995.[28] CPPRAG recommended that a comprehensive manual and best practice guide should be prepared giving advice about such matters; the DETR accepted this recommendation and has let a contract for the preparation of the manual which is due to be completed in the middle of next year.[29]

Compensation

The compensation code has developed over a very long period of time and judicial decisions have added considerably to the statute law. Broadly speaking it is a sound code; it would be a great mistake to think that it would be either necessary, desirable or even feasible to attempt to rewrite the code starting with a clean sheet of paper.

The fundamental principle underlying the whole code was expressed by Lord Justice Scott in a well known passage from the case of *Horn v. Sunderland Corporation*.[30] Compensation

> "is the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater".

This principle is not unique to compensation for compulsory purchase; it governs the assessment of damages in civil actions. Fairness, which is one of the present Government's stated criteria, would be achieved if all elements of the compensation code functioned to meet that objective.[31]

Compensation for compulsory purchase is payable as a lump sum assessed under three main heads: the market value of the land acquired, loss of value to the claimant's other land due to severance or injurious affection and disturbance which is intended to cover all the costs imposed upon the claimant as a result of losing possession of his land. These heads are capable in principle of fulfilling Lord Justice Scott's criterion, although there is undoubtedly a need to examine particular aspects of how the rules operate to ensure fairness in practice. Supplementary payments were introduced in 1973,[32] referred to as home loss payments, farm loss payments and disturbance payments. Home loss payments are intended to reflect the fact that the acquisition is compulsory and that the market value of a property may not fully reflect the attributes which the owner values on a personal basis. They are calculated at 10 per cent of the market value of the property, but subject to a ceiling of £15,000 which, as property values rise, is becoming progressively restrictive.

The compensation code is undoubtedly in need of consolidation, codification and modernisation of the statutory language, quite apart from substantive changes which might be merited. Accessibility should be one of the primary objectives of such consolidation, codification and modernisation. Practitioners

[28] The Operation of Compulsory Purchase Orders: Report by City University Business School: DETR May 1997.
[29] Fundamental review of the laws and procedures relating to compulsory purchase and compensation: Interim Report, Paragraph 8.7.12.
[30] [1941] 2 K.B. 26, at page 42
[31] Fundamental review of the laws and procedures relating to compulsory purchase and compensation: Interim Report, Paragraph 1.2.
[32] Land Compensation Act 1973, Part III.

who are dealing regularly with compensation law know where to find it and are familiar with its principles. However, compulsory purchase is not an everyday event, even for bodies which have the powers. For persons whose land is being compulsorily acquired, their first port of call for assistance is likely to be their surveyor or land agent followed perhaps by their local solicitor. It is important that all these advisers, acting for both the acquiring authority and the claimant, should find the law and principles reasonably accessible so that they can give advice which is not influenced by uncertainty as to how the principles are likely to apply in their client's case.

Consolidation is the process by which the statute law on a particular subject which is spread across a number of different Acts is drawn together into one Act for convenience and clarity. In terms of consolidation, compulsory purchase is the poor sister of the town and country planning legislation which, having been originally enacted in 1947, has been consolidated three times in 1962, 1971 and 1990.

The existing statute law relating to compensation for compulsory purchase is to be found mainly in three Acts: the Land Compensation Act 1961, the Compulsory Purchase Act 1965 and the Land Compensation Act 1973, although each of those has been added to and amended by other Acts including most recently the Planning and Compensation Act 1991. However, the fact that these Acts are only at the most about forty years old disguises the antiquity of their provisions. Much of the Compulsory Purchase Act 1965 originated in the Lands Clauses Consolidation Act 1845 and adopted the same language. For reasons which have never been very clear to me, the Lands Clauses Consolidation Act 1845 has never been fully repealed, and it continues to apply to compulsory purchase orders which are outside the 1965 Act. The Land Compensation Act 1961 originated in the Acquisition of Land (Assessment of Compensation) Act 1919. Where a compulsory purchase may affect minerals, the Railways Clauses Consolidation Act 1845[33] may also be relevant.

Consolidation of itself would be a convenience, but it would be insufficient. It would leave much antiquated legislation in place and would leave many important principles resting on judicial interpretation. Such principles need to be brought into a comprehensive code; codification must, therefore, be considered in addition to consolidation.

The purpose of codification would be to enable the law to be found largely in a statute instead of having roam over a range of judicial decisions. In the context of compensation for compulsory purchase, the Courts have over the years found it necessary to extend and even depart from the words of the statutes. They have, for example, established that there is a right to compensation, even though this is not expressly stated anywhere in the legislation. A good example of this can be found in the speech of Lord Wilberforce in *Argyle Motors (Birkenhead) Ltd. v. Birkenhead Corporation* [1974] 2 W.L.R. 71 concerning the Lands Clauses Consolidation Act 1845, s 68 (now the Compulsory Purchase Act 1965, s 10) which, he said,

> ". . . has, over 100 years, received, through a number of judicial decisions, some in this House, and by no means easy to reconcile, an interpretation which fixes upon it a meaning having little perceptible relation to the words used. This represents a century of judicial effort to keep the primitive wording—which itself has an earlier history—in some sort of accord with the realities of the industrial age".

Modernisation, in the sense of clarification of the language, needs little explanation after the passage just cited from Lord Wilberforce's speech. Many provisions suffer from unnecessary degrees of obscurity. Now that in civil procedure the use of familiar terms such as "plaintiff" and "writ" are ceasing, we must

[33] Now re-enacted in the Acquisition of Land Act 1981, schedule 2.

look hard at terminology such as "injurious affection", "severance" and "notice to treat". Practitioners of course become fully familiar with these terms, but, even though it will be difficult to simplify compensation law, it should be possible to make it more accessible and less intimidating.

Modernisation would also require careful scrutiny of many detailed aspects of the law. For example, the rules which determine what planning permissions may be assumed should be reviewed to reflect modern conditions. The process by which assumptions as to planning permissions are determined (at present section 17 of the Land Compensation Act 1961) needs review. Another example is the Pointe Gourde rule and the relationship between that rule and s 6 of the Land Compensation Act 1961. The detailed aspects of the current code need review which will in turn raise a menu of questions for decision. Some of those will be legal issues to which the answer may not be controversial. Other questions will involve policy requiring decisions by the Government, for example, whether it is acceptable to widen a right to compensation. Such a review will require considerable effort, it will require input from a range of experienced legal and valuation practitioners and there needs to be realism about the timescale within which it can be achieved. On the recommendation of C.P.P.R.A.G., the D.E.T.R. is in the process of commissioning consultants to review the main principles of the compensation code with a view to making recommendations which can be passed on to Parliamentary draftsmen in due course. It remains to be seen whether they have the stamina to see the review through to legislation. We may find some encouragement about this in a recent speech by Nick Raynsford when he said[34]:

> "The opportunity to effect a complete overhaul of the law on compulsory purchase and compensation is unlikely to present itself again in our lifetime. So, at the end of this review, we must ensure that we have the very best system we can possibly devise . . . I guarantee you that we will take careful notice of all that you say: propositions which survive the heat of debate will have considerable authority."

Substantive changes to the compensation code

The Urban Task Force report says,

> "One of the major stumbling blocks with compulsory purchase arises out of the way in which owners of land are compensated for their loss of property . . . actions taken by public authorities with CPO powers to redevelop, or those planning to redevelop areas, can result in sharp increases in land and property values. We need to secure an equitable balance between the instigator of a CPO and the property owner. The basis of compensation should be prevailing market value at the time immediately before the announcement of any plans to regenerate an area . . .".[35]

Presumably they seek to achieve the exclusion from the compensation payable any value attributable to the prospect of the area being improved or redeveloped as a result of the intervention of a body promoting urban regeneration with compulsory purchase powers. There are rules in the existing compensation code which are intended to have this effect[36]; while those rules may need fine tuning, "stumbling block" is not appropriate terminology, and the suggestion of fixing the valuation date at a

[34] Speech at National Symposium entitled "Compulsory Purchase: An Appropriate Power for the 21st Century?" 22nd February 1999, published by D.E.T.R. August 1999.
[35] Towards an Urban Renaissance Urban Task Force Report, page 231.
[36] The "Pointe Gourde" rule and Land Compensation Act 1961, section 6.

time before plans for an area are announced could result in the valuation date preceding the compulsory purchase by many years, ruling out from consideration movements in the market (up or down) in the interim.

The Urban Task Force Report also said:

> "We recognise that, if we are to lubricate the system, we should allow an additional payment for compensatory loss. Residential property owners are entitled to an additional 'home loss payment' to reflect the distress and inconvenience which people suffer when they are required to move house at a time not of their choosing."[37]

Recognising that home loss payments are subject to a ceiling and not available all to the occupiers of business premises, the Report made a specific recommendation that the compensation rules should

> "Allow an additional 10 per cent above market value to be payable as compensation for the compulsory purchase of all properties. Payment of the extra compensation should be tapered according to a timetable to encourage early settlement."

Extending the existing right to 10 per cent to the compulsory purchase of all homes would certainly be just; there is no logic to the existing ceiling. There is also force in the recommendation to extend it to business premises. Such changes might assist in improving the public perception of the compensation code, but would not "lubricate" the system, as suggested by the Urban Task Force; there would just be more at stake in the negotiations. Nor would it be practicable to taper the 10 per cent to encourage early settlement because that would merely put pressure on the claimant to accept what he had been offered even when the offer was unreasonably low. Further, it would not be practicable to confine the 10 per cent to compulsory purchase, otherwise there would be no incentive to dispose of land by agreement.

Determination of compensation

The City University was commissioned a few years ago by the Department of the Environment to carry out research in relation to a number of aspects of the compulsory purchase system, one of which was "to assess the effectiveness of the machinery for settling disputed valuations, in particular the role of the Lands Tribunal". Their report, published in May 1997, included a finding on this issue that

> "the Lands Tribunal is not acting as an effective forum for settling compensation disputes. Less than 1 per cent of claims are referred and only 0.4% are actually determined by the Lands Tribunal. This lack of an effective appeals procedure hampers negotiations and lengthens their duration. However, the Lands Tribunal is held in high regard by all professionals involved in the CPO process".

As a result of this finding, they recommended that a local disputes forum should be created for resolving compensation claims as a court of first instance leaving the Lands Tribunal to hear major cases and appeals from the local forum.

The Urban Task Force Report, relying solely on the City University Report, makes this comment:

> "The disputes resolution process itself, however, should be overhauled. The Lands Tribunal is deemed by many to be an inaccessible forum for disputes to be resolved. As things stand, many owners will be deterred from resorting to the Lands Tribunal because of the risk of having to bear the acquiring authority's cost, if the Tribunal's award is less than the authority's sealed offer. The

[37] The rationale for the 10 per cent home loss payment goes a little wider than the Report states; it is intended in a broad way to reflect the difference between market value and value to the claimant.

> two most promising alternative options are: a local tribunal, along the lines of the Valuation Tribunal or Leasehold Valuation Tribunals, or a formal mediation process (such as that undertaken by Mediation Centres)."[38]

Fairness in the assessment of compensation requires not only that a competent forum be available to determine disputes but also that recourse to such a forum be a real option to the parties. The more real the option, the more realistic will their negotiations be without requiring recourse to that forum. It will be a real option if it is accessible and if its decisions are respected for their quality and consistency.

The Lands Tribunal was established in 1950 to perform a specialist function in relation to valuation and other land issues. It has proved an outstanding success as is evidenced by the City University's finding (which for some reason the Urban Task Force report did not include) that the Lands Tribunal is held in high regard by all professionals involved in the compulsory purchase process. I do not myself find it surprising that only a small proportion of claims reach the Tribunal. The generality of claims are not so complex that the parties cannot reach agreement through negotiations. Indeed, the low proportion of claims reaching the Tribunal may partly be a function of the fact that its decisions are held in high regard, and, although not strictly binding, since the decisions are given in writing with full reasons which are reported, there are plenty of examples in the reports and textbooks as to how the fundamental principles should be interpreted and applied to particular situations.

It is rare to hear criticism of the quality of the Lands Tribunal's decisions, or of its conduct of cases. The criticism usually focuses upon delay in getting a hearing, delay in getting a decision after a hearing and the rules as to costs. These criticisms are not unique to the Lands Tribunal. The procedures of the civil courts are undergoing enormous upheaval in order to address such problems. In the Lands Tribunal, a simplified procedure for appropriate cases, in which the claimant is not at risk of an award of costs against him if his claim is unsuccessful, was introduced in 1996. The new President, who is determined to minimise delay, has already introduced significant changes to achieve this objective and there is now case management from the outset. Although based in London, the Tribunal will sit locally where that is appropriate and convenient for the parties.

There may be a case for scrutinising the rules as to costs. At present, a claimant will normally be awarded his costs up to the date on which the acquiring authority makes him an offer. After the acquiring authority has made an offer, the claimant is at risk of having to pay his own and the acquiring authority's costs if the eventual award is less than the authority's offer. There are good reasons for this rule but it can operate harshly, for example, where the Tribunal's award comes close to but does not quite exceed the acquiring authority's offer. It might be considered whether in compulsory purchase cases the rule should be that the acquiring authority should always pay all the claimant's costs unless the claimant has acted unreasonably in relation to either the substance of the claim or the procedure, but it might be thought that this would swing the balance too far in favour of the claimant. Perhaps the Lands Tribunal should have a wider discretion so that, if it considers that the claimant was justified in all the circumstances in pursuing the claim, costs should not be awarded against him even if the award does fall short of the offer made. Widening the Tribunal's discretion might well serve the interest of fairness, but it would not address one important dimension, that is certainty, which assists parties to judge whether or not to pursue a claim. The present rule does provide a degree of certainty as to which way the costs will go in defined circumstances.

In my view, the creation of a local disputes forum, in the sense of another tribunal or court, separate from the Lands Tribunal is neither necessary nor desirable. It is true that there is a tier of tribunal below

[38] Towards an Urban Renaissance: Urban Task Force. June 1999.

the Lands Tribunal for rating and council tax appeals, but such tribunals are needed because both those taxes are nation-wide affecting respectively every commercial or domestic property, the value of which is amended every five years with associated rights of appeal. In contrast, there is no consistent pattern to the need for adjudication of compensation issues either in terms of geography or timescale. Further, it is a highly specialised subject and adjudicators benefit from experience.

Attention should focus upon improving the quality of the negotiations between claimants and compensating authorities. These are often protracted, and often handled insensitively. To an extent, acquiring authorities are in the difficult position that much of the information necessary to determine the claim is in the hands of a claimant; this applies especially to a business disturbance claim. However, all too often acquiring authorities believe that they are unable to depart from the District Valuer's valuation when in fact they do have a degree of latitude to settle a claim and thereby achieve certainty and avoid further costs. This problem is compounded all too often by a conservative and cautious approach on the part of the District Valuer. There is no doubt that the quality of advice available to both claimants and acquiring authorities has a direct bearing upon the quality of the negotiations. This is fertile ground for the introduction of some form of mediation which offers the prospect of assisting parties to reach agreement, and to do so more quickly and with less resentment than occurs at present.

Finally, it should be mentioned that compensation for compulsory purchase cannot be scrutinised and possibly changed without also having some regard to the many other rights to compensation which arise where land is not actually acquired but its value or usefulness to the owner or occupier is affected by decisions taken in the public interest. There is a right to compensation for injurious affection, that is, loss of value, caused to land not compulsorily acquired by the execution of works (but not by their use),[39] and there is a right to compensation for depreciation in value caused by the use of public works such as roads and airports.[40] In addition, there are numerous rights in other legislation; for example, there are of the order of 20 separate rights to compensation under the town and country planning legislation, a further 20 under the Highways Act 1980 and another 10 under the water and pollution control legislation. It is obviously important that all these rights should operate in a way that is consistent, one with another.

Blight

A detailed consideration of blight is outside the scope of this paper, but a discussion of compulsory purchase cannot pass without a brief mention of blight which is a serious problem both for landowners who experience it and the areas affected by it. Blight occurs where the prospect of a project, especially one which requires compulsory land acquisition, undermines confidence in area. There is no easy solution to the problem, as a Departmental Study discovered,[41] but it could be significantly alleviated if the time between conception and implementation of a project could be substantially shortened, which those who want to promote urban regeneration also want to achieve.

Conclusion

I do not contend that our system of compulsory purchase is perfect, but I do say that many of the criticisms of it as an alleged obstacle to urban regeneration are misplaced. The three most crucial

[39] Compulsory Purchase Act 1965, section 10.
[40] Land Compensation Act 1973, Part I.
[41] Interdepartmental Working Group on Blight: Final Report: D.E.T.R. 1997.

ingredients to making any system of compulsory acquisition work effectively are political will, adequate funds available at the right time and administrative efficiency. If the Government attaches importance to urban regeneration, it must identify the bodies to achieve it, the functions they are to perform, they must give them adequate powers and provide a strong policy context. If it does so, the "system" will not be a serious impediment to achieving urban regeneration.