Compulsory acquisition of land for in-house lawyers

This article outlines the law and procedure for the compulsory acquisition of land. It also gives some practical tips for in-house lawyers.

THE THREE PRINCIPAL STAGES OF ACQUISITION

There are three basic stages in compulsory acquisition. First, the conferment of statutory powers of compulsory acquisition upon an acquiring authority or other promoter. Second, the steps to acquire the land or interest for which powers have been conferred under stage one: this involves taking possession and obtaining title. Third, the preparation and submission of claims for compensation, and dealing with the heads of losses for which compensation is payable.

A wide variety of projects may involve compulsory acquisition. Highway and redevelopment schemes are now being pursued with renewed vigour with the general improvement of the economy. Railway schemes, such as Crossrail and HS2, the London to Birmingham rail project, also involve compulsory acquisition of land on a large scale. In-house lawyers will need to manage the compulsory acquisition of any part of the estate of their ‘client’ companies, whether it be the taking of a small area of land as part of a highway scheme, or the acquisition of a significant and important property to be incorporated in, say, a town centre or redevelopment scheme. While the relevant legal rules may not be the everyday fare of the in-house lawyer, this article attempts to give lawyers confidence in dealing with these matters, either in-house, or in the instruction of external lawyers.
STAGE ONE: THE CONFERMENT OF STATUTORY POWERS OF ACQUISITION

No authority or promoter may take land, or an interest in land, without statutory powers. There are three principal sources of such powers.

First, an Act of Parliament may authorise a specific project. The Crossrail Act 2008, and, if enacted, the Bill authorising HS2. Such Acts authorise the project, and thereby authorise works and uses that might otherwise constitute an actionable nuisance. They also authorise the compulsory acquisition of land for the project and, in that connection, they incorporate, by reference, legislation concerned with stages two and three, considered below.

A second group of Acts of Parliament authorise the compulsory acquisition of land provided some further order is made and confirmed by a minister. These fall into two categories. First, those where a compulsory purchase order (CPO) is made by the appropriate authority and, and confirmed by a minister, following the recommendation of an inspector. Examples include the Highways Act 1980 (highway schemes) and the Town and Country Planning Act 1990 (development of land). Second, those where a Development Consent Order (DCO) is made under the Planning Act 2008, examined by the planning inspectorate and then confirmed by a minister. A DCO is required for Nationally Significant Infrastructure Projects (NSIPs). These include certain significant highway schemes, some railway or railway-related projects, and can include projects that are being advanced by promoters in the private sector, such as power stations.

Practical tip number one: while there are procedural differences between the making and confirming of CPOs and DCOs, both procedures enable an affected landowner to make objections, in the case of CPOs, or relevant representations, in the case of DCOs. It is this writer’s experience and firm belief that affected landowners should always seriously consider making objections or ‘relevant representations’, as the case may be. Making objections and representations gives the landowner a negotiating advantage, at least for a while. In broad terms, where an acquiring authority has made a CPO, it must show a compelling case to acquire the land compulsorily. In the case of DCOs promoters must also show that the land is required for the project, facilitates it, or is incidental to it. Nothing alarms an authority or promoter more than to face an objection or representation which has identified and articulated one or more arguments that appear to challenge the grounds for taking powers of compulsory acquisition.

The risk that the inspector, in the case of CPOs, the examiner (planning inspectorate), in the case of a DCOs, and the appropriate confirming minister in both cases, might be persuaded to exclude certain land is usually sufficient to promote negotiations with a view that the objections or representations can be withdrawn on terms. Such negotiations often go up ‘to the wire’ with deals being concluded in the course of the CPO inquiry or the DCO, examination by the planning inspectorate. However the negotiating advantage handed to a landowner usually disappears once an inquiry or examination is concluded. The agreements that can be reached may include the exclusion of land, the inclusion of measures to alleviate any detrimental effects on any retained land of an objector, or even the conclusion of an agreement by which the affected land is acquired at an agreed price.

Finally, a third category of Acts authorise the compulsory acquisition of rights in land for the utility services. The Water Industry Act 1991 contains powers by which authorised undertakers may, following the service of a notice, enter private land to lay water pipes or sewers. The Electricity Act 1989 authorises necessary wayleaves to install and retain electricity apparatus, and the Telecommunications Act 1984 (as amended) authorises the installation and retention of ‘electronic communication’ apparatus. Each Act contains procedures unique to the respective subject matter.
STAGE TWO: THE ACQUISITION PROCEDURES

Save for certain special cases, such as the third category of Acts mentioned above, there are common acquisition procedures whether land is to be acquired directly under an Act of Parliament, or under CPOs or DCOs. The procedures provide two alternatives. Either the acquiring authority or promoter serves a notice to treat and notice of entry under the Compulsory Purchase Act 1965, or makes a general vesting declaration (GVD) under the Compulsory Purchase (Vesting Declarations) Act 1981.

A notice to treat states that the authority wishes to treat for the purchase of the interest concerned, and demands details of the affected interest and of any claim. A statement of claim, which sets out certain particulars of a claimant, and its claim for compensation, must be lodged within 21 days. While there is no direct statutory sanction if that is not complied with, there is a theoretical penalty in costs if an authority has insufficient information to make an offer to settle. Where a notice to treat and a notice of entry have both been served, then the acquiring authority may enter and take possession. The date of entry is the date by which compensation falls to be assessed. Where, in due course, compensation is either agreed or determined by the Upper Tribunal (Lands Chamber), then title is conveyed to the acquiring authority.

In the case of a GVD, the effect of a vesting declaration made by an authority or promoter is that title, with certain exceptions, vests in that authority on the vesting date. That date fixes the date by which compensation falls to be assessed, and it is also the date on which the authority is entitled to take possession. Accordingly, no further conveyancing is required or takes place. The GVD procedure is appropriate in redevelopment schemes where the acquiring authority requires title at an early stage to enable interests to be granted and finance raised in order to develop the scheme.

LAND SEVERED BY A NOTICE TO TREAT OR GVD

A notice to treat may affect only part of a particular landowner’s property. This can have quite serious consequences if, for example, the land is severed in two by a linear project such as a highway or railway, or a sufficient part of an owner’s land is taken as may render the development or use of the retained land seriously disadvantaged. There are two ways in which these consequences may be addressed. By payment of compensation, which is considered in outline below, or by the service of a notice requiring the authority to acquire the whole of the owner’s land.

Practical tip number two: an owner may serve a counternotice to a notice to treat before entry by the authority requiring the whole or any house, building, manufactory, car park or garden, to be acquired where otherwise there would be material detriment to the retained land, that is a house, building or manufactory.

There are two aspects of a ‘material detriment counternotice’. First, there may be little time after the service of a notice to treat in which to consider the service of a counternotice, but it must be done before entry is taken of the part the subject of the notice to treat. Second, material detriment is normally established by showing that the part that would otherwise be severed and retained is damaged in value by reason of the part that is taken. In Ravenseft Properties Ltd v Hillingdon London Borough Council [1968], the Tribunal put forward a test for deciding what amounted to material detriment: the remaining part must be ‘less useful or less valuable in some significant degree’.

There are broadly comparable provisions where, under a GVD, only part of an owner’s land is included in the declaration.
**THIRD-PARTY RIGHTS**

Where land is compulsorily acquired, and that land is burdened by third-party rights, such as easements or restrictive covenants, those rights are normally unenforceable against a purchaser exercising statutory powers: see *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)* [1973]. There are also specific powers to override third-party rights and restrictive covenants under s237 of the Town and Country Planning Act 1990. Two matters follow.

First, such rights are not necessarily extinguished and may remain binding against the title and survive the compulsory purchase conveyance or GVD. Therefore, if the statutory powers under which the land came to be used by the acquiring authority are no longer relied on, for example where the scheme underlying the original acquisition is either abandoned, or the land is surplus to those requirements, then the benefit of the statutory powers authorising an interference with the third-party rights ceases: the relevant third party rights again become exercisable. It is for that reason that where developers acquire land from an authority that has exercised statutory powers they may be surprised that third-party rights are retained on the title.

Second, where a third-party right is interfered with by the exercise of statutory powers, compensation is payable.

**STAGE THREE: ASSESSMENT OF COMPENSATION**

Where a person fails to respond to a notice to treat with a notice of claim within 21 days, the question of compensation can be referred to the Upper Tribunal (Lands Chamber). Further, a failure to formulate a claim with sufficient detail to enable an authority or promoter to make an offer of compensation can result in an adverse award of costs. However in practice a detailed, robust, and well supported claim can very rarely be formulated within the 21-day period, and may be impossible until after possession is taken, when the relevant date of valuation is so determined. Further, where a claimant may suffer losses in addition to the loss of the value of the land taken, it may be difficult to assess those losses immediately on or after the date when possession is taken.

Practical tip number three: a statement of claim should be made as early as possible to forestall the recent trend for acquiring authorities to make references to the Upper Tribunal at an early stage, and before a claimant has been able to formulate a claim in sufficient detail.

Practical tip number four: while it is essential that a chartered surveyor (and where appropriate chartered accountant) should be appointed for the purpose of formulating a claim, any claim so formulated should not be given a ‘without prejudice’ protection, which chartered surveyors commonly add, as it is essential that a claim has legal consequence to meet the statutory provisions mentioned above. Where there is some doubt about the figures being advanced in a claim, it is far more sensible to add words to the claim such as ‘the claimant reserves the right to amend and add to this claim as it shall be advised from time to time’.

Practical tip number five: it is also important that any statement of claim is more than simply a figure or set of figures giving the amount of claim under each head contended for. Where an authority/promoter has taken possession of the land, there is a right to claim an advance payment of compensation. The amount of the advance payment is 90% of the authority’s estimate of the compensation that will become payable. Most claimants fail to provide sufficient details in their statements of claim to justify the figures. This causes delays in making an advance payment if the authority does not have the material upon which to base an estimate. Thus, for example, in the simple case of a claim for the value of land, the statement of claim would contain the value contended for by the claimant, but would also contain the reasons why that figure is appropriate, such as by reference to any materials concerning its planning status, and any supporting
comparable transactions the valuer has relied on. The more material that is provided as early as possible, the greater the chance of a more satisfactory advance payment, or indeed an offer to settle any claim in any event.

**COMPENSATION AND THE HEADS OF CLAIM**

As to what may be claimed, there are five principal heads.

First, the value of the land that is compulsorily taken. The measure is the open market value, subject to a number of rules briefly considered below. Second, there is compensation for the diminution in value of any retained land of the claimant that is severed or injuriously affected by the acquisition and the use of the land taken and other land by the authority. The measure of compensation is, again, based on open market values. If, as a result of acquiring the land taken, the retained land of a claimant is diminished in value (severance effect), then compensation is due for that diminution. If the acquired land (with other land) is put to a use that is noisy or causes vibrations or similar, and this causes the retained land to diminish in value, compensation is payable for that diminution.

Third, compensation is payable for disturbance and other losses. This is an enormous topic but the claim must satisfy what are called the ‘fair principles’. These principles embrace the rules of causation, reasonableness, and mitigation. A claim for disturbance and other losses arises where the threat of, and then the actual dispossession of the claimant, cause the losses. Thus, a claimant running a business may begin to suffer loss of profits before dispossession attributable to the impending threat of losing possession, as well as loss of profits on and after the dispossession. In the case of an investment landlord, such a claimant may suffer loss of rents attributable to an inability to relet or to achieve rent reviews at the levels otherwise to be expected. Such losses may be claimable.

Practical tip number six: as good records are invaluable in furthering any claim for compensation, it is suggested that photographs are taken of the affected property, a condition record taken, and all steps or events are recorded in diary or similar form.

Fourth, there are a number of additional statutory payments under the Land Compensation Act 1973, such as the basic and occupier’s loss payments, the former being at a rate of the lower of 7.5% of the value of the interest or £75,000, and the latter being at the rate of 2.5% of a maximum of £25,000. There are detailed rules as to the calculation of these loss payments.

Fifth, compensation is payable for the costs of professional and legal fees incurred in preparing and advancing a claim. Although strictly these fall under Rule (6), as other losses, they are usually separately advanced.

As mentioned above, the claim for compensation for the land taken is subject to a number of additional rules. The principal purpose of these rules is to ensure that the effect of the proposal to compulsorily acquire land, and to advance some scheme, falls to be disregarded. While the rules are statutory in origin, a number of judicial decisions have illuminated their application. It is beyond the scope of this article to examine these rules, other than to identify them. First, there are a group of rules that concern the planning status of the land acquired. Second, there are rules concerned with disregarding any increase or decrease in value of the land acquired attributable to the scheme or project itself.

**DISPUTES**

Disputes about compensation are referred to the Upper Tribunal (Lands Chamber). A well-prepared claim, supported by adequate details and reasons, should normally provoke a sensible conclusion of negotiations.
and a reference can be avoided. But sometimes there are issues of some considerable difficulty that cannot be so settled. The normal rule is that costs of a reference are paid by the acquiring authority. But this rule is subject to two considerations. First, where any award of the Tribunal does not exceed any offer that the authority may have made to settle: the claimant pays the authority’s costs after the offer. Second, that the claimant has not taken unreasonable points.

Practical tip number seven: in order to encourage the highest offer to settle, provide the acquiring authority with well-supported valuation evidence and as much detail as possible at the earliest opportunity.


Notes

1. For example under s239.
2. Section 226.
5. Section 159, for which there are compensation provisions in the Twelfth Schedule.
10. Section 8 of the 1965 Act.
11. The position may be different under s237 of the 1990 Act where land is disposed for development purposes by a local planning authority.
18. Director of Buildings and Lands v Shun Fung Ironworks [1995]
19. Pattle v Secretary of State for Transport [2009]

21. For example, s6 of, and the First Schedule to, the 1961 Act; s9 of the 1961 Act and the Pointe Gourde principle, which states that any increase or decrease in the value of land taken solely due to the scheme of the authority must be disregarded.

22. Section 4 of the 1961 Act.